The Fourth Amendment and Search & Seizure
An Update

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***Forward*:** The following, throughout this Outline, are the rules developed by the courts and legislatures for the purpose of protecting society's reasonable privacy expectations and effectuating the purposes of the **Fourth Amendment** of the **United States Constitution**.

> **The United States Constitution**: In reviewing the development over the years of the **U.S. Constitution**, and in particular its first ten amendments (i.e., the "**Bill of Rights**"), including, specifically, the **Fourth Amendment**, as well as **California's** similarly constructed **Constitution**, it is helpful to remember where this all originated.
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> > "In considering the **United States Constitution**, we must 'always regard it as unique.' ***Rhode Island v. Massachusetts***, 37 U.S. 657, 673; 9 L.Ed. 1233 (1838). The Constitution is a 'singular and solemn . . . experiment' created by one of the finest group of statesmen ever assembled. The Federalist No. 40 (James Madison). It was born of a hard-fought struggle that against all odds wrested a fledgling nation from oppression by the then-greatest empire on earth. The **Bill of Rights** was adopted in the same vein, championed by James Madison. When we interpret the **Fourth Amendment**, we ground our jurisprudence in an understanding of the text's original public meaning at ratification and 'traditional standards of reasonableness.' *See* ***Virginia v. Moore***, 553 U.S. 164, 168-69, 171, 128 S.Ct. 1598, 170 L.Ed.2nd 559 (2008). Above all, Chief Justice Marshall reminds us, 'we must never forget that it is a *constitution* we are

expounding.' ***McCulloch v. Maryland***, 17 U.S. 316, 407, 4 L.Ed. 579 (1819)." (***Tabares v. City of Huntington Beach*** (9th Cir. 2021) 988 F.3rd 1119, 1122.)

***The Outline*:** In an attempt to provide some organization to the myriad of case law and relevant statutes to this subject, the Outline has been broken down into *20 specific* (although often overlapping) *chapters*:

The Basics:

- *The Constitutional Basis For Searches and Seizures*: (Chapter 1)
- *Procedural Rules*: (Chapter 2)

Police-Citizen Contacts: Contacts between law enforcement officers and private individuals can be broken down into three distinct situations: (See ***Florida v. Royer*** (1983) 460 U.S. 491 [103 S.Ct. 1319; 75 L.Ed.2nd 229]; ***In re James D.*** (1987) 43 Cal.3rd 903, 911-912; ***In re Manuel G.*** (1997) 16 Cal.4th 805, 821; ***People v. Hughes*** (2002) 27 Cal.4th 287, 327-328; **People *v.* Steele** (2016) 246 Cal.App.4th 1110, 1115; **People *v.* Arebalos-Cabrera** (2018) 27 Cal.App.5th 179, 186.):

- *Consensual Encounters* (Chapter 3)
- *Detentions* (Chapter 4)
- *Arrests* (Chapter 5)

***Other Topics*:** Treated separately despite common overlaps, are issues involving:

- *Use of Force* (Chapter 6)
- *The Bill of Rights Protections* (Chapter 7)
- *Searches and Seizures* (Chapter 8)
- *Warrantless Searches and Seizures* (Chapter 9)
- *Searches With a Search Warrant* (10)
- *Searches of Persons* (Chapter 11)
- *Searches of Vehicles* (Chapter 12)
- *Searches of Residences and Other Buildings* (Chapter 13)
- *New and Developing Law Enforcement Tools and Technology* (Chapter 14)
- *Open Fields* (Chapter 15)
- *Searches of Containers* (Chapter 16)
- *Seizures and Searches of High Tech Devices* (Chapter 17)
- *Border Searches* (Chapter 18)
- ***Fourth** Waiver Searches* (Chapter 19)
- *Consent Searches* (Chapter 20)

***Chapter 1*:**

***<u>The Constitutional Basis For Searches and Seizures</u>*:**

Rule: "Both the federal and state Constitutions prohibit unreasonable searches and seizures." (***People v. Ovieda*** (2019) 7 Cal.5th 1034, 1041.)

***The Fourth Amendment*:** "The right of the people to be secure in their *persons, houses, papers,* and *effects*, against *unreasonable searches and seizures*, shall not be violated, and *no warrants shall issue*, but upon *probable cause*, supported by oath or affirmation, and *particularly describing the place to be searched* and *the persons or things to be seized*." (Italics added)

***California Constitution, Art I, § 13*:** "The right of the people to be secure in their *persons, houses, papers, and effects* against *unreasonable seizures and searches* may not be violated; and *a warrant may not issue* except on *probable cause*, supported by oath or affirmation, *particularly describing the place to be searched and the persons and things to be seized*." (Italics added)

"'California has generally adopted **Fourth Amendment** jurisprudence for interpreting analogous provisions of the California Constitution. [Citations.] Our courts therefore apply federal legal standards when analyzing the reasonableness of a search or seizure under California constitutional law.'" (***Coalition on Homelessness v. City and County of San Francisco*** (2023) 93 Cal.App.5th 928, 935, fn. 1; quoting ***People v. Perry*** (2019) 36 Cal.App.5th 444, 466.)

***Purpose*:**

"The **Fourth Amendment** protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The 'basic purpose of this **Amendment**,' our cases have recognized, 'is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.' ***Camara v. Municipal Court of City and County of San Francisco***, 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed.2nd 930 (1967). The Founding generation crafted the **Fourth Amendment** as a 'response to the reviled "general warrants" and "writs of assistance" of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." ***Riley v. California***, 573 U.S. 373, 403, 134 S.Ct. 2473, 189 L.Ed.2nd 430, 452 (2014). In fact, as John Adams recalled, the patriot James Otis's 1761 speech condemning writs of assistance was 'the first act of opposition to the arbitrary claims of Great Britain' and helped spark the Revolution itself. ***Ibid***, 134 S.Ct. 2473, 189 L.Ed.2nd 430, 452 (quoting 10 Works of John Adams 248 (C. Adams ed. 1856))." (***Carpenter v. United States*** (June 22, 2018) 585 U.S. __, __ [138 S.Ct. 2206; 201 L.Ed.2nd 507].)

"The **Amendment** seeks to secure 'the privacies of life' against "arbitrary power" (citing ***Boyd v. United States***, 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886) . . . (and) 'to place obstacles in the way of a too permeating police surveillance.'"; (***Id***., at p. __; citing ***United States v. Di Re*** (1948) 332 U.S. 581, 595 [68 S.Ct. 222; 92 L.Ed. 210].)

See ***Florida v. Jardines*** (2013) 569 U.S. 1, 5 [133 S.Ct. 1409; 185 L.Ed.2nd 495], noting that in addition to privacy interests, the **Fourth Amendment** protects citizens' interests in being free from physical intrusions.

See also **Mendez *v. County of Los Angeles*** (9th Cir. 2018) 897 F.3rd 1067, 1074-1075; "The **Fourth Amendment** protects not only a person's broad interests in privacy, but also, and specifically, a person's interest in being shielded from physical governmental intrusions."

"The **Fourth Amendment's** 'essential purpose' is 'to impose a standard of "*reasonableness*" (Italics added) upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions.'"" (***United States v. Anderson*** (9th Cir. 2022) 56 F.4th 748, 756; quoting ***Delaware v. Prouse*** (1979) 440 U.S. 648, 653-654 [99 S.Ct. 1391; 59 L.Ed.2nd 660].)

Per the ***Anderson*** court, at p. 736: "The **Fourth Amendment's** reasonableness standard 'is not capable of precise definition or mechanical application,' (citation), and 'each case must be decided on its own facts.'" (quoting ***Bell v. Wolfish*** (1979) 441 U.S. 520, 559 [99 S.Ct. 1861; 60 L.Ed.2nd 447].)

"The Supreme Court evaluates the reasonableness of a warrantless search 'by balancing its intrusion on the individual's **Fourth Amendment** interests against its promotion of legitimate governmental interests.'" (***United States v. Anderson***, *supra*, quoting ***Delaware v. Prouse***, *supra,* at p. 654.)

***The Supremacy Clause*:**

"A state legislature does not have the power to 'deem' into existence 'facts' operating to negate individual rights arising under the federal constitution." (See **U.S. Const**., **art. VI**, **cl. 2** [**Supremacy Clause**]; ***Marbury v. Madison*** (1803) 5 U.S. 137, 177-180 [2 L.Ed. 60]; ***Younger v. Harris*** (1971) 401 U.S. 37, 52 [27 L.Ed.2nd 699; 91 S.Ct. 746] ['a statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the **Supremacy Clause**, when such an application of the statute would conflict with the Constitution'].) A statute attempting such a feat would be a 'nullity.' (***Gibbons v. Ogden*** (1824) 22 U.S. 1, 210-211 [6 L.Ed. 23].)" (***People v. Arredondo*** (2016)

245 Cal.App.4th 186, 200-201; see also **People *v.* Mason** (2016) 8 Cal.App.5th Supp. 11, 29.)

Note: Petition for Review in **People v. Arredondo**, supra, was dismissed and the case remanded in light of the decision in ***Mitchell v. Wisconsin*** (June 27, 2019) __ U.S.__, __ [139 S.Ct. 2525; 204 L.Ed.2nd 1040], where the U.S. Supreme Court held that when a DUI arrestee is unconscious, this fact alone will "almost always" constitute an exigency, allowing for a warrantless blood draw. (See "*Legal Effects of California's Implied Consent Law*," under "*Consent Searches*" (Chapter 20), below.

***Scope*:**

Due Process: Initially intended to control the actions of the federal government only (See ***Barron ex rel. Tiernan v. Mayor of Baltimore*** (1833) 7 Pet. 243.), the United States Supreme Court eventually ruled that a violation of the **Fourth Amendment** by state (which includes all county and municipal) authorities does in fact constitute a **Fourteenth Amendment**, "*due process*" violation, thus imposing compliance with this protection upon the states as well. (***Mapp v. Ohio*** (1961) 367 U.S 643 [81 S.Ct. 1684; 6 L.Ed.2nd 1081]; ***Baker v. McCollan*** (1979) 443 U.S. 137, 142 [61 L.Ed.2nd 433, 440-441]; ***People v. Bracamonte*** (1975) 15 Cal.3rd 394, 400; ***People v. Espino*** (2016) 247 Cal.App.4th 746, 755; see also **People v. Ovieda** (2019) 7 Cal.5th 1034, 1041; citing ***People v. Troyer*** (2011) 51 Cal.4th 599, 605; see also ***Association for Los Angeles Deputy Sheriffs v. Superior Court*** (2019) 8 Cal.5th 28, 39.)

The **Fourteenth Amendment** provides that no "*state*" shall deprive its citizens of "*life, liberty, or property, without due process of la*w." Violations of the **Fourth Amendment** constitute such a deprivation. (***Mapp v. Ohio***, *supra*.)

See also **Article I**, **section 7**, of the California Constitution.

"The **Fourth Amendment's** prohibition against unreasonable searches and seizures applies to respondents through the **Fourteenth Amendment** (due process clause)." (***Coalition on Homelessness v. City and County of San Francisco*** (2023) 93 Cal.App.5th 928, 938; citing ***Soldal v. Cook County, Illinois*** (1992) 506 U.S. 56, 61 [112 S.Ct. 538; 121 L.Ed.2nd 450]; and ***Verdun v. City of San Diego*** (9th Cir. 2022) 51 F.4th 1033, 1036.)

"The **Fourth Amendment's** prohibition against unreasonable searches and seizures applies to states through the **Fourteenth Amendment**." (***People v. Alvarez*** (2023) 98 Cal.App.5th 531, 543, citing ***Soldal v. Cook County, Illinois***, *supra*.)

"The ***Fourth Amendment's*** *protection* extends beyond the sphere of a criminal investigation." (**Grady *v.* North Carolina** (2015) 575 U.S. 306, 309 [135 S.Ct. 1368, 1371; 191 L.Ed.2nd 459]; finding that the use of a "satellite-based monitoring" ("SBM") device, attached to a recidivist sex offender's ankle to monitor his movements, although imposed in a post-conviction, post sentence proceeding that is "civil in nature," constitutes a "search" under the **Fourth Amendment**."

This includes affording criminal defendants the right to a fair trial. (***Association for Los Angeles Deputy Sheriffs v. Superior Court***, supra.)

Persons, Houses, Papers, and Effects: Also, the **Fourth Amendment** (as well as the California Constitution) protects against *trespassory searches* only with regard to those items (i.e., "*persons, houses, papers, and effects*") that it enumerates. (***United States v. Jones*** (2012) 565 U.S. 400, 404-413 [132 S.Ct. 945, 949-954; 181 L.Ed.2nd 911].) (See "*Trespassory Searches*," under "*Searches and Seizures*" (Chapter 8), below.)

***Double Jeopardy*:**

The Double Jeopardy Clause: The "**Double Jeopardy Clause**" of the **Fifth Amendment** provides in part that; ". . . *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb*." (The **Fifth Amendment** to the United States Constitution.)

The **Double Jeopardy Clause** is applicable to the states as well as the federal government.

"The double jeopardy clauses of the **Fifth Amendment** to the United States Constitution and **article I**, **section 15**, of the **California Constitution** provide that no person may be tried more than once for the same offense. (***People v. Anderson*** (2009) 47 Cal.4th 92, 103–104 . . . .) The double jeopardy clause thus 'protects against a second prosecution for the same offense following an acquittal or conviction, and also protects against multiple punishment for the same offense.' (***Anderson***, at pp. 103–104; accord, ***North Carolina v. Pearce*** (1969) 395 U.S. 711, 717 [23 L.Ed.2nd 656; 89 S. Ct. 2072] . . . , overruled on other grounds . . . .)" (***People v. Sanchez*** (2020) 49 Cal.App.5th 961, 974.)

In ***Sanchez***, after defendant was acquitted on a charge that he murdered his nine-month-old child, it was held that double jeopardy principles, did not bar his retrial for assault on a child causing death, a charge on which the jury hung, because the jury could have grounded the murder verdict on defendant's mental state, rather than necessarily deciding that he did not commit an act that causing death. Also, amending the information to add a

> charge of child endangerment did not give rise to a presumption of vindictiveness; the new charge was less serious than the original murder and assault counts and did not increase his maximum potential sentence. Lastly, **Pen. Code § 654** did not preclude a subsequent trial. Its bar against multiple prosecutions does not apply to the amendment of an information to add new charges after a mistrial. (***Ibid***.)

The trial court initially imposed an aggregate 12-year prison term for numerous convictions arising out of defendant's violent relationship with his former girlfriend. On remand following defendant's first appeal, the trial court corrected its **Pen. Code § 654** errors, and resentenced defendant to a total prison term of 12 years four months. The Appellate Court held that this violated double jeopardy. Where unauthorized sentences imposed on remand were erroneously harsh or neutral rather than lenient, the ***Serrato*** exception to double jeopardy (***People v. Serrato*** (1973) 9 Cal.3rd 753) did not apply. Consequently, while the trial court was allowed to reconsider all of the other elements of the sentence, it could not impose an aggregate sentence greater than the original sentence of 12 years. The 12 year, four month sentence the court imposed on resentencing thus violated **Cal. Const.**, **art. I, 15**. (***People v. Trammel*** (2023) 97 Cal.App.5th 415.)

> In ***Serrato***, the two defendants had been convicted by a jury of felony possession of a firebomb. The defendants moved for a new trial and the trial court purported to modify their convictions to misdemeanor disturbing the peace. It then placed them on probation for two years on the condition that each pay a fine of $125. The California Supreme Court concluded that the trial court had exceeded its statutory authority and violated due process in the case because disturbing the peace was not a lesser included offense of possession of a firebomb. (***Id.*** at p. 758.) In holding that the defendants were not entitled to a dismissal, the Court pointed out that a defendant who has successfully moved to have a conviction set aside "impliedly waives any objection to being retried" on the original charge. (pp. 759–760.) The court also acknowledged another well-established rule: "[W]here a trier of the facts finds the defendant guilty of a lesser degree of the offense charged, or of a lesser included offense, there is an implied acquittal of the greater offense." (p. 760.) And it confirmed that "[i]f in lieu of granting a new trial the court decides to modify the verdict to a lesser included offense, and this modified verdict ultimately ripens into a final judgment of conviction, the conviction bars further prosecution of either the offense charged or the lesser offense." (p. 761.)

In 2012, defendant Damian McElrath, a young man diagnosed with multiple serious mental health disorders, killed his mother. Georgia

charged defendant with three crimes: malice murder, felony murder, and aggravated assault. At trial, defendant asserted an insanity defense. The jury found him not guilty by reason of insanity on the malice-murder charge but guilty but mentally ill on the felony-murder and aggravated-assault charges. The Georgia state courts, however, decided that these verdicts were "repugnant" because they required contradictory conclusions about defendant's mental state at the time of the crime. They therefore nullified both the "not guilty" and "guilty" verdicts and authorized defendant's retrial. (***McElrath v. Georgia*** (Feb. 21, 2024) __ U.S __ [144 S.Ct. 651; 217 L.Ed.2nd 419].)

The Supreme Court of the United States reversed, holding that the **Double Jeopardy Clause** of the **Fifth Amendment** prevents the State from retrying defendant for the crime that had resulted in the "not guilty by reason of insanity" finding. The court clarified that a jury's determination that a defendant is not guilty by reason of insanity is a conclusion that "criminal culpability had not been established," just as much as any other form of acquittal. Despite the seemingly inconsistent findings, the court emphasized that, once rendered, a jury's verdict of acquittal is inviolate, and the **Double Jeopardy Clause** prohibits second-guessing the reason for a jury's acquittal. The Supreme Court remanded the case for further proceedings not inconsistent with its opinion. (***Ibid.***)

Exception: The "*dual-sovereignty exception*" provides that a state being a separate entity from the federal government, prosecution by one governmental entity does not prevent the other from also prosecuting a defendant for the same offense based upon the same facts. The Supreme Court has determined that prosecution in federal and state court for the same conduct does not violate the **Double Jeopardy Clause** because the state and federal governments are separate sovereigns. (***Abbate v. United States*** (1959) 359 U.S. 187, 195 [79 S.Ct. 666; 3 L.Ed.2nd 729]; see also ***United States v. Hayes*** (5th Cir. 1979) 589 F.2nd 811, 817-818.)

The Supreme Court has held that the states are separate sovereigns from the federal government because the States rely on authority originally belonging to them before admission to the Union and preserved to them by the **Tenth Amendment**. (***Puerto Rico v. Sanchez-Valle*** (2016) 579 U.S. 59, 69, 136 S.Ct. 1863; 195 L.Ed.2nd 179].)

"The **Double Jeopardy Clause** does not prevent different sovereigns (i.e., a state government and the federal government) from punishing a defendant for the same criminal conduct." (***United States v. Bidwell*** (11th Cir. 2004) 393 F.3rd 1206, 1209.)

The continuing validity of the "*dual-sovereignty exception*" was recently reaffirmed by the U.S. Supreme Court in ***Gamble v. United States*** (June

17, 2019) __ U.S. __ [139 S.Ct. 1960; 204 L.Ed.2nd 322]. Defendant was convicted in Alabama for possessing a firearm as a felon. Per the U.S. Supreme Court, the **Double Jeopardy Clause** did not preclude his prosecution by the United States under its own felon-in-possession law because a crime under one sovereign's laws was not "the same offense" as a crime under the laws of another sovereign, and under the dual-sovereignty doctrine, a state could prosecute a defendant under state law even if the federal government had already prosecuted him for the same conduct under a federal statute. The U.S. Supreme Court declined to overrule this long-standing interpretation of the **Double Jeopardy Clause** of the **Fifth Amendment** because, contrary to the defendant's contention, it did not depart from the founding-era understanding of the right enshrined by the **Double Jeopardy Clause** and defendant's historical evidence did not warrant overturning 170 years of precedent.

The state Court of Appeal unreasonably applied ***Ashe v. Swenson*** (1970) 397 U.S. 436 [90 S.Ct. 1189; 25 L.Ed.2nd 469], in concluding that collateral estoppel and the **Double Jeopardy Clause** did not apply to bar petitioner's perjury prosecution. In petitioner's case, the traffic court necessarily decided, in petitioner's favor, an issue that was critical to both the traffic court and perjury proceedings—that petitioner was not the driver of the speeding car. A second prosecution was impermissible when, to have convicted the defendant in the second trial, the second jury had to have reached a directly contrary conclusion to the factfinder in the first trial. The handful of state court decisions that attempted to carve out a special exception to the Constitution's protection against double jeopardy for perjury prosecutions did not represent "fairminded disagreement" on an open question of constitutional law. (***Wilkinson v. Gingrich*** (9th Cir. 2015) 806 F.3rd 511.)

Defendant's conviction in federal district court of aggravated sexual abuse in Indian country under the **Major Crimes Act** (**18 U.S.C. §§2241(a)(1)**, **(a)(2)**, **1153(a)**), which followed his guilty plea in a Court of Indian Offenses to assault and battery (**6 Ute Mountain Ute Code §2 (1988)**), under a tribal code arising from the same incident, was held to have *not* violated the **Double Jeopardy Clause** of the **Fifth Amendment** because defendant's single act transgressed two laws defined by separate sovereigns that therefore proscribed separate offenses. However, even if the federal government arguably prosecuted both offenses, the **Double Jeopardy Clause** did not bar successive prosecutions by the same sovereign. Per the Court: "(T)he **Clause** does not ask who puts a person in jeopardy. It zeroes in on what the person is put in jeopardy for: the "offence," . . . or violation of a law. We had seen no evidence that "offence" was originally understood to encompass both the violation of the law and the identity of the prosecutor." (***Denezpi v. United States*** (June 13, 2022) 596 U.S. __, __ [142 S.Ct. 1838; 213 L.Ed.2nd 141].)

Defendant was indicted in the Northern District of Florida for theft of trade secrets from the StrikeLines' website. Defendant moved to dismiss the indictment, citing the Constitution's **Venue Clause** and the **Vicinage Clause**. He argued that he had accessed the website from his Alabama home and that the servers storing StrikeLines' data were in Orlando, Florida. The Eleventh Circuit agreed, determining that venue was improper and vacated defendant's conviction. The Eleventh Circuit also held, however, that a trial in an improper venue did not bar re-prosecution in the proper venue. (See ***United States v. Smith*** (11th Cir. 2022) 22 F.4th 1236.) The Supreme Court affirmed, holding that the Constitution permitted retrying petitioner for theft of trade secrets following a trial in an improper venue that was tried before a jury drawn from the wrong district. The **Double Jeopardy Clause** is not implicated by a retrial in a proper venue. The Eleventh Circuit's decision that venue in the Northern District of Florida was improper did not adjudicate petitioner's culpability and thus did not trigger the **Double Jeopardy Clause**. (***Smith v. United States*** (June 15, 2023) __ U.S. __ [143 S.Ct. 1594; 216 L.Ed.2nd 238].)

See also ***Wilkinson v. Magrann*** (9th Cir. 2019) 781 F.3rd Appx 669 (unpublished), under "*Doctrine of* '*Issue Preclusion*,'" below.

Penal Code §§ 654 & 1023*:** By statute (**P.C. §§ 654** and **1023**), an offense already prosecuted by another entity (e.g., federally) is *not* also punishable under California state law. (See ***People v. Tideman (1962) 57 Cal.2nd 574, for a discussion on double jeopardy principles as interpreted under California law.)

The Exclusionary Rule; Overview*:** The **Fourth Amendment** serves as the primary basis for the "*Exclusionary Rule*;" excluding evidence from the courtroom which would be otherwise admissible, when seized by law enforcement in violation of its terms. (Weeks v. United States*** (1914) 232 U.S. 383 [34 S.Ct. 341; 58 L.Ed. 652].)

Rule: "The **Fourth Amendment** to the United States Constitution protects the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' (fn 2, omitted) The right is primarily enforced through the exclusionary rule, 'a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a **Fourth Amendment violation**.'" (***People v. McWilliams*** (2023) 14 Cal.5th 429, 537, quoting ***Davis v. United States*** (2011) 564 U.S. 229, 231–232 [180 L.Ed.2nd 285; 131 S.Ct. 2419].)

The omitted footnote #2 notes that: "The California Constitution similarly protects the 'right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches.' (**Cal. Const., art. I, § 13**.) But under the so-called truth-in-evidence provision of the state Constitution, "issues relating to the suppression of evidence

> derived from governmental searches and seizures are reviewed under federal constitutional standards."'" (Quoting ***People v. Macabeo*** (2016) 1 Cal.5th 1206, 1212; citing **Cal. Const.**, **art. I**, **§ 28**, **subd. (f)(2)**, commonly referred to simply as "**Proposition 8**.")

Theory: "Exclusion of evidence due to a **Fourth Amendment** violation is not automatic. As the high court stated: 'The **Fourth Amendment** protects the right to be free from "*unreasonable searches and seizures*," but it is silent about how this right is to be enforced. To supplement the bare text, this Court created the exclusionary rule, a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a **Fourth Amendment** violation." (***Davis v. United States*** (2011) 564 U.S. 229 [180 L.Ed.2nd 285, 131 S.Ct. 2419].) 'The rule … operates as "a judicially created remedy designed to safeguard **Fourth Amendment** rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."' (***United States v. Leon*** (1984) 468 U.S. 897, 906 [82 L.Ed.2nd 677, 104 S.Ct. 3405].)" (**People *v.* Macabeo** (2016) 1 Cal.5th 1206, 1219-1220.)

> "The exclusionary rule is thus not 'a personal constitutional right of the party aggrieved,' but rather 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.' (***United States v.***) ***Calandra*** (1973) 414 U.S. (338) at 348. As such, the question of '[w]hether the exclusionary sanction is appropriately imposed in a particular case' is an entirely separate issue 'from the question whether the **Fourth Amendment** rights of the party seeking to invoke the rule were violated by police conduct.' (***United States v. Elmore*** (9th Cir. 2019) 917 F.3rd 1068, 1076; quoting ***United States* v. *Leon*** (1984) 468 U.S. 897, 906 [104 S.Ct. 3405, 82 L.Ed.2nd 677].)

History:

> "Because officers who violated the **Fourth Amendment** were traditionally considered trespassers, individuals subject to unconstitutional searches or seizures historically enforced their rights through tort suits or self-help." (***Utah v. Strieff*** (2016) 579 U.S. 232, 237 [136 S.Ct. 2056, 2060-2061; 195 L.Ed.2nd 400]; citing *Davies, Recovering the Original* ***Fourth Amendment***, 98 Mich. L. Rev. 547, 625 (1999).
>
> "The *exclusionary rule* was originally adopted in ***Weeks v. United States*** (1914) 232 U.S. 383 [58 L.Ed. 652, 34 S.Ct. 341], which barred evidence obtained by federal officers in violation of the **Fourth Amendment**.
>
> The Supreme Court subsequently held that the rule was *not* constitutionally imposed upon the states. (***Wolf v. Colorado*** (1949) 338 U.S. 25 [93 L.Ed. 1782; 69 S.Ct. 1359]; see ***Breithaupt v. Abram*** (1957) 352 U.S. 432, 434 [1 L.Ed.2nd 448; 77 S.Ct. 408].)

> However, the Supreme Court held in ***Elkins v. United States*** (1960) 364 U.S. 206 [4 L.Ed.2nd 1669; 80 S.Ct. 1437], that evidence (wiretap information in this case) illegally seized by state authorities cannot be used by federal authorities claiming they did not know that such evidence had been illegally seized, negating the so-called "*silver platter*" doctrine. The Court ruled that in determining whether there had been an unreasonable search and seizure by state officers, federal courts must make independent inquiries, irrespective of whether the state court made such an inquiry and of how any such inquiry may have turned out.
>
> It was not until 1961, however, when ***Wolf*** was overruled, and that the exclusionary rule was made mandatory in state prosecutions. (***Mapp v. Ohio*** (1961) 367 U.S. 643 [6 L.Ed.2nd 1081, 81 S.Ct. 1684]; see ***Schmerber v. California*** (1966) 384 U.S. 757, 766 [86 S.Ct. 1826; 16 L.Ed.2nd 908, 917, . . .].)" (***People v. Bracamonte*** (1975) 15 Cal.3rd 394, 400, fn. 2.)

The primary purpose of the *Exclusionary Rule* "is to deter future unlawful police conduct and thereby effectuate the guarantee of the **Fourth Amendment** against unreasonable searches and seizures." (***United States v. Calandra*** (1974) 414 U.S. 338 [38 L.Ed.2nd 561]; ***Illinois v. Krull*** (1987) 480 U.S. 340 [94 L.Ed.2nd 364]; ***People v. Robles*** (2000) 23 Cal.4th 789, 799; see also **People *v.* Arredondo** (2016) 245 Cal.App.4th 186, 206-210; ***People v. Marquez*** (2019) 31 Cal.App.5th 402, 411-412.)

> Note: Petition for Review was dismissed in **People *v.* Arredondo** and the case remanded in light of the decision in ***Mitchell v. Wisconsin*** (June 27, 2019) __ U.S.__, __ [139 S.Ct. 2525; 204 L.Ed.2nd 1040], where the U.S. Supreme Court held that when a DUI arrestee is unconscious, this fact alone will "almost always" constitute an exigency, allowing for a warrantless blood draw.
>
> "'[T]he "*prime purpose*" of the [exclusionary] rule, if not the sole one, "is to deter future unlawful police conduct." [Citations]' (Citations)" (Italics added; ***People v. Sanders*** (2003) 31 Cal.4th 318, 324.)
>
> "The exclusionary rule has traditionally been driven by one primary policy consideration: the deterrence of unconstitutional acts by law enforcement. ***United States v. Calandra***, 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2nd 561 (1974) ('[T]he [exclusionary] rule is a judicially created remedy designed to safeguard **Fourth Amendment** rights generally through its deterrent effect . . . .'); *see also* (***United States v.***) ***Leon***, 468 U.S. at 909. The rule effects this goal in different ways, depending on the case. The most common is preventing police from benefiting from evidence obtained as a result of a constitutional violation, thereby removing the

incentive to violate the Constitution to obtain evidence. *See, e.g.*, ***United States v. Artis***, 919 F.3rd 1123, 1133-1134 (9th Cir. 2019); ***United States v. Camou***, 773 F.3rd 932, 944-45 (9th Cir. 2014)" (***United States v. Jobe*** (9th Cir. 2019) 933 F.3rd 1074, 1078.)

> In ***United States v. Jobe***, *supra*, at pp. 1078-1079, it was held that a 20-day delay in obtaining a search warrant to search an already lawfully seized laptop computer, although unreasonable, was not grounds for suppression of the laptop's contents. "(I)n another category of cases, police misconduct effectively bears no 'fruit.' . . . Unreasonable delays fall into this latter category." (Citing ***United States v. Cha*** (9th Cir. 2010) 597 F.3rd 995, 1003, where, in an apparent contradiction, the Court suppressed the evidence seized after an "unreasonable" 26½ hour delay in obtaining a warrant for a residence, the Court, in ***Jobe***, comparing the differences in the relevant officers' actions.

It is also *the purpose* of the **Fourth Amendment** to "safeguard the privacy and security of individuals against arbitrary invasions by government officials." (***Camara v. Municipal Court of the City and County of San Francisco*** (1967) 387 U.S. 523, 528 [87 S.Ct. 1727; 18 L.Ed.2nd 930, 935].)

The Exclusionary Rule also encourages officers to learn the rules for respecting private citizens' constitutional rights and abide by them. "Responsible law-enforcement officers will take care to learn 'what is required of them' under **Fourth Amendment** precedent and will conform their conduct to these rules." (***Davis v. United States***, *supra*, at p. 241, quoting ***Hudson v. Michigan*** (2006) 547 U.S. 586, at 599 [126 S.Ct. 2159; 165 L.Ed.2nd 56].)

Use of the exclusionary rule is a preferable sanction over outright dismissal of a case (***United States v. Struckman*** (9th Cir. 2010) 611 F.3rd 560, 574-578; noting that dismissal under a court's "inherent supervisory powers" might be appropriate if necessary to (1) implement a remedy for the violation of a recognized statutory or constitutional right; (2) preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and (3) deter future illegal conduct, but even then, only after the defendant demonstrates sufficient prejudice.)

"(T)he exclusionary rule is not an individual right and applies only where it 'result[s] in appreciable deterrence.' (Citation)" (***Herring v. United States*** (2009) 155 U.S. 135, 141 [129 S.Ct. 695; 172 L.Ed.2nd 496].)

"The [exclusionary] rule's sole purpose, we have repeatedly held, is to deter future **Fourth Amendment** violations." (***United States v. Korte*** (9th

Cir. 2019) 918 F.3rd 750, 759; quoting ***Davis v. United States*** (2011) 564 U.S. 229, 236-237 [131 S.Ct. 2419; 180 L.Ed.2nd 285].)

"The exclusionary rule applies only 'where its deterrence benefits outweigh its 'substantial social costs.' (***Pennsylvania Bd. of Probation and Parole v. Scott*** (1998) 524 U.S. 357, 363 [141 L. Ed. 2d 344, 118 S. Ct. 2014], quoting ***United States v. Leon*** (1984) 468 U.S. 897, 907 [82 L. Ed. 2d 677, 104 S. Ct. 3405]; accord, ***Arizona v. Evans*** (1995) 514 U.S. 1, 13 [131 L. Ed. 2d 34, 115 S. Ct. 1185]; see also ***People v. Reyes*** (1998) 19 Cal.4th 743, 755–756 . . . .) The United States Supreme Court has cautioned that "[s]uppression of evidence … has always been our last resort." (***Hudson*** (***v. Michigan*** (2006) . . . 547 U.S. (586) at p. 591 ([165 L.Ed.2nd 56; 126 S.Ct. 2159].) In ***Hudson***, the court emphasized that the exclusionary rule's "costly toll" upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.' (*Ibid*.)" (***People v. Robinson*** (2010) 47 Cal.4th 1104, 1124.)

See "*Remedy for Violations*; *The* '*Exclusionary Rule*,'" under "*Searches and Seizures*" (Chapter 8), below.

The Rule of Reasonableness:

Rule: "(T)he ultimate touchstone of the **Fourth Amendment** is '*reasonableness*.'" (***Riley v. California*** (2014) 573 U.S. 373, 381 [134 S.Ct. 2473, 2482; 189 L.Ed.2nd 430]; citing ***Brigham City v. Stuart*** (2006) 547 U.S. 398, 403 [126 S.Ct. 1943; 164 L.Ed.2nd 650]; **Heien *v.* North Carolina** (2014) 574 U.S. 54, 60 [135 S.Ct. 530; 190 L.Ed.2nd 475, 482]; **People *v.* Steele** (2016) 246 Cal.App.4th 1110, 1116; ***People v. Macabeo*** (2016) 1 Cal.5th 1206, 1213; see also ***Ohio v. Robinette*** (1996) 519 U.S. 33, 39 [136 L.Ed.2nd 347]; ***People v. Ovieda*** (2019) 7 Cal.5th 1034, 1041; ***Kansas v. Glover*** (Apr. 6, 2020) __ U.S. __, __ [140 S.Ct. 1183; 206 L.Ed.2nd 412].)

> "The question, then, is whether the warrantless searches at issue here were reasonable." (***Birchfield v. North Dakota*** (2016) 579 U.S. 438, 455 [136 S.Ct. 2160; 195 L.Ed.2nd 560]; citing ***Vernonia School District 47J v. Acton*** (1995) 515 U. S. 646, 652 [115 S.Ct. 2386; 132 L. Ed. 2nd 564]: "As the text of the **Fourth Amendment** indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness'").
>
> "Since the **Fourth Amendment** guarantees the right to be free from 'unreasonable searches and seizures,' **U.S. Const. amend. IV**, the first question—whether the officer violated a constitutional right—will typically turn on the 'reasonableness' of the officer's

actions. (**Bonivert *v. City of* Clarkston** (9th Cir. 2018) 883 F.3rd 865, 872.)

"'(R)easonableness "depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers,'"' [citation].' (***Maryland v. Wilson*** (1997) 519 U.S. 408, 411 [137 L.Ed.2d 41, 46, 117 S. Ct. 882].) 'Officer safety is a weighty public interest.' (***Id.***, at p. 413 [137 L.Ed.2nd at p. 47].)" (***People v. Steele*** (2016) 246 Cal.App.4th 1110, 1116.)

"Reasonableness 'is measured in objective terms by examining the totality of the circumstances'" (***People v. Tran*** (2019) 42 Cal.App.5th 1, 7-8; quoting ***People v. Robinson*** (2010) 47 Cal.4th 1104, 1120.)

Also note: "To be reasonable is not to be perfect, and so the **Fourth Amendment** allows for some mistakes on the part of government officials." (***United States v. Ped*** (9th Cir. 2019) 943 F.3rd 427, 431, quoting ***Heien v. North Carolina*** (2014) 574 U.S. 54, 60-61 [135 S.Ct. 530; 190 L.Ed.2nd 475].)

An otherwise lawful seizure can violate the **Fourth Amendment** if it is executed in an unreasonable manner. (***United States v. Alverez-Tejeda*** (9th Cir. 2007) 491 F.3rd 1013, citing ***United States v. Jacobsen*** (1984) 466 U.S. 109, 124 [104 S.Ct.1652; 80 L.Ed.2nd 85]: "(I)ncluding if it is executed by means of an unreasonable ruse." (***I.d.***, at pp. 1016-1017; and see ***United States v. Ramirez*** (9th Cir. 2020) 976 F.3rd 946, 952.)

While a parolee is subject to search or seizure without probable cause or even a reasonable suspicion, searching him may still be illegal if done in an unreasonable manner, such as by a strip search in a public place. (See ***People v. Smith*** (2009) 172 Cal.App.4th 1354; checking defendant's crotch area for drugs, while shielded from the public, held not to be a strip search and not unreasonable.)

See "*Use of a Motorized Battering Ram*," under "*Searches With a Search Warrant*," (Chapter 10), below.

Exceptions:

"To be reasonable is not to be perfect, and so the **Fourth Amendment** allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.'" (***Heien v. North Carolina*** (2014) 574

U.S. 54, 60-61 [135 S.Ct. 530; 190 L.Ed.2nd 475]; quoting ***Brinegar v. United States*** (1949) 338 U.S. 160, 176 [93 L.Ed. 1879].)

> In ***Heien***, the United States Supreme Court held that an officer's misapprehension as to the law "*may*" be reasonable when the issue is not yet settled. (See "*Mistake of Law vs. Mistake of Fact*," under "*Types of Detentions*," and "*Detentions*" (Chapter 4), below.)

Based upon the above, it has been held that if a detaining officer's justification for a traffic stop is based on a reasonable mistake—"*either factual or legal*"—(often referred to as "*a mistake of fact or a mistake of law*"), then the resulting search or seizure will be held to be lawful despite the **Fourth Amendment** violation, at least if it can be said that the officer's mistake was "*objectively*" reasonable. (***Heien v. North Carolina*** (2014) 574 U.S. 54, 57, 60–61, 67.) "To be reasonable is not to be perfect, and so the **Fourth Amendment** allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.'" (***Id.*** at pp. 60–61.) (***People v. Holiman*** (2022) 76 Cal.App.5th 825.)

> However, this exception can be stretched only so far. As noted by the Supreme Court in ***Heien***: "(A)n officer can gain no **Fourth Amendment** advantage through a sloppy study of the laws he is duty-bound to enforce." (***Id.***, at p. 831; quoting ***Heien v. North Carolina***, *supra*, at p. 67.)

Balancing Test; Totality of the Circumstances:

> "'Reasonableness … is measured in objective terms by examining the totality of the circumstances' [citation], and 'whether a particular search meets the reasonableness standard '"'is judged by balancing its intrusion on the individual's **Fourth Amendment** interests against its promotion of legitimate governmental interests.'"' [Citations.]" (***People v. Robinson*** (2010) 47 Cal.4th 1104, 1120 [104 Cal. Rptr. 3d 727, 224 P.3d 55]; see ***Bell v. Wolfish*** (1979), 441 U.S. 520 at p. 559 ["Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."]'.)" (***People v. Boulter*** (2011) 199 Cal.App.4th 761.)

Digital evidence seized by local state authority during the execution of a state-issued search warrant from defendant's

cellphone, but not necessary to the prosecution of the state case, cannot be turned over to a federal agency for use in a separate federal prosecution absent a second search warrant seeking the evidence related to the pending federal charges. Citing ***Riley v. California*** (2014) 573 U.S. 373, 403 [134 S.Ct. 2473; 189 L.Ed.2nd 430, 452], the South Dakota federal District Court noted that the High Court has held that "because cell phones contain immense amounts of personal information about people's lives, they are unique, and law enforcement officers must generally secure a warrant before conducting such a search." Thus, in this case, a federal agent who sought digital evidence from defendant's cellphone collected, but not used, by in the state prosecution, "should have applied for and obtained a second warrant [that] would have authorized him to search Mr. Hulscher's cell phone data for evidence of (the federal) firearms offenses." In discussing whether use in federal court the evidence obtained via a separate state-issued search warrant was harmless error, the Court held that it was not. "Here, the cost of applying the exclusionary rule is minimized because the evidence is peripheral in nature and not directly related to the firearms offense." (***United States v. Hulscher*** (Dist. of So. Dakota, S. Div. 2017) 2017 U.S. Dist. LEXIS 22874; at pgs. 9-10.)

The Rule of Lenity:

Courts are to resolve doubts as to the meaning of a statute in a criminal defendant's favor. (***People ex rel. Lungren v. Superior Court*** (1996) 14 Cal.4th 294, 312; ***People v. Reyes*** (2020) 56 Cal.App.5th 972.)

"'[W]e have frequently noted, "[the rule of lenity] applies 'only if two reasonable interpretations of the statute stand in relative equipoise.' [Citation.]" [Citations.]' (***People v. Soria*** (2010) 48 Cal.4th 58, 65 . . . ; accord, ***People v. Lee*** (2003) 31 Cal.4th 613, 627 . . . .) The rule 'has no application where, "as here, a court 'can fairly discern a contrary legislative intent."'" (***Lexin v. Superior Court*** (2010) 47 Cal.4th 1050, 1102, fn. 30. . . ; see ***People v. Avery*** (2002) 27 Cal.4th 49, 58 . . . .) "'[A] rule of construction . . . is not a straitjacket. Where the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent." [Citation.]' (***People v. Jones*** (1988) 46 Cal.3rd 585, 599 . . . .)" (***People v. Cornett*** (2012) 53 Cal.4th 1261, 1271; the Rule held not to apply.)

The "*rule of lenity*" generally requires that "ambiguity in a criminal statute should be resolved in favor of lenity, giving the defendant the benefit of every reasonable doubt on questions of interpretation." (Citing ***People v. Nuckles*** (2013) 56 Cal.4th 601, 611.) "But '[t]he rule of lenity does not

apply every time there are two or more reasonable interpretations of a penal statute.'" (Citing ***People v. Manzo*** (2012) 53 Cal.4th 880, 889.) "On the contrary, this principle applies only 'when "two reasonable interpretations of the same provision stand in relative equipoise."'" (***Smith v. Loanme, Inc.*** (2021) 11 Cal.5th 183, 201.)

Private Persons and the Exclusionary Rule: Evidence illegally obtained by private persons, acting in a private capacity, is *not* subject to the Exclusionary Rule. (See ***Burdeau v. McDowell*** (1921) 256 U.S. 465 [41 S.Ct. 574; 65 L.Ed. 1048]; ***Coolidge v. New Hampshire*** (1971 403 U.S. 443, 489 [91 S.Ct. 2022; 29 L.Ed.2nd 564; *Kr**auss v. Superior Court*** (1971) 5 Cal.3rd 418, 421; ***Jones v. Kmart Corp.*** (1998) 17 Cal.4th 329, 332.)

Even a peace officer, when off-duty and acting in a private capacity, may be found to have acted as a private citizen. (See ***People v. Wachter*** (1976) 58 Cal.App.3rd 911, 920, 922.)

However, a civil rights action pursuant to **42 U.S.C. § 1983** was held to be proper against non-law enforcement employees of a private corporation that operated a federal prison under contract. (***Pollard v. GEO Group, Inc.*** (9th Cir. 2010) 607 F.3rd 583.)

The National Center for Missing and Exploited Children (NCMEC) was held to qualify as a governmental entity for **Fourth Amendment** purposes. Even though NCMEC is privately incorporated, its two primary authorizing statutes, **18 U.S.C. § 2258A** and **42 U.S.C. § 5773(b)**, mandate its collaboration with federal, state, and local law enforcement agencies in over a dozen different ways. For example, Internet Service Providers (AOL, in this case) are required to forward emails suspected of containing child pornography to NCMEC, and NCMEC is required to maintain a CyberTipline to receive such emails. NCMEC is then allowed to review the emails and is required to report possible child sexual exploitation violations to the government. (***United States v. Ackerman*** (10th Cir. Kan. 2016) 831 F.3rd 1292.)

A security guard employed by a private security company (i.e., AGB Investigative Services, or AGB) stopped and searched defendant at a Chicago Housing Authority ("CHA") public housing unit. After seizing a handgun from defendant, the security guard called the Chicago Police Department. Defendant was charged in federal court with possession of a firearm by a felon. The Court rejected defendant's argument that the security guard was an agent of law enforcement and therefore subject to the **Fourth Amendment's** search and seizure rules. Per the Court, the **Fourth Amendment** does not apply "to a search or seizure, even an unreasonable one, effected by a private individual who is not acting as an agent of the government or with the participation or knowledge of any

government official." The Seventh Circuit Court of Appeals found that Illinois law expressly categorizes CHA's police powers as distinct from its power to employ security personnel. Next, the court noted that the CHA contract with AGB labels AGB as an independent contractor. As such, the security guard was acting as a private person, and not a law enforcement agent. (***United States v. Green*** (7th Cir. 2020) 975 F.3rd 653.)

Defendant had conversations with a 15-year-old minor concerning their sexual exploits together via Facebook. When Facebook discovered this fact, it passed the information onto the National Center for Missing and Exploited Children (NCMEC) via a "cyber tip," which in turn passed it onto law enforcement in the geographical location where both defendant and the minor resided (i.e., Corpus Christi, Texas). As a result, a Corpus Christi investigator obtained a search warrant for both defendant's and the minor's Facebook accounts. This revealed additional conversations confirming defendant's sexual relationship with A.A. The investigator then obtained a second search warrant based upon this additional evidence to search defendant's electronic devices, home, and a trailer. The second search uncovered child pornography on defendant's devices resulting in defendant being charged in federal court with several child pornography-related offenses. Defendant argued that both Facebook and NCMEC acted as government agents, making their viewing of defendant's Facebook messages an illegal search. Upholding the trial court's denial of defendant's motion to suppress, the Fifth Circuit Court of Appeal disagreed. The **Fourth Amendment** applies to the government, not private citizens. Consequently, under the private search doctrine, if a non-government entity violates a person's expectation of privacy, discovering evidence, and turns over the evidence to law enforcement, the evidence can be used to obtain warrants and/or prosecute. There are two exceptions to the private search doctrine. *First*, if the "private actor" who conducted the search was acting as an agent of the government when the search was conducted, the private search doctrine does not apply. *Second*, if the government, exceeds the scope of the private actor's original search without a warrant and discovers new evidence, the private search doctrine does not apply to the new evidence, and the new evidence may be suppressed. In this case, the Court held that Facebook was a "*private actor*" and not a government agent when it searched defendant's messages. Even though **18 U.S.C. § 2258A(a)** requires electronic communication service providers like Facebook to send a cyber tip to NCMEC for all instances of child exploitation that they discover on their platforms, it does not compel nor coercively encourage these providers to actively search for such evidence. Instead, the Court recognized that **18 U.S.C. § 2258A(f)** contains language indicating that service providers like Facebook are not required to monitor their customers or affirmatively search their accounts for evidence of child exploitation. Given this disclaimer, the Court held that Facebook conducted a private search when

it searched defendant's messages. Next, the court found that NCMEC is a private, nonprofit corporation, and not a government entity. However, the court added that even if NCMEC was acting as a government agent, it did not exceed the scope of Facebook's private search when it reviewed the same content initially reviewed by a Facebook employee and forwarded to NCMEC in the cyber tip. Consequently, the Court held that defendant's motion to suppress was properly denied. (***United States v. Meals*** (5th Cir. 2021) 21 F.4th 903.)

Limited Use of the Exclusionary Rule:

General Rule:

The Exclusionary Rule is not intended to prevent all police misconduct or as a remedy for all police errors. "*The use of the exclusionary rule is an exceptional remedy typically reserved for violations of constitutional rights*." (***United States v. Smith*** (9th Cir. 1999) 196 F.3rd 1034, 1040.)

"The exclusionary rule generates substantial social costs, which sometimes include setting the guilty free and the dangerous at large. We have therefore been cautious against expanding it, and have repeatedly emphasized that the rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging its application." (***United States v. Dreyer*** (9th Cir. 2015) 804 F.3rd 1266, 1278.)

"To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." (***Herring v. United States*** (2009) 555 U.S. 135, 144 [129 S.Ct. 695; 172 L.Ed.2nd 496]; see also ***People v. Leal*** (2009) 178 Cal.App.4th 1051, 1064-1065.)

The exclusionary rule should only be used when necessary to deter "deliberate, reckless, or grossly negligent conduct, or in some circumstances, recurring or systematic negligence." (***Herring v. United States***, *supra*, at p. 144.)

See ***United States v. Monghur*** (9th Cir. 2009) 588 F.3rd 975, where a case involving the illegal warrantless search of a container was remanded for a determination of whether the exclusionary rule required the suppression of the gun found in that container.

"(E)ven when there is a **Fourth Amendment** violation, (the) exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits. In some cases, for example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression." (***Utah v. Strieff*** (2016) 579 U.S. 232, 235 [136 S.Ct. 2056, 2059; 195 L.Ed.2nd 400]; existence of an arrest warrant "attenuated the taint" between an unlawful detention and the discovery of evidence incident to the arrest on the warrant, at least where the police misconduct was not flagrant.)

"Establishing a violation of the **Fourth Amendment**, though, does not automatically entitle a criminal defendant to exclusion of evidence. Far from it. '[T]he exclusionary rule is not an individual right.' ***Herring v. United States***, 555 U. S. 135, 141, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009). It is a '"prudential' doctrine created by this Court,' ***Davis v. United States***, 564 U. S. 229, 236, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011) (citation omitted), and there is always a 'high obstacle for those urging application of the rule,' ***Pennsylvania Bd. of Probation and Parole v. Scott***, 524 U. S. 357, 364-365, 118 S. Ct. 2014, 141 L. Ed. 2d 344 (1998). Relevant here, the rule 'does not apply when the costs of exclusion outweigh its deterrent benefits.' (***Utah v.***) ***Strieff***, 579 U. S. (232), at 235, 136 S. Ct. 2056, 2059, 195 L. Ed. 2d 400." (See concurring opinion in ***Lange v. California*** (June 23, 2021) __ U.S.__, __ [141 S.Ct. 2011; 210 L.Ed.2nd 486.)

In ***Lange*** (at pp. __) the concurring opinion noted that to use the Exclusionary Rule in this case would violate a number of rules:

- It would encourage bad conduct (i.e., fleeing from the police**).**
- It would allow a criminal defendant to use the exclusionary rule as "a shield against" his own bad conduct.
- The evidence against him (i.e., DUI) would have inevitably been discovered anyway.
- A criminal defendant should "not . . . be put in a better position than [he] would have been in if no illegality had transpired."

Case Law in General:

The argument has been made that the exclusionary rule should not apply to the penalty phase of a capital murder trial when the

prosecution is attempting to introduce **P.C. § 190.3**, "**factor (b)**" evidence. Specifically, the A.G. argued that the exclusionary rule has little deterrent value at the penalty phase of a capital case, the purpose of which is "to enable the jury to make an individualized determination of the appropriate penalty based on the character of the defendant and the circumstances of the crime." Because law enforcement is not likely to be deterred from conducting unreasonable searches and seizures where it is a remote possibility that the evidence could not be used during the penalty phase in an unrelated prosecution occurring potentially years later, any limited deterrent value is outweighed by the societal costs of exclusion of the evidence and the resultant incomplete picture of the defendant's criminal activities. However, because this issue was not first raised by the prosecution in front of the trial judge, and finding admission of the questioned evidence to be harmless error anyway, the Supreme Court declined to resolve this question in this case. (***People v. Casares*** (2016) 62 Cal.4th 808, 834.)

Note: The hint here made by the California Supreme Court is that this argument should be attempted by a prosecutor at the trial level, to test this issue.

Evidence obtained in violation of someone else's (i.e., someone other than the present defendant's) **Fourth Amendment** (search and seizure) rights *may be used* as part of the probable cause in a search warrant affidavit, unless the defendant can show that he has "*standing*" (i.e., it was his reasonable expectation of privacy that was violated) to challenge the use of the evidence. (***People v. Madrid*** (1992) 7 Cal.App.4th 1888, 1896.)

"To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in [the Supreme Court's] cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." (***United States v. Jobe*** (9th Cir. 2019) 933 F.3rd 1074, 1077.)

See "*Searches and Seizures*," "*Remedy for Violations*; *The* '*Exclusionary Rule*,'" under "*Searches and Seizures*" (Chapter 8), below.

Driving Under the Influence (DUI) Cases:

"'[E]vidence should be suppressed "only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the **Fourth Amendment**."'" (***Herring v. United States*** (2009) 555 U.S. 135, 143 [172 L. Ed. 2d 496, 129 S. Ct. 695].) . . . The good-faith exception to the exclusionary rule asks whether a reasonably well-trained officer would have known the search was illegal in light of all the circumstances. (***Id.*** at p. 145.) This is "an objective" standard that "requires officers to have a reasonable knowledge of what the law prohibits." (***United States v. Leon*** (1984) 468 U.S. 897, 919, fn. 20 [82 L. Ed. 2d 677, 104 S. Ct. 3405].) "Police officers are presumed to know the law, particularly those laws that relate to the performance of their duties." (***People v. Rosas*** (2020) 50 Cal.App.5th 17, 25 [264 Cal. Rptr. 3d 43].) [¶] "For the last decade, it has been settled that absent some exception, the **Fourth Amendment** requires a warrant for a blood draw. (***McNeely***, *supra*, 569 U.S. at p. 148.) '[A] warrantless search of the person is reasonable only if it falls within a recognized exception,' and this principle applies to the 'invasion of bodily integrity' implicated by a blood draw. (***Ibid***.) A warrant is required even for a blood draw incident to arrest. (***Birchfield***, *supra*, (2016) 579 U.S. at pp. 474–476.) Any reasonably well-trained officer would have known this in 2018, when the events at issue here took place." (***People v. Alvarez*** (2023) 98 Cal.App.5th 531, 546; holding that "good faith" did not apply to the officer obtaining a warrantless blood sample from an unconscious felony DUI suspect in that the officer, with several hours in which he could have obtained a telephonic search warrant to draw the blood, failed to do so.

Searches conducted in objectively reasonable reliance (i.e., "*good faith*") on binding appellate precedent in effect at the time of the search, despite a later decision changing the rules, are not subject to the Exclusionary Rule. (***Davis v. United States*** (2011) 564 U.S. 229, 236-239 [131 S.Ct. 2419; 180 L.Ed.2nd 285]; see also ***People v. Youn*** (2014) 229 Cal.App.4th 571, 576-579; ***People v. Rossetti*** (2014) 230 Cal.App.4th 1070, 1074-1077; four officers held defendant down as a warrantless forced blood draw was made in a medically approved manner; ***People v. Harris*** (2015) 234 Cal.App.4th 671, 697-704, and **People *v.* Jimenez** (2015) 242 Cal.App.4th 1337, 1360-1365; applicability of ***Missouri v. McNeely*** (2013) 569 U.S. 141 [133 S.Ct. 1552; 185 L.Ed.2nd 696] to cases occurring before.)

Illegally collecting blood samples from defendant, mistakenly believing that he qualified under the newly enacted **DNA and**

Forensic Identification Data Base and Data Bank Act of 1998 (**P.C. §§ 295 et seq.**), even if it was a **Fourth Amendment** violation to do so, did not require the suppression of the results in that the mistake was not intentional, reckless, the results of gross negligence, nor of recurring or systematic negligence. (***People v. Robinson*** (2010) 47 Cal.4th 1104, 1124-1129.)

Also, a forced blood draw performed in 2011, before ***Missouri v. McNeely*** (2013) 569 U.S. 141 [133 S.Ct. 1552; 185 L.Ed.2nd 696] (requiring a search warrant to force a blood draw in a DUI case absent an exigent circumstance) was decided, does not require the suppression of the blood result in that police officers are entitled to act on the law as it is understood at the time to apply. The **Fourth Amendment** exclusionary rule does not require suppression of evidence from a warrantless blood draw because the draw was conducted in an objectively reasonable reliance on then-binding precedent. (***People v. Youn*** (2014) 229 Cal.App.4th 571, 576-579; **People *v.* Jimenez** (2015) 242 Cal.App.4th 1337, 1360-1365; see also ***People v. Rossetti*** (2014) 230 Cal.App.4th 1070, 1074-1077; four officers held defendant down as a warrantless forced draw was made in a medically approved manner; and see ***People v. Jones*** (2014) 231 Cal.App.4th 1257, 1262-1265.)

Griffith v. Kentucky (1987) 479 U.S. 314, 328 [93 L.Ed.2nd 649], holding that in criminal prosecutions, a new constitutional rule is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past, does not apply when the offending violation involves the **Fourth Amendment's** Exclusionary Rule. (***Griffith*** involved a jury selection issue.) (***People v. Jones***, *supra*, at pp. 1264-1265.)

Case Law: *Evidence Admitted Under* ***Herring***:

Holding that a Department of Homeland Security special agent's affidavit supporting the state warrant contained sufficient information to render his reliance on the warrant reasonable, the Ninth Circuit held that the district court erred in granting defendant's motion to suppress evidence found on a laptop. The affidavit laid out facts indicative of a large-scale marijuana growing operation, including information from a tipper that was corroborated by the agent's own observations, investigation, and experience. There was no indication that the agent deliberately tarried or received insufficient training because immediately after

seizing the laptop, he contacted the United States Attorney's Office about prosecuting the case federally. The fact that it took 20 days between the seizure of the laptop and its eventual search under authority of a second warrant did not require the suppression of evidence obtained from the laptop. The agent made a good-faith effort to comply with the Warrant Clause of the **Fourth Amendment**. (***United States v. Jobe*** (9th Cir. 2019) 933 F.3rd 1074; citing ***Herring v. United States*** (2009) 555 U.S. 135, 140 [129 S.Ct. 695; 172 L.Ed.2nd 496].)

Case Law: *Evidence Excluded Despite* ***Herring***:

Officers who took 26½ hours to obtain a search warrant for a residence while the residence was "detained" (i.e., the occupant was kept from reentering), failing to recognize that they were required to act with due diligence and to expedite the process, were not excused by the rule of ***Herring***. The resulting evidence, therefore, was subject to exclusion. (***United States v. Cha*** (9th Cir. 2010) 597 F.3rd 995, 1004-1006.)

Where a defendant's detention was in the absence of any reasonable suspicion of criminal wrongdoing, and was found to be deliberate in the sense that it was not accidental or negligent conduct, suppression of the resulting evidence is appropriate in that it serves the policy objectives of the exclusionary rule as articulated by the U.S. Supreme Court. (***People v. Kidd*** (2019) 36 Cal.App.5th 12, 23.)

Good Faith:

Under **28 U.S.C. § 2254(d)(1)**, clearly established federal law includes only the Supreme Court's decisions issued before the relevant adjudication of the merits of a prisoner's claim, regardless of when the prisoner's conviction became final. A direct appeal was thus the relevant adjudication of the merits. (***Greene v. Fisher*** (2011) 565 U.S. 34 [132 S.Ct. 38; 181 L.Ed.2nd 336], citing ***Gray v. Maryland*** (1998) 523 U.S. 185 [140 L.Ed.2nd 294]; see also ***Thompson v. Runnels*** (9th Cir. 2013) 705 F.3rd 1089, 1095-1097.)

Whether or not the theory of ***Florida v. Jardines*** (2013) 569 U.S. 1 [133 S.Ct. 1409; 185 L.Ed.2nd 495], involving the illegality of using drug-sniffing dogs within the curtilage of a person's home, is applicable to a drug-sniffing dog used around the outside, and leaning up against, the open bed and tool box in a suspect's truck (which would over-rule prior case law), was left open by the Ninth Circuit Court of Appeal, holding that the pursuant to the "*faith-in-*

case law" rule of ***Davis v. United States*** (2011) 564 U.S. 229, 236-239 [131 S.Ct. 2419; 180 L.Ed.2nd 285], it was unnecessary to decide the issue. (***United States v. Thomas*** (9th Cir. 2013) 726 F.3rd 1086, 1092-1095.)

The Ninth Circuit has held that for "good faith" to save an otherwise unlawful search, the officers must have relied upon prior "binding appellate precedent." Prior authority that is merely "unclear" only allows an officer to escape civil liability under a "qualified immunity" argument. Whether or not an officer may search a cellphone based upon a "**Fourth** waiver probationary search" is not the subject of any binding appellate precedent. Therefore, "good faith" does not save such a search where current or subsequent cases (e.g., ***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430].) have held such a search to be unlawful. (***United States v. Lara*** (9th Cir. 2016) 815 F.3rd 605, 612-614.)

A search of a cellphone "incident to arrest" (as opposed to a **Fourth** waiver search) was clearly lawful prior to ***Riley***, and therefore, the officer's good faith reliance upon that pre-***Riley*** binding precedent will save a warrantless search of defendant's cellphones found on his person when he was arrested. (***United States v. Lustig*** (9th Cir. 2016) 830 F.3rd 1075, 1077-1085.)

However, the California Supreme Court concluded in a warrantless cellphone search case (reversing a lower appellate court decision) that the search of defendant's cellphone would not have been proper even under its prior decision in ***People v. Diaz*** (2011) 51 Cal.4th 84 (a search incident to arrest case), and that a reasonably well-trained officer would have known this. Defendant was not under arrest when officers searched his phone. Under ***Riley v. California*** (2014) 573 U.S. 373[134 S.Ct. 2473; 189 L.Ed.2nd 430], which overruled ***Diaz***, even if defendant had been properly arrested, a warrant was required to search his cellphone. The search in this case violated the **Fourth Amendment**; the good faith exception to the exclusionary rule did not apply. Also, the search was not the result of negligence, nor did it result from any pressure to apply a newly enacted statutory scheme that was confusing and complex. The officers' conduct, including the search, was deliberate. Exclusion of the evidence in this case serves to deter future similar behavior. (***People v. Macabeo*** (2016) 1 Cal.5th 1206, 1212-1226.)

Officers' and FBI Agents' good faith belief, based upon statutory and case authority existing at the time that a court order, pursuant

to the federal "**Stored Communications Act"** ("**SCA**;" **18 U.S.C. § 2703(d))** (as opposed to a search warrant) was all that was necessary in order to acquire defendant's historical cell site location information (i.e., "CSLI"), allowed for the admission into evidence of the defendant's CSLI. (***United States v. Korte*** (9th Cir. 2019) 918 F.3rd 750, 757-758.)

> *Note*: "Cell sites usually consist of a set of radio antennas mounted on a tower, although 'they can also be found on light posts, flagpoles, church steeples, or the sides of buildings.' ***Carpenter v. United States***, 138 S.Ct. 2206, 2211, 201 L.Ed.2nd 507 (2018). 'Each time [a] phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI).' ***Id***. This CSLI data indicates the general geographic area in which the cell phone user was located when his or her phone connected to the network. Because most smartphones tap into the wireless network 'several times a minute whenever their signal is on . . . modern cell phones generate increasingly vast amounts of increasingly precise CSLI.' ***Id***. at 2211-12." (***United States v. Elmore*** (9th Cir. 2019) 917 F.3rd 1068, 1072, fn. 2.)
>
> Subsequent to the obtaining of defendant's CSLI in this case, but prior to the Ninth Circuit's ruling, the U.S. Supreme Court held that a search warrant was necessary to obtain such information. (See **Carpenter *v.* United States** (June 22, 2018) 585 U.S. __ [138 S.Ct. 2206; 201 L.Ed.2nd 507].)
>
> See also ***United States v. Goldstein*** (3rd Cir. 2019) 914 F.3rd 200, 203-205; ***United States v. Curtis*** (7th Cir. 2018) 901 F.3rd 846, 848-949; ***United States v. Joyner*** (11th Cir. 2018) 899 F.3rd 1199, 1205; and ***United States v. Chavez*** (4th Cir. 2018) 894 F.3rd 593, 608.)

The People bear the burden of showing that the good-faith exception applies. (***United States v. Artis*** (9th Cir. 2019) 919 F.3rd 1123, 1134; citing ***United States v. Underwood*** (9th Cir. 2013) 725 F.3rd 1076, 1085.)

See ***People v. Kidd*** (2019) 36 Cal.App.5th 12, 23: "We do not suggest the officer here acted in bad faith, but we find his detention of Kidd in the absence of any reasonable suspicion of wrongdoing to be deliberate, in the sense that it was not accidental or negligent conduct."

However, the Fourth District Court of appeal, in ***People v. Smith*** (2020) 46 Cal.App.5th 375, declined to apply the "good faith" exception to a warrantless entry into a residence based upon no more than the fact that a vehicle was left out front with the engine running, and no one answered the door upon the officers knocking. Rejecting the People's argument that the officer was using the rational of ***People v. Ray*** (1999) 21 Cal.4th 464, applying the "*community caretaking*" theory to warrantless residential entries, the Court here noted that because ***Ray*** was only a "*plurality*" opinion, it was not binding precedent. Reliance on the rule in ***Ray***, therefore, does not trigger the "good faith" exception. (Citing ***People v. Karis*** (1988) 46 Cal.3rd 612, 632.)

Border agents' warrantless forensic search of defendant's cellphone after his arrest at the border for having smuggled cocaine in his vehicle, was held *not* to have been justified under the "Good Faith" exception in that there was no prior binding appellate authority authorizing such a search. (***United States v. Cano*** (9th Cir. 2019) 934 F.3rd 1002, 1021-2022; rejecting ***United States v. Cotterman*** (9th Cir. 2013) 709 F.3rd 952, a computer-search case, as authorizing such a search.)

An officer's good faith belief in the rules for searching vehicle's incident to arrest, as dictated under ***New York v. Belton*** (1981) 453 U.S. 454, 455, 460–461 [69 L. Ed. 2d 768; 101 S. Ct. 2860], as it existed in 1991 when defendant's vehicle was searched, held to apply despite the subsequent tightening of the rules under ***Arizona v. Gant*** (2009) 556 U.S. 332 [173 L.Ed.2nd 485; 129 S.Ct. 1710]. (***People v. Silveria and Travis*** (2020) 10 Cal.5th 195, 236, 239.)

See also ***People v. Maxwell*** (2020) 58 Cal.App.5th 546, where a year after the search in issue here, the appellate court struck the search condition imposed as a condition of his bail as invalid due to the lack of any "particularized need" for such a condition in defendant's case. On appeal from the warrantless search of defendant's person, his vehicle, and his residence, the Court held that the trial court properly denied defendant's motion to suppress evidence, the searches at issue which were premised on the bail condition that was later found to be invalid, in that the good-faith exception to the exclusionary rule applied. The officer who conducted the search acted in good-faith reliance on defendant's then-extant bail terms, and that reliance was objectively reasonable. (***Id***., at pp. 558-560.)

On remand from ***Lange v. California*** (June 23, 2021) __ U.S.__, __ [141 S.Ct. 2011; 219 L.Ed.2nd 486], which held that; "(i)n misdemeanor cases, flight does not always supply the exigency that this Court has demanded for a warrantless home entry," given the many other possible reasons—not necessarily involving an exigency—why a misdemeanor suspect has fled into his home, California's First District Court of Appeal (Div. 5) held that under the good faith exception to the **Fourth Amendment** exclusionary rule, it was not necessary to suppress evidence from an officer's warrantless entry into defendant's garage after the officer observed defendant blaring loud music and honking unnecessarily and defendant, rather than pulling over, drove up his driveway and into his attached garage. When the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply. (***People v. Lange*** (2021) 72 Cal.App.5th 1114.)

Even if evidence was obtained pursuant to execution of an invalid search warrant based on dog sniffs of curtilage of defendant's home, the good faith exception under ***United States v. Leon*** (1984) 468 U.S. 897 [82 L.Ed.2nd 677, 104 S.Ct. 3405], applied because it was reasonable for officers to rely on circuit precedent that dog sniffs at interior apartment door were permissible; defendant's motion to suppress was properly denied. (***United States v. Hines*** (8th Cir. 2023) 62 F.4th 1087.)

Where a geofence warrant (see "*Geofence Warrants*," under "*Searches With A Search Warrant*" (Chapter 10, below) was sought at a time when geofence warrants were still a novel investigative tool, the good faith exception was held to apply despite the warrant being too broad. In early 2019 when this warrant was drafted and executed, there were no published cases anywhere in the country, let alone in California, analyzing the constitutionality of geofence warrants. (***People v. Meza*** (2023) 90 Cal.App.5th 520, 543-545.)

Good faith was similarly held to apply to California's second geofence warrant case, ***Price v. Superior Court*** (2023) 93 Cal.App.5th 13, at pages 49-51, even though the warrants used were held to be constitutionally sufficient.

> Per ***Price*** (at p. 50): "There are four 'limited situations' in which reasonable, good faith reliance on the warrant cannot not (italics added) be established and suppression remains appropriate: "(i) the issuing magistrate was misled by information that the officer knew or should have known

> was false; (ii) the magistrate 'wholly abandoned his judicial role'; (iii) the affidavit was '"so lacking in indicia of probable cause"' that it would be '"entirely unreasonable "' for an officer to believe such cause existed; and (iv) the warrant was so facially deficient that the executing officer could not reasonably presume it to be valid." (Quoting ***People v. Camarella*** (1991) 54 Cal.3rd 592, 596.)

Statutory Violations: By the same token, not all courts are in agreement that the exclusionary rule is reserved exclusively for constitutional violations. (See discussion in ***United States v. Lombera-Camorlinga*** (9th Cir. 2000) 206 F.3rd 882, 886-887, and in the dissenting opinion, p. 893.)

> A civil rights "action under (**42 U.S.C.**) **section 1983** 'encompasses violations of federal statutory law as well as constitutional law.' (***Maine v. Thiboutot*** (1980) 448 U.S. 1, 4, . . . 65 L.Ed.2nd 555.) Thus, **section 1983** may be used to enforce rights created by both the **United States Constitution** and federal statutes. (***Gonzaga University v. Doe*** (2002) 536 U.S. 273, 279, ... 153 L.Ed.2nd 309.) But conduct by an official that violates only state law will not support a claim under **section 1983**. (***Malek v. Haun*** (10th Cir. 1994) 26 F.3rd 1013, 1016; . . .)" (***Ritschel v. City of Fountain Valley*** (2005) 137 Cal.App.4th 107, 116.)
>
> "(T)he Supreme Court has approved of using the (exclusionary) rule to remedy statutory violations only in rare circumstances," although such a remedy is generally limited to statutes with "constitutional underpinnings." (***United States v. Dreyer*** (9th Cir. Nov. 4, 2015) 804 F.3rd 1266, 1278-1279; finding that suppression is an available remedy for violations of the statutory **Posse Comitatus** rules, although not appropriate in this case.)
>
> See also ***United States v. Roberts*** (9th Cir. 1986) 779 F.2nd 565, 568; "(A)n exclusionary rule should not be applied to violations of **10 U.S.C. §§ 371-378** (i.e., Posse Comitatus) until a need to deter future violations is demonstrated."

Is The Exclusionary Rule's Application to the States Mandated?

U.S. Supreme Court Justice Clarence Thomas has made the interesting argument that the requirement that state courts must abide by the federal Exclusionary Rule is "*legally dubious*," and an issue that should be re-considered by the Court. (See ***Collins v. Virginia*** (2018) 584 U.S. 586, 601 [138 S.Ct. 1663; 201 L.Ed.2nd 9].)

Specifically, per Justice Thomas' argument: "(T)he Court concluded in ***Mapp* v. *Ohio***, 367 U. S. 643, 81 S.Ct. 1684, 6 L.Ed.2nd 1081, 81 S.Ct. 1684 (1961), that the States must apply the federal exclusionary rule in their own courts. ***Id.***, at 655, 81 S.Ct. 1684, 6 L.Ed.2nd 1081, . . . (fn. omitted). ***Mapp*** suggested that the exclusionary rule was required by the Constitution itself. See, *e.g.*, ***id.***, at 657, 81 S.Ct. 1684, 6 L.Ed.2nd 1081, . . . ("[T]he exclusionary rule is an essential part of both the **Fourth** and **Fourteenth Amendments**"); ***id.***, at 655, 81 S.Ct. 1684, 6 L.Ed.2nd 1081, . . . ("[E]vidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court"); ***id.***, at 655-656, 81 S.Ct. 1684, 6 L.Ed.2nd 1081, . . . ("[I]t was . . . constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon"). (fn. omitted) But that suggestion could not withstand even the slightest scrutiny. The exclusionary rule appears nowhere in the Constitution, postdates the founding by more than a century, and contradicts several longstanding principles of the common law. See . . . *Cuddihy* (*The **Fourth Amendment**: Origins and Original Meaning* 602-1791 (2009) at p.) 759-760; *Amar*, ***Fourth Amendment** First Principles*, 107 Harv. L. Rev. 757, 786 (1994); *Kaplan*, *The Limits of the Exclusionary Rule*, 26 Stan. L. Rev. 1027, 1030-1031 (1974)." [⁋] "Recognizing this, the Court has since rejected ***Mapp*'s** """[e]xpansive dicta""" and clarified that the exclusionary rule is *not* (italics added) required by the Constitution. ***Davis* v. *United States***, 564 U.S. 229, 237, 131 S.Ct. 2419, 180 L.Ed.2nd 285 (2011) (quoting ***Hudson* v. *Michigan***, 547 U.S. 586, 591, 126 S.Ct. 2159, 165 L.Ed.2nd 56 (2006)). Suppression, this Court has explained, is not "a personal constitutional right." ***United States* v. *Calandra***, 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2nd 561 (1974); accord, ***Stone* v. *Powell***, 428 U.S. 465, 486, 96 S.Ct. 3037, 49 L.Ed.2nd 1067 (1976). The **Fourth Amendment** "says nothing about suppressing evidence," ***Davis***, *supra*, at 236, 131 S.Ct. 2419, 180 L.Ed.2nd 285, and a prosecutor's "'use of fruits of a past unlawful search or seizure '"work[s] no new **Fourth Amendment** wrong,"'" ***United States* v. *Leon***, 468 U.S. 897, 906, 104 S.Ct. 3405, 82 L.Ed.2nd 677 (1984) (quoting (***United States v.***) ***Calandra*** ((1974) . . . *(414 U.S. 338)* at 354, 94 S.Ct. 613, 38 L.Ed.2nd 561). (fn. omitted) Instead, the exclusionary rule is a "'judicially created'" doctrine that is "'prudential rather than constitutionally mandated.'" ***Pennsylvania Bd. of Probation and Parole* v. *Scott***, 524 U.S. 357, 363, 118 S.Ct. 2014, 141 L.Ed.2nd 344 (1998); accord, ***Herring* v. *United States***, 555 U.S. 135, 139, 129 S.Ct. 695, 172 L.Ed.2nd 496 (2009); ***Arizona* v. *Evans***, 514 U.S. 1, 10, 115 S.Ct. 1185, 131 L.Ed.2nd 34 (1995); ***United States* v. *Janis***,

428 U.S. 433, 459-460, 96 S.Ct. 3021, 49 L.Ed.2nd 1046 (1976). (Fn. omitted)" [¶] "Although the exclusionary rule is not part of the Constitution, this Court has continued to describe it as "federal law" and assume that it applies to the States. ***Evans***, *supra*; ***Massachusetts* v. *Sheppard***, 468 U. S. 981, 991, 104 S. Ct. 3424, 82 L. Ed. 2d 737 (1984). Yet the Court has never attempted to justify this assumption. If the exclusionary rule is federal law, but is not grounded in the Constitution or a federal statute, then it must be federal common law. See Monaghan, Foreword: *Constitutional Common Law*, 89 Harv. L. Rev. 1, 10 (1975). As federal common law, however, the exclusionary rule cannot bind the States." (***Collins v. Virginia***, *supra*, at pp. 605-606.)

Rule of Exclusion: "Evidence which is obtained as a direct result of an illegal search and seizure may not be used to establish probable cause for a subsequent search." (***United States v. Wanless*** (9th Cir. 1989) 882 F.2nd 1459, 1465; see "*Remedies for Violations*," under "*Searches and Seizures*" (Chapter 8), below.)

Justice Benjamin Cardozo: In the immortal words of the Honorable Justice *Benjamin Cardozo*: "*The criminal is to go free because the constable has blundered*." (***People v. Defore*** (1926) 242 N.Y. 13, 21 [150 N.E. 585, 587].)

Factually Based Question: What constitutes an illegal search or seizure is necessarily *a factually based question* that must be determined on a case-by-case basis: "The constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case." (***Sibron v. New York*** (1968) 392 U.S. 40, 59 [20 L.Ed.2nd 917]; ***City of Los Angeles v. Patel*** (2015) 576 U.S. 409, 416 [135 S.Ct. 2443; 192 L.Ed.2nd 435]; discussing the difficulties in facial challenges to a statute that seeks to control or authorize police searches.)

Verbal Evidence: This includes "*verbal evidence*," (i.e., a suspect's admissions or confession), when obtained as a direct product of an illegal detention, arrest or search. (See ***United States v. Crews*** (9th Cir. 2007) 502 F.3rd 1130, 1135.)

Federal Rules of Evidence, Rule 402:

"All relevant evidence is admissible, except as otherwise provided by:

- The Constitution of the United States;
- Act of Congress;
- These rules; *or*

- Other rules prescribed by the Supreme Court pursuant to statutory authority."

Fruit of the Poisonous Tree and "*Attenuation of the Taint*:"

General Rule: The exclusionary rule encompasses both the "primary evidence obtained as a direct result of an illegal search or seizure" as well as "evidence later discovered and found to be derivative of an illegality;" i.e., the so-called "*fruit of the poisonous tree*." (***Utah v. Strieff*** (2016) 579 U.S. 232, 237 [136 S.Ct. 2056, 2059; 195 L.Ed.2nd 400]; 195 L.Ed.2nd 400]; citing ***Segura v. United States*** (1984) 468 U. S. 796, 804, 104 S.Ct. 3380; 82 L. Ed. 2nd 599; ***United States v. Gorman*** (9th Cir. 2017) 859 F.3rd 706, 716.)

> "Where evidence is obtained from an unlawful search or seizure, the exclusionary rule renders inadmissible both 'primary evidence obtained as a direct result of an illegal search or seizure' and 'evidence later discovered and found to be derivative of an illegality,' known as 'fruit of the poisonous tree.'" (***United States v. Baker*** (9th Cir. 2023) 58 F.4th 1109, 1119; quoting ***Utah v. Strieff*** (2016) 579 U.S. 232, 237 [136 S.Ct. 2056; 195 L.Ed.2nd 400].)
>
> > "Where it applies, the exclusionary rule forbids admission of both the 'primary evidence obtained as a direct result of an illegal search or seizure' and 'evidence later discovered and found to be derivative of an illegality'—familiarly known as the 'fruit of the poisonous tree.' (***People v. McWilliams*** (2023) 14 Cal.5th 429, 437, quoting ***Utah v. Strieff***, *supra*.)
>
> The evidence that is suppressed is extended to the "*indirect*" as well as the "*direct products*" of the constitutional violation; i.e., the "*fruit of the poisonous tree*." (***Wong Sun v. United States*** (1963) 371 U.S. 471, 484 [83 S.Ct. 407; 9 L.Ed.2nd 441]; ***United States v. Gorman***, *supra*.)
>
> "This rule—the exclusionary rule—encompasses evidence directly 'seized during an unlawful search' as well as '[e]vidence derivative of a **Fourth Amendment** violation—the so-called "fruit of the poisonous tree."'" (***United States v. Garcia*** (9th Cir. 2020) 974 F.3rd 1071, 1075; quoting ***United States v. Gorman***, *supra*.)
>
> "The 'fruit of the poisonous tree' doctrine does not require a particularly tight causal chain between the illegal search and the

discovery of the evidence sought to be suppressed." (***United States v. Ngumezi*** (9th Cir. 2020) 980 F.3rd 1285, 1291.)

Attenuation of the Taint Exception:

"The Supreme Court has adopted several exceptions to the exclusionary rule, observing that the 'significant costs' of excluding evidence from a criminal trial 'have led us to deem it applicable only where its deterrence benefits outweigh its substantial social costs.'" (***United States v. Baker*** (9th Cir. 2023) 58 F.4th 1109, 1119-1122; discussing the "attenuation doctrine," and quoting ***Utah v. Strieff*** (216) 579 U.S. 232, at p. 237 [136 S.Ct. 2056; 195 L Ed.2nd 400].)

"Under the attenuation doctrine, '[e]vidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained."'" (***United States v. Baker***, *supra*, at p. 1119, quoting ***Hudson v. Michigan*** (2006) 547 U.S. 586, at 593 [126 S.Ct. 2159; 165 L.Ed.2nd 56].)

It is the Government's burden to prove attenuation. (***Brown v. Illinois*** (1975) 422 U.S. 590, 604 [95 S.Ct. 2254; 45 L.Ed.2nd 41]; ***United States v. Garcia*** **(**9th Cir. 2020) 974 F.3rd 1071, 1078.)

Factors:

In determining where the line is between the direct and indirect products of an illegal search (which will likely be suppressed) and that which is *not* the "*fruit of the poisonous tree*" (which will *not* be suppressed), it has been held that the following factors are relevant, as first set out in ***Brown v. Illinois*** (1975) 422 U.S. 590, 603–604 [45 L.Ed.2nd 416; 95 S.Ct. 2254]:

(1) The temporal proximity of the **Fourth Amendment** search and seizure violation to the ultimate procurement of the challenged evidence;

(2) The presence of intervening circumstances; *and*

(3) The flagrancy of the official misconduct.

(See also ***People v. Rodriguez*** (2006) 143 Cal.App.4th 1137; and ***United States v. Baker***, *supra*, at pp. 1119-1120;

> noting that the government bears the burden of proof on this issue. See also ***People v. McWilliams*** (2023) 14 Cal.5th 429, 438, 440-450.)

Using the above factors, the fact that the defendant had an outstanding arrest warrant may, depending upon the circumstances, be sufficient of an intervening circumstance to allow for the admissibility of the evidence seized incident to arrest despite the fact that the original detention was illegal. (***People v. Brendlin*** (2008) 45 Cal.4th 262; an illegal traffic stop.)

Defendant's incriminatory statements obtained some 36 hours after an illegal search of his residence, and recognizing that what was found during the search would be used in defendant's subsequent interrogation, were held to be inadmissible as a direct product of the illegal search. (***United States v. Shetler*** (9th Cir. 2011) 665 F.3rd 1150, 1156-1160.)

> It was also noted that because the government bore the burden of proving that the defendant's confession was not "fruit of the poisonous tree," the government was required to produce evidence demonstrating that the defendant's answers were not induced or influenced by the illegal search. (**Id**., at pp. 1157-1161.)

The United States Supreme Court is in accord: "(E)ven when there is a **Fourth Amendment** violation, (the) exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits. In some cases, for example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression." (***Utah v. Strieff*** (2016) 579 U.S. 232, 234 [136 S.Ct. 2056, 2059; 195 L.Ed.2nd 400]; existence of an arrest warrant "attenuated the taint" between an unlawful detention and the discovery of evidence incident to the arrest on the warrant, at least where the police misconduct was not flagrant.

> In ***Strieff***, the lower Utah Supreme Court declined to apply the attenuation doctrine because it read the U.S. Supreme Court's precedents as applying the doctrine only "to circumstances involving an independent act of a defendant's 'free will' (such as) in confessing to a crime or consenting to a search." (2015 UT 2, 357 P. 3rd 532 at p. 544.) The ***Strieff*** Court specifically disagreed with this interpretation. "The attenuation doctrine evaluates the causal link between the government's unlawful act and the discovery of evidence, which often has nothing to do with a

defendant's actions. Per the Supreme Court; "the logic of (its) prior attenuation cases is not limited to independent acts by the defendant." (***Id***. at 136 S.Ct. p. 2061.)

Pre-existing Search & Seizure Conditions:

The "illegality in the initial traffic detention was attenuated by appellant's probation search condition." (***People v. Durant*** (2012) 205 Cal.App.4th 57, 66; disapproved to the extent it is in conflict with the reasoning of ***People v. McWilliams*** (2023) 14 Cal.5th 429, 437, as noted in ***McWilliams*** at footnote 5, pg. 450. See below.)

But see ***People v. Bates*** (2013) 222 Cal.App.4th 60, 71, declining to adopt ***Durant's*** reasoning and reaching the opposite conclusion on the facts.

"The exclusionary rule does not, however, apply in every case involving a **Fourth Amendment** violation. Balancing the benefits of the exclusionary remedy against its costs, the United States Supreme Court has fashioned various exceptions to the exclusionary rule, including the so-called attenuation doctrine." (***People v. McWilliams*** (2023) 14 Cal.5th 429, 437, citing ***Utah v. Strieff*** (2016) 579 U.S. 232, 237-238 [136 S.Ct. 2056, 2059; 195 L.Ed.2nd 400].)

The attenuation doctrine, however, was held *not* to apply in ***McWilliams*** (at pp. 440-450) (overruling the appellate court on this issue, where defendant, who was illegally detained, was found to be on parole with search and seizure conditions after the detention was initiated. Applying the "***Brown*** factors" (see ***Brown v. Illinois*** (1975) 422 U.S. 590, 603-604 [95 S.Ct. 2254; 45 L.Ed.2nd 41], above), The Court ruled that:

The temporal proximity between the unlawful detention and the search: To find that this factor favors attenuation, "substantial time" must have elapsed between an unlawful act (the illegal detention in this case) and when the evidence is obtained. In ***McWilliams***, it was only a matter of a minute or two between the defendant's illegal detention and the officer discovering that defendant was subject to search and seizure conditions, and the search was initiated. (p. 440.)

Intervening circumstances: Contrary to the situation where an officer is made aware of an outstanding arrest warrant, which mandates that the officer take the suspect into custody, leaving "the officer with no effective choice but to carry out an arrest," discovery of a search condition does not require that the officer conduct such a search. "(A) parole search condition merely authorizes a suspicionless search of the parolee for purposes of monitoring the parolee's rehabilitation and compliance with the terms of parole. It is not a judicial mandate, nor does it compel further action of any sort. It suffices to conclude that in this case—where the same officer who conducted the illegal detention also decided, minutes later, to conduct a parole search that yielded incriminating evidence—the discovery of the parole search condition did relatively little to break the causal connection between the two events." (pgs. 440-446.)

The flagrancy of the official misconduct: In McWilliams, while there was no evidence to support the argument that the officer acted in "bad faith," (or because defendant was Black), the Court "conclude(d) that the officer's decision to detain McWilliams merely because he was in the broad vicinity of reported suspicious activity was purposeful and further supports applying the exclusionary rule to deter this type of unconstitutional conduct. (pgs. 447-449.)

However, note Justice Goodwin Liu's concurring opinion (at pgs. 449-452) where he notes that "an officer's decision making may be vulnerable to implicit (racial) biases that result in a heightened risk of exploitation of the unlawful detention," suggesting that this factor should be given more weight.

Additional Case Law:

But, per the Ninth Circuit, even though the "fruit of the poisonous tree" doctrine does *not* apply to the lawful search of a residence after the house was "detained" for an unreasonable time while a

search warrant was obtained, the resulting evidence recovered from the residence when the home was searched with the warrant will be suppressed anyway in that the officers were not acting reasonably in taking 26½ hours to get the warrant, and some punishment must follow such an unreasonable delay. (***United States v. Cha*** (9th Cir. 2010) 597 F.3rd 995, 1003-1004.)

The government did not dispute that omissions and distortions in a sheriff office's affidavits for a search warrant were reckless and material, and that the warrant was therefore invalid and that the sheriff's raids that resulted from those reckless and material inaccuracies constituted a **Fourth Amendment** violation. The results of this illegal search, including records suggesting that the business was employing undocumented immigrants, was passed along to Immigration and Customs Enforcement (ICE). ICE subsequently issued a subpoena requiring the business to produce employer verification forms and other records. Based on information turned over in response to the subpoena, ICE charged the business with violations of the Immigration and Nationality Act. Noting that the **Fourth Amendment** violations were egregious, the Court held that it was plain that the evidence ICE obtained was the product of the sheriff's illegal activity. ICE's evidence subsequently obtained was the fruit of the sheriff's unlawful search. The sheriff's conduct easily met the flagrancy standard. The exclusionary rule would serve to deter the sheriff from **Fourth Amendment** violations by the probability that illegally obtained evidence will not be useful to ICE, even in a civil proceeding. (***Frimmel Management, LLC v. United States*** (9th Cir. 2018) 897 F.3rd 1045.)

However, the Ninth Circuit Court of Appeal has held that a mere passage of time, even a significant amount, does not necessarily attenuate the taint of an earlier illegal detention. For instance, after someone at the defendant's address pointed a laser at a police aircraft in flight, officers went to the defendant's home, illegally detained him, interrogated him without ***Miranda*** warnings, and after the defendant confessed, seized the laser. *Eight months later*, an FBI agent approached the defendant outside his home and stated he was there to ask "follow-up" questions about the incident. The defendant repeated his earlier confession. Charged with aiming a laser at an aircraft in violation of **18 U.S.C. § 39A**, defendant moved to suppress the inculpatory statements he made to the FBI agent, arguing that the illegality of the first encounter tainted the second. The government did not dispute that the initial encounter violated at least the **Fourth Amendment**. Agreeing with the defendant, the Ninth Circuit explained that when a confession

results from certain types of **Fourth Amendment** violations, the government must go beyond proving that the later confession was voluntary. It must also show a sufficient break in events to undermine the inference that the confession was caused by the **Fourth Amendment** violation. After considering together the relevant factors as set forth in ***Brown v. Illinois*** (1975) 422 U.S. 590 [95 S.Ct. 2254; 45 L.Ed.2nd 416 (1975), the panel was persuaded that the second encounter, introduced as a "follow up" to the first, was directly linked to the original illegalities. Per the Court, although significant time had passed, and the record does not show that the officers' conduct was purposeful or flagrant, the eight-month time period was collapsed by the agent opening the conversation by stating that he was following up on the original investigation. Without other intervening circumstances that act to separate the incidents, the Court concluded that the government failed to carry its burden of proving that the defendant's statements were sufficiently attenuated from the illegal detention and seizure eight months prior. (***United States v. Bocharnikov*** (9th Cir. 2020) 966 F.3rd 1000.)

After chasing a wanted suspect to defendant's home, and arresting him when he tried to escape via a back window, officers entered defendant's home without a warrant and without consent for the stated purposes of checking the welfare of anyone inside (i.e., the "emergency aid exception") and/or as a "protective sweep" for other suspects. While inside, officers contacted defendant, held him at gunpoint, handcuffed him, and took him outside. Once outside, it was discovered that defendant was subject to probationary **Fourth** waiver, and subject to warrantless searches. Officers then reentered his home and conducted a full search, discovering methamphetamine and other incriminating evidence. In a previous appeal, both reasons for entering defendant's home were held to have been in violation of the **Fourth Amendment**, as was defendant's arrest, in an unpublished decision. (See ***United States v. Garcia*** (9th Cir. 2018) 749 F. App'x. 516.) Upon returning the case to the trial court for a determination of whether the "attenuation doctrine" applied; i.e., whether the discovery of the suspicionless search condition was an intervening circumstance that broke the causal chain between the initial unlawful entry and the discovery of the evidence supporting defendant's conviction, the trial court held that it did. In a second appeal, the Ninth Circuit disagreed and ruled that the evidence should have been suppressed after finding that all three of the factors as discussed in ***Utah v. Strieff****, supra,* favored suppression. (***United States v. Garcia*** **(**9th Cir. 2020) 974 F.3rd 1071.)

"The attenuation doctrine is an exception to the usual rule of exclusion or suppression of the evidence. It applies when 'the connection between the illegality and the challenged evidence' has become so attenuated 'as to dissipate the taint caused by the illegality.'" (***Id***, at p. 1076; quoting ***United States v. Gorman*** (9th Cir. 2017) 859 F.3rd 706, 718.)

In ***Garcia***, in evaluating the three factors as dictated in ***Utah v. Strieff***, supra (see above), the Court determined the following:

> "The temporal proximity factor weigh(ed) in favor of suppression because only a few minutes passed between the officers' unconstitutional entry into (defendant's) home and those very same officers' reentry into his home to conduct the investigatory search." (pg. 1077.)
>
> The presence of intervening circumstances (e.g., the **Fourth** waiver), also weighed in favor of suppression, noting that "a suspicionless search condition differs from an arrest warrant [as occurred in ***Strieff***] in a significant respect," finding the former to be an optional "exercise of discretionary authority," while the latter is acting on a mandatory court order. (pgs. 1077-1080.)
>
> "The purpose and the flagrancy of the official misconduct" factor was also held to favor suppression in that it was the warrantless entry into a residence and handcuffing defendant before removing him from his own apartment, even if the officers acted in good faith, that was at issue. (pgs. 1080-1082.)

"(A)lthough the flagrancy of the government's conduct is relevant to the attenuation doctrine (Citation), lack of flagrancy is not a freestanding basis for avoiding the application of the exclusionary rule—at least not where, as here, it falls short of establishing that the officer had an 'objectively "reasonable good-faith belief"' in the lawfulness of his conduct, ..." (***United States v. Ngumezi*** (9th Cir. 2020) 980 F.3rd 1285, 1291, quoting ***United States v. Lustig*** (9th Cir. 2016) 830 F.3rd 1075, 1080.)

Where an officer illegally seized a car key from the detained defendant's belt, and used the electronic button on the key to locate defendant's nearby vehicle in which was observed a firearm used in a robbery, the Court held that defendant's subsequent flight did *not* qualify as an intervening factor sufficient to attenuate the taint of the illegal seizure of defendant's car key, the flight having occurred *after* the discovery of the gun. (***United States v. Baker*** (9th Cir. 2023) 58 F.4th 1109, 1116-1122.)

See also "*Fruit of The Poisonous Tree*," under "*Searches and Seizures*" (Chapter 6), below.

And see "*Intervening* (or *Superseding*) *Circumstances*," under "*Use of Force*," under "*Arrests*" (Chapter 5), below.

Exceptions:

Demise of the Independent State Grounds Theory; "***Proposition 8***:" **Cal. Const., Art I, § 28(d)** (subsequently redesignated as **section 28(f)(2)**), the "*Truth in Evidence*" provisions of **Proposition 8** (passed in June, 1982), abrogated California's "*independent state grounds*" theory of exclusion of evidence, leaving the **United States Constitution** and its amendments as the sole basis for imposing an "*Exclusionary Rule*" on the admissibility of evidence. (***In re Lance W.*** (1985) 37 Cal.3rd 873; ***People v. Gutierrez*** (1984) 163 Cal.App.3rd 332, 334; ***People v. Macabeo*** (2016) 1 Cal.5th 1206, 1212.)

California Constitution art. I, section 28(f)(2) ("Right to "Truth-in-Evidence," a part of 1982's **Proposition 8**) provides that relevant evidence shall not be excluded in any criminal proceeding or in any trial or hearing of a juvenile for a criminal offense, *except* where two-thirds of the members of both houses of the Legislature enact a statute to provide for exclusion.

While a state may impose stricter standards on law enforcement in interpreting its own state constitution (i.e., "*independent state grounds*"), suppressing evidence for having violated a state exclusionary rule under a state constitution, a prosecution in federal court is guided by the federal interpretation of the **Fourth Amendment** and is not required to use the state's stricter standards. (***United States v. Brobst*** (9th Cir. 2009) 558 F.3rd 982, 989-991, 997.)

Until passage of **Proposition 8**, California Courts were obligated to follows California's rules that in some circumstances may (and lawfully were allowed to) have been stricter than the federal standards. (See ***American Academy of Pediatrics v. Lungren*** (1997) 16 Cal.4th 307, 327-328; ***Raven v. Deukmejian*** (1990) 52 Cal.3rd 336. 353.)

Since passage of **Proposition 8**, California state courts now determine the reasonableness of a search or seizure by federal constitutional standards. (***People v. Schmitz*** (2012) 55 Cal.4th 909, 916; ***People v. Steele*** (2016) 246 Cal.App.4th 1110, 1114-1115; ***People v. Lenart*** (2004) 32 Cal.4th 1107, 1118; ***People v. Tran*** (2019) 42 Cal.App.5th 1, 7.)

> "The question whether relevant evidence obtained by assertedly unlawful means—that is, in violation of the **Fourth Amendment**—must be excluded is determined by deciding whether its suppression is mandated by the federal Constitution. (**Cal. Const., art. I, § 24** (Citations omitted))" (***People v. Johnson*** (2018) 21 Cal.App.5th 1026, 1032.)

"'Under the current provisions of the **California Constitution**, evidence sought to be introduced at a criminal trial is subject to suppression as the fruit of an unconstitutional search and seizure "only if exclusion is . . . mandated by the federal exclusionary rule applicable to evidence seized in violation of the **Fourth Amendment** [of the **United States Constitution**].'" (***People v. Maikhio*** (2011) 51 Cal.4th 1074, 1089 . . . , quoting ***In re Lance W.*** (1985) 37 Cal.3rd 873, 896, . . . ; see **Cal. Const. art. I, § 28, subd. (f)(2)**.)" (***People v. Harris*** (2015) 234 Cal.App.4th 671, 681-682.)

Per at least one court, however, it is "doubtful" whether **Proposition 8's** "truth-in-evidence provision applies where the requested remedy is not suppression of evidence, but dismissal of all charges based on the state's violation of a defendant's (**Sixth Amendment**, speedy trial, delay in filing charges) due process rights." (***People v. Lazarus*** (2015) 238 Cal.App.4th 734, 756.)

In a child sexual abuse case, the California Supreme Court held that the state constitutional right to truth in evidence

under **Cal. Const., art. I, § 28, subd. (f)(2)**, abrogated the prohibition in **Pen. Code, § 632(d)**, against the admission into evidence of secretly recorded conversations in criminal proceedings. The statute did not fit within any express exception and the right to privacy under **Cal. Const., art. I, § 1**, was not affected. The exclusionary remedy was not revived just because of reenactments and amendments to **§ 632(d)**. Such changes did not address the exclusionary remedy. Also, **Gov't. Code § 9605** (Effect of Amendment on Time of Enactment; Presumption that Statute Enacted Last Prevails) provides that reenactment under **Cal. Const., art. IV, § 9**, has no effect on the unchanged portions of an amended statute. Because the exclusionary provision remained abrogated in criminal proceedings, a surreptitious recording was properly admitted into evidence in defendant's trial for committing a lewd and lascivious act upon a child. (***People v. Guzman*** (2019) 8 Cal.5th 673.)

> **Proposition 8** has served to abrogate statutory, as well as judicially created exclusionary rules. (***Id***., at pp. 681-682; noting examples.)

As a result of the passage of **Proposition 8**, "(i)n matters of federal law, the United States Supreme Court has the final word; we (the California Supreme Court) operate as an intermediate court and not as a court of last resort." (***People v. Lopez*** (2019) 8 Cal.5th 353, 366.)

Defendant and His Identity: It is a rule of law that neither *a defendant's body* nor *his or her identity* is subject to suppression, "even if it is conceded that an unlawful arrest, search, or interrogation occurred." (***Immigration and Naturalization Service v. Lopez-Mendoza*** (1984) 468 U.S. 1032, 1039-1040 [104 S.Ct. 3479; 82 L.Ed.2nd 778].)

For purposes of this rule, it makes no difference that the illegal arrest, search or interrogation was "*egregious*" in nature. (E.g., the result of "*racial profiling*.") (***United States v. Gudino*** (9th Cir. 2004) 376 F.3rd 997: See also ***United States v. Garcia*** (9th Cir. 2020) 974 F.3rd 1071, 1079, fn. 4.)

It is illegal to resist any arrest or detention by a peace officer, even if it is determined to be an *illegal* arrest or detention. (***Evans v. City of Bakersfield*** (1994) 22 Cal.App.4th 321; ***King v. State of California*** (2015) 242

Cal.App.4th 265, 294-295.) However, the person illegally arrested or detained may have a civil remedy against the offending officer(s). (See **42 U.S.C. § 1983**; and **Civil Code § 52.1**; the "***Bane Act***:")

See "***California Civil Code § 52.1***; *the* '***Bane Act***,'" under "*Procedural Rules*" (Chapter 2), below.

Identity of a Witness: "Where the testimony of live witnesses is at issue, the test focuses primarily on the effect of the illegality on the witness's willingness to testify, and less on whether illegal conduct led to discovery of the witness's identity." (***People v. Boyer*** (2006) 38 Cal.4th 412, 448-449, citing ***United States v. Ceccolini*** (1978) 435 U.S. 268, 276-279 [55 L.Ed.2nd 268].)

"The greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means and, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness." (***United States v. Ceccolini***, *supra*, at p. 276.)

In ***People v. McCurdy*** (2014) 59 Cal.4th 1063, at pp. 1092-1093, the Court ruled that nothing in the record suggested that any assumed illegality concerning defendant's arrest, which resulted in defendant's picture in the news media, influenced a witness's willingness to identify defendant as the man he saw with an 8-year-old abduction and murder victim outside a grocery store on the day she disappeared. Law enforcement did not generate the publicity over this case. And the witness came forward on his own, testifying voluntarily. As such, this testimony was too attenuated from any perceived illegality in defendant's arrest and was not subject to suppression.

Search Warrant Executed by Someone Other than a Peace Officer:

In order to lawfully execute a state-issued search warrant, the person executing it, by statute, must be a "*peace officer*," as this term is defined in **P.C. §§ 830 et seq.** Also by statute, federal officers are not peace officers. (**P.C. § 830.8(a)**) However, violation of this statutory restriction is not also a **Fourth Amendment** constitutional violation. Evidence is suppressed only when the **Fourth Amendment** is violated, and not merely state statutory law. Upon execution of state warrants, the resulting evidence will not be suppressed absent a "heightened intrusion upon privacy

interests." There is no such "heightened intrusion" merely because a law enforcement officer who is not a California peace officer executed a state-issued search warrant. Specifically, the Ninth Circuit Court of Appeal held that the identity of the executing officers—federal agents versus peace officers—does not implicate any interest protected by the **Fourth Amendment**. (***United States v. Artis*** (9th Cir. 2019) 919 F.3rd 1123, 1130.)

*The Product of a **Miranda** Violation*:

"(A) ***Miranda*** violation does not alone warrant suppression of the physical fruits of the defendant's inculpatory statements." (***United States v. Mora-Alcaraz*** (9th Cir. 2021) 986 F.3rd 1151, 1153, citing ***United States v. Patane*** (2004) 542 U.S. 630, 635 [124 S.Ct. 2620; 159 L.Ed.2nd 667; remanding the case to the trial court for a determining whether his consent to search the trunk of this car, where a firearm was recovered, was voluntary.)

"We find that the (non-applicability of the fruit of the poisonous tree doctrine) reasoning of ***Elstad*** and ***Tucker*** applies to physical evidence obtained as a result of a ***Miranda*** violation" absent evidence of coercion or any '*due process*' violation." (***United States v. Gonzalez-Sandoval*** (9th Cir. 1990) 894 F.2nd 1043, 1048; accord, ***United States v. Sangineto-Miranda*** (6th Cir. 1988) 859 F.2nd 1501, 1518.)

Referencing ***Oregon v. Elstad*** (1985) 470 U.S. 298, 309 [84 L.Ed.2nd 222; 105 S.Ct. 1285], and ***Michigan v. Tucker*** (1974) 417 U.S. 433, 439 [94 S.Ct. 2357; 41 L.Ed.2nd 182].

Weapons and other physical evidence, and the identity of a witness, all discovered as a result of unadmonished, but non-coercive questioning, were not subject to the fruit of the poisonous tree suppression doctrine. (***United States v. Elie*** (4th Cir. 1997) 111 F.3rd 1135.)

Immigration Issues:

The exclusionary rule generally does not apply in federal removal proceedings unless the alien can show "egregious violations of the **Fourth Amendment**." Defendant alien, a native and citizen of Guatemala, who was removable due to the fact that he stayed in the U.S. beyond his visa's

expiration, was not entitled to relief from removal because he failed to present a prima facie case showing that the search and seizure leading to his arrest amounted to an egregious violation of the **Fourth Amendment**. (***Corado-Arriaza v. Lynch*** (1st Cir. 2016) 844 F.3rd 74.)

Searches by Foreign Entities:

The **Fourth Amendment's** exclusionary rule does not apply to foreign searches and seizures unless the conduct of the foreign police shocks the judicial conscience or the American law enforcement officers participated in the foreign search or the foreign officers acted as agents for the American officers. (***United States v. Valdivia*** (1st Cir. 2012) 680 F.3rd 33, 51-52.)

Formalized collaboration between an American law enforcement agency and its foreign counterpart does not, by itself, give rise to an "agency" relationship between the two entities sufficient to implicate the **Fourth Amendment** abroad. The **Fourth Amendment** exclusionary rule does not impose a duty upon American law enforcement officials to review the legality, under foreign law, of applications for surveillance authority considered by foreign courts. Defendant was not, therefore, entitled to discovery of the wiretap application materials, submitted by Jamaican law enforcement to courts in that nation, underlying the electronic surveillance abroad. (***United States v. Lee*** (2nd Cir. 2013) 723 F.3rd 134.)

An ongoing collaboration between an American law enforcement agency and its foreign counterpart I the course of parallel investigations does not, without American control, direction, or an intent to evade the Constitution, give rise to a relationship between the two entities sufficient to apply the exclusionary rule to evidence obtained abroad by foreign law enforcement. In this case, also the warrantless searches and surveillance performed by the foreign entity did not shock the judicial conscience. (***United States v. Getto*** (2nd Cir. 2013) 729 F.3rd 221, 227-234.)

Impeachment Evidence: *Also*, evidence illegally seized may be introduced for the *purpose of impeaching* the defendant's testimony given in both direct examination (***Walder v. United States*** (1954) 347 U.S 62 [74 S.Ct. 354; 98 L.Ed. 503].) and cross-

examination, so long as the cross-examination questions are otherwise proper. (***United States v. Havens*** (1980) 446 U.S. 620 [64 L.Ed.2nd 559].)

> California authority prior to passage of **Proposition 8** (The "*Truth in Evidence Initiative*"), to the effect that evidence suppressed pursuant to a motion brought under authority of **P.C. § 1538.5** is suppressed for all purposes (i.e., ***People v. Belleci*** (1979) 24 Cal.3rd 879, 887-888.), was abrogated by **Proposition 8**. Now, it is clear that suppressed evidence may be used for purposes of impeachment should the defendant testify and lie. (***People v. Moore*** (1988) 201 Cal.App.3rd 877, 883-886.)
>
> Also, suppressed evidence pursuant to **P.C. § 1538.5(d)** is admissible at the defendant's probation revocation hearing unless the officer's actions were egregious. "(T)he exclusionary rule does not apply in probation revocation hearings, unless the police conduct at issue shocks the conscience." (Citations omitted; ***People v. Lazlo*** (2012) 206 Cal.App.4th 1063, 1068-1072.)
>
> However, inculpatory statements made by the defendant but suppressed as a product of the defendant's illegal arrest *may not* be used to impeach other defense witnesses. (***James v. Illinois*** (1990) 493 U.S. 307, 314-316 [107 L.Ed.2nd 676].)

New Crimes Committed in Response to an Illegal Detention or Arrest:

> Whether or not a detention or an arrest is lawful, a suspect is not immunized from prosecution for any new crimes he might commit against the officer in response. A defendant's violent response to an unlawful detention, such as assaulting a police officer, may still be the source of criminal charges. A suspect has a duty to cooperate with law enforcement whether or not an attempt to detain or arrest him is later held to be in violation of the **Fourth Amendment**. (***In re Richard G.*** (2009) 173 Cal.App.4th 1252, 1260-1263.)
>
> Even when the detention is illegal, every person has a legal duty to submit (***Evans v. City of Bakersfield*** (1994) 22 Cal.App.4th 321.), although declining to do so is *not* a violation of **P.C. § 148** in that a peace officer is *not* acting

in the "*performance of his* (*or her*) *duties*" by unlawfully detaining someone.

> *However*, an excessive use of force used by the officer *after* the arrest does not itself negate the "in the performance of his (or her) duties" element of **P.C. §§ 148(a)** (or **69**). (***People v. Williams*** (2018) 26 Cal.App.5th 71.)

Pen. Code § 1538.5 does not require the trial court to hold an evidentiary hearing when the defendant's stated issue to be decided is not relevant to the motion to suppress. **Section 1538.5(c)(1)** requires the trial court to receive evidence on any issue of fact necessary to determine the motion. The lawfulness of the initial contact was not an issue of fact necessary for a determination of the motion in this case. The trial court properly rejected defendant's argument that he was entitled to an evidentiary hearing on any issue. The language of **§ 1538.5** limits the scope of such a hearing. In this case (a violation of **P.C. § 148(a)(1)**), "the lawfulness of the initial [police] contact is irrelevant to the suppression of evidence" because defendant's new criminal behavior broke any causal link to an underlying illegality. (***People v. Chavez*** (2020) 54 Cal.App.5th 477.)

Searches Based Upon Existing Precedent; the "*Faith-In-Case Law*" Exception: Searches conducted in objectively reasonable reliance on binding appellate precedent in effect at the time of the search, despite a later decision changing the rules, are not subject to the Exclusionary Rule. **(*Davis v. United States*** (2011) 564 U.S. 229, 236-239 [131 S.Ct. 2419; 180 L.Ed.2nd 285].)

> See ***United States v. Sparks*** (1st Cir. 2013) 711 F.3rd 58; holding that the use of a GPS prior to the U.S. Supreme Court's decision in ***United States v. Jones*** (2012) 565 U.S. 400 [132 S.Ct. 945; 181 L.Ed.2nd 911].), even if done in violation of the **Fourth Amendment**, does not require the suppression of the resulting evidence due to the officer's good faith reliance in earlier binding precedence. (See also ***People v. Mackey*** (2015) 233 Cal.App.4th 32, 93-97; reaching the same conclusion.)
>
> Also, whether or not the theory of ***Florida v. Jardines*** (2013) 569 U.S. 1 [133 S.Ct. 1409; 185 L.Ed.2nd 495], involving the illegality of using drug-sniffing dogs within

the curtilage of a person's home, is applicable to a drug-sniffing dog used around the outside, and leaning up against, the open bed and tool box in a suspect's truck (which would over-rule prior case law), was left open by the Ninth Circuit Court of Appeal, holding that the pursuant to the "*faith-in-case law*" rule of ***Davis v. United States*** (2011) 564 U.S. 229, 236-239 [131 S.Ct. 2419; 180 L.Ed.2nd 285], it was unnecessary to decide the issue. (***United States v. Thomas*** (9th Cir. 2013) 726 F.3rd 1086, 1092-1095.)

A search of a cellphone "incident to arrest" (as opposed to a **Fourth** waiver search) was clearly lawful prior to the United States Supreme Court case of ***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430], where it was held that a warrant must be obtained, and therefore, the officer's good faith reliance upon that pre-***Riley*** binding precedent will save a warrantless search of defendant's cellphones found on his person when he was arrested. (***United States v. Lustig*** (9th Cir. 2016) 830 F.3rd 1075, 1077-1085.)

Even if evidence was obtained pursuant to execution of an invalid search warrant based on dog sniffs of curtilage of defendant's home, the good faith exception under ***United States v. Leon*** (1984) 468 U.S. 897 [82 L.Ed.2nd 677, 104 S.Ct. 3405], applied because it was reasonable for officers to rely on circuit precedent that dog sniffs at interior apartment door were permissible; defendant's motion to suppress was properly denied. (***United States v. Hines*** (8th Cir. 2023) 62 F.4th 1087.)

See also "*Good Faith*," under "*Limited Use of the Exclusionary Rule*," above.

The "*Minimal Intrusion Doctrine*:" California's First District Court of Appeal (Div. 5) has found this theory to be a whole separate exception to the search warrant requirement, calling it the "*Minimal Intrusion Exception*." (***People v. Robinson*** (2012) 208 Cal.App.4th 232, 246-255; the insertion and turning of a key in a door lock; citing ***Illinois v. McArthur*** (2001) 531 U.S. 326, 330 [121 S.Ct. 946; 148 L.Ed.2nd 838].)

"The minimal intrusion exception to the warrant requirement rests on the conclusion that in a very narrow class of 'searches' the privacy interests implicated are 'so

small that the officers do not need probable cause; for the search to be reasonable." (***People v. Robinson***, *supra*, at p. 247.)

See "*The Minimal Intrusion Exception*," under "*Searches and Seizures*" (Chapter 8), below.

*In a **42 U.S.C. § 1983** Civil Suit*:

The exclusionary rule is inapplicable in a **42 U.S.C. § 1983** civil suit; a cause of action for the deprivation of constitutional rights by persons acting under color of state law. The need for deterrence is minimal in such a context. Application of the exclusionary rule in such a context would not prevent the State from using illegally obtained evidence against someone, but instead would prevent state actors (i.e., civil defendants) merely from being able to defend themselves against a claim for monetary damages. Exclusion of evidence in this context would not remove any preexisting incentive that the government might have to seize evidence unlawfully. It would simply increase state actors' financial exposure in tort actions that happen to involve illegally seized evidence. In effect, **§ 1983** plaintiffs would receive a windfall allowing them to prevail on torn claims that might otherwise have been defeated if critical evidence had not been suppressed. Even if such application of the rule might in some way deter illegal police conduct, that deterrence would impose an extreme cost to law enforcement officers that is not generally countenanced by the doctrine. The cost of applying the exclusionary rule in the **§ 1983** context is significant, and the deterrence benefits are miniscule. The availability of the exclusionary rule in **§ 1983** cases would vastly over-deter police officers and would result in a wealth transfer that is at least peculiar, if not perverse. (***Lingo v. City of Salem*** (9th Cir. 2016) 832 F.3rd 953, 957-960.)

In an Administrative Proceeding:

In General:

In discussing California's "implied consent" statute (i.e., **Veh. Code § 23612**), noting that such consent cannot overcome the **Fourth Amendment's** provisions for refusing to consent to a warrantless search (i.e., a blood draw), it has been noted that

such a "deemed" consent, while not effective (by itself) in the criminal context, does not prevent a DUI arrestee's refusal to submit to a blood or breath test of the alcohol content of his blood from being used against him in an administrative license-revocation proceedings before the Department of Motor Vehicles. (***People v. Mason*** (2016) 8 Cal.App.5th Supp. 11, 18-33.)

> "While this statutory 'deemed' consent may be sufficient where the issue is whether the administrative consequences of refusal to consent are properly imposed ***Hughey*** (***v. Dept. of Motor Vehicles*** (1991)) 235 Cal.App.3rd (752) at p. 754; [DMV properly revoked driver's license for express refusal to consent; court did not consider constitutional issues]), a state legislature does not have the power to 'deem' into existence 'facts' operating to negate individual rights arising under the U.S. Constitution. (***People v. Mason***, *supra*, at p. 29.)

Federal Supervised Release: Defendant was found to be in possession of marijuana, an illegal firearm, and drug paraphernalia while he was serving a term of federal supervised release. In noting that the **Fourth Amendment** contains no provision that expressly precludes the use of evidence obtained in violation of the **Fourth Amendment**, the Eleventh Circuit Court of Appeals pointed out that nonetheless, the Supreme Court has held that the exclusionary rule "forbids the use of improperly obtained evidence during a criminal trial." However, the Supreme Court has not extended the exclusionary rule to judicial proceedings outside the criminal trial context. Specifically, the Supreme Court has held that the exclusionary rule does not apply to the following: State parole revocation proceedings. Deportation proceedings. Civil proceedings. Grand jury proceedings. Every circuit that has faced the issue, to include the 4th, 5th, 6th, 7th, 8th, and 9th Circuits, has found that the exclusionary rule does not apply in *supervised release proceedings*. Because the Supreme Court has held in similar situations, including most notably, state parole revocation proceedings, that the exclusionary rule does not apply, the court affirmed the district court's

denial of defendant's motion to suppress in this case. (***United States v. Hill*** (11th Cir. 2020) 946 F.3rd 1239; citing ***United States v. Hebert*** (9th Cir. 2000) 201 F.3rd 1103, 1104, from the Ninth Circuit.)

Expectation of Privacy: Whether a search or seizure is "*unreasonable*" under the **Fourth Amendment**, and therefore requires the exclusion of evidence obtained thereby, turns on "whether a person has a constitutionally protected *reasonable expectation of privacy*, that is, whether he or she has manifested a *subjective expectation of privacy* in the object of the challenged search (or seizure) that society is willing to recognize as reasonable." (*Emphasis added*; ***People v. Robles*** (2000) 23 Cal.4th 789, 794.)

Rule: The United States Supreme Court has held: "Our **Fourth Amendment** analysis embraces two questions. First, we ask whether the individual, by his conduct, has exhibited an *actual expectation of privacy*; that is, whether he has shown that 'he [sought] to preserve [something] as private.' [Citation.] . . . Second, we inquire whether the individual's expectation of privacy is 'one that society is prepared to recognize as *reasonable*.' [Citation, fn. omitted.]" (***Bond v. United States*** (2000) 529 U.S. 334, 338 [120 S. Ct. 1462, 1465, 146 L. Ed.2nd 365, 370]; see also ***People v. Maury*** (2003) 30 Cal.4th 342, 384; ***United States v. Wahchumwah*** (9th Cir. 2013) 710 F.3rd 862, 867; ***Carpenter v. United States*** (June 22, 2018) 585 U.S. __, __ [138 S.Ct. 2206, 2213; 201 L.Ed.2nd 507]; ***People v. Pride*** (2019) 31 Cal.App.5th 133, 139.)

Examples:

A hotline for citizens to call in tips on criminal activity, advertised as guaranteeing the caller's anonymity, does not create a constitutionally protected reasonable expectation of privacy in either the caller's identity or the information provided. It was expected that the information would be passed onto law enforcement. The caller in this case became the suspect in the alleged crimes, thus negating any reasonable expectation to believe that the police would not determine and use his identity in the investigation. (***People v. Maury***, *supra*, at pp. 381-403.)

A defendant has the burden of proving that he had standing to contest a warrantless search. In other words, he must first prove that he had a reasonable expectation of privacy in the areas searched. A person seeking to invoke the protection of the **Fourth Amendment** must demonstrate both that he harbored a subjective (i.e., in his own mind) expectation of privacy and that the expectation was objectively reasonable. An objectively reasonable expectation of privacy is one that society is willing to recognize as

reasonable. Among the factors considered in making this determination are whether a defendant has a possessory interest in the thing seized or place searched; whether he has the right to exclude others from that place; whether he has exhibited a subjective expectation that it would remain free from governmental invasion; whether he took normal precautions to maintain his privacy; and whether he was legitimately on the premises. (***People v. Nishi*** (2012) 207 Cal.App.4th 954, 959-963; defendant held to not have an expectation of privacy in his tent on public land without a permit, nor the area around his tent.)

No violation of the **Fourth Amendment** resulted when a gang police detective portrayed himself as a friend to gain access to defendant's social media account and viewed and saved a copy of a video that defendant posted and that was later admitted into evidence. In the posted video, defendant wore and discussed a chain resembling one taken in a strong-arm robbery. Although defendant chose a social media platform where posts disappeared after a period of time, he assumed the risk that the account for one of his "friends" could be an undercover profile for a police detective or that any other "friend" could save and share the information with government officials. No expectation of privacy. The California **Electronic Communications Privacy Act** ("**CalECPA**") had no application because defendant voluntarily granted access to his social media account to a "friend" and voluntarily then posted a video of himself with incriminating evidence. (***People v. Pride*** (2019) 31 Cal.App.5th 133, 137-141.)

> See also ***Everett v State*** (Del. 2018) 186 A.3rd 1224, 1236; ***United States v. Meregildo*** (S.D.N.Y. 2012) 883 F.Supp.2nd 523, 526; ***Palmieri v. United States*** (D.D.C. 2014) 72 F.Supp.3rd 191, 210, cited by the ***Pride*** Court at pp. 130-140.)

See "*Standing*," under "*Searches and Seizures*" (Chapter 8), below.

***Victim's Rights*:**

Penal Code §679.02: *Victims' Rights*:

(a) The following rights are hereby established as the statutory rights of victims and witnesses of crimes:

(1) To be notified as soon as feasible that a court proceeding to which the victim or witness has been subpoenaed as a witness will

not proceed as scheduled, provided the prosecuting attorney determines that the witness' attendance is not required.

(2) Upon request of the victim or a witness, to be informed by the prosecuting attorney of the final disposition of the case, as provided by **Section 11116.10**.

(3) For the victim, the victim's parents or guardian if the victim is a minor, or the next of kin of the victim if the victim has died, to be notified of all sentencing proceedings, and of the right to appear, to reasonably express their views, have those views preserved by audio or video means as provided in **Section 1191.16**, and to have the court consider their statements, as provided by Sections **1191.1** and **1191.15**.

(4) For the victim, the victim's parents or guardian if the victim is a minor, or the next of kin of the victim if the victim has died, to be notified of all juvenile disposition hearings in which the alleged act would have been a felony if committed by an adult, and of the right to attend and to express their views, as provided by **Section 656.2** of the **Welfare and Institutions Code.**

(5) Upon request by the victim or the next of kin of the victim if the victim has died, to be notified of any parole eligibility hearing and of the right to appear, either personally as provided by **Section 3043**, or by other means as provided by **Sections 3043.2** and **3043.25**, to reasonably express their views, and to have their statements considered, as provided by Section 3043 of this code and by **Section 1767 Welfare and Institutions Code**.

(6) Upon request by the victim or the next of kin of the victim if the crime was a homicide, to be notified of an inmate's placement in a reentry or work furlough program, or notified of the inmate's escape as provided by **Section 11155**.

(7) To be notified that a witness may be entitled to witness fees and mileage, as provided by **Section 1329.1**.

(8) For the victim, to be provided with information concerning the victim's right to civil recovery and the opportunity to be compensated from the *Restitution Fund* pursuant to **Chapter 5** (commencing with **Section 13959)** of **Part 4** of **Division 3** of **Title 2** of the **Government Code** and **Section 1191.2** of this code.

(9) To the expeditious return of property that has allegedly been stolen or embezzled, when it is no longer needed as evidence, as

provided by **Chapter 12** (commencing with **Section 1407**) and **Chapter 13** (commencing with **Section 1417**) of **Title 10** of **Part 2**.

(10) To an expeditious disposition of the criminal action.

(11) To be notified, if applicable, in accordance with **Sections 679.03** and **3058.8** if the defendant is to be placed on parole.

(12) For the victim, upon request, to be notified of any pretrial disposition of the case, to the extent required by **Section 28** of **Article I** of the **California Constitution**.

(A) A victim may request to be notified of a pretrial disposition.

(B) The victim may be notified by any reasonable means available.

(C) This paragraph is not intended to affect the right of the people and the defendant to an expeditious disposition as provided in **Section 1050**.

(13) For the victim, to be notified by the district attorney's office of the right to request, upon a form provided by the district attorney's office, and receive a notice pursuant to **paragraph (14)**, if the defendant is convicted of any of the following offenses:

(A) Assault with intent to commit rape, sodomy, oral copulation, or any violation of **Section 264.1**, **288**, or **289**, in violation of **Section 220**.

(B) A violation of **Section 207** or **209** committed with the intent to commit a violation of **Section 261**, **286**, **287**, **288**, or **289**, or former **Section 262** or **288a**.

(C) *Rape*, in violation of **Section 261**.

(D) Oral copulation, in violation of **Section 287** or former **Section 288a**.

(E) Sodomy, in violation of **Section 286**.

(F) A violation of **Section 288**.

(G) A violation of **Section 289**.

(14) When a victim has requested notification pursuant to **paragraph (13)**, the sheriff shall inform the victim that the person who was convicted of the offense has been ordered to be placed on probation, and give the victim notice of the proposed date upon which the person will be released from the custody of the sheriff.

(b) The rights set forth in **subdivision (a)** shall be set forth in the information and educational materials prepared pursuant to **Section 13897.1**. The information and educational materials shall be distributed to local law enforcement agencies and local victims' programs by the *Victims' Legal Resource Center* established pursuant to Chapter 11 (commencing with **Section 13897**) of **Title 6** of **Part 4**.

(c) Local law enforcement agencies shall make available copies of the materials described in **subdivision (b)** to victims and witnesses.

(d) This section is not intended to affect the rights and services provided to victims and witnesses by the local assistance centers for victims and witnesses.

(e) The court shall not release statements, made pursuant to **paragraph (3)** or **(4)** of **subdivision (a)**, to the public prior to the statement being heard in court.

Note: The above is sometimes referred to as "*Marsy's Law*." (See https://www.marsyslaw.us/marsys_story)

***California Constitution Article I*, *Section 28*:**

(a) The People of the State of California find and declare all of the following:

(1) Criminal activity has a serious impact on the citizens of California. The rights of victims of crime and their families in criminal prosecutions are a subject of grave statewide concern.

(2) Victims of crime are entitled to have the criminal justice system view criminal acts as serious threats to the safety and welfare of the people of California. The enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system fully protecting those rights and ensuring that crime victims are treated with respect and dignity, is a matter of high public importance. California's victims of crime are largely dependent upon the proper functioning of government, upon the criminal

justice system and upon the expeditious enforcement of the rights of victims of crime described herein, in order to protect the public safety and to secure justice when the public safety has been compromised by criminal activity.

(3) The rights of victims pervade the criminal justice system. These rights include personally held and enforceable rights described in **paragraphs (1)** through **(17)** of **subdivision (b)**.

(4) The rights of victims also include broader shared collective rights that are held in common with all of the People of the State of California and that are enforceable through the enactment of laws and through good-faith efforts and actions of California's elected, appointed, and publicly employed officials. These rights encompass the expectation shared with all of the people of California that persons who commit felonious acts causing injury to innocent victims will be appropriately and thoroughly investigated, appropriately detained in custody, brought before the courts of California even if arrested outside the State, tried by the courts in a timely manner, sentenced, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance.

(5) Victims of crime have a collectively shared right to expect that persons convicted of committing criminal acts are sufficiently punished in both the manner and the length of the sentences imposed by the courts of the State of California. This right includes the right to expect that the punitive and deterrent effect of custodial sentences imposed by the courts will not be undercut or diminished by the granting of rights and privileges to prisoners that are not required by any provision of the United States Constitution or by the laws of this State to be granted to any person incarcerated in a penal or other custodial facility in this State as a punishment or correction for the commission of a crime.

(6) Victims of crime are entitled to finality in their criminal cases. Lengthy appeals and other post-judgment proceedings that challenge criminal convictions, frequent and difficult parole hearings that threaten to release criminal offenders, and the ongoing threat that the sentences of criminal wrongdoers will be reduced, prolong the suffering of crime victims for many years after the crimes themselves have been perpetrated. This prolonged suffering of crime victims and their families must come to an end.

(7) Finally, the People find and declare that the right to public safety extends to public and private primary, elementary, junior

high, and senior high school, and community college, California State University, University of California, and private college and university campuses, where students and staff have the right to be safe and secure in their persons.

(8) To accomplish the goals it is necessary that the laws of California relating to the criminal justice process be amended in order to protect the legitimate rights of victims of crime.

(b) In order to preserve and protect a victim's rights to justice and *due process,* a victim shall be entitled to the following rights:

(1) To be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process.

(2) To be reasonably protected from the defendant and persons acting on behalf of the defendant.

(3) To have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant.

(4) To prevent the disclosure of confidential information or records to the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, which could be used to locate or harass the victim or the victim's family or which disclose confidential communications made in the course of medical or counseling treatment, or which are otherwise privileged or confidential by law.

(5) To refuse an interview, deposition, or discovery request by the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, and to set reasonable conditions on the conduct of any such interview to which the victim consents.

(6) To reasonable notice of and to reasonably confer with the prosecuting agency, upon request, regarding, the arrest of the defendant if known by the prosecutor, the charges filed, the determination whether to extradite the defendant, and, upon request, to be notified of and informed before any pretrial disposition of the case.

(7) To reasonable notice of all public proceedings, including delinquency proceedings, upon request, at which the defendant and the prosecutor are entitled to be present and of all parole or other

post-conviction release proceedings, and to be present at all such proceedings.

(8) To be heard, upon request, at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue.

(9) To a speedy trial and a prompt and final conclusion of the case and any related post-judgment proceedings.

(10) To provide information to a probation department official conducting a pre-sentence investigation concerning the impact of the offense on the victim and the victim's family and any sentencing recommendations before the sentencing of the defendant.

(11) To receive, upon request, the pre-sentence report when available to the defendant, except for those portions made confidential by law.

(12) To be informed, upon request, of the conviction, sentence, place and time of incarceration, or other disposition of the defendant, the scheduled release date of the defendant, and the release of or the escape by the defendant from custody.

(13) To restitution.

(A) It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.

(B) Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.

(C) All monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim.

(14) To the prompt return of property when no longer needed as evidence.

(15) To be informed of all parole procedures, to participate in the parole process, to provide information to the parole authority to be considered before the parole of the offender, and to be notified, upon request, of the parole or other release of the offender.

(16) To have the safety of the victim, the victim's family, and the general public considered before any parole or other post-judgment release decision is made.

(17) To be informed of the rights enumerated in **paragraphs (1)** through **(16)**.

(c)

(1) A victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon request of the victim, may enforce the rights enumerated in **subdivision (b)** in any trial or appellate court with jurisdiction over the case as a matter of right. The court shall act promptly on such a request.

(2) This section does not create any cause of action for compensation or damages against the State, any political subdivision of the State, any officer, employee, or agent of the State or of any of its political subdivisions, or any officer or employee of the court.

(d) The granting of these rights to victims shall not be construed to deny or disparage other rights possessed by victims. The court in its discretion may extend the right to be heard at sentencing to any person harmed by the defendant. The parole authority shall extend the right to be heard at a parole hearing to any person harmed by the offender.

(e) As used in this section, a "*victim*" is a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act. The term "victim" also includes the person's spouse, parents, children, siblings, or guardian, and includes a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated. The term "victim" does not include a person in custody for an offense, the accused, or a person whom the court finds would not act in the best interests of a minor victim.

(f) In addition to the enumerated rights provided in subdivision **(b)** that are personally enforceable by victims as provided in **subdivision (c)**,

victims of crime have additional rights that are shared with all of the People of the State of California. These collectively held rights include, but are not limited to, the following:

(1) *Right to Safe Schools*. All students and staff of public primary, elementary, junior high, and senior high schools, and community colleges, colleges, and universities have the inalienable right to attend campuses which are safe, secure and peaceful.

(2) *Right to Truth-in-Evidence*. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or **Evidence Code Sections 352**, **782** or **1103**. Nothing in this section shall affect any existing statutory or constitutional right of the press.

(3) *Public Safety Bail*. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary considerations.

A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail.

Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney and the victim shall be given notice and reasonable opportunity to be heard on the matter.

When a judge or magistrate grants or denies bail or release on a person's own recognizance, the reasons for that

decision shall be stated in the record and included in the court's minutes.

(4) *Use of Prior Convictions*. Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding. When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court.

(5) *Truth in Sentencing*. Sentences that are individually imposed upon convicted criminal wrongdoers based upon the facts and circumstances surrounding their cases shall be carried out in compliance with the courts' sentencing orders, and shall not be substantially diminished by early release policies intended to alleviate overcrowding in custodial facilities. The legislative branch shall ensure sufficient funding to adequately house inmates for the full terms of their sentences, except for statutorily authorized credits which reduce those sentences.

(6) *Reform of the parole process*. The current process for parole hearings is excessive, especially in cases in which the defendant has been convicted of murder. The parole hearing process must be reformed for the benefit of crime victims.

(g) As used in this article, the term "*serious felony*" is any crime defined in **subdivision (c)** of **Section 1192.7** of the **Penal Code**, or any successor statute.

***Chapter 2*:**

***<u>Procedural Rules</u>*:**

Standard of Review On Appeal:

Appeals in General:

> An appellate court is bound by prior precedential opinions, even when outside of its own court, until they are overruled by a higher authority. (***United States v. Langley*** (9th Cir. 2021) 17 F.4th 1273, at p. 1273; citing ***Miller v. Gammie*** (9th Cir. 2003) 335 F.3rd 889, 900.)
>
> "As the Supreme Court has explained, moreover, '[i]f a precedent of this Court has direct application in a case' . . . a lower court 'should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.' ***Mallory v. Norfolk S. Ry. Co.***, 600 U.S. 122, 136, 143 S. Ct. 2028, 216 L. Ed. 2d 815 (2023) (quoting ***Rodriguez de Quijas v. Shearson/Am. Exp., Inc.***, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)). 'This is true even if the lower court thinks the precedent is in tension with "some other line of decisions."' ***Id.*** (quoting ***Rodriguez de Quijas***, 490 U.S. at 484)." (***United States v. Esqueda*** (9th Cir. 2023) 88 F.4th 818, 828.)

Review of Evidentiary Rulings in General:

> "A trial court has broad discretion to admit or exclude evidence. We (the appellate court) will not disturb its ruling unless there is a showing the court abused this discretion by acting in an arbitrary, capricious, or patently absurd manner resulting in a miscarriage of justice. (***People v. Vieira*** ((2005)) 35 Cal.4th (264) at p. 292.) Unless a defendant elaborates or provides a separate argument for related constitutional claims, we have declined to address any boilerplate contentions. (***People v. Mills*** (2010) 48 Cal.4th 158, 194 . . . ["The 'routine application of state evidentiary law does not implicate [a] defendant's constitutional rights"']." (***People v. Fayed*** (2020) 9 Cal.5th 147, 189-190.)

Motion to Suppress:

> Denial of a motion to suppress evidence is reviewed by an appellate court "*de novo*." (***United States v. Bautista*** (9th Cir. 2004) 362 F.3rd 584, 588-589; see also ***United States v. Crawford*** (9th Cir. 2004) 372 F.3rd 1048, 1053.)
>
> "A determination whether there was reasonable suspicion to support an investigatory 'stop and frisk' is a mixed question of law and fact, also

reviewed de novo." (***United States v. Williams*** (9th Cir. 2017) 846 F.3rd 303, 306; citing ***United States v. Burkett*** (9th Cir. 2010) 612 F.3rd 1103, 1106.)

> The district court's factual findings are reviewed for clear error. (***United States v. Williams***, *supra*, citing ***United States v. Crawford***, *supra*, and ***United States v. Hammett*** (9th Cir. 2001) 236 F.3rd 1054, 1057-1058.)

An appellate court then "review(s) the trial court's resolution of the first inquiry (above), which involves questions of fact, under the deferential substantial-evidence standard, but subject(s) the second and third inquires to independent review." (***People v. Parson*** (2008) 44 Cal.4th 332, 345; citing ***People v. Ayala*** (2000) 24 Cal.4th 243, 279, and ***People v. Weaver*** (2001) 26 Cal.4th 76, 924.)

> In reviewing a trial court's denial a defendant's motion to suppress, the appellate court defers to the trial court's factual findings where they are supported by substantial evidence, but, but then exercises its own independent judgment in determining the legality of a search on the facts so found. (***People v. Meza*** (2018) 23 Cal.App.5th 604, 609; citing ***People v. Tully*** (2012) 54 Cal.4th 952, 979.)

Should a defendant fail to object to evidence as presented at trial, he generally waives any right to challenge that evidence on appeal. However, an appellate court may still consider the admissibility of that evidence if (1) there was error; (2) it was plain; (3) it affected the defendant's substantial rights; and (4) viewed in the context of the entire trial, the impropriety seriously affected the fairness, integrity, or public reputation of judicial proceedings. (***United States and Garcia-Morales*** (9th Cir. 2019) 942 F.3rd 474. 475, quoting ***United States v. Alcantara-Castillo*** (9th Cir. 2015) 788 F.3rd 1186, 1191.)

"Where a motion to suppress is submitted after the filing of an information, 'the appellate court disregards the findings of the superior court and reviews the determination of the magistrate who ruled on the motion to suppress, drawing all presumptions in favor of the factual determinations of the magistrate, . . . and measuring the facts as found by the trier against the constitutional standard of reasonableness.' (***People v. Thompson*** (1990) 221 Cal.App.3rd 923, 940 . . .) In so doing, we defer to the magistrate's factual findings and, exercising our independent judgment, determine whether, 'on the facts so found, the search or seizure was reasonable under the **Fourth Amendment**.' (***People v. Glaser*** (1995) 11 Cal.4th 354, 362 . . . .)" (***People v. McGee*** (2020) 53 Cal.App.5th 796, 801.)

Reconsidering a decision not to continue the hearing on a suppression motion was within the trial court's discretion based on its conclusion that the People would be unable to proceed to trial if the challenged evidence were suppressed. Defendant was out of custody, the continuance was within the speedy trial timeframe, there was no indication that defendant suffered any prejudice by the hearing's delay, and the trial court expressly found that the prosecutor had not sought the continuance in bad faith. When the People are unable to proceed with the hearing on a motion to suppress, it is an abuse of discretion to deny a trial continuance under **Pen. Code § 1050**, solely because good cause is lacking, when doing so will result in dismissal of the charges and the continuance can be granted without violating the defendant's speedy trial rights. (***People v. Brown*** (2023) 14 Cal.5th 530.)

Federal Rules of Crim. Proc., Rule 12 (2003)'s "*good-cause*" standard applies when a defendant raises new theories on appeal in support of a required pre-trial motion to suppress. (***United States v. Guerrero*** (9th Cir. 2019) 921 F.3rd 895.)

See "*Procedural Remedy*: *Motion to Suppress, per* ***P.C. § 1538.5***," under "*Searches and Seizures*" (Chapter 8), below.

P.C. § 995 *Motion to Dismiss Rulings*:

Pursuant to **P.C. § 995(a)(2)(B)**, a court properly sets aside all or part of an information upon finding that the defendant "had been committed without reasonable or probable cause." (***People v. Garcia*** (2018) 29 Cal.App.5th 864, 870.)

"'[I]n proceedings under **section 995** it is the (preliminary hearing) magistrate who is the finder of fact; the superior court has none of the foregoing powers, and sits merely as a reviewing court; it must draw every legitimate inference in favor of the information, and cannot substitute its judgment as to the credibility or weight of the evidence for that of the magistrate. [Citation.] On review by appeal or writ, moreover, the appellate court in effect disregards the ruling of the superior court and directly reviews the determination of the magistrate … .' (***People v. Laiwa*** (1983) 34 Cal.3rd 711, 718 . . . ; see ***People v. Konow*** (2004) 32 Cal.4th 995, 1025 . . . .) 'Insofar as the **Penal Code section 995** motion rests on issues of statutory interpretation, our review is de novo.' (***Lexin v. Superior Court*** (2010) 47 Cal.4th 1050, 1072 . . . .) """'As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose. [Citation.] We begin by examining the statute's words, giving them a plain and commonsense meaning.'"" (***People v. Scott*** (2014) 58 Cal.4th 1415,

1421 . . . .) "'[W]e consider the language of the entire scheme and related statutes, harmonizing the terms when possible.' (***Riverside County Sheriff's Dept. v. Stiglitz*** (2014) 60 Cal.4th 624, 632 . . . ; see ***People v. Gonzalez*** (2014) 60 Cal.4th 533, 537 . . . .)" (***People v. Gonzalez*** (2017) 2 Cal.5th 1138, 1141; see also ***People v. Reyes*** (2020) 56 Cal.App.5th 972, 981-982.)

"The showing required at this stage 'is exceedingly low' (***Salazar v. Superior Cour***t (2000) 83 Cal.App.4th 840, 846 . . .), and an information 'should be set aside only when there is a total absence of evidence to support a necessary element of the offense charged' (***Id.*** at p. 842, quoting ***People v. Superior Cour***t (***Jurado***) (1992) 4 Cal.App.4th 1217, 1226 . . .)" ***People v. Garcia*** (2018) 29 Cal.App.5th 864, 870-871.)

"'In a proceeding under **section 995**, the superior court's role is similar to that of an appellate court reviewing the sufficiency of the evidence to sustain a judgment.'" (***People v. Kidd*** (2019) 36 Cal.App.5th 12, 16; quoting ***People v. Magee*** (2011) 194 Cal.App.4th 178, 182.)

> "Thus, the superior court 'merely reviews the evidence; it does not substitute its judgment on the weight of the evidence nor does it resolve factual conflicts.'" The Appellate Court, thereafter, "review(s) the magistrate's decision directly, deferring to the magistrate's factual findings." (***People v. Kidd***, *supra*, at pp. 16-17.)

The Superior Court, however, in reviewing a magistrate's motion to suppress as a part of a **P.C. § 995** motion, is not to be making any new findings of fact, being bound by the magistrate's findings of fact so long as supported by substantial evidence. (***People v. Tacardon*** (2020) 53 Cal.App.5th 89, 96; petition granted.)

"'"[I]n proceedings under [**Penal Code**] **section 995** it is the magistrate who is the finder of fact; the superior court . . . sits merely as a reviewing court; it . . . cannot substitute its judgment as to the credibility or weight of the evidence for that of the magistrate. [Citation.] On review by appeal or writ, moreover, the appellate court in effect disregards the ruling of the superior court and directly reviews the determination of the magistrate.'"' (***People v. Hall*** (2020) 57 Cal.App.5th 946, 951; quoting ***People v. Gonzalez*** (2017) 2 Cal.5th 1138, 1141; "Thus, . . . disregard(ing) the lower court's rationale for denying the motion to set aside the information and directly review(ing) the court's ruling at the preliminary hearing denying (defendant)'s motion to suppress."

Court's Ruling Reducing a Felony to a Misdemeanor:

The People have no statutory authority to appeal the magistrate's determination that charged wobbler offenses were misdemeanors. The court held that while the People may appeal "an order entered at sentencing reducing a felony conviction for a wobbler offense to a misdemeanor," the People may not appeal "a pretrial order declaring a wobbler offense charged as a felony to be a misdemeanor." This is true even though, as is the case here, reducing the charges to misdemeanors had the effect of dismissing the prior strikes and a prior prison term. (***People v. Williams*** (2005) 35 Cal.4th 817, 820.)

In a case in which the People charged defendant in a felony complaint with attempting to dissuade a witness, the appellate court held that the People had no authority to appeal a trial court's pretrial order reducing the charge to a misdemeanor. The inability to appeal a trial court's pretrial reduction to a misdemeanor is consistent with the inability to appeal a magistrate's reduction to a misdemeanor (***People v. Williams***, *supra*.), even when the order is in excess of the magistrate's jurisdiction. Because the order did not modify a verdict, it could not be appealed pursuant to **Pen. Code, § 1238(a)(6)**. Because the People's appeal was not authorized by law, it had to be dismissed. (***People v. Bartholomew*** (2022) 85 Cal.App.5th 775.)

Federal Court Use of a Magistrate:

"Under the **Federal Magistrates Act**, a district court may designate a magistrate judge to conduct an evidentiary hearing and submit proposed findings of fact and recommendations for the disposition of a motion to suppress. **28 U.S.C. § 636(b)(1)(B)**. Within fourteen days, any party may file written objections to the report. ***Id.* § 636(b)(1)(C)**. If an objection is made, the district court 'shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.' ***Id.***; *see also* **Fed. R. Civ. P. 72(b)(3)**; ***United States v. Reyna-Tapia***, 328 F.3rd 1114, 1121 (9th Cir. 2003) ('[T]he district judge must review the magistrate judge's findings and recommendations de novo *if objection is made*, but not otherwise.'). After conducting de novo review, the district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.' **28 U.S.C. § 636(b)(1)(C)**. 'In providing for a de novo determination . . . Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations.' ***United States v. Raddatz***, 447 U.S. 667, 676, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980) (internal quotation marks omitted)." (***United States v. Ramos*** (9th Cir. 2023) 65 F.4th 427, 433.)

Constitutionality of a Statute:

"Where an issue presented involves the constitutionality of a statute, (an appellate court will) review the lower court's determination de novo. (***Vergara v. State of California*** (2016) 246 Cal.App.4th 619, 642 . . . .) In conducting (the court's) review, (it will) adhere to the settled principles that ""'[statutes] are to be so construed, if their language permits, as to render them valid and constitutional rather than invalid and unconstitutional" [citation] and that California courts must adopt an interpretation of a statutory provision which, 'consistent with the statutory language and purpose, eliminates doubt as to the provision's constitutionality.'""" (***People v. Morera-Munoz*** (2016) 5 Cal.App.5th 838, 846; quoting ***People v. Armor*** (1974) 12 Cal.3rd 20, 30; and citing ***People v. Harrison*** (2013) 57 Cal.4th 1211, 1228.)

Statutory Construction:

When the applicability of a statute is in issue, and the issue is one of "*statutory construction*," the rules are simple. A reviewing court is to "exercise de novo review when . . . engag(ing) in statutory construction. (***People v. Brewer*** (2011) 192 Cal.App.4th 457, 461, . . .) 'Statutory construction begins with the plain, commonsense meaning of the words in the statute, "because it is generally the most reliable indicator of legislative intent and purpose." [Citation.] "When the language of a statute is clear, we need go no further." (***People v. Manzo*** (2012) 53 Cal.4th 880, 885 . . . .) Where the language of the statute is potentially ambiguous, "[i]t is appropriate to consider evidence of the intent of the enacting body in addition to the words of the measure, and to examine the history and background of the provision, in an attempt to ascertain the most reasonable interpretation." [Citation.] We may also consider extrinsic aids such as the ostensible objects to be achieved, the evils to be remedied, and public policy. [Citation.] When construing a statute, "our goal is 'to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law.'" (***Id.*** at p. 886.) 'It is a settled principle of statutory interpretation that if a statute contains a provision regarding one subject, that provision's omission in the same or another statute regarding a related subject is evidence of a different legislative intent.' (***People v. Arriaga*** (2014) 58 Cal.4th 950, 960 . . . .)" (***People v. Mackreth*** (2020) 58 Cal.App.5th 317, 330.)

"We generally presume that when the Legislature uses common law terms in its enactments, it intends to incorporate their settled common law meanings." (***Leon v. County of Riverside*** (2023) 14 Cal.5th 910, 921; citing ***People v. Lopez*** (2003) 31 Cal.4th 1051, 1060; and ***People v. Tufunga*** (1999) 21 Cal.4th 935, 946; and noting the differences between the investigatory stage and the prosecutorial stage, in interpreting whether

a law enforcement officer is immune from civil liability under **Gov't. Code § 621.6**.)

Sufficiency of the Evidence:

All persons are presumed innocent in the absence of sufficient evidence to the contrary, proving his or her guilt beyond a reasonable doubt. (*See* ***Morrisette v. United States*** (1952 342 U.S. 246 [72 S.Ct. 240; 96 L.Ed.2nd 288]; ***Herrera v. Collins*** (1993) 506 U.S. 390, 398-399 [113 S.Ct. 853; 122 L.Ed.2nd 203.)

An inmate convicted of first degree murder was entitled to **28 U.S.C. § 2254** federal habeas corpus relief because, in overruling defense counsel's objection to the prosecutor's statements in closing argument that the presumption of innocence no longer applied, the state court violated defendant's **due process** rights under ***Darden***. The state appellate court was objectively unreasonable in holding that any error was harmless beyond a reasonable doubt in light of the fact that the weight of the evidence against the inmate was not great, but rather circumstantial, incomplete, and in conflict in a very close case. (***Ford v. Peery*** (9th Cir. 2020) 976 F.3rd 1032.)

Pursuant to ***Darden v. Wainwright*** (1986) 477 U.S. 168 [106 S.Ct. 2464, 91 L.Ed.2nd 144], in evaluating whether a prosecutor violated due process in closing arguments, the so-called ***Darden*** factors are as follows; the weight of the evidence, the prominence of the comment in the context of the entire trial, whether the prosecution misstated the evidence, whether the judge instructed the jury to disregard the comment, whether the comment was invited by defense counsel in its summation and whether defense counsel had an adequate opportunity to rebut the comment. Courts are to place improper argument in the context of the entire trial to evaluate whether its damaging effect was mitigated or aggravated.

In a "*sufficiency of the evidence case*," an appellate court will "consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt. [Citations.]" ***People v. White*** (2015) 241 Cal.App.4th 881, 884, citing ***People v. Mincy*** (1992) 2 Cal.4th 408, 432. See also ***King v. State of California*** (2015) 242 Cal.App.4th 265, 278-279; ***People v. Jimenez*** (2015) 242 Cal.App.4th 1337, 1353.)

In a criminal case, the issue is "whether a rational fact finder could have concluded defendant was guilty beyond a reasonable doubt. (***People v. Rowland*** (1992) 4 Cal.4th 238, 269 . . . .) 'Reversal on this ground is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." [Citation.]' (***People v. Bolin*** (1998) 18 Cal.4th 297, 331 . . . .) Evidence is substantial when it is reasonable in nature, credible, and of solid value. (***People v. Ramsey*** (1988) 203 Cal.App.3rd 671, 682 . . . .) We consider the evidence, including the reasonable inferences drawn from the evidence, in the light most favorable to the judgment. (***People v. Valdez*** (2004) 32 Cal.4th 73, 104 . . . .)" (***People v. Nicolas*** (2017) 8 Cal. App. 5th 1165, 1171.)

"'Substantial evidence' is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value." (Citation) 'The focus is on the quality, rather than the quantity, of the evidence.' (Citation) 'Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence.' (Citation) 'The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record. (Citation) The testimony of a single witness may be sufficient.' (Citation)" (Internal quotations and citations omitted; ***King v. State of California*** (2015) 242 Cal.App.4th 265, 278-279.)

The same standards apply when the evidence being evaluated constitutes circumstantial evidence. (***People v. Snow*** (2003) 30 Cal.4th 43, 66; ***People v. Jimenez*** (2015) 242 Cal.App.4th 1337, 1354; ***People v. Lopez*** (2017) 8 Cal.App.5th 1230, 1234.)

The same standards also apply when the defendant is a minor, and the issue is whether or not there was "substantial evidence" supporting a true finding that she'd violated a particular criminal offense (P.C. § 148(a), in this case). (***In re Amanda A.*** (2015) 242 Cal.App.4th 537, 545-546.)

But, "a jury may not rely upon unreasonable inferences, and … '[a]n inference is not reasonable if it is based only on speculation.'" (Citation) "Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact]. (Citation)" (***People v. Goode*** (2015) 243 Cal.App.4th 484, 488.)

"The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution,

any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ‘“‘Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant’s guilt beyond a reasonable doubt. ‘“‘If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.”’”’”’ (***People v. Dealba*** (2015) 242 Cal.App.4th 1142, 1148-1149, quoting ***People v. Rodriguez*** (1999) 20 Cal.4th 1, 11.)

‘“‘“An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.” [Citation.] “Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact].’ [Citation.]” (***People v. Sanghera*** (2006) 139 Cal.App.4th 1567, 1573.) As our Supreme Court said in ***People v. Rodriguez***, *supra*, 20 Cal.4th 1, while reversing an insufficient evidence finding because the reviewing court had rejected contrary, but equally logical, inferences the jury might have drawn: ‘The [Court of Appeal] majority’s reasoning . . . amounted to nothing more than a different weighing of the evidence, one the jury might well have considered and rejected. The Attorney General’s inferences from the evidence were *no more inherently speculative* than the majority’s; consequently, the majority erred in substituting its own assessment of the evidence for that of the jury.’ (***Id.***, at p. 12, italics added.)” (***People v. Dealba***, *supra*, at p. 1149.)

“On appeal of a conviction under (**Penal Code**) **section 288(a)**, “[t]he proper test for determining a claim of insufficiency of evidence . . . is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’” (***People v. Villagran*** (2016) 5 Cal.App.5th 880, 889-890; quoting ***People v. Jones*** (1990) 51 Cal.3rd 294, 314.)

“‘Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence.’ (***People v. Brook****s* (2017) 3 Cal.5th 1, 57 . . . .) We presume the existence of every fact the trier of fact could reasonably deduce from the evidence in support of the

judgment. (***People v. Clark*** (2011) 52 Cal.4th 856, 943 . . . .)" (***People v. Korwin*** (2019) 36 Cal.App.5th 682, 687.)

On the Issue of a Reasonable Suspicion to Detain or Probable Cause to Arrest:

"'California cases hold that although the (trial) court, not the jury, usually decides whether police action was supported by legal cause, *disputed facts* bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element, since the lawfulness of the victim's conduct forms part of the corpus delicti of the offense.'" (***People v. Gonzalez*** (1990) 51 Cal.3rd 1179, 1217 . . . , italics added.) 'Disputed facts relating to the question whether the officer was acting lawfully are for the jury to determine when such an offense (as when **P.C. § 148(a)(1))** is charged.' (***People v. Jenkins*** (2000) 22 Cal.4th 900, 1020. . . .)" (***People v. Mackreth*** (2020) 58 Cal.App.5th 317, 338.)

"Probable cause 'is a more demanding standard than mere reasonable suspicion. [Citation.] It exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found … ." [Citation.] In determining whether a reasonable officer would have probable cause to search, we consider the totality of the circumstances.'" (***People v. Sims*** (2021) 59 Cal.App.5th 943, 951, quoting ***People v. Lee*** (2019) 40 Cal.App.5th 853, at p. 862.)

Habeas Corpus:

In ruling on a denial or granting of a federal petition for writ of habeas corpus, the Ninth Circuit Court of Appeal will consider the issue "de novo." But then, it can only reverse the district court's denial or granting of the petition, and overturn or uphold the state decision, respectively, if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." (***Jones v. Harrington*** (9th Cir. 2016) 829 F.3rd 1128, 1135-1136; **28 U.S.C. § 2254(d)(1)-(2)**; see also ***Bradford v. Davis*** (9th Cir. 2019) 923 F.3rd 599, 609; ***Balbuena v. Sullivan*** (9th Cir. 2020) 970 F.3rd 1176, 1184.)

"A defendant's right to seek habeas corpus relief is enshrined in California's Constitution. (See **Cal. Const., art. I, § 11**; ***People v. Duvall*** (1995) 9 Cal.4th 464, 474 . . .) A habeas corpus remedy may be available when relief by direct appeal is inadequate. (***In re Sanders*** (1999) 21 Cal.4th 697, 703–704 . . .). Habeas corpus relief may be warranted when the invalidity of a judgment is not apparent from the record on appeal. (***In***

re Robbins (1998) 18 Cal.4th 770, 777 . . .; see also ***In re Reno*** (2012) 55 Cal.4th 428, 450 . . .) 'Because a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them.' (***Duvall***, *supra*, 9 Cal.4th at p. 474.) This court evaluates a petition 'by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief. [Citations.] If no prima facie case for relief is stated, the court will summarily deny the petition. If, however, the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an [order to show cause.' (***Id***. at pp. 474–475.)" (***In re Figueroa*** (2018) 4 Cal.5th 576, 586-587; litigating the applicability of a Habeas Corpus writ to the challenge of "false evidence," e.g., expert opinion evidence which has since been repudiated by the expert.)

"(A federal) habeas petition (in a state case) is governed by the provisions of the **Antiterrorism and Effective Death Penalty Act of 1996** ('**AEDPA**'), **Pub. L. No. 104-132**, **110 Stat. 1214** (1996). **AEDPA** 'restricts the circumstances under which a federal habeas court may grant relief to a state prisoner whose claim has already been 'adjudicated on the merits in State court.' ***Johnson v. Williams***, 568 U.S. 289, 292, 133 S.Ct. 1088, 185 L.Ed.2nd 105 (2013) (quoting **28 U.S.C. § 2254(d)**). Under **AEDPA**, this court may only grant habeas relief if a state court's decision was (1) 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,' or (2) 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' **28 U.S.C. § 2254(d)**." (***Martinez v. Cate*** (9th Cir. 2018) 903 F.3rd 982, 991.)

In response to an inquiry by the Ninth Circuit, the California Supreme Court explained how California treats "*gap delays*" in successive *non-capital* habeas corpus petitions (i.e., "the time gap between the denial of a petition . . . in a lower California court and the filing of a new petition in a higher California court raising the same claims"). "California's habeas corpus timeliness standards refer to *overall* delay in presenting a habeas corpus claim and not specifically gap delay. We consider whether, under all of the circumstances, the petitioner presented the claim without substantial delay after it was, or reasonably should have been, known to the petitioner." (***In re Robbins*** (1998) 18 Cal.4th 770.) The Court went on to establish a "safe harbor" of 120 days. "Providing a safe harbor simply means that delay beyond the specified time would be subject to the normal ***Robbins*** analysis (whether there was substantial delay, and if so, the existence of good cause or an exception)." (***Robinson v. Lewis*** (2020) 9 Cal.5th 883.)

After a state court has ruled on the merits of a state prisoner's claim, a federal court may not grant relief without first applying both the ***Brecht*** test, pursuant to ***Brecht* v. *Abrahamson*** (1993) 507 U. S. 619 [113 S.Ct. 1710; 123 L.Ed.2nd 353, and the **Antiterrorism and Effective Death Penalty Act of 1996** (**AEDPA**). The federal court failing to ask whether petitioner had satisfied **AEDPA** disregarded Congress' instruction that habeas relief was not to be granted unless **AEDPA's** terms were satisfied. Secondly, proof of prejudice under the ***Brecht*** test did not equate to a successful showing under **AEDPA** as those tests posed different questions and required different legal materials to answer them. Prior case law does not answer whether a petitioner who satisfied the ***Brecht*** test also satisfied the **AEDPA** test. Lastly, even if the **Brecht** test was met, petitioner in this case had not met the **AEDPA** test given the state court's finding that shackling him was harmless due to the overwhelming evidence and the jurors' testimony that it did not affect their verdict. (***Brown v. Davenport*** (Apr. 21, 2022) __ U.S.__ [142 S.Ct. 1510; 212 L.Ed.2nd 1463].)

The ***Brecht*** test, pursuant to ***Brecht v. Abrahamson***, *supra*, refers to the standard of proof in a federal habeas corpus case, noting that that the ***Chapman*** harmless error standard (pursuant to ***Chapman* v. *California*** (1967) 386 U.S. 18 [17 L.Ed.2nd 705; 87 S.Ct. 824]), "*harmless beyond a reasonable doubt*," does *not* apply, but rather that whether a violation had a substantial and injurious effect in determining the jury's verdict.

Demurrer:

Definition: A demurrer is a legal objection to the sufficiency of a pleading, attacking what appears on the face of the document and seeking dismissal of a case against the defendant. The demurrer must be made in open court before a plea is entered unless the court allows it to be made at a later time.

Case Law:

"""'In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory.'" (***Mathews v. Becerra*** (2019) 8 Cal.5th 756, 768. . . ; accord, ***T.H. v. Novartis Pharmaceuticals Corp.*** (2017) 4 Cal.5th 145, 162. . . .) When evaluating the complaint, "we assume the truth of the allegations." (***Brown v. USA Taekwondo*** (2021) 11 Cal.5th 204, 209. . . ; accord, ***Lee v. Hanley*** (2015) 61 Cal.4th 1225, 1230.) "A judgment of dismissal after a demurrer has been sustained without leave to amend will be affirmed if proper on any grounds stated in the demurrer, whether or not the court acted on that ground."

(***Carman v. Alvord*** (1982) 31 Cal.3rd 318, 324; accord, ***Ko v. Maxim Healthcare Services, Inc.*** (2020) 58 Cal.App.5th 1144, 1150.) [⁋] A trial court abuses its discretion by sustaining a demurrer without leave to amend where "'there is a reasonable possibility that the defect can be cured by amendment.'" (***Loeffler v. Target Corp.*** (2014) 58 Cal.4th 1081, 1100. . . ; accord, ***City of Dinuba v. County of Tulare*** (2007) 41 Cal.4th 859, 865. . . ; ***Ko***, *supra*, 58 Cal.App.5th at p. 1150.) "'The plaintiff has the burden of proving that [an] amendment would cure the legal defect, and may [even] meet this burden [for the first time] on appeal.'" (***Sierra Palms Homeowners Assn. v. Metro Gold Line Foothill Extension Construction Authority*** (2018) 19 Cal.App.5th 1127, 1132 . . ; accord, ***Ko***, at p. 1150; see ***Aubry v. Tri-City Hospital Dist.*** (1992) 2 Cal.4th 962, 971. . . .) [⁋] """[A] demurrer based on an affirmative defense will be sustained only where the face of the complaint discloses that the action is necessarily barred by the defense."""" (***Heshejin v. Rostami*** (2020) 54 Cal.App.5th 984, 992 . . . ; accord, ***Aryeh v. Canon Business Solutions, Inc.*** (2013) 55 Cal.4th 1185, 1191 . . . [application on demurrer of affirmative defense of statute of limitations based on facts alleged in a complaint is a legal question subject to de novo review]; ***Favila v. Katten Muchin Rosenman LLP*** (2010) 188 Cal.App.4th 189, 223. . . . ["'It must appear clearly and affirmatively that, upon the face of the complaint [and matters of which the court may properly take judicial notice], the right of action is necessarily barred.'"].)" (***Silva v. Langford*** (2022) 79 Cal.App.5th 710, 715-716.)

Dismissal of a Case Due to Outrageous Government Conduct:

California Courts of Appeal occasionally have concluded that outrageous government conduct merited dismissal of criminal charges.

People v. Velasco-Palacios (2015) 235 Cal.App.4th 439; affirming dismissal of criminal charges as sanction for outrageous government misconduct where prosecutor deliberately altered an interrogation transcript to include a confession and that misconduct prejudiced defendant's constitutional right to counsel.

Morrow v. Superior Court (1994) 30 Cal.App.4th 1252, 1261; "the court's conscience is shocked and dismissal is the appropriate remedy" where "the prosecutor orchestrates an eavesdropping upon a privileged attorney-client communication in the courtroom and acquires confidential information."

Dismissal of a case, however, is not always the appropriate remedy.

A trial court's approach should be "to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial. . . . . [T]here is no basis for imposing a remedy [of dismissal] in [a] proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial". (***United States v. Morrison*** (1981) 449 U.S. 361, 365 [66 L.Ed.2nd 564; 101 S. Ct. 665].)

Where defendant's right to counsel is not implicated, dismissal for outrageous government conduct is warranted only where the conduct impairs a defendant's constitutional right to a fair retrial. (***People v. Guillen*** (2014) 227 Cal.App.4th 934, 1007.)

The prosecutor's false testimony at a hearing on motions to disqualify the district attorney and to dismiss did not constitute outrageous governmental conduct in violation of due process where there was no showing that the misconduct prevented defendant from receiving a fair trial. (***People v. Uribe*** (2011) 199 Cal.App.4th 836, 841, 884–885.)

See ***People v. Fultz*** (2021) 69 Cal.App.5th 395, where dismissal of the case was held *not* to be an appropriate remedy due to prosecutorial misconduct because the prosecution's interference with the two co-defendant's testimony (when they were offered plea bargains in return for their truthful testimony) was held to be "not of constitutional magnitude" as the trial court had believed. Thus, the credibility of the co-defendant's testimony was not tainted beyond redemption but is reasonably left to the jury to determine. (pgs. 431-433.)

Penal Code § 1382: *Statutory Speedy Trial Rights*:

(a) The court, unless good cause to the contrary is shown, shall order the action to be dismissed in the following cases:

(1) When a person has been held to answer for a public offense and an information is not filed against that person within *15 days*.

(2) In a felony case, when a defendant is not brought to trial within *60 days* of the defendant's arraignment on an indictment or information, or reinstatement of criminal proceedings pursuant to **Chapter 6** (commencing with **Section 1367**) of **Title 10** of **Part 2**, or, in case the cause is to be tried again following a mistrial, an order granting a new trial from which an appeal is

not taken, or an appeal from the superior court, within *60 days* after the mistrial has been declared, after entry of the order granting the new trial, or after the filing of the remittitur in the trial court, or after the issuance of a writ or order which, in effect, grants a new trial, within *60 days* after notice of the writ or order is filed in the trial court and served upon the prosecuting attorney, or within *90 days* after notice of the writ or order is filed in the trial court and served upon the prosecuting attorney in any case where the district attorney chooses to resubmit the case for a preliminary examination after an appeal or the issuance of a writ reversing a judgment of conviction upon a plea of guilty prior to a preliminary hearing. However, an action shall not be dismissed under this paragraph if either of the following circumstances exists:

(A) The defendant enters a general waiver of the *60-day* trial requirement. A general waiver of the *60-day* trial requirement entitles the superior court to set or continue a trial date without the sanction of dismissal should the case fail to proceed on the date set for trial. If the defendant, after proper notice to all parties, later withdraws, in open court, his or her waiver in the superior court, the defendant shall be brought to trial within *60 days* of the date of that withdrawal. Upon the withdrawal of a general time waiver in open court, a trial date shall be set and all parties shall be properly notified of that date. If a general time waiver is not expressly entered, **subparagraph (B)** shall apply.

(B) The defendant requests or consents to the setting of a trial date beyond the *60-day* period. In the absence of an express general time waiver from the defendant, or upon the withdrawal of a general time waiver, the court shall set a trial date. Whenever a case is set for trial beyond the *60-day* period by request or consent, expressed or implied, of the defendant without a general waiver, the defendant shall be brought to trial on the date set for trial or within *10 days* thereafter.

Whenever a case is set for trial after a defendant enters either a general waiver as to the *60-day* trial requirement or requests or consents, expressed or implied, to the setting of a trial date beyond the *60-day* period pursuant to this paragraph, the court may not grant a motion of the defendant to vacate the date set for trial and to set an earlier

trial date unless all parties are properly noticed and the court finds good cause for granting that motion.

(3) Regardless of when the complaint is filed, when a defendant in a misdemeanor or infraction case is not brought to trial within *30 days* after he or she is arraigned or enters his or her plea, whichever occurs later, if the defendant is in custody at the time of arraignment or plea, whichever occurs later, or in all other cases, within *45 days* after the defendant's arraignment or entry of the plea, whichever occurs later, or in case the cause is to be tried again following a mistrial, an order granting a new trial from which no appeal is taken, or an appeal from a judgment in a misdemeanor or infraction case, within 30 days after the mistrial has been declared, after entry of the order granting the new trial, or after the remittitur is filed in the trial court, or within 30 days after the date of the reinstatement of criminal proceedings pursuant to **Chapter 6** (commencing with **Section 1367**). However, an action shall not be dismissed under this subdivision if any of the following circumstances exists:

(A) The defendant enters a general waiver of the *30-day* or *45-day* trial requirement. A general waiver of the *30-day* or *45-day* trial requirement entitles the court to set or continue a trial date without the sanction of dismissal should the case fail to proceed on the date set for trial. If the defendant, after proper notice to all parties, later withdraws, in open court, his or her waiver in the superior court, the defendant shall be brought to trial within *30 days* of the date of that withdrawal. Upon the withdrawal of a general time waiver in open court, a trial date shall be set and all parties shall be properly notified of that date. If a general time waiver is not expressly entered, **subparagraph (B)** shall apply.

(B) The defendant requests or consents to the setting of a trial date beyond the *30-day* or *45-day* period. In the absence of an express general time waiver from the defendant, or upon the withdrawal of a general time waiver the court shall set a trial date. Whenever a case is set for trial beyond the 30-day or *45-day* period by request or consent, expressed or implied, of the defendant without a general waiver, the defendant shall be brought to trial on the date set for trial or within *10 days* thereafter.

(C) The defendant in a misdemeanor case has been ordered to appear on a case set for hearing prior to trial, but the defendant fails to appear on that date and a bench warrant is issued, or the case is not tried on the date set for trial because of the defendant's neglect or failure to appear, in which case the defendant shall be deemed to have been arraigned within the meaning of this subdivision on the date of his or her subsequent arraignment on a bench warrant or his or her submission to the court.

(b) Whenever a defendant has been ordered to appear in superior court on a felony case set for trial or set for a hearing prior to trial after being held to answer, if the defendant fails to appear on that date and a bench warrant is issued, the defendant shall be brought to trial within *60 days* after the defendant next appears in the superior court unless a trial date previously had been set which is beyond that *60-day* period.

(c) If the defendant is not represented by counsel, the defendant shall not be deemed under this section to have consented to the date for the defendant's trial unless the court has explained to the defendant his or her rights under this section and the effect of his or her consent.

Case Law:

After a previous appeal resulted in the reversal of defendant's conviction and a remand for a new trial, defendant was not brought to trial within *60 days* of the filing of the remittitur under **Pen. Code § 1382(a)(2)**, and therefore was entitled to dismissal by reason of a speedy trial violation because the filing was effective under **Cal. Rules of Court, rule 1.20**, when a superior court clerk received the signed remittitur. The clerk's failure to promptly deliver the remittitur to the sentencing judge's department under informal local procedures did not alter the effective filing date because the requirements for filing with the sentencing judge's department were not properly promulgated local rules and were not known to the public, and thus the superior court lacked authority to require filing of the remittitur with the sentencing judge's department. (***Waldsworth v. Superior Court*** (2023) 98 Cal.App.5th 1.)

Use of Prejudicial Evidence:

Evid. Code § 352: Discretion of the Court to Exclude Evidence:

The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Evid. Code § 352.2: Admission of Creative Expressions:

(a) In any criminal proceeding where a party seeks to admit as evidence a form of creative expression, the court, while balancing the probative value of that evidence against the substantial danger of undue prejudice under **Section 352**, shall consider, in addition to the factors listed in **Section 352**, that: (1) the probative value of such expression for its literal truth or as a truthful narrative is minimal unless that expression is created near in time to the charged crime or crimes, bears a sufficient level of similarity to the charged crime or crimes, or includes factual detail not otherwise publicly available; and (2) undue prejudice includes, but is not limited to, the possibility that the trier of fact will, in violation of **Section 1101**, treat the expression as evidence of the defendant's propensity for violence or general criminal disposition as well as the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings.

(b) If proffered and relevant to the issues in the case, the court shall consider the following as well as any additional relevant evidence offered by either party:

(1) Credible testimony on the genre of creative expression as to the social or cultural context, rules, conventions, and artistic techniques of the expression.

(2) Experimental or social science research demonstrating that the introduction of a particular type of expression explicitly or implicitly introduces racial bias into the proceedings.

(3) Evidence to rebut such research or testimony.

(c) For purposes of this section, "*creative expression*" means the expression or application of creativity or imagination in the production or arrangement of forms, sounds, words, movements, or symbols, including, but not limited to, music, dance, performance art, visual art, poetry, literature, film, and other such objects or media.

(d) The question of the admissibility of a form of creative expression shall be heard in limine and determined by the court, outside the presence and hearing of the jury, pursuant to Section 402. The court shall state on the record its ruling and its reasons therefor.

Case Law:

In a murder trial relating to a shooting from a car, **Evid. Code § 352.2**, which was enacted while appeal was pending and required consideration of specific factors before admitting evidence of a form of creative expression, applied retroactively to the admission of a rap video. The admission of the video without the new safeguards was prejudicial because there was substantial doubt whether the trial judge would have admitted the video evidence and the prosecution used the video to tie defendant, the alleged driver, to the specific crime. (***People v. Venable*** (2023) 88 Cal.App.5th 445.)

Petition for review was granted by the California Supreme Court on May 17, 2023, at 2023 Cal. LEXIS 6202, and the matter was deferred pending consideration and disposition of related issues in ***People v. Bankston***, S044739 and ***People v. Hin***, S141519.

Pen. Code § 745*: *The Racial Justice Act: Sentencing on the Basis of Race, Ethnicity, or National Origin:

"The express purpose of the **Racial Justice Act** is 'to eliminate racial bias from California's criminal justice system because racism in any form or amount, at any stage of a criminal trial, is intolerable [and] inimical to a fair criminal justice system . . . .' (**Stats. 2020**, **ch. 317**, **§ 2**, **subd. (i)** [uncodified].) The trial court in this case expressed concern that in enacting the **Racial Justice Act**, 'the Legislature . . . has not thought through some of these issues sufficiently to provide proper guidance to attorneys and judges.' That may or may not be true. Surely the implementation of legislative policy often involves a back-and-forth process of enactment, interpretation, and amendment to clarify and fine-tune a statutory scheme. Whatever may be uncertain about the **Racial Justice Act**, there are a few things that are abundantly clear. Perhaps most obvious is that the **Racial Justice Act** was enacted to address much more than purposeful discrimination based on race. Indeed, the primary motivation for the legislation was the failure of

the judicial system to afford meaningful relief to victims of unintentional but *implicit* bias. In an uncodified section of **Assembly Bill No. 2542**, the Legislature explained, 'Implicit bias, *although often unintentional and unconscious*, may inject racism and unfairness into proceedings similar to intentional bias. The intent of the Legislature is not to punish this type of bias, but rather to remedy the harm to the defendant's case and to the integrity of the judicial system.' (**Stats. 2020**, **ch. 317**, **§ 2**, **subd. (i)** [uncodified], italics added.) According to the author of the bill, the **Racial Justice Act** 'is a countermeasure to a widely condemned 1987 legal precedent established in the [United States Supreme Court] case of ***McCleskey v. Kemp***[, which] established an unreasonably high standard for victims of racism in the criminal legal system that is almost impossible to meet without direct proof that the racially discriminatory behavior was conscious, deliberate and targeted.' (Sen. Com. on Public Safety, Analysis of Assem. Bill No. 2542 (2019–2020 Reg. Sess.) as amended Aug. 1, 2020, p. 7, italics added.) This overriding purpose is emphasized in **subdivision (c)(2)** of **section 745**, which defines the defendant's burden of proof on a motion to demonstrate a violation of the **Racial Justice Act**. It expressly provides that '*[t]he defendant does not need to prove intentional discrimination*.' (***Ibid.***, italics added.)" (Italics in original: ***Bonds v. Superior Court*** (Feb. 14, 2024) __ Cal.App.5th __, __-__ [2024 Cal.App. LEXIS 92].)

(a) The state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin. A violation is established if the defendant proves, by a preponderance of the evidence, any of the following:

> **(1)** The judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin.
>
> **(2)** During the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful. This paragraph does not apply if the person speaking is relating language used by another that is relevant to the case or if the person speaking is giving a

racially neutral and unbiased physical description of the suspect.

(3) The defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who have engaged in similar conduct and are similarly situated, and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the county where the convictions were sought or obtained.

(4)

(A) A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where the sentence was imposed.

(B) A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for the same offense on defendants in cases with victims of one race, ethnicity, or national origin than in cases with victims of other races, ethnicities, or national origins, in the county where the sentence was imposed.

(b) A defendant may file a motion in the trial court or, if judgment has been imposed, may file a petition for writ of habeas corpus or a motion under **Section 1473.7** in a court of competent jurisdiction, alleging a violation of **subdivision (a)**. If the motion is based in whole or in part on conduct or statements by the judge, the judge shall disqualify themselves from any further proceedings under this section.

(c) If a motion is filed in the trial court and the defendant makes a prima facie showing of a violation of **subdivision (a)**, the trial court shall hold a hearing. A motion made at trial shall be made as

soon as practicable upon the defendant learning of the alleged violation. A motion that is not timely may be deemed waived, in the discretion of the court.

(1) At the hearing, evidence may be presented by either party, including, but not limited to, statistical evidence, aggregate data, expert testimony, and the sworn testimony of witnesses. The court may also appoint an independent expert. For the purpose of a motion and hearing under this section, out-of-court statements that the court finds trustworthy and reliable, statistical evidence, and aggregated data are admissible for the limited purpose of determining whether a violation of **subdivision (a)** has occurred.

(2) The defendant shall have the burden of proving a violation of **subdivision (a)** by a *preponderance of the evidence*. The defendant does not need to prove intentional discrimination.

(3) At the conclusion of the hearing, the court shall make findings on the record.

(d) A defendant may file a motion requesting disclosure to the defense of all evidence relevant to a potential violation of **subdivision (a)** in the possession or control of the state. A motion filed under this section shall describe the type of records or information the defendant seeks. Upon a showing of good cause, the court shall order the records to be released. Upon a showing of good cause, and in order to protect a privacy right or privilege, the court may permit the prosecution to redact information prior to disclosure or may subject disclosure to a protective order. If a statutory privilege or constitutional privacy right cannot be adequately protected by redaction or a protective order, the court shall not order the release of the records.

(e) Notwithstanding any other law, except as provided in subdivision(k), or for an initiative approved by the voters, if the court finds, by a preponderance of evidence, a violation of **subdivision (a)**, the court shall impose a remedy specific to the violation found from the following list:

(1) Before a judgment has been entered, the court may impose any of the following remedies:

(A) Declare a mistrial, if requested by the defendant.

(B) Discharge the jury panel and empanel a new jury.

(C) If the court determines that it would be in the interest of justice, dismiss enhancements, special circumstances, or special allegations, or reduce one or more charges.

(2)

(A) After a judgment has been entered, if the court finds that a conviction was sought or obtained in violation of **subdivision (a)**, the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings consistent with **subdivision (a)**. If the court finds that the only violation of **subdivision (a)** that occurred is based on **paragraph (3)** of **subdivision (a)**, the court may modify the judgment to a lesser included or lesser related offense. On resentencing, the court shall not impose a new sentence greater than that previously imposed.

(B) After a judgment has been entered, if the court finds that only the sentence was sought, obtained, or imposed in violation of **subdivision (a)**, the court shall vacate the sentence, find that it is legally invalid, and impose a new sentence. On resentencing, the court shall not impose a new sentence greater than that previously imposed.

(3) When the court finds there has been a violation of **subdivision (a)**, the defendant shall not be eligible for the death penalty.

(4) The remedies available under this section do not foreclose any other remedies available under the United States Constitution, the California Constitution, or any other law.

(f) This section also applies to adjudications and dispositions in the juvenile delinquency system and adjudications to transfer a juvenile case to adult court.

(g) This section shall not prevent the prosecution of hate crimes pursuant to **Sections 422.6** to **422.865**, inclusive.

(h) As used in this section, the following definitions apply:

(1) "*More frequently sought or obtained*" or "*more frequently imposed*" means that the totality of the evidence demonstrates a significant difference in seeking or obtaining convictions or in imposing sentences comparing individuals who have engaged in similar conduct and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity. The evidence may include statistical evidence, aggregate data, or nonstatistical evidence. Statistical significance is a factor the court may consider, but is not necessary to establish a significant difference. In evaluating the totality of the evidence, the court shall consider whether systemic and institutional racial bias, racial profiling, and historical patterns of racially biased policing and prosecution may have contributed to, or caused differences observed in, the data or impacted the availability of data overall. Race-neutral reasons shall be relevant factors to charges, convictions, and sentences that are not influenced by implicit, systemic, or institutional bias based on race, ethnicity, or national origin.

(2) "*Prima facie showing*" means that the defendant produces facts that, if true, establish that there is a substantial likelihood that a violation of **subdivision (a)** occurred. For purposes of this section, a "substantial likelihood" requires more than a mere possibility, but less than a standard of more likely than not.

(3) "*Relevant factors*," as that phrase applies to sentencing, means the factors in the **California Rules of Court** that pertain to sentencing decisions and any additional factors required to or permitted to be considered in sentencing under state law and under the state and federal constitutions.

(4) "*Racially discriminatory language*" means language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded language, language that compares the defendant to an animal, or language that references the

defendant's physical appearance, culture, ethnicity, or national origin. Evidence that particular words or images are used exclusively or disproportionately in cases where the defendant is of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory.

(5) "*State*" includes the Attorney General, a district attorney, or a city prosecutor.

(6) "*Similarly situated*" means that factors that are relevant in charging and sentencing are similar and do not require that all individuals in the comparison group are identical. A defendant's conviction history may be a relevant factor to the severity of the charges, convictions, or sentences. If it is a relevant factor and the defense produces evidence that the conviction history may have been impacted by racial profiling or historical patterns of racially biased policing, the court shall consider the evidence.

(i) A defendant may share a race, ethnicity, or national origin with more than one group. A defendant may aggregate data among groups to demonstrate a violation of **subdivision (a)**.

(j) This section applies as follows:

(1) To all cases in which judgment is not final.

(2) Commencing *January 1, 2023*, to all cases in which, at the time of the filing of a petition pursuant to **subdivision (f)** of **Section 1473** raising a claim under this section, the petitioner is sentenced to death or to cases in which the motion is filed pursuant to **Section 1473.7** because of actual or potential immigration consequences related to the conviction or sentence, regardless of when the judgment or disposition became final.

(3) Commencing *January 1, 2024*, to all cases in which, at the time of the filing of a petition pursuant to **subdivision (f)** of **Section 1473** raising a claim under this section, the petitioner is currently serving a sentence in the state prison or in a county jail pursuant to **subdivision (h)** of **Section 1170**, or committed to the Division of Juvenile Justice for a juvenile disposition, regardless of when the judgment or disposition became final.

(4) Commencing *January 1, 2025*, to all cases filed pursuant to **Section 1473.7** or **subdivision (f)** of **Section 1473** in which judgment became final for a felony conviction or juvenile disposition that resulted in a commitment to the Division of Juvenile Justice on or after *January 1, 2015*.

(5) Commencing *January 1, 2026*, to all cases filed pursuant to **Section 1473.7** or **subdivision (f)** of **Section 1473** in which judgment was for a felony conviction or juvenile disposition that resulted in a commitment to the Division of Juvenile Justice, regardless of when the judgment or disposition became final.

(k) For petitions that are filed in cases for which judgment was entered before *January 1, 2021*, and only in those cases, if the petition is based on a violation of **paragraph (1)** or **(2)** of **subdivision (a)**, the petitioner shall be entitled to relief as provided in subdivision (e), unless the state proves beyond a reasonable doubt that the violation did not contribute to the judgment.

Case Law:

In denying petitioner's motion under the **California Racial Justice Act of 2020**, the trial court did not apply the correct legal standard at the prima facie stage. The trial court's review of petitioner's motion went beyond the confines of determining whether it stated a prima facie case. The trial court's statements during the hearing on petitioner's motion demonstrated that it weighed all the evidence presented during the earlier preliminary hearing—both favorable and unfavorable to petitioner's motion—rather than focusing on and accepting as true the evidence that supported petitioner. The focus at the prima facie stage of the **Racial Justice Act** proceedings should have been on the allegations and supporting evidence proffered by petitioner, not evidence supporting the People's argument. (***Finley v. Superior Court*** (2023) 95 Cal.App.5th 12.)

A jury found defendant guilty of attempted murder and fleeing a pursuing peace officer's motor vehicle while driving recklessly and further found that he personally used a handgun in committing the attempted murder. The Court of Appeal reversed the judgment and remanded for further proceedings. The court held that the Legislature acted within its law-making authority when it declared in

the **Racial Justice Act (Pen. Code § 745**) that the use of racially discriminatory language in a criminal trial constitutes a miscarriage of justice. In the current case, the prosecutor violated the statute when she referred to defendant's complexion and ambiguous ethnic presentation as reasons to doubt his credibility, and defense counsel was ineffective for failing to bring that statutory violation to the attention of the trial court at the earliest possible opportunity. Because the trial court had not yet had the opportunity to exercise its discretion to select which of the enumerated remedies it would impose, the matter was remanded for the trial court to exercise its discretion in that regard. (***People v. Simmons*** (2023) 96 Cal.App.5th 323.)

Defendant forfeited review on direct appeal of a claim under the **California Racial Justice Act**, **Pen. Code § 745**, (as amended by **AB 1118** (2023-2024 Reg. Sess.), because defendant failed to make a motion before entry of judgment. The legislative history of amendments indicates that the appellate courts retain discretionary authority to apply the general forfeiture rule to a claim that could have been, but was not, presented in the trial court. Defendant's arguments regarding constitutional issues and the futility of objection did not excuse forfeiture because the claim did not present a pure question of law and the record did not demonstrate either that defendant could not object or that doing so would have been futile. There was no basis to stay and remand the case because defendant did not identify what factual development might be needed in the trial court. (***People v. Lashon*** (2024) 98 Cal.App.5th 804.)

In a capital murder case, defendant—a black man—file a "Motion for a Hearing & Relief Pursuant to the **Racial Justice Act**" claiming the District Attorney's decision to seek the death penalty violated the **California Racial Justice Act of 2020**. Defendant argued that pursuant to the Act, he could not be charged with a more serious offense than defendants of other races who have engaged in similar conduct and were similarly situated. The trial court denied the motion determining that defendant failed to satisfy the first prong of the following two-prong test: (1) that defendant personally was being charged more harshly than similarly situated defendants of other races or ethnicities; and (2) statistical evidence shows a historic pattern of racial inequality in Riverside County's capital charging practice. The Third District Court of Appeal reversed, ruling that

based on the evidence presented in this case, which included (1) factual examples of nonminority defendants who committed murder but were not charged with the death penalty in cases involving similar conduct and who were similarly situated, e.g. had prior records or committed multiple murders, and (2) statistical evidence that there was a history of racial disparity in charging the death penalty by the District Attorney, and that defendant had met his burden of establishing a prima facie case under **P.C. § 745(a)(3)**. The trial court should have ordered an evidentiary hearing at which the District Attorney could produce evidence of the relevant factors that were used to determine the charges against the nonminority defendants who were involved in similar conduct, and who were similarly situated to defendant, and to provide any race-neutral reasons that it considered in deciding to charge defendant with the death penalty in this case. (***Mosby vs. Superior Court*** (2024) 99 Cal.App.5th 106.)

The defendant Tommy Bonds was the subject of a traffic stop by an officer of the San Diego Police Department (SDPD). The stop led to defendant's arrest on a misdemeanor concealed firearm violation. From the outset, defendant believed he had been stopped because he was Black. During a later hearing to address defendant's **Racial Justice Act** claim, the officer testified that race played no role in his decision to stop defendant's vehicle because he could not "see what race was in that vehicle." Accepting the officer's statement as credible, the court ruled it could not find that the officer exhibited any bias because of defendant's race. The Court first noted that scope of its decision is narrow. In denying defendant's motion, the trial court employed reasoning that ignores a central premise of the **Racial Justice Act**—that bias can be unconscious and implied as well as conscious and express. By relying on its conclusion that the officer was not lying when he said he could not discern the race of the occupants in defendant's vehicle, the court ignored the possibility that the officer's actions were a product of an implicit bias that associated things the officer did know—the location of the stop and the clothing defendant was wearing—with race. Accordingly, the Court issued a writ directing the court to conduct a new hearing at which it considers whether the officer's actions in initiating and conducting the traffic stop exhibited implied bias on the basis of race. (***Bonds v.***

Superior Court (Feb. 14, 2024) __ Cal.App.5th __ [2024 Cal.App. LEXIS 92].)

Gov't. Code § 12525.5: ***The Racial and Identity Profiling Act*** *of 2015; Mandated Reporting*:

(a)

(1) Each state and local agency that employs peace officers shall annually report to the Attorney General data on all stops conducted by that agency's peace officers for the preceding calendar year.

(2) Each agency that employs 1,000 or more peace officers shall issue its first round of reports on or before *April 1, 2019*.
Each agency that employs 667 or more but less than 1,000 peace officers shall issue its first round of reports on or before *April 1, 2020*.
Each agency that employs 334 or more but less than 667 peace officers shall issue its first round of reports on or before *April 1, 2022*.
Each agency that employs one or more but less than 334 peace officers shall issue its first round of reports on or before *April 1, 2023*.

(b) The reporting shall include, at a minimum, the following information for each stop:

(1) The time, date, and location of the stop.

(2) The reason for the stop.

(3) The result of the stop, such as, no action, warning, citation, property seizure, or arrest.

(4) If a warning or citation was issued, the warning provided or violation cited.

(5) If an arrest was made, the offense charged.

(6) The perceived race or ethnicity, gender, and approximate age of the person stopped, provided that the identification of these characteristics shall be based on the observation and perception of the peace officer making the stop, and the information shall not be requested from the

person stopped. For motor vehicle stops, this paragraph only applies to the driver, unless any actions specified under **paragraph (7)** apply in relation to a passenger, in which case the characteristics specified in this paragraph shall also be reported for him or her.

(7) Actions taken by the peace officer during the stop, including, but not limited to, the following:

(A) Whether the peace officer asked for consent to search the person, and, if so, whether consent was provided.

(B) Whether the peace officer searched the person or any property, and, if so, the basis for the search and the type of contraband or evidence discovered, if any.

(C) Whether the peace officer seized any property and, if so, the type of property that was seized and the basis for seizing the property.

(c) If more than one peace officer performs a stop, only one officer is required to collect and report to his or her agency the information specified under **subd. (b)**.

(d) State and local law enforcement agencies shall not report the name, address, social security number, or other unique personal identifying information of persons stopped, searched, or subjected to a property seizure, for purposes of this section. Notwithstanding any other law, the data reported shall be available to the public, except for the badge number or other unique identifying information of the peace officer involved, which shall be released to the public only to the extent the release is permissible under state law.

(e) Not later than *January 1, 2017*, the Attorney General, in consultation with stakeholders, including the Racial and Identity Profiling Advisory Board (RIPA) established pursuant to **P.C. § 13519.4(j)(1)**, federal, state, and local law enforcement agencies and community, professional, academic, research, and civil and human rights organizations, shall issue regulations for the collection and reporting of data required under **subd. (b)**. The regulations shall specify all data to be reported, and provide standards, definitions, and technical specifications to ensure uniform reporting practices across all reporting agencies. To the

best extent possible, such regulations should be compatible with any similar federal data collection or reporting program.

(f) All data and reports made pursuant to this section are public records within the meaning of **P.C. § 6252(e)**, and are open to public inspection pursuant to **P.C. §§ 6253** and **6258**.

(g)

(1) For purposes of this section, "*peace officer*," as defined in **P.C. §§ 830 et seq**., is limited to members of the California Highway Patrol, a city or county law enforcement agency, and California state or university educational institutions. "*Peace officer*," as used in this section, does *not* include probation officers and officers in a custodial setting.

(2) For purposes of this section, "*stop*" means any detention by a peace officer of a person, or any peace officer interaction with a person in which the peace officer conducts a search, including a consensual search, of the person's body or property in the person's possession or control.

Pen. Code § 13012: *Reporting Requirements for the Department of Justice*:

(a) The annual report of the Department of Justice provided for in **P.C. § 13010** (see below) shall contain statistics showing all of the following:

(1) The amount and the types of offenses known to the public authorities.

(2) The personal and social characteristics of criminals and delinquents.

(3) The administrative actions taken by law enforcement, judicial, penal, and correctional agencies or institutions, including those in the juvenile justice system, in dealing with criminals or delinquents.

(4) The administrative actions taken by law enforcement, prosecutorial, judicial, penal, and correctional agencies, including those in the juvenile justice system, in dealing with minors who are the subject of a petition or hearing in

the juvenile court to transfer their case to the jurisdiction of an adult criminal court or whose cases are directly filed or otherwise initiated in an adult criminal court.

(5)

(A) The total number of each of the following:

(i) Citizen complaints received by law enforcement agencies under **P.C. § 832.5**.

(ii) Citizen complaints alleging criminal conduct of either a felony or misdemeanor.

(iii) Citizen complaints alleging racial or identity profiling, as defined in **P.C. § 13519.4(e)**. These statistics shall be disaggregated by the specific type of racial or identity profiling alleged, such as based on a consideration of race, color, ethnicity, national origin, religion, gender identity or expression, sexual orientation, or mental or physical disability.

(B) The statistics reported under this paragraph shall provide, for each category of complaint identified under **subpara. (A)**, the number of complaints within each of the following disposition categories:

(i) "*Sustained*," which means that the investigation disclosed sufficient evidence to prove the truth of allegation in the complaint by preponderance of evidence.

(ii) "*Exonerated*," which means that the investigation clearly established that the actions of the personnel that formed the basis of the complaint are not a violation of law or agency policy.

(iii) "*Not sustained*," which means that the investigation failed to disclose sufficient evidence to clearly prove or disprove the allegation in the complaint.

(iv) "*Unfounded*," which means that the investigation clearly established that the allegation is not true.

(C) The reports under **subpara. (A)** and **(B)** shall be made available to the public and disaggregated for each individual law enforcement agency.

(b) It shall be the duty of the Department of Justice to give adequate interpretation of the statistics and so to present the information that it may be of value in guiding the policies of the Legislature and of those in charge of the apprehension, prosecution, and treatment of the criminals and delinquents, or concerned with the prevention of crime and delinquency. The report shall also include statistics which are comparable with national uniform criminal statistics published by federal bureaus or departments heretofore mentioned.

(c) Each year, on an annual basis, the Racial and Identity Profiling Board (RIPA), established pursuant to **P.C. § 13519.4(j)(1)**, shall analyze the statistics reported pursuant to **subd. (a)(5)(A)** & **(B)** of this section. RIPA's analysis of the complaints shall be incorporated into its annual report as required by **P.C. § 13519.4(j)(3)**. The reports shall not disclose the identity of peace officers.

Note: **P.C. § 13010**, effective on 1/1/2010, mandates certain data collection requirements for the Department of Justice.

Pen. Code § 13519.4: *Racial and Identity Profiling; Guidelines, Training, and Legislative Findings*:

(a) & **(b)**: Amended section mandates the development and dissemination of guidelines and training for all peace officers on the racial and cultural differences among residents, stressing the understanding and respect for racial, identity, and cultural differences and the development of effective, non-combative methods of carrying out law enforcement duties in a diverse racial, identity, and cultural environment. The training is to include instruction on racial, identity, and cultural diversity, fostering a mutual respect and cooperation between law enforcement and members of all racial, identity, and cultural groups.

(c) Definitions are provided as follows:

(1) "*Disability*," "*gender*," "*nationality*," "*religion*," and "*sexual orientation*" have the same meaning as in **P.C. § 422.55**.

(2) "*Culturally diverse*" and "*cultural diversity*" include, but are not limited to, disability, gender, nationality, religion, and sexual orientation issues.

(3) "*Racial*" has the same meaning as "race or ethnicity" in **P.C. § 422.55**.

(4) "*Stop*" has the same meaning as in **Gov't Code § 12525.5(g)(2)**.

(d) The Legislature finds and declares as follows:

(1) The working men and women in California law enforcement risk their lives every day. The people of California greatly appreciate the hard work and dedication of peace officers in protecting public safety. The good name of these officers should not be tarnished by the actions of those few who commit discriminatory practices.

(2) Racial or identity profiling is a practice that presents a great danger to the fundamental principles of our Constitution and a democratic society. It is abhorrent and cannot be tolerated.

(3) Racial or identity profiling alienates people from law enforcement, hinders community policing efforts, and causes law enforcement to lose credibility and trust among the people whom law enforcement is sworn to protect and serve.

(4) Pedestrians, users of public transportation, and vehicular occupants who have been stopped, searched, interrogated, and subjected to a property seizure by a peace officer for no reason other than the color of their skin, national origin, religion, gender identity or expression, housing status, sexual orientation, or mental or physical disability are the victims of discriminatory practices.

(5) It is the intent of the Legislature in enacting the changes to this section made by the act that added this paragraph that additional training is required to address the pernicious practice of racial or identity profiling and that enactment of

this section is in no way dispositive of the issue of how the state should deal with racial or identity profiling.

(e) "*Racial or identity profiling*," for purposes of this section, is the consideration of, or reliance on, to any degree, actual or perceived race, color, ethnicity, national origin, age, religion, gender identity or expression, sexual orientation, or mental or physical disability in deciding which persons to subject to a stop or in deciding upon the scope or substance of law enforcement activities following a stop, except that an officer may consider or rely on characteristics listed in a specific suspect description. The activities include, but are not limited to, traffic or pedestrian stops, or actions during a stop, such as asking questions, frisks, consensual and nonconsensual searches of a person or any property, seizing any property, removing vehicle occupants during a traffic stop, issuing a citation, and making an arrest.

(f) A peace officer shall not engage in racial or identity profiling.

(g) Every peace officer in this state shall participate in expanded training as prescribed and certified by the Commission on Peace Officers Standards and Training.

(h) The curriculum shall be evidence-based and shall include and examine evidence-based patterns, practices, and protocols that make up racial or identity profiling, including implicit bias. This training shall prescribe evidenced-based patterns, practices, and protocols that prevent racial or identity profiling. In developing the training, the commission shall consult with the Racial and Identity Profiling Advisory Board established pursuant to **subd. (j)**. The course of instruction shall include, but not be limited to, significant consideration of each of the following subjects:

(1) Identification of key indices and perspectives that make up racial, identity, and cultural differences among residents in a local community.

(2) Negative impact of intentional and implicit biases, prejudices, and stereotyping on effective law enforcement, including examination of how historical perceptions of discriminatory enforcement practices have harmed police-community relations and contributed to injury, death, disparities in arrest detention and incarceration rights, and wrongful convictions.

(3) The history and role of the civil and human rights movement and struggles and their impact on law enforcement.

(4) Specific obligations of peace officers in preventing, reporting, and responding to discriminatory or biased practices by fellow peace officers.

(5) Perspectives of diverse, local constituency groups and experts on particular racial, identity, and cultural and police-community relations issues in a local area.

(6) The prohibition against racial or identity profiling in **subd. (f)**.

(i) Once the initial basic training is completed, each peace officer in California as described in **P.C. § 13510(a)** who adheres to the standards approved by the commission shall be required to complete a refresher course every five years thereafter, or on a more frequent basis if deemed necessary, in order to keep current with changing racial, identity, and cultural trends.

(j)

(1) Beginning *July 1, 2016*, the Attorney General shall establish the "*Racial and Identity Profiling Advisory Board*" (RIPA) for the purpose of eliminating racial and identity profiling, and improving diversity and racial and identity sensitivity in law enforcement.

(2) RIPA shall include the members as specifically listed in **subpara. (A)** through **(M)**, with duties and limitations as listed in **subpara. (3)(A)** through **(F)** and **subpara. (4)** through **(8)**. (See the section)

Forfeiture of an Issue by Failure to Object:

Rule:

"It is hornbook law that an objection to evidence is forfeited for purposes of appeal if not raised below." (***People v. Jimenez*** (2021) 72 Cal.App.5th 712, 723; citing **Evid. Code § 353(a)**.)

Evid. Code § 353: A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be

reversed, by reason of the erroneous admission of evidence unless:

> **(a)** There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and
>
> **(b)** The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

"'Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal,' and '[t]he purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected.'" (***People v. Rorabaugh*** (2022) 74 Cal.App.5th 296, 314; quoting ***In re Sheena K.*** (2007) 40 Cal.4th 875, 880–881.)

> However, "**Pen. Code, § 1538.5**, **subd. (h)** permits defendant to bring a new suppression motion 'if there occur[s] an intervening change in the applicable law . . . in support of suppression." (***Ibid***, quoting ***People v. Superior Court* (*Edmonds*)** (1971) 4 Cal.3rd 605, 611.)

Case Law:

Defense counsel's failure to object to the admissibility of a non-***Mirandized*** statement forfeited the issue on appeal. (***People v. Alvarez*** (2022) 75 Cal.App.5th 28, 33-34; defendant's un-*Mirandized* admission, in response to a deputy sheriff's question whether a black plastic bag near the scene of defendant's unlawful entry of a residence, and important on the issue of his intend in breaking into the residence, was not challenged by defense counsel.)

In ***People v. Ray*** (1996) 13 Cal.4th 313, at p.339, the Supreme Court declined to consider a claim of involuntariness for the first time on appeal. (***Id.*** at p. 339.) The Court explained that, because the defendant had not moved to suppress based on involuntariness, "the parties had no incentive to fully litigate this theory below, and the trial court had no opportunity to resolve material factual

disputes and make necessary factual findings. Under such circumstances, a claim of involuntariness generally will not be addressed for the first time on appeal. [Citations.]" (Accord; ***People v. Cruz*** (2008) 44 Cal.4th 636, 669.)

Exception: *Legal Question on Undisputed Facts*:

Despite the lack of an objection at the trial court level, an appellate court "'may consider new arguments that present pure questions of law on undisputed facts. [Citations.]'" (***People v. Jimenez*** (2021) 72 Cal.App.5th 712, 723, quoting ***People v. Runyan*** (2012) 54 Cal.4th 849, 859, fn. 3; and citing ***People v. Hines*** (1997) 15 Cal.4th 997, 1061.)

This is apparently a "*discretionary*" call which a court is more prone to make when the evidence at issue deals with a defendant's constitutional rights. (***Ibid***.)

The Court in ***Jimenez*** also noted that "(g)iven that we have such discretion, one sound reason to exercise it is to head off a future habeas corpus petition asserting ineffective assistance of counsel. (***Id.***, at p. 724, citing ***In re Spencer S***. (2009) 176 Cal.App.4th 1315, 1323.)

Note, however, that the California Supreme Court in ***People v. Kelly*** (1992) 1 Cal.4th 495, at p. 519, fn. 5, "has mused about whether the rule that an objection is not required when the evidence of involuntariness is uncontradicted 'has survived in light of subsequent authority and the development of the law of ineffective assistance of counsel . . . .'" The Court, in ***Kelly***, did not answer this question. (***People v. Jimenez***, *supra*, at pp. 724-725.)

"To sum up, 'because "special policy considerations preclude the use of involuntary statements," review of the admissibility of such statements based on the evidence that is not in conflict is permitted despite the lack of a timely objection. [Citation.]'" (***Id.***, at p. 725; quoting ***People v. Cahill*** (1994) 22 Cal.App.4th 296, 309, fn. 3.)

Defendant's conviction was reversed on the ground that statements he made (and that a witness made) were involuntary, even though "defendant's attorney did not make a sufficient and timely objection . . . ." It was noted that "the evidence was uncontroverted that the prior statements of defendant and (the

witness) were coerced . . . ." (***People v. Underwood*** (1964) 61 Cal.2d 113, 126.)

The California Supreme Court held in ***In re Cameron*** (1968) 68 Cal.2nd 487, at p. 503: "From the record at the trial it appears as a matter of law that the [defendant's] second confession was involuntary. In such a case, a defendant is not precluded from raising the issue on appeal even though he did not object in the trial court. [Citations.]"

Factual Innocence:

***Penal Code § 1473.7(a)*:** A person who is no longer in criminal custody may file a motion to vacate a conviction or sentence for any of the following reasons:

. . . .

(2) Newly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice.

The burden of proof is by a preponderance of the evidence. (**Subd. (e)(1)**)

Case Law:

A motion to vacate a conviction may be filed if the person is no longer in criminal custody for the particular conviction. The Legislature did not intend to bar persons from moving under **P.C. § 1473.7** when they are in custody for another, unrelated conviction. (***People v. Rodriguez*** (2021), 68 Cal.App.5th 301.)

***Justiciable Controversies Only*:**

It is a rule of law that: "'California courts decide only justiciable controversies and do not resolve lawsuits that are not based on an actual controversy.' (***Bichai v. Dignity Health*** (2021) 61 Cal.App.5th 869, 879. . . .) For example, 'unripeness and mootness describe situations where there is no justiciable controversy.' (***Ibid.***) 'Where there is no justiciable controversy the proper remedy is not to render judgment for one side or the other, but to dismiss.' (***Connerly v. Schwarzenegger*** (2007) 146 Cal.App.4th 739, 752. . . .)" (***Los Angeles Police Protective League v. City of Los Angeles*** (2022) 78 Cal.App.5th 1081, 1092, fn. 6.)

***Expert Testimony; Admissibility*:**

As noted in the federal district court of appeal decision of ***Wheatcroft v. City of Glendale*** (U.S. Dist. AZ 2022) 2022 U.S. Dist. LEXIS 57006.); "(a) party seeking to offer expert testimony must establish that the testimony satisfies **Rule 702** of the **Federal Rules of Evidence**. **Rule 702** provides: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

> **(a)** The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> **(b)** The testimony is based on sufficient facts or data;
>
> **(c)** The testimony is the product of reliable principles and methods; and
>
> **(d)** The expert has reliably applied the principles and methods to the facts of the case.

"As gatekeepers, trial judges make a preliminary assessment as to whether expert testimony is admissible. ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579, 589, 597, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Specifically, 'the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.' ***Id.*** at 589. To meet the requirements of **Rule 702**, an expert must be qualified, the expert's opinion must be reliable in that it is based on sufficient facts or data and is the product of reliable principles and methods, and the expert's testimony must fit the case such that the expert's opinion is relevant. ***Id.*** at 589-95. The **Rule 702** inquiry is 'flexible.' ***Id.*** at 594. The focus 'must be solely on principles and methodology, not on the conclusions that they generate.' ***Id.*** at 595. Because the requirements of **Rule 702** are conditions for determining whether expert testimony is admissible, a party offering expert testimony must show by a preponderance of the evidence that the expert's testimony satisfies **Rule 702**. **Fed. R. Evid. 104(a)**; see also ***Lust v. Merrell Dow Pharms. Inc.***, 89 F.3rd 594, 598 (9th Cir. 1996)." (***Ibid***.)

The "***Kelly/Frye***" (***People v. Kelly*** (1976) 17 Cal.3rd 24; ***Frye v. United States*** (D.C. Cir. 1923) 293 F. 1013.) standard does not apply to a DNA data base search used to identify a possible suspect. Requiring inmates to supply a DNA sample, even though not a criminal suspect at the time of the taking of the sample, is a constitutional "search" pursuant to **Pen. Code § 295**. (***People v. Johnson*** (2006) 139 Cal.App.4th 1135.)

The trial court was held not to have erred in relying on expert testimony presented at a ***Kelly*** (i.e., "***Kelly/Frye***:" ***People v. Kelly*** (1976) 17 Cal.3rd 24; ***Frye v. United States*** (D.C. Cir. 1923) 293 F. 1013.) hearing in determining that a method of DNA analysis, which had been used on blood from a murder scene, had gained general acceptance. One expert was not shown to be biased, while another expert

who had a vested professional interest in the method's acceptance did not fail to set forth the scientific community's views fairly and impartially while including any opposing scientific views,. Further, the prosecution supported the latter expert's testimony with literature and legal decisions. The evidence was also held not to be unduly prejudicial under **Evid. Code § 352** because it was highly probative on the issue of identity and would not have caused the jury to decide the case on an improper basis. Lastly, due process was not violated because the jury was instructed with **CALCRIM No. 332**; i.e., that it was not required to accept expert testimony. (***People v. Davis*** (2022) 75 Cal.App.5th 694.)

Juvenile Cases:

General Procedures:

"Generally, any person under the age of 18 who is charged with violating a law is considered a 'minor.' (See [**Welf. & Inst. Code**] **§ 602**.) A 'juvenile court' is a separate, civil division of the superior court. (**[Welf. & Inst. Code] § 246**.) A prosecutor charges a minor with an offense by filing a juvenile petition, rather than a criminal complaint. (See [**Welf. & Inst. Code**] **§§ 653.7**, **655**.) Minors 'admit' or 'deny' an offense, rather than plead 'guilty' or 'not guilty.' (**§ 702.3**.) There are no 'trials,' per se, in juvenile court, rather there is a 'jurisdictional hearing' presided over by a juvenile court judge. ([**Welf. & Inst. Code**] **§ 602**.) The jurisdictional hearing is equivalent to a 'bench trial' in a criminal court. (See **Cal. Rules of Court, Rule 5.780**.) Although a juvenile court judge adjudicates alleged law violations, there are no 'conviction[s]' in juvenile court. ([**Welf. & Inst. Code**] **§ 203**.) Rather, the juvenile court determines—under the familiar beyond the reasonable doubt standard and under the ordinary rules of evidence—whether the allegations are 'true' and if the minor comes within its jurisdiction. (See [**Welf. & Inst. Code**] **§ 602 et seq**.)

"There is no 'sentence,' per se, in juvenile court. Rather a judge can impose a wide variety of rehabilitation alternatives after conducting a 'dispositional hearing,' which is equivalent to a sentencing hearing in a criminal court. ([**Welf. & Inst. Code**,] **§ 725.5**; ***In re Devin J.*** (1984) 155 Cal.App.3rd 1096, 1100 . . . .) In the more serious cases, a juvenile court can 'commit' a minor to juvenile hall or to the Division of Juvenile Justice (DJJ), formerly known as the California Youth Authority (CYA). In order to commit a minor to the DJJ, the record must show that less restrictive alternatives would be ineffective or inappropriate. (***In re Teofilio A.*** (1989) 210 Cal.App.3d 571, 576 . . . .) The DJJ, rather than the court, sets a parole consideration date. DJJ commitments can range from one year or less for nonserious offenses, and up to seven years for the most serious offenses, including murder. (See **Cal. Code Regs., tit. 15, §§ 4951–4957**.) A minor committed to DJJ must generally be discharged no later than 23

years of age. ([**Welf. & Inst. Code**] **§ 607**, **subd. (f)**.)" (*In re M.S.* (2019) 32 Cal.App.5th 1177, 1192-1193; quoting ***People v. Vela*** (2018) 21 Cal.App.5th 1099, 1104–1105.)

The Exclusionary Rule: The *exclusionary rule* applies to juvenile proceedings that are filed pursuant to the **Welfare and Institutions Code**. (***In re William G.*** (1985) 40 Cal.3rd 550, 567, fn. 17; ***In re Tyrell J.*** (1994) 8 Cal.4th 68, 75-76.)

Civil Liability: A law enforcement officer who violates a subject's **Fourth Amendment** rights also, in addition to having the resulting evidence exposed to possible suppression in a criminal case, potentially opens him or herself up to civil liability.

*The **Civil Rights Act**; **42 U.S.C. § 1983***: When filed in federal court: "The **Civil Rights Act** codified in **42 U.S.C. § 1983** provides a cause of action against state officials who deprive a plaintiff of her federal constitutional rights." (***Sinclair v. City of Seattle*** (9th Cir. 2023) 61 F.4th 674, 678.)

See "***Federal Civil 42 U.S.C. § 1983** Civil Liability and Qualified Immunity*," below.

Integral Participation Requirement:

"An officer can be held liable for a constitutional violation only when there is a showing of 'integral participation' or 'personal involvement' in the unlawful conduct, as opposed to mere presence at the scene." (***Bonivert v. City of Clarkston*** (9th Cir. 2018) 883 F.3rd 865, 879; citing ***Jones v. Williams*** (9th Cir. 2002) 297 F.3rd 930, 935-936.)

"(I)integral participation does not require that each officer's actions themselves rise to the level of a constitutional violation." (***Bonivert v. City of Clarkston***, *supra*, citing ***Boyd v. Benton County*** (9th Cir. 2004) 374 F.3rd 773, 780.)

In ***Bonivert***, where it was alleged that deputies from another agency backing up the original agency helped to develop a plan of entry with the initial officers, provided armed backup to the supervising officer as he broke into defendant's back door, and entered the home on the officer's heels, it was held that the backup officers were also potentially liable for an illegal entry into a residence.

Due Process: Violating a person's "*due process*" rights will also generate civil liability for a police officer, as well as for the agency that employs the officer:

Under the state-created "*danger doctrine*," police officers violated the constitutional right to due process of a victim of domestic violence when

the supervisor on the scene remarked positively about the alleged abuser and his family while simultaneously ordering other officers not to arrest the abuser despite the presence of probable cause, thus acting with deliberate indifference to the risk of future abuse when they ignored the risk of the abuser's violent tendencies. Nonetheless, the officers were entitled to qualified immunity under **42 U.S.C. § 1983** because at the time of these events, a reasonable officer would not have known that such conduct violated the due process rights of the domestic violence victim. (***Martinez v. City of Clovis*** (9th Cir. 2019) 943 F.3rd 1260.)

See also ***Martinez v. High*** (2024) 91 F.4th 1022, reaching the same "qualified immunity" result in favor of another Clovis P.D. officer who deliberately passed along confidential information concerning the abuse that was on-going.

See "*The Failure to Protect*: '*Danger Doctrine*,'" under "*The Bill of Rights Protections*" (Chapter 7), below.

Qualified Immunity:

General Rules:

"A government official (who is) sued under (**42 U.S.C.**) **§ 1983** is entitled to qualified immunity unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." (See ***Ashcroft v. al-Kidd*** (2011) 563 U.S. 731, 735 [131 S.Ct. 2074; 179 L.Ed.2nd 1149]; ***Pearson v. Callahan*** (2009) 555 U.S. 223, 231 [129 S.Ct. 808; 172 L.Ed.2nd 565; ***District of Columbia v. Wesby et al.*** (2018) 583 U.S. 48, 65 [138 S.Ct. 577; 199 L. Ed.2nd 453]; ***West v. City of Caldwell*** (9th Cir. 2019) 831 F.3rd 978, 982-983; ***Tuuamalemalo v. Greene*** (9th Cir. 2019) 946 F.3rd 471, 476-477; ***Tobias v. Arteaga*** (9th Cir. 2021) 996 F.3rd 571, 579; ***Andrews v. City of Henderson*** (9th Cir. 2022) 35 F.4th 710, 714-715; ***Hopson v. Alexander*** (9th Cir. 2023) 71 F.4th 692.)

"Qualified immunity protects government officials acting in good faith and under the color of state law from suit under **§ 1983**. . . Qualified immunity bars suits against government officials when either (1) no deprivation of constitutional rights was alleged or (2) the law dictating that specific constitutional right was not yet clearly established. . . . Courts may begin with either prong of the analysis. (***Cates v. Stroud*** (9th Cir. 2020) 976 F.3rd 972, 978; citing ***Pearson v. Callahan***, *supra*, at pgs. 231 & 236.)

> Qualified immunity balances "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." (***Pearson v. Callahan***, *supra*; ***Martinez v. City of Clovis*** (9th Cir. 2019) 943 F.3rd 1260, 1274-1275.)

"The Supreme Court long ago laid down the principle that qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" (***Thompson v. Rahr*** (9th Cir. WA 2018) 885 F.3rd 582, 587-590; quoting ***Harlow v. Fitzgerald*** (1982) 457 U.S. 800, 818 [102 S.Ct. 2727; 73 L.Ed.2nd 396]; ***Cortesluna v. Leon*** (9th Cir. 2020) 979 F.3rd 645, 651-652.)

On the issue of determining the propriety of qualified immunity in a given case, "requiring the comparing of a given case with existing statutory or constitutional precedent, is quintessentially a question of law for the judge, not the jury. A bifurcation of duties is unavoidable. Only the jury can decide the disputed factual issues, while only the judge can decide whether the right was clearly established once the factual issues are resolved. "'The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts.'" (***Morales v. Fry*** (9th Cir. 2017) 873 F.3rd 817, 823; quoting ***Dimick v. Schiedt*** (1935) 293 U.S. 474, 486 [55 S.Ct. 296; 79 L.Ed. 603].)

The fact that there is a genuine issue to debate does not end the inquiry. "(T)he existence of a genuine dispute about the reasonableness of an officer's use of force does not preclude granting qualified immunity or eliminate any basis for an immediate appeal of denial of qualified immunity." (***Isayeva v. Sacramento Sheriff's Department*** (9th Cir. 2017) 872 F.3rd 938, 944-950.)

"Defining the clearly established law with 'specificity is especially important in the **Fourth Amendment** context, where it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'" (***Seidner v. De Vries*** (9th Cir. 2022) 39 F.4th 591, 601; quoting ***City of Tahlequah v. Bond*** (Oct. 18, 2021) __ U.S. __ [142 S.Ct. 9; 211 L.Ed.2nd 170].)

An exception to these rules *might* be when the officer at issue actually knew of the relevant rules, even though the rule at issue might not yet have been clearly established. Justice Brennan's brief concurrence in ***Harlow v. Fitzgerald*** (1982) 457 U.S. 800, 821 [102 S.Ct. 2727; 73 L.Ed.2d 396].), notes that although the qualified-immunity doctrine focuses on the objective legal reasonableness of an official's conduct, it does "not allow the official who *actually knows* that he was violating the law to escape liability for his actions, even if he could not 'reasonably have been expected' to know what he actually did know." (***Frasier v. Evans*** (10th Cir. 2021) 992 F.3rd 1003.)

> The Tenth Circuit, in ***Frasier v. Evans***, disagreed with this theory, holding that the issue as to whether a rule was "clearly established" is an objective one, making an individual officer's own subjective knowledge totally irrelevant, citing the majority opinion in ***Harlow*** as authority for this conclusion, and noting that "whatever training the officers received concerning the **First Amendment** was irrelevant to the clearly-established-law inquiry."

"Qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' ***Harlow v. Fitzgerald***, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). It protects government officials 'unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was "clearly established at the time."' ***District of Columbia v. Wesby***, 583 U.S. 48, 62-63, 138 S. Ct. 577, 199 L. Ed. 2d 453 (2018) (quoting ***Reichle v. Howards***, 566 U.S. 658, 664, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012))." (***Waid v. County of Lyon*** (9th Cir. 2023) 87 F.4th 383, 387.)

Defendant police officers *not* entitled to qualified immunity on the issue of whether they used unreasonable force by ordering an 83-year-old, 5'2", 117-pound, unarmed, completely compliant woman, to get on her knees and handcuffing her when it was suspected that she might be driving a stolen car. (***Brown v. County of San Bernardino*** (9th Cir. 2023) 2023 U.S.App. LEXIS 2941; unpublished: Petition denied by U.S. Supreme Court, Dec. 11, 2023, 2023 U.S. LEXIS 4763.)

> But see the dissenting opinion where it was argued that the constitutionality of doing so was *not* **"'**beyond debate' by

existing precedent," and that therefore, the officers were entitled to qualified immunity on the issue of whether the force used was unreasonable.

Note also, however, that the panel was unanimous on the issue of whether the officers were entitled to qualified immunity on the lawfulness of detaining (or arresting) the woman for auto theft, until it could be determined whether she was lawfully driving the car in question.

Two Steps:

An Appellate Court's "review of a grant of summary judgment based on qualified immunity involves two distinct steps: government officials are *not* (Italics added) entitled to qualified immunity if (1) the facts '[t]aken in the light most favorable to the party asserting the injury . . . show [that] the [defendants'] conduct violated a constitutional right' *and* (Italics added) (2) 'the right was clearly established' at the time of the alleged violation." (***Bonivert v. City of Clarkston*** (9th Cir. 2018) 883 F.3rd 865, 871-872; quoting ***Saucier v. Katz*** (2001) 533 U.S. 194, 201 [121 S.Ct. 2151; 150 L.Ed.2nd 272]; ***Martinez v. City of Clovis*** (9th Cir. 2019) 943 F.3rd 1260, 1270. See also ***Pike v. Hester*** (9th Cir. Nev. 2018) 891 F.3rd 1131, 1137; ***Tuuamalemalo v. Greene*** (9th Cir. 2019) 946 F.3rd 471, 476-477; ***Cortesluna v. Leon*** (9th Cir. 2020) 979 F.3rd 645, 651-652; (***Williamson v. City of National City*** (9th Cir. 2022) 23 F.4th 1146, 1151; ***Waid v. County of Lyon*** (9th Cir. 2023) 87 F.4th 383.)

"Qualified immunity applies either where there was no constitutional violation *or* where the constitutional violation was not clearly established." The Court has the discretion to consider these two questions in either order, "in light of the circumstances in the particular case at hand." (***Martinez v. City of Clovis***, *supra*.)

The second step (i.e., the right was not clearly established at the time of the alleged violation) is never reached if a reasonable jury would necessarily find that the police officers used reasonable force in attempting to subdue the petitioner. (See dissenting opinion in ***Lombardo v. City of St. Louis*** (June 28, 2021) __ U.S. __, __ [141 S.Ct. 2239; 210 L.Ed.2nd 609].)

A plaintiff has the burden of showing that a defendant is not entitled to qualified immunity. To meet this burden, the plaintiff must allege facts that would permit a reasonable juror to find that: (1) the defendant (police officer) violated a constitutional right;

and (2) the right was clearly established. (***Habich v. Wayne County*** (6th Cir. 2023) 2023 U.S.App. LEXIS 8868.)

"At the summary judgment stage, '[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.'" (***Anderson v. Liberty Lobby, Inc.*** (1986) 477 U.S. 242, 255 [106 S.Ct. 2505; 91 L.Ed.2nd 202].); "see also ***Jesinger v. Nevada Fed. Credit Union***, 24 F.3rd 1127, 1131 (9th Cir. 1994) (the court determines whether there is a genuine issue for trial but does not weigh the evidence or determine the truth of matters asserted). That said, '[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.' ***Scott v. Harris***, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2nd 686 (2007)." (***Wheatcroft v. City of Glendale*** (U.S. Dist. AZ 2022) 2022 U.S. Dist. LEXIS 57006.); ***Seidner v. De Vries*** (9th Cir. 2022) 39 F.4th 591, 599-600.)

> The Court in ***Seidner*** notes that "flight" increases significantly the Government's interest in affecting a stop and detention. (***Id***., at p. 600; "(F)light increases the government's interest to use force to 'stop a suspect and show that flight from the law is no way to freedom.'" (Quoting ***County of Sacramento v. Lewis*** (1998) 523 U.S. 833, 853 [118 S.Ct. 1708; 140 L.Ed.2nd 1043].)

"The Supreme Court has 'warned against beginning with the first prong of the qualified-immunity analysis when it would unnecessarily wade into "difficult questions" of constitutional interpretation that have no effect on the outcome of the case.' ***Sjurset v. Button***, 810 F.3rd 609, 615 (9th Cir. 2015) (quoting ***Pearson***, 555 U.S. at 236-237). But the Supreme Court has also recognized that the two-step qualified immunity procedure 'is intended to further the development of constitutional precedent.' ***Horton ex rel. Horton v. City of Santa Maria***, 915 F.3rd 592, 602 (9th Cir. 2019) (quoting ***Pearson***, 555 U.S. at 237). Even in difficult cases, our court tends 'to address both prongs of qualified immunity where the "two-step procedure promotes the development of constitutional precedent' in an area where this court's guidance is . . . needed.'" ***Id***. (quoting ***Mattos v. Agarano***, 661 F.3rd 433, 440 (9th Cir. 2011) (en banc))." (***Martinez v. City of Clovis***, *supra*, at p. 1270.)

Exception to the "general rule" that a court must view the facts in light most favorable to the Plaintiff:

> When deciding whether an officer is entitled to qualified immunity, the court is generally bound to view the facts in the light most favorable to the Plaintiff. However, in ***Scott v. Harris*** (2007) 550 U.S. 372, 380-381 [127 S.Ct. 1769; 167 L.Ed.2nd 686], the Supreme Court held that when *video footage exists*, the reviewing court need not credit the version of a party who claims facts that are "*blatantly contradicted*" by the videotape. Instead, the reviewing court should view the facts in the light depicted by the videotape. (***Cunningham v. Shelby County*** (6th Cir. 2021) 944 F.3d 761.)
>
> > Sheriff's deputies in ***Cunningham*** were entitled to qualified immunity where the decedent, who had called 911 to report that she would shoot anyone who approached, came out of her house carrying what appeared to be a .45 caliber pistol (which was in fact a BB gun), and pointed it at the officers in her driveway.
>
> The district court's disregarding of plaintiff's claim that he had offered to exit his vehicle peaceably before officers unleashed a police dog on him was contradicted by an officer's *bodycam footage* of the arrest, providing an exception to the rule. (***Hernandez v. Town of Gilbert*** (9th Cir. 2021) 989 F.3rd 739.)
>
> See also ***Hughes v. Rodriguez*** (9th Cir. 2022) 31 F.4th 1211, at p. 1218, the Ninth Circuit, citing ***Scott v. Harris***, *supra*, where the Court noted that the district court had "properly relied on the bodycam footage and audio to the extent they 'blatantly contradicted' (Plaintiff) Hughes's deposition testimony" in determining whether the arresting officers had used excessive force in arresting him. The Court further noted other authority from other circuits to the same effect:
>
> > ***Coble v. City of White House*** (6th Cir. 2011) 634 F.3rd 865, 868-869; audio from *dashcam footage*, at least up to the point where the officer and the plaintiff were no longer within view of the dashcam.

Curran v. Aleshire (5th Cir. 2015) 800 F.3rd 656, 663; *still photographs*.

McManemy v. Tierney (8th Cir. 2020) 970 F.3rd 1034, 1038; *taser log*.

White v. Georgia (11th Cir. 2010) 380 Fed. App'x 796, 797; *uncontradicted medical testimony*.

Scott v. County of San Bernardino (9th Cir. 2018) 903 F.3rd 943, 952: Defendant officers' claim that the students' behavior in the classroom justified an arrest because there was reason to believe the students would engage in imminent fights was belied by an audio record of the encounter which "quite clearly contradicts the version of the story told by" the officers, the students being quiet and in control. (Cited in ***Andrews v. City of Henderson*** (9th Cir. 2022) 35 F.4th 710, 713, fn. 1.)

Note: The Court in ***Hughes v. Rodriguez***, in a footnote (p. 1219, fn. 2.) further noted that "While the trier of fact may rely on the rule of *falsus in uno, falsus in omnibus* to decide that *a witness who has lied about one material fact must be disbelieved as to all facts*, . . . this rule is not a binding mandate, and *is certainly not to be applied by judges ruling on motions for summary judgment*. (Italics added.)

However, in ***Hughes v. Rodriguez***, after one officer's bodycam was turned off, and a second not focused on plaintiff's arrest, the plaintiff's assertion that he was beaten by police after being handcuffed was only partly disputed (i.e., as to the duration, but not on the issue of whether it occurred at all) and, as such, on appeal from summary judgment for the defendant officers, had to be accepted as true. (***Id***., at pp. 1218-1220.)

"*Clearly Established*" *Principles*:

"A right is clearly established only if its contours are sufficiently clear that 'a reasonable official would understand that what he is doing violates that right." (***Anderson v. Creighton*** (1987) 483 U.S. 635, 640 [97 L.Ed.2nd 523]; ***Tuuamalemalo v. Greene*** (9th Cir. 2019) 946 F.3rd 471, 477.)

"Although 'a case directly on point' is not necessarily required, a rule is only clearly established if it has been 'settled' by 'controlling authority' or 'a robust consensus of cases of persuasive authority' that 'clearly prohibit[s] the officer's conduct in the particular circumstances,' with 'a high degree of specificity.'" (***Hopson v. Alexander*** (9th Cir. 2023) 71 F.4th 692, 697; quoting ***District of Columbia v. Wesby*** (2018) 583 U.S. 48, 64 [138 S.Ct. 577; 199 L. Ed.2nd 453])

> Per the Ninth Circuit: "These guideposts, which the Supreme Court has insistently fixed in many cases, have special relevance in the **Fourth Amendment** context. See ***Mullenix v. Luna***, 577 U.S. 7, 12, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (per curiam). **Fourth Amendment** violations generally, and excessive force claims more specifically, can involve situations 'in which the result[s] depend[] very much on the facts of each case.' ***Plumhoff*** (***v. Rickard*** (2014))572 U.S. (765) at 799 ([134 S.Ct. 2012; 188 L.Ed.2nd 1056]) (quoting ***Brosseau v. Haugen***, 543 U.S. 194, 201, 125 S.Ct. 596, 160 L. Ed. 2d 583 (2004) (per curiam)). The often fact-dependent nature of judicial decision-making in this area can make it difficult for officers to know in advance whether their actions will be found unlawful. *See* ***Mullenix***, 577 U.S. at 12. Plaintiffs asserting excessive force claims must thus point to an existing rule that 'squarely governs' the facts at issue and that moves the officer's actions outside the 'hazy border between excessive and acceptable force.' ***Brosseau***, 543 U.S. at 201 (quotation omitted); *see also* ***Rivas-Villegas v. Cortesluna***, 142 S. Ct. 4, 8, 211 L. Ed. 2d 164 (2021) (per curiam) (burden is on the plaintiff to identify precedent 'that put [the defendant] on notice that his specific conduct was unlawful')." (***Hopson v. Alexander***, *supra*, at pp. 697-698.)

"'A right is "clearly established" when "the contours of the right were already delineated with sufficient clarity to make a reasonable offic[ial] in the defendant's circumstances aware that what he was doing violated the right."' (***Tobias v. Arteaga*** (9th Cir. 2021) 996 F.3rd 571, 579; citing ***Costanich v. Dep't. of Soc. & Health Servs.*** (9th Cir. 2010) 627 F.3d 1101, 1114, which in turn quotes ***Devereaux v. Abbey*** (9th Cir. 2001) 263 F.3rd 1070, at p. 1074.)

"'Clearly established' means that, at the time of the officer's conduct, the law was '"'"sufficiently clear" that every '"reasonable official would understand that what he is doing'"' is unlawful. (Citations)" (***Columbia v. Wesby*** (2018) 583 U.S. 48, 63 [138 S.Ct. 577; 199 L.Ed.2nd 453].)

> It has also been noted that in discussing the "clearly established" requirement, the "*specificity*" of the rule is "especially important in the **Fourth Amendment** context." Finding probable cause to arrest must necessarily turn on a specific set of facts and circumstances. (***Ibid***.)

In other words, "existing precedent must have placed the statutory or constitutional question beyond debate." (***Ashcroft v. al-Kidd*** (2011) 563 U.S. 731, 741 [179 L.Ed.2nd 1149, 1159]; ***West v. City of Caldwell*** (9th Cir. 2019) 831 F.3rd 978, 983.)

> "This doctrine 'gives government officials breathing room to make reasonable but mistaken judgments,' and 'protects "all but the plainly incompetent or those who knowingly violate the law."' (***Ashcroft v. al-Kidd***, *supra*, at p. 743 [179 L.Ed.2nd at p. 1160; quoting ***Malley v. Briggs*** (1986) 475 U.S. 335, 341 [89 L.Ed.2nd 271].)" (***Carroll v. Carman*** (2014) 574 U.S. 13, 17 [135 S.Ct. 348; 190 L.Ed.2nd 311]; see also ***Guillory v. Hill*** (2015) 233 Cal.App.4th 240, 250-252; ***Thompson v. Rahr*** (9th Cir. WA 2018) 885 F.3rd 582, 587; ***Reese v. County of Sacramento*** (9th Cir. 2018) 888 F.3rd 1030, 1037.)

> "Prior precedent must articulate 'a constitutional rule specific enough to alert these deputies in this case that their particular conduct was unlawful.'" (***West v. City of Caldwell***, *supra*, at p. 984; quoting ***Sharp v. County of Orange*** (9th Cir. 2017) 871 F.3d 901, 911.)

See also ***City & County of San Francisco v. Sheehan*** (2015) 575 U.S. 600, 613 [135 S.Ct. 1765, 1775-1776; 191 L.Ed.2nd 856], severely criticizing the Ninth Circuit Court of appeal for using the general rationale of prior decisions in holding that officers should have been aware of any particular rule. "We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." (***Id***.,135 S.Ct. at pp. 1775-1776; quoting and citing ***Ashcroft v. al-Kidd*** (2011) 563 U. S. 731, 742 [179 L. Ed.2nd 1149, 1160]; and ***Lopez v. Smith*** (2014) 574 U.S. 1, [135 S.Ct. 1; 190 L.Ed.2nd 1]; see also ***Kirkpatrick v. County of Washoe*** (9th Cir. 2016) 843 F.3rd 784, 792-793; ***Kisela***

v. Hughes (2018) 584 U.S. 100 [200 L.Ed.2nd 449; 138 S.Ct. 1148]; ***Martinez v. City of Clovis*** (9th Cir. 2019) 943 F.3rd 1260, 1275; ***Tuuamalemalo v. Greene*** (9th Cir. 2019) 946 F.3rd 471, 477.)

> It was also noted in ***Sheehan*** that the fact that officers may violate or ignore their training and written policies in forcing entry and using force does not itself negate qualified immunity where it would otherwise be warranted. (***Id***., 135 S.Ct. at pp. 1174-1178.)

"Qualified immunity protects public officials from a court action unless their conduct violated a constitutional right that was clearly established at the time." (***Felarca v. Birgeneau*** (2018) 891 F.3rd 809, 815; citing ***City & County of San Francisco v. Sheehan***, *supra,* at p. 611.)

> "The relevant inquiry requires us to ask two questions: (1) whether the facts, taken in the light most favorable to the non-moving party, show that the officials' conduct violated a constitutional right, and (2) whether the law at the time of the challenged conduct clearly established that the conduct was unlawful." (***Felarca v. Birgeneau***, *supra*, citing ***Saucier v. Katz*** (2001) 533 U.S. 194, 201 [121 S.Ct. 2151; 150 L.Ed.2nd 272].)

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. (Citation) A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right. (Citation). We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. (Citation) We have repeatedly told courts . . . not to define clearly established law at a high level of generality. (Citation) The dispositive question is whether the violative nature of particular conduct is clearly established. (Citation) This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition. (Citation) Such specificity is especially important in the **Fourth Amendment** context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. (Citation)" (Internal

quotations and citations deleted; ***Mullenix v. Luna*** (2015) 577 U.S. 7, 12 [193 L.Ed.2nd 255; 136 S. Ct. 305, 308]; see also ***Kisela v. Hughes*** (2018) 584 U.S. 100, 104 [200 L.Ed.2nd 449; 138 S.Ct. 1148]; noting that the Ninth Circuit Court of Appeal is a frequent offender of this rule.)

> It is helpful if there is a specific case on point, putting officers on notice that they are violating one's constitutional rights. However, "(a)n exception exists for 'the rare "obvious case," where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances.'" (***Cortesluna v. Leon*** (9th Cir. 2020) 979 F.3rd 645, 652, fn. 4; quoting ***District of Columbia v. Wesby*** (2018) 583 U.S. 48, 64 [138 S.Ct. 577; 199 L. Ed.2nd 453].)

"On the second question, even with a constitutional violation, officers may still receive qualified immunity if the unlawfulness of their conduct was not 'clearly established' at the time of arrest. By 'clearly established,' we mean that the 'contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' ***Acosta v. City of Costa Mesa***, 718 F.3d 800, 824 (9th Cir. 2013) (per curiam) (simplified). In other words, 'existing law must have placed the constitutionality of the officer's conduct beyond debate.' ***Wesby***, 138 S. Ct. at 589 (simplified). And we only look to 'controlling authority' or 'a robust consensus of cases of persuasive authority' to determine settled law. ***Id.*** at 589-90 (simplified)." (***Vanegas v. City of Pasadena*** (9th Cir. 2022) 46 F.4th 1159, 1164.)

"'[Q]ualified immunity is a question of law, not a question of fact. [Citation.] But Defendants are only entitled to qualified immunity as a matter of law if, taking the facts in the light most favorable to [the plaintiff], they violated no clearly established constitutional right. The court must deny the motion for judgment as a matter of law if reasonable jurors could believe that Defendants violated [the plaintiff's] constitutional right, and the right at issue was clearly established.' (***Torres v. City of Los Angeles*** (9th Cir. 2008) 548 F.34d 1197, 1210.) 'The availability of qualified immunity after a trial is a legal question informed by the jury's findings of fact, but ultimately committed to the court's judgment.' (***Acevedo-Garcia v. Monroig*** (1st Cir. 2003) 351 F.3rd 547, 563.) """[D]eference to the jury's view of the facts persists throughout each prong of the qualified immunity inquiry."""" (***A.D. v. California Highway Patrol*** (9th Cir. 2013) 712 F.3rd 446, 456.) "'[T]he jury's view of the facts must govern our analysis once litigation has ended with a

jury's verdict.'" (***Id***., at p. 457.) "'Where, as here, the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability.'" (***Sova v. City of Mt. Pleasant*** (6th Cir. 1998) 142 F.3rd 898, 903.)" (***King v. State of California*** (2015) 242 Cal.App.4th 265, 289.)

"Qualified immunity attaches when an official's conduct '"'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"' ***Mullenix v. Luna***, 577 U.S. at pg. 11, [136 S.Ct. 305; 193 L.Ed.2nd 255, 257]. While this Court's case law '"'do[es] not require a case directly on point'"' for a right to be clearly established, '"'existing precedent must have placed the statutory or constitutional question beyond debate.'" ***Id.***, *at 12, 136 S.Ct. 305; 193 L.Ed.2nd 255, 257.* In other words, immunity protects '"'all but the plainly incompetent or those who knowingly violate the law.'"' ***Ibid. (White v. Pauly*** (2017) 580 U.S. 73 [137 S.Ct. 548, 551; 196 L.Ed.2nd 463, 468]; see also ***Kisela v. Hughes*** (2018) 584 U.S. 100 [200 L.Ed.2nd 449; 138 S.Ct. 1148]; ***Thompson v. Rahr*** (9th Cir. WA 2018) 885 F.3rd 582, 587; ***Rivas-Villegas v. Cortesluna*** (Oct. 18, 2021) __ U.S.__, __ [142 S.Ct. 4; 211 L.Ed.2nd 164].)

> In ***White***, *supra*, the Court "again . . . reiterate(d), the longstanding principle that "'clearly established law' should *not* be defined "'at a high level of generality.'" ***Ashcroft* v. *al-Kidd***, 563 U.S. 731, 742, 131 S.Ct. 2074, 179 L.Ed.2nd 1149 (2011). As this Court explained decades ago, the clearly established law must be "'particularized'" to the facts of the case. ***Anderson v. Creighton***, 483 U. S. 635, 640, 107 S.Ct. 3034, 97 L.Ed. 2nd 523 (1987). Otherwise, "'[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." ***Id.***, at 639, 107 S.Ct. 3034, 97 L.Ed. 2nd 523.'" (***White v. Pauly***, *supra*; see also ***Kisela v. Hughes*** (2018) 584 U.S. 100, 104 [200 L.Ed.2nd 449; 138 S.Ct. 1148]; noting that the Ninth Circuit Court of Appeal is a frequent offender of this rule.)
>
> In ***Kisela***, the U.S. Supreme Court, in reversing the Ninth Circuit Court of Appeal, held that an officer shooting a woman reported by witnesses to be acting "irrationally," and when observed was holding a knife while approaching another woman, was "at least" entitled to qualified immunity, there being nothing in the prior case law that

would have put the officer on notice that such a use of force was unreasonable under those circumstances. (***Kisela v. Hughes***, *supra*, at pp. 103-104.)

On remand, the Ninth Circuit Court of Appeal affirmed the decision of the district court, "(i)n view of the Supreme Court's opinion . . ." (***Hughes v. Kisela*** (9th Cir. 2018) 891 F.3rd 888.)

See also ***Rivas-Villegas v. Cortesluna*** (Oct. 18, 2021) __ U.S.__, __ [142 S.Ct. 4; 211 L.Ed.2nd 164]: "Although 'this Court's case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.' (Citation omitted) This inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" (Quoting ***White v. Pauly*** (2017) 580 U.S. 73 [137 S.Ct. 548, 551; 196 L.Ed.2nd 463]; and citing ***Brosseau* v. *Haugen*** (2004) 543 U.S. 194, 198 [125 S.Ct. 596; 160 L.Ed.2nd 583.)

The entry of summary judgment on a defense of qualified immunity in favor of the City of Fresno and its police officers in a **§ 1983** case alleging **Fourth** (search and seizure) and **Fourteenth** (due process) **Amendment** violations was affirmed. The Appellate Court did not need to decide whether the officers violated the **Fourth Amendment** by allegedly stealing appellants' property ($225,000) during the execution of a search and seizure pursuant to a warrant. The lack of any cases of controlling authority or a consensus of cases of persuasive authority on the constitutional question compelled the conclusion that the law was not clearly established at the time of the incident. The appellants' **Fourteenth Amendment** substantive due process claim suffered the same fate. (***Jessop v. City of Fresno*** (9th Cir. 2019) 936 F.3rd 937; certiorari denied.)

"For a constitutional right to be clearly established, a court must define the right at issue with 'specificity' and 'not . . . at a high level of generality.' ***City of Escondido, Cal. v. Emmons***, 139 S. Ct. 500, 503, 202 L. Ed. 2nd 455 (2019) (per curiam) (quoting ***Kisela*** (***v. Hughes***) 138 S. Ct. (1148) at 1152). The plaintiff 'bears the burden of showing that the rights allegedly violated were clearly established.' ***Shafer v. Cty. of Santa Barbara***, 868 F.3rd 1110, 1118 (9th Cir. 2017) . . . 'While there does not have to be a case directly on point, existing precedent must place the lawfulness of the particular [action] beyond debate.' ***Emmons***, 139 S. Ct. at 504

(quoting ***District of Columbia v. Wesby***, 138 S. Ct. 577, 581, 199 L. Ed. 2nd 453 (2018) . . . .); *see* ***Jessop v. City of Fresno***, 936 F.3rd 937, 940-41 (9th Cir. 2019) ('The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.') (quoting ***Anderson v. Creighton***, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed.2nd 523 (1987))." (***A.T. v. Baldo*** (9th Cir. 2019) 2019 U.S. App. LEXIS 38325; Unpublished.)

The U.S. Supreme Court held in a 7-to-1 decision that Texas prison guards can be sued over claims that they placed a mentally ill inmate in cells covered in feces and raw sewage, reversing a decision from the Fifth Circuit Court of Appeal that shielded the guards under the doctrine of qualified immunity. The case stems from six days that inmate Trent Taylor spent at a psychiatric prison unit in Lubbock, Texas, where guards first placed him in a cell covered in what court documents described as "massive amounts of feces." After days of refusing to eat or drink for fear that his food would be contaminated, Taylor was moved to a separate cell without a bed. There, he was left to sleep in naked in a pool of sewage after a drain in the cell overflowed. The Fifth Circuit had ruled that the guards could not be held responsible because there was no "clearly established law" that prisoners cannot be held in such conditions for the specific time period of six days. The Supreme Court rejected that finding, holding that "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time." Per the Supreme Court, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question" (citing ***Hope* v. *Pelzer*** (2002) 536 U. S. 730, 741 [122 S.Ct. 2508, 153 L.Ed.2nd 666].) (***Taylor v. Riojas*** (Nov. 2, 2020) __ U.S. __ [141 S.Ct. 52; 208 L.Ed.2nd 164].)

> *Note*: The ruling in this case seems to say that even though there may not be a specific prior case directly on point, "*obvious clarity*" may be found based upon general case law, putting any "*reasonable*" officer on notice that what he is doing constitutes "cruel and unusual" activity.

In a companion case to the U.S. Supreme Court's decision in ***Rivas-Villegas v. Cortesluna*** (Oct. 18, 2021) __ U.S.__, __ [142 S.Ct. 4; 211 L.Ed.2nd 164].), the High Court reversed where it was held by the Tenth Circuit Court of Appeal (Oklahoma), when the officers involved were sued by the decedent's estate, that the

officers who shot and killed a hammer-wielding, intoxicated suspect, were *not* entitled to qualified immunity. In reversing the 10th Circuit, the Court held that it was unnecessary to decide whether the police officers involved did in fact violate the **Fourth Amendment** in the first place, or whether they recklessly created a situation that required deadly force. (It was alleged that by stepping towards the decedent and cornering him in the garage, the officers "recklessly" caused him to react by grabbing the hammer.) On this record, the officers plainly did not violate any clearly established law. The officers engaged in a conversation with the decedent, followed him into a garage at a distance of 6 to 10 feet, and did not yell at him until after he picked up a hammer and took a stance as if he was about to throw the hammer or charge at the officers. It was at this point that the officers shot and killed the decedent. Neither the Tenth Circuit Court of Appeal, nor respondent, was able to identify a single case law precedent finding a **Fourth Amendment** violation under similar circumstances. The officers were thus entitled to qualified immunity. (***City of Tahlequah v. Bond*** (Oct. 18, 2021) __ U.S. __ [142 S.Ct. 9; 211 L.Ed.2nd 179].)

> In so finding, the Supreme Court chastised the 10th Circuit, as the justices have so often done with the Ninth Circuit, telling the lower court: "We have repeatedly told courts not to define clearly established law at too high a level of generality. (Citation) It is not enough that a rule be suggested by then-existing precedent; the 'rule's contours must be so well defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted."' (Citation) Such specificity is 'especially important in the **Fourth Amendment** context,' where it is 'sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.' (Citation)" (***Id.***, at p. __.)

"Cases 'cast at a high level of generality' are unlikely to establish rights with the requisite specificity. ***Brosseau v. Haugen***, 543 U.S. 194, 199, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (per curiam). While a case addressing general principles may clearly establish a right 'in an obvious case,' *id.*, such obvious cases are 'rare,' (***District of Columbia v.***) ***Wesby*** ((2018)), 583 U.S. (48), at 64. ((138 S.Ct. 577; 199 L.Ed.2nd 453].)) Instead, a clearly established right usually requires "controlling authority or a robust consensus of cases of persuasive authority.' ***Id.*** at 63 . . ." (***Waid v. County of Lyon*** (9th Cir. 2023) 87 F.4th 383, 388.)

Defendant police officers *not* entitled to qualified immunity on the issue of whether they used unreasonable force by ordering an 83-year-old, 5'2", 117-pound, unarmed, completely compliant woman, to get on her knees and handcuffing her when it was suspected that she might be driving a stolen car. (***Brown v. County of San Bernardino*** (9th Cir. 2023) 2023 U.S.App. LEXIS 2941; Unpublished; Petition denied by U.S. Supreme Court, Dec. 11, 2023, 2023 U.S. LEXIS 4763.)

> But see the dissenting opinion, where it was argued that the constitutionality of doing so was *not* **"**'beyond debate' by existing precedent," and that therefore, the officers were entitled to qualified immunity on the issue of whether the force used was unreasonable.
>
> Note also, however, that the panel was unanimous on the issue of whether the officers were entitled to qualified immunity on the lawfulness of detaining (or arresting) the woman for auto theft, until it could be determined whether she was lawfully driving the car in question.

The Third Circuit Court of Appeal reviewed a lower court's denial of qualified immunity status for officers involved in the arrest of the deceased Thomas. Upon Thomas' arrest, he appeared to have recently ingested a large amount of crack cocaine for the purpose of hiding it from the arresting officers. Each officer present, two initially, and later five total, concluded that Thomas had likely ingested the drugs. Upon his arrest, but in violation of department policy, he was not taken to a hospital but booked into jail instead. Two hours after booking, Thomas passed out in his cell and was finally taken to the hospital. He died three days later without regaining consciousness. His Estate sued in federal court, claiming two separate **Fourteenth Amendment** causes of action: (1) Failure to Render Aid and Fourteenth Amendment and (2) Failure to Intervene. Thomas's Estate claimed a violation of the well-established constitutional right to medical care. To plead a violation of the right to medical care, an individual must allege (1) "a serious medical need" and (2) "acts or omissions by [individuals] that indicate a deliberate indifference to that need." In inadequate medical care cases, courts have specifically found deliberate indifference where objective evidence of a serious need for care was ignored and where "necessary medical treatment is delayed for non-medical reasons." The Court found the officers were *not* entitled to qualified immunity on the claim of failure to render medical care. The Appeals Court then conducted a separate

analysis regarding the second claim that "failure to intervene" involved a constitutional violation. However, it also concluded that no previous appeals court has recognized any such right, nor has the Supreme Court. Though courts have recognized a right to have a government actor intervene when the underlying constitutional violation involves excessive force or sexual assault of a person in custody or detention, courts have since concluded that there is no precedent, let alone a clearly established right to intervention in other contexts. Because there is not a clearly established right to intervention to prevent a violation of the right to medical care, the Officers were entitled to qualified immunity as to Thomas's Estate's second claim failure to intervene. (***Thomas v. City of Harrisburg*** (3rd Cir. 2023) 88 F.4th 275.)

Additional Case Law:

"Qualified immunity attaches when an official's conduct '"'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"' ***Mullenix v. Luna***, 577 U.S. at 11, 136 S.Ct. 305; 193 L.Ed.2nd 255, 257. While this Court's case law '"'do[es] not require a case directly on point'"' for a right to be clearly established, '"'existing precedent must have placed the statutory or constitutional question beyond debate.'" ***Id.***, at 12, 136 S.Ct. 305; 193 L.Ed.2nd 255, 257. In other words, immunity protects '"'all but the plainly incompetent or those who knowingly violate the law.'"' ***Ibid.***" ***(White v. Pauly*** (2017) 580 U.S. 73 [137 S.Ct. 548, 551; 196 L.Ed.2nd 463, 468].)

In ***White***, *supra*, the Supreme Court "again . . . reiterate(d), the longstanding principle that "'clearly established law' should not be defined "'at a high level of generality.'" ***Ashcroft* v. *al-Kidd***, 563 U.S. 731, 742, 131 S.Ct. 2074, 179 L.Ed.2nd 1149 (2011). As this Court explained decades ago, the clearly established law must be "'particularized'" to the facts of the case. ***Anderson v. Creighton***, 483 U. S. 635, 640, 107 S.Ct. 3034, 97 L.Ed. 2nd 523 (1987). Otherwise, "'[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." ***Id.***, at 639, 107 S.Ct. 3034, 97 L.Ed. 2nd 523.'" (***White v. Pauly***, *supra*; see also ***Kisela v. Hughes*** (2018) 584 U.S. 100, 104 [200 L.Ed.2nd 449; 138 S.Ct. 1148]; noting that the Ninth Circuit Court of Appeal is a frequent offender of this rule. See also ***Reese v. County of Sacramento*** (9th Cir. 2018) 888 F.3rd 1030, 1036-1040.)

> In ***Reese***, it was noted that while it is in the jury's province to determine whether the force used under the circumstances was unreasonable or not, it the judge's duty to determine, as a purely legal question, whether the officer should have been aware that the unreasonableness of his actions was "clearly established" by prior case authority. (***Id.***, at pp. 1037-1038.)

Qualified immunity from civil liability for using excessive force was denied where defendant police detective executed a search warrant on the plaintiff's apartment to look for property allegedly purchased with another deputy's stolen credit card, the detective and victim deputy were close friends, the detective purposely executed the warrant when he knew the plaintiff's children (by the deputy) were in her apartment, an excessive number of officers were used to execute the warrant, and plaintiff was handcuffed so tightly as to cause bruises. (***Cameron v. Craig*** (9th Cir. 2013) 713 F.3rd 1012, 1018-1022; summary judgment in defendant's favor was upheld on allegation that the search was conducted without probable cause.)

> Even where the force used is held to be unreasonable, an officer may still be protected from civil liability under the doctrine of "*qualified immunity*." "The qualified immunity rule shields public officers from (**42 U.S.C.**) **1983** actions unless the officer has violated a clearly established constitutional right. This turns on a determination of whether it would be clear to a reasonable officer that his conduct was unlawful under the circumstances he confronted." (***Mendoza v. City of West Covina*** (2012) 206 Cal.App.4th 702, 711; citing ***Saucier v. Katz*** (2001) 533 U.S. 194, 202 [121 S.Ct. 2151; 150 L.Ed.2nd 272].)
>
> "To be clearly established, a right must be sufficiently clear 'that every "reasonable official would [have understood] that what he is doing violates that right.'"" (Citations omitted; ***Reichle v. Howards*** (2012) 566 U.S. 658, 664 [132 S.Ct. 2088; 182 L.Ed.2nd 985].)
>
> > In ***Reichle v. Howards***, the Supreme Court held that it was *not* clearly established that when an arrest is made with probable cause, a law enforcement officer might still be violating the arrestee's **First Amendment** freedom of speech where the arrestee

had criticized the Vice President. (***Id.***, at pp. 662-670.)

Where a sheriff's deputy was alleged to have aggressively grabbed plaintiff by the arm and pull him toward the curb, swinging him around, and then kick his feet out from under him causing him to fall to the pavement, after which a knee went into his back and a boot pushed his head into the pavement before being handcuffed, a jury found the force to be unreasonable under the circumstances. However, citing ***White v. Pauly*** (2017) 580 U.S. 73 [137 S.Ct. 548; 196 L.Ed.2nd 463], the Court held that where no case could be identified that would have put the sheriff's deputy on notice that the force he used was unreasonable, entitling the deputy to qualified immunity, the jury's verdict and damage award was set aside. (***Shafer v. County of Santa Barbara*** **(Padilla)** (9th Cir. 2017) 868 F.3rd 1110, 1115-1118.)

Finding photographs of the plaintiffs' three female children, ages 5, 4 and 1½ years, showing the children lying while nude on a blanket with their buttocks and "some genitalia" showing, without any evidence to support a belief that the children were being sexually exploited, was insufficient to give defendant social worker sufficient "reasonable cause" to believe that the minors were "at imminent risk of serious bodily injury or molestation." Taking them from the custody of the plaintiffs was held to violate the **Fourth** and **Fourteenth Amendments**. With the applicable legal standards being clearly established, defendants were not entitled to qualified immunity. (***Demaree v. Pederson*** (9th Cir. 2018) 887 F.3rd 870, 878-884.)

In a case where the deceased son sued an officer for failing to recognize a medical condition, the Court held that to the extent the district court found that the officer's video (bodycam) evidence contradicted anything in the amended complaint, it rejected the son's conclusory allegations regarding whether the officers' conduct met the legal standard of a constitutional violation. In doing so, the district court acted within its discretion. The son's allegations suggested that the moving force behind the alleged constitutional violation against the detainee was not a failure to train, but the officers' failure to heed their training. The son did not show that the alleged unlawfulness of the officers' conduct was clearly established at the time they encountered the detainee. The son's argument concerning the deprivation of life claim had been waived. (***J.K.J. v. City of San Diego*** (9th Cir. 2022) 42 F.4th 990.)

***Absolute Immunity from Civil Liability*:**

Law Enforcement Officer Cases Denying Absolute Immunity:

Where a courtroom marshal "shoved" the disruptive plaintiff out of a courtroom upon the order of the judge, the marshal was *not* entitled to absolute immunity when sued for using excessive force. However, the marshal is entitled to qualified immunity where a reasonable marshal under the circumstances could have believed that the **Fourth Amendment** permitted him to use the amount of force the plaintiff claimed the marshal used. (***Brooks v. Clark County*** (9th Cir. 2016) 828 F.3rd 910.)

Under the procedures followed by an Oregon County Circuit Court, the "defendant release assistance officer" had not been delegated authority to make release decisions. Rather, pursuant to **Or. Rev. Stat. § 135.235**, he was authorized only to make recommendations to a judge. Therefore, the officer's action in submitting a bare unsigned warrant for plaintiff's arrest to a judge should have been seen as making a recommendation only that the warrant be signed. Accordingly, the officer was *not* entitled to absolute immunity in plaintiff's **42 U.S.C. § 1983** lawsuit. (***Patterson v. Van Arsdel*** (9th Cir. 2018) 883 F.3rd 826.)

Prosecutors:

Prosecutors enjoy absolute immunity from civil liability so long as the forced detention of a person, done for the purpose of interviewing her, is considered to be "advocacy conduct that is intimately associated with the judicial phase of the criminal process." (***Giraldo v. Kessler*** (2nd Cir. 2012) 684 F.3rd 161.)

See "*Ethical Considerations*," under "*The Prosecutor*," below.

Additional Case Law:

A videotape of undisputed validity should be treated as providing undisputed facts under a summary judgment motion. (***Scott v. Harris*** (2007) 550 U.S. 372, 380-381 [127 S.Ct. 1769; 167 L.Ed.2nd 686]; ***Recchia v. City of Los Angeles Department of Animal Services*** (9th Cir. 2018) 889 F.3rd 553, 556, fn. 1.)

An officer is entitled to qualified immunity from a civil allegation of unlawful arrest so long as at the time of the arrest (1) there was probable cause for the arrest, *or* (2) "it is *reasonably arguable* that there was probable cause for arrest—that is, whether reasonable officers could disagree as to the legality of the arrest such that the arresting officer is entitled to qualified immunity." (***Rosenbaum v. Washoe County*** (9th Cir. 2011) 663 F.3rd 1071, 1076; finding

that because no Nevada statute applied to the plaintiff's "scalping" of tickets to a fair, his arrest was unlawful and because no reasonable officer would have believed so, the officer was not entitled to qualified immunity.)

Qualified immunity may be available, depending upon the circumstances, to off-duty police officers acting as private security guards, but only if it is shown that the officer was, under the circumstances, serving a public, governmental function even though being paid by a private company to provide private security. Where the off-duty officer/defendant in this case, while acting as a hotel security but in full uniform complete with his badge, failed to intercede to stop an assault on the plaintiff by other hotel security guards, he was held *not* to be entitled to qualified immunity for failing to have met this standard. Also, where a reasonable jury could find that the officer exposed the plaintiff to harm he would not otherwise have faced, that the harm was foreseeable, and the officer acted with deliberate indifference to the presence of a known danger that was created by his conduct, he was not entitled to qualified immunity. (***Bracken v. Okura*** (9th Cir. 2017) 869 F.3rd 771.)

Qualified immunity for an Internal Revenue Service Agent was properly denied in an action alleging that the agent violated plaintiff's **Fourth Amendment** right to bodily privacy when, during the lawful execution of a search warrant at plaintiff's home, the agent (a female) escorted plaintiff (also a female) to the bathroom and monitored her while she relieved herself. Given the scope, manner, justification, and place of the search, a reasonable jury could conclude that the agent's actions were unreasonable and violated plaintiff's **Fourth Amendment** rights. The agent's general interests in preventing destruction of evidence and promoting officer safety did not justify the scope or manner of the intrusion into plaintiff's most basic subject of privacy, her naked body. A reasonable officer in the agent's position would have known that such a significant intrusion into bodily privacy, in the absence of legitimate government justification, was unlawful. (***Ioane v. Hodges*** (9th Cir. 2019) 939 F.3rd 945, 956-957.)

In a **42 USC § 1983 Fourth Amendment** excessive force case involving two police officers who had responded to a 911 domestic disturbance call, and where one of the officers "took him . . . to the ground and handcuffed him," the U.S. Supreme Court held that the Ninth Circuit Court of Appeal erred, again, in reversing and remanding the district court's ruling where both

officers had been granted qualified immunity. As to one officer, the Ninth Circuit offered no explanation for its decision, which was erroneous in light of the district court's conclusion that only the other officer was involved in the excessive force claim. The Ninth Circuit also erred as to the other officer because it defined the clearly established right at a "high level of generality" by saying only that the "right to be free of excessive force" was clearly established, and this formulation of the clearly established right was too general, particularly as the Circuit Could made no effort to explain how the case law prohibited the officer's actions in this case. (***Escondido v. Emmons*** (Jan. 7, 2019) __ U.S. __ [139 S.Ct. 500; 202 L.Ed.2nd 455].)

In a guardian's state law and **42 U.S.C. § 1983** suit against a city, its police department, and an officer, alleging deliberate indifference to the ward's serious medical needs when, while the ward was detained in a holding cell and left unattended for about 30 minutes, he attempted suicide, causing permanent and severe injury, the officer was entitled to qualified immunity because, given the available case law at the time of the attempted suicide, a reasonable officer would not have known that failing to check on the ward immediately after his mother advised that he had suicidal tendencies presented such a substantial risk of harm that the failure to act was unconstitutional. (***Horton v. City of Santa Maria*** (2019) 915 F.3rd 592.)

Transportation Security Administration (TSA) officers do not have absolute immunity from civil suit for conducting abusive searches of travelers at airport. Plaintiff's claims brought under the **Federal Tort Claims Act** (**FTCA**), **28 U.S.C. § 2680(h)**, to recover against Transportation Security Officers (TSOs) at airports when TSOs allegedly detained her, damaged her property, and fabricated charges against her, were improperly dismissed because TSOs were officers of United States empowered to execute searches for violations of Federal law. (***Pellegrino v. Transportation Security Administration*** (3rd Cir. 2019) 937 F.3rd 164.)

> *First*, the Court noted that TSOs are officers by name, wear uniform with badges noting that title, and serve in positions of trust and authority. Although TSOs are designated as "employees" under the **Aviation Security Act** (**ASA**) and not "law enforcement officers," the court found there is no indication that only a specialized "law enforcement officer" as defined in the **ASA** qualifies as an officer of the United States under the **FTCA**.

> *Second*, the Court held that TSO screenings are searches under the **Fourth Amendment** and under the definition provided by the Supreme Court in ***Terry v. Ohio***. In ***Terry***, the Court found that "a careful exploration of the outer surfaces of a person's clothing all over his or her body" in an attempt to find weapons constitutes a "search." Here, the court found this to be an accurate description of the duties of a TSO, who are empowered by **49 U.S.C. § 44935(f)(1)(B)(v)** to "thoroughly conduct" an exploration "over an individual's entire body."
>
> *Finally*, the Court held that TSOs' searches are "for violations of Federal law" given that their inspections are for items such as firearms and explosives, which is banned on aircraft pursuant to federal law.

Under the state-created "*danger doctrine*," it was held that police officers violated the constitutional right to due process of a victim of domestic violence when they remarked positively about the alleged abuser's family while simultaneously ordering other officers not to arrest the abuser despite the presence of probable cause to arrest because they acted with deliberate indifference to the risk of future abuse when they ignored the risk of the abuser's violent tendencies. Nonetheless, the officers were entitled to qualified immunity under **42 U.S.C. § 1983** because at the time of these events, a reasonable officer would not have known that such conduct violated the due process rights of the domestic violence victim. (***Martinez v. City of Clovis*** (9th Cir. 2019) 943 F.3rd 1260, 1271-1277.)

> See "*The Failure to Protect*: '*Danger Doctrine*,'" under "*The Bill of Rights Protections*" (Chapter 7), below.

The Ninth Circuit affirmed in part and reversed in part the district court's denial, on summary judgment, of qualified immunity to medical providers at Orange County Jail in an action brought pursuant to **42 U.S.C. § 1983** alleging that defendants (a jail doctor and several nurses) were deliberately indifferent to the medical needs of Patrick John Russell, a pretrial detainee who died from a ruptured aortic dissection. Applying ***Sandoval v. County of San Diego*** (9th Cir. 2021) 985 F.3d 657, the Court ruled that to defeat a claim of qualified immunity plaintiffs must show that, given the available case law at the time, a reasonable official, knowing what the jail doctor and nurses knew, and would have understood that their actions presented such a substantial risk of harm to Russell that the failure to act was unconstitutional. Their actual subjective

appreciation of the risk was not an element of the established-law inquiry. The Court held that under the circumstances of this case, taking the facts most favorably to the plaintiffs, the on-call physician at the time could not have reasonably believed that based on the clearly established law as it stood then that he could provide constitutionally adequate care without even examining a patient with Russell's symptoms who had not responded to a dose of nitroglycerin. Therefore, the district court was correct in denying summary judgment on qualified immunity to the jail doctor. The Court held that Nurse Teofilo had access to facts from which an inference could be drawn that Russell was at serious risk. Yet she did not call the paramedics, nor did she call the doctor to ask whether Russell's worsening symptoms required anything more than the Motrin that had previously been prescribed. The district court was correct in denying summary judgment on qualified immunity to Nurse Teofilo. A reasonable jury could conclude that she met the standard for deliberate indifference. The panel held that Nurse Trout was entitled to summary judgment on qualified immunity. A jury could not, on the facts pleaded, reasonably conclude that Nurse Trout was deliberately indifferent. Though perhaps she should have called the paramedics, her having promptly called the physician on call and followed his instructions could not be categorized as deliberate indifference. Lastly, the Court held that Nurse Lumitap was not entitled to qualified immunity. Drawing all inferences in plaintiff's favor, a reasonable person in Nurse Lumitap's position would have inferred that Russell was at serious risk if not hospitalized. (***Russell v. Lumitap*** (9th Cir. 2022) 31 F.4th 729.)

The Ninth Circuit Court of Appeal reversed the district court's order on summary judgment denying qualified immunity to police officers in an action alleging, in part, **First Amendment** retaliation arising from the police officers/defendants' investigation of two arsons at properties connected to plaintiff Greg Moore. Plaintiffs alleged that in retaliation for Mr. Moore remaining silent during police questioning and plaintiffs' subsequent civil rights lawsuit and request for disclosures of public records, defendants, among other things, opened criminal investigations against them and attempted to induce the IRS into opening a criminal investigation. The Court concluded that plaintiffs failed to show that defendants' conduct violated clearly established law. It was not clearly established, for instance, that Mr. Moore has a **First Amendment** right to remain silent when questioned by the police. Nor was it clearly established that a retaliatory investigation per se violates the **First Amendment**. Defendants were therefore entitled to qualified immunity on the **First Amendment** claims based on Mr.

> Moore's silence and plaintiffs' lawsuits and requests for public disclosures. (***Moore v. Garnand*** (9th Cir. 2023) 83 F.4th 743.)

California Civil Code § 52.1; *the* "***Bane Act***:"

> California's **Civil Code § 52.1**, the so-called "***Bane Act***" (the state equivalent to a federal **42 U.S.C. § 1983** civil suit), authorizes a civil action "against anyone who interferes, or tries to do so, by threats, intimidation, or coercion, with an individual's exercise or enjoyment of rights secured by federal or state law." (See ***Jones v. Kmart Corp.*** (1998) 17 Cal.4th 329, 331.) The **Bane Act** applies whenever there is a **Fourth Amendment** use of force violation. An illegal arrest (i.e., without probable cause) accompanied by the use of excessive force constitutes a **Bane Act** violation. It does not require a showing that the conduct also caused a violation of a separate and distinct constitutional right. (***Bender v. County of Los Angeles*** (2013) 217 Cal.App.4th 968, 976-981.)
>
> "The **Bane Act** provides a cause of action for individuals whose 'rights secured by' federal or California law have been interfered with 'by threat, intimidation, or coercion.' **Cal. Civ. Code § 52.1(a)-(b)**." (***Smith v. City of Santa Clara*** (9th Cir. 2017) 876 F.3rd 987, 990, fn. 2.)
>
> "**The Tom Bane Civil Rights Act**, . . . was enacted in 1987 to address hate crimes. **The Bane Act** civilly protects individuals from conduct aimed at interfering with rights that are secured by federal or state law, where the interference is carried out 'by threats, intimidation or coercion.' See ***Venegas v. County of Los Angeles*** ((2007)) 153 Cal.App.4th 1230, . . . **Section 52.1** 'provides a cause of action for violations of a plaintiff's state or federal civil rights committed by "threats, intimidation, or coercion."' ***Chaudhry v. City of Los Angeles***, 751 F.3rd 1096, 1105 (9th Cir. 2014) (quoting **Cal. Civ. Code § 52.1**). (fn. omitted) Claims under **section 52.1** may be brought against public officials who are alleged to interfere with protected rights, and qualified immunity is not available for those claims. See ***Venegas***, 63 Cal. Rptr. 3rd at 753." (***Reese v. County of Sacramento*** (9th Cir. 2018) 888 F.3rd 1030, 1040-1041.)
>
> > In ***Venegas v. County of Los Angeles***, *supra*, the California Supreme Court, in holding that a **Section 52.1** plaintiff need not be a member of a protected class, found that plaintiffs had "adequately stated a cause of action under **section 52.1**" where they alleged warrantless, unconsented searches and unlawful detention.
>
> However, **Section 52.1** "does not require proof of discriminatory intent." Also, "a successful claim for excessive force under the **Fourth Amendment** provides the basis for a successful claim under **§ 52.1**." (***Chaudhry v. City of Los Angeles***, *supra*, at p. 1105.)

"(T)he use of excessive force can be enough to satisfy the 'threat, intimidation or coercion' element of **Section 52.1**." (***Cornell v. City and County of San Francisco*** (2017) 17 Cal.App.5th 766, 799.)

> ***Cornell***, however, also held that there is an "egregiousness require(ment)" under **Section 52.1**, necessitating a finding of circumstances indicating that the arresting officer had "a specific intent to violate the arrestee's right to freedom from unreasonable seizure." In so holding, ***Cornell*** adopted a specific intent standard for assessing criminal violations of federal civil rights. (***Reese v. County of Sacramento***, *supra*, at p. 1043, citing ***Cornell v. City and County of San Francisco***, *supra,* at pp. 801-802; and ***Screws*** v. ***United State***s (1945) 325 U.S. 91 [65 S.Ct. 1031; 89 L.Ed. 1495].)

Thus, the Ninth Circuit reached two conclusions relative to the **Bane Act's** application: "First, the **Bane Act** does not require the 'threat, intimidation or coercion' element of the claim to be transactionally independent from the constitutional violation alleged. (Citation). Second, the **Bane Act** requires 'a specific intent to violate the arrestee's right to freedom from unreasonable seizure.' (Citation)" (***Reese v. County of Sacramento***, *supra*; holding that the trial court failed to properly instruct the jury that the deputies' had the specific intent not only to use force, but also to use *unreasonable* force.)

"The **Bane Act** permits an individual to pursue a civil action for damages where another person 'interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state.' (**Civ. Code, § 52.1, subd. (a)**.) 'The essence of a **Bane Act** claim is that the defendant, by the specified improper means (i.e., "threat[], intimidation or coercion"), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law.' (Citation)" (***King v. State of California*** (2015) 242 Cal.App.4th 265, 294.)

> Evidence as presented in a civil rights action was held to be insufficient to support a **Bane Act** claim because the driver did not testify that the officer's threat made during a frisk caused him to do anything or refrain from doing anything; only that it caused him fear. The driver had no right to resist the unconstitutional frisk and thus the threat did not interfere with the exercise of his constitutional rights. (***Id***., at pp. 293-295.)

"California's **Bane Act** requires proof of an underlying constitutional violation. ***Reese v. County of Sacramento***, 888 F.3rd 1030, 1044 (9th Cir. 2018) ('[T]he elements of the excessive force claim under [the **Bane Act**] are the same as under **§ 1983**[.]' (quoting ***Chaudhry v. City of Los Angeles***, 751 F.3rd

1096, 1105 (9th Cir. 2014)))." (***Williamson v. City of National City*** (9th Cir. 2022) 23 F.4th 1146, 1155; holding that since plaintiff failed to prove defendants used excessive force as a matter of law, the defendants were entitled to summary judgement on the **Bane Act** allegation.)

On the Issue of a Government Agency's "*Duty of Care*," and/or "*Duty to Warn*" *a Potential Victim and* "*Special Relationships*:"

General Rule: "As a general rule, one owes no duty to control the conduct of another, nor to warn those endangered by such conduct. Such a duty may arise, however, if '(a) a *special relation* exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, *or* (b) a *special relation* exists between the actor and the other which gives the other a right to protection.'" (Italics added; ***Russell v. Department of Corrections and Rehabilitation*** (2021) 72 Cal.App.5th 916, 931; quoting ***Davidson v. City of Westminster*** (1982) 32 Cal.3rd 197, 203.)

"'As a general principle, a "defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous.'"" (***Golick v. State of California*** (2022) 82 Cal.App.5th 1127, 1138, quoting ***Tarasoff v. Regents of University of California*** (1976) 17 Cal.3rd 425, 434–435, and citing **Civ. Code § 1714**.)

However, "(a) duty exists only if 'the plaintiff's interests are entitled to legal protection against the defendant's conduct.' . . . 'Recovery for negligence depends as a threshold matter on the existence of a legal duty of care.'" (***Golick v. State of California***, *supra*., quoting ***Brown v. USA Taekwondo*** (2021) 11 Cal.5th 204, at p. 213.)

"[W]hen the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of such conduct, the common law has traditionally imposed liability only if the defendant bears some *special relationship* to the dangerous person or to the potential victim." (Italics added; ***Ibid***; quoting ***Zelig v. County of Los Angeles*** (2002) 27 Cal.4th 1112, 1129.)

"Whether a defendant has a special relationship giving rise to a duty to warn rests on policy and is a question of law." (***Russell v. Department of Corrections and Rehabilitation***, *supra*, at pp. 934-935, citing ***Regents of University of California v. Superior Court*** (2018) 4 Cal.5th 607, 620, and multiple other authorities.)

In ***Russell***, the trial court erroneously (without objection from either party) "instructed the *jury* to make a factual finding

regarding the existence of a special relationship between the Department's agents (the civil defendant) and Russell (the victim), and later provided the jury with a list of factors for it to consider when making that determination." The Court held this to be error, and grounds for reversal. "(T)he existence of a legal duty in a given factual situation is a question of law that the trial court should have determined." (pgs. 935-936.)

The Court in ***Russell*** had some difficulty defining what is meant by a "*special relationship*," trying to explain the concept by example rather than giving us a one-size-fits-all definition. For instance, per the Court (at pp. 931-932), special relationships have "an aspect of dependency in which one party relies to some degree on the other for protection." (***Regents of University of California v. Superior Court*** (2018) 4 Cal.5th 607, 620–621.) "The corollary of dependence in a special relationship is control. Whereas one party is dependent, the other has superior control over the means of protection. '[A] typical setting for the recognition of a special relationship is where "the plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly, has some control over the plaintiff's welfare."'" (***Id.*** at p. 621.) The Court further notes that "the factors to a finding of a special relationship include 'detrimental reliance by the plaintiff on the officer's conduct, statements made by them which induced a false sense of security and thereby worsened her position.'" (Citing ***Williams v. State of California*** (1983) 34 Cal.3rd 18, 28.) "Recovery has been denied, however, for injuries caused by the failure of police personnel to respond to requests for assistance, the failure to investigate properly, or the failure to investigate at all, where the police had not induced reliance on a promise, express or implied, that they would provide protection.' (***Id.*** at p. 25.)"

Duty of Care to Third Parties:

General Rule:

"(N)egligence liability for an officer's unreasonable use of deadly force may potentially extend to unintended victims whom the officer injures in the course of a deadly force incident. If a third party suffers physical injury during a deadly force incident, that person may have a negligence claim based on the officer's duty to act reasonably when using deadly force against the suspect." (***Golick v. State of California*** (2022) 82 Cal.App.5th 1127, 1140, citing ***Brown v. Ransweiler*** (2009) 171 Cal.App.4th 516, 534; and ***Koussaya v. City of Stockton*** (2020) 54 Cal.App.5th 909 937; while noting that "there is no duty to act to protect others from the

conduct of third parties;" citing ***Barenborg v. Sigma Alpha Epsilon Fraternity*** (2019) 33 Cal.App.5th 70, 76.)

> "'Unlike private citizens, police officers act under color of law to protect the public interest. They are charged with acting affirmatively and using force as part of their duties, because "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." (***Edson v. City of Anaheim*** (1998) 63 Cal.App.4th 1269, 1273 . . .], quoting ***Graham v. Connor*** (1989) 490 U.S. 386, 396 [104 L.Ed. 2nd 443; 109 S.Ct. 1865].) Thus, under California law, a peace officer "may use reasonable force to make an arrest, prevent escape or overcome resistance, and need not desist in the face of resistance."' (***Brown v. Ransweiler*** (2009) 171 Cal.App.4th 516, 527 . . . ; see **Pen. Code, § 835a**.) [¶] An important corollary to these principles is that police officers have a duty in tort to act reasonably when employing deadly force against a suspect.'" (***Golick v. State of California*** (2022) 82 Cal.App.5th 1127, 1138-1139; quoting ***Hayes v. County of San Diego*** (2013) 57 Cal.4th 622, 629.)
>
> "(A)n 'officer's lack of due care can give rise to negligence liability for the intentional shooting death of a suspect.'" (***Golick v. State of California***, supra, at p. 1139, quoting ***Munoz v. Olin*** (1979) 24 Cal.3rd 629, 634.)
>
> "(L)aw enforcement officers do not 'owe bystanders a duty different from the duty they owe to a suspect, which is the duty to use reasonable force under the totality of the circumstances.'" (***Golick v. State of California***, *supra*, quoting ***Brown v. Ransweiler***, *supra*, at p. 526, fn. 10.)

Also: "Under California law, the general duty to exercise due care for the safety of others is broad, 'but it has limits.' . . . This general duty of care applies 'only when it is the defendant who has 'created a risk' of harm to the plaintiff, including when 'the defendant is responsible for making the plaintiff's position worse.'" . . . By contrast, a defendant is generally not liable in tort for failing to protect another from a peril that the defendant did not create. . . . This is because the law does not impose a general duty to protect others from the conduct of third parties." (***Golick v. State of California*** (2022) 82 Cal.App.5th 1127, 1143-1144, quoting ***Brown v. USA Taekwondo*** (2021) 11 Cal.5th 204, 214,

and citing ***Williams v. State of California*** (1983) 34 Cal.3rd 18, 23; there is no general "duty to come to the aid of another"].)

> The rule is simple enough: "(O)ne owes no duty to control the conduct of another, nor to warn those endangered by such conduct." . . . These principles apply to law enforcement officers who, 'like other members of the public, generally do not have a legal duty to come to the aid of [another] person.'" (***Golick v. State of California***, *supra*, at p. 1144; quoting ***Davidson v. City of Westminster*** (1982) 32 Cal.3rd 197, 203; and ***Lugtu v. California Highway Patrol*** (2001) 26 Cal.4th 703, 717; and citing ***Benavidez v. San Jose Police Dept.*** (1999) 71 Cal.App.4th 853, 859–860.)

Case law:

The California Supreme Court, in determining the tort liability of a police officer for shooting and killing a mentally ill person, ruled that law enforcement's pre-shooting conduct may be relevant "to the extent it shows, as part of the totality of the circumstances, that the shooting itself was negligent." In reaching this conclusion, the Court cautioned that "the reasonableness of the officers' pre-shooting conduct should not be considered in isolation," but "should be considered in relation to the question whether the officers' ultimate use of deadly force was reasonable." (***Hayes v. County of San Diego*** (2013) 57 Cal.4th 622, 631-632.)

A peace officer does not have a legal duty to take reasonable care in attempting to prevent a threatened suicide from being carried out. (***Adams v. City of Fremont*** (1998) 68 Cal.App.4th 243, 276.)

See ***Koussaya v. City of Stockton*** (2020) 54 Cal.App.5th 909 (as described in ***Golick v. State of California***, *supra*, at p. 1140.) where a woman ("plaintiff") alleged police were liable for injuries she sustained while being held hostage by bank robbers.
The woman was one of three hostages the bank robbers took after police confronted them at the bank. The robbers walked the hostages through the bank parking lot, ignoring commands from an officer who aimed his weapon at them and ordered them to stop, and the robbers fled with their hostages in a Ford Explorer. Less than a minute later, one of the hostages was shot by one of the robbers and pushed out of the Explorer. Then another robber "fired a barrage of bullets" from his assault rifle at a pursuing police car, shattering the back window of the Explorer. The pursuit evolved into a high speed chase and twice during the chase officers

exchanged fire with the robber in the back of the Explorer. Shortly after the second exchange of gunfire, the plaintiff decided to jump out of the Explorer, fearing she would be shot if she remained in the car when the chase ended. Minutes later, the chase did end, at which point police officers fired several hundred rounds into the Explorer, killing two of the robbers and the remaining hostage. The plaintiff sued the city and the officers who fired at the Explorer while she was in it, alleging causes of action for assault and battery, intentional infliction of emotional distress and negligence. Her theory was that the officers' use of deadly force against the robbers was unreasonable and had caused her injuries. The city and the officer defendants filed separate motions for summary judgment, which were granted. The Appellate Court affirmed, holding that the officers' use of deadly force against the robbery suspects was reasonable as a matter of law.

A patrol officer who orders a speeding motorist to pull over owes the passengers of the vehicle a duty to exercise reasonable care not to expose them to a risk of harm by other motorists. In such a situation, the general rule that there is no duty to protect a plaintiff from third party injury does not apply because the officer has exercised his authority to direct the motorist to stop in the center median strip of a divided highway. In giving such a directive, the officer has a duty to use reasonable care "so as not to place the person in danger or to expose the person to an unreasonable risk of harm." (***Lugtu v. California Highway Patrol*** (2001) 26 Cal.4th 703, 715-718.)

Good Samaritan Rule:

What is sometimes referred to as the "*negligent undertaking doctrine*" or the "*Good Samaritan rule*," it has been held that a person may be civilly liable upon negligently attempting to render services to another. (See *Rest.3rd Torts, Liability for Physical and Emotional Harm (2012) § 42* [Duty Based on Undertaking].) Under this doctrine, "one who undertakes to aid another is under a duty to exercise due care in acting and is liable if the failure to do so increases the risk of harm or if the harm is suffered because the other relied on the undertaking." (***Paz v. State of California*** (2000) 22 Cal.4th 550, 553, 558-559; see also ***Delgado v. Trax Bar & Grill*** (2005) 36 Cal.4th 224, 249.)

See also ***Mann v. State of California*** (1977) 70 Cal.App.3rd 773, 776 & 780: State held liable for an officer's negligence in leaving stranded motorist unprotected while the officer undertook to investigate a dangerous situation.

Duty to Warn: In determining whether a government agency has a "*duty to warn*" a potential victim, a court must make a two-step inquiry:

> "*First*, the court must determine whether there exists a *special relationship* between the parties or some other set of circumstances giving rise to an affirmative duty to [warn]. *Second*, if so, the court must consult the factors described in [***Rowland v. Christian*** (1968) 69 Cal.2nd 108 . . . .] to determine whether relevant policy considerations counsel limiting that duty." (Italics added; ***Russell v. Department of Corrections and Rehabilitation*** (2021) 72 Cal.App.5th 916, 930-931; quoting ***Brown v. USA Taekwondo*** (2021) 11 Cal.5th 204, 209; see also ***Golick v. State of California*** (2022) 82 Cal.App.5th 1127, 1144.)
>
> > See ***Rowland v. Christian***, *supra*, at p. 119, for the California Supreme Court's discussion concerning a landowner's "*duty to warn*" others of hazardous conditions on the landowner's property: I.e.; that there was a "defective and dangerous (condition), that the defect was not obvious, and that plaintiff was about to come in contact with the defective condition, and under the undisputed facts (the civil defendant/landowner) neither remedied the condition nor warned plaintiff of it."
> >
> > In ***Rowland***, *supra*, it was further noted: "Where the occupier of land is aware of a concealed condition involving in the absence of precautions an unreasonable risk of harm to those coming in contact with it and is aware that a person (i.e., the plaintiff) on the premises is about to come in contact with it, the trier of fact can reasonably conclude that a failure to warn or to repair the condition constitutes negligence. Whether or not a guest has a right to expect that his host will remedy dangerous conditions on his account, he should reasonably be entitled to rely upon a warning of the dangerous condition so that he, like the host, will be in a position to take special precautions when he comes in contact with it."
> >
> > And then ***Roland*** (at p. 113) sets for the factors to consider when determining whether there is a "*duty of care*" is imposed upon a person: "(T)he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy

> of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (See ***Golick v. State of California*** (2022) 82 Cal.App.5th 1127, 1136-1137.)

Police officers surveilling a laundromat watched as a man suspected of stabbing women in the laundromat "entered and left the laundromat 'several times.'" The officers saw Ms. Davidson in the laundromat but did not warn or otherwise intercede to protect her and, foreseeably, the suspect eventually stabbed her. The California Supreme Court concluded no cause of action for negligence was stated because the officers owed Davidson no "duty to warn or protect." (***Davidson v. City of Westminster*** (1982) 32 Cal.3rd 197, 209.)

Examples of Qualifying or Non-Qualifying "*Special Relationships*:"

Rule:

> A duty of care to protect a victim from third party harm may arise when the defendant has a special relationship with either the victim or the third party. (***Golick v. State of California*** (2022) 82 Cal.App.5th 1127, 1149; citing ***Zelig v. County of Los Angeles*** (2002) 27 Cal.4th 1112, 1129.)

Case Law:

> A relationship that has an aspect of dependency in which one party relies to some degree on the other for protection. (***Regents of University of California v. Superior Court*** (2018) 4 Cal.5th 607, 620–621.)
>
> > "The corollary of dependence in a special relationship is *control*. Whereas one party is dependent, the other has superior control over the means of protection. '[A] typical setting for the recognition of a special relationship is where "the plaintiff is *particularly vulnerable and dependent* upon the defendant who, correspondingly, has some control over the plaintiff's welfare."'" (Italics added; ***Id.***, at p. 621.)

> Also, "Special relationships also have defined boundaries. They create a duty of care owed to a limited community, not the public at large." (***Ibid***.)

As for the government being held civilly liable due to a "*special relationship*" between a government agent and a crime victim, it has been held that there must be "circumstances under which the government may be liable based on law enforcement's failure to act reasonably in protecting members of the public: the factors to a finding of a special relationship include 'detrimental reliance by the plaintiff on the officer's conduct, statements made by them which induced a false sense of security and thereby worsened her position.'" (***Williams v. State of California*** (1983) 34 Cal.3rd 18, 28.)

> "Recovery has been denied, however, for injuries caused by the failure of police personnel to respond to requests for assistance, the failure to investigate properly, or the failure to investigate at all, where the police had not induced reliance on a promise, express or implied, that they would provide protection." (***Id***., at p. 25.)

Where a deputy sheriff voluntarily promised to warn the victim if a prisoner, who had threatened the victim's life, was released, but failed to do so when the prisoner was released, and then killed the victim. The Appellate Court recognized an exception to the general rule of "nonliability for an unperformed gratuitous undertaking," or nonfeasance, "'where a person, *in reasonable reliance thereon*, suffers harm, as by refraining from securing other necessary assistance.'" (Italics in original, ***Morgan v. County of Yuba*** (1964) 230 Cal.App.2nd 938, 944.)

Where an agent of the government requested that the plaintiff provide a foster home for a 16-year-old boy without warning the plaintiff of the boy's homicidal tendencies and violent background, and subsequently, the boy attacked and injured the plaintiff, the plaintiff filed suit against the state for failing to warn her about the boy's history and propensity for violence. The California Supreme Court concluded that "the state's relationship to [the] plaintiff was such that its duty extended to warning of latent, dangerous qualities suggested by the parolee's history or character." The Court further noted that a duty is

imposed "upon those *who create a foreseeable peril*, not readily discoverable by endangered persons, to warn them of such potential peril. Accordingly, the state owed a duty to inform [the plaintiff] of any matter that its agents knew or should have known that might endanger [the plaintiff's] family; at a minimum, these facts certainly would have included 'homicidal tendencies, and a background of violence and cruelty' as well as the youth's criminal record." (***Johnson v. State of California*** (1968) 69 Cal.2nd 782, 785-786.)

A defendant therapist had a special relationship with the patient giving rise to a duty to warn a potential victim where the patient made specific threats against the victim. However, the defendant law enforcement officers who had briefly detained the patient had no duty of care to the decedent because there was no "special relationship" between them and either the victim or the patient. Also, the Court found no facts to support a cause of action under ***Restatement Second of Torts*** (1965**) section 321**, which provides: "'If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.'" (***Tarasoff v. Regents of University of California*** (1976) 17 Cal.3rd 425, 436, 444, and fn. 18.)

Plaintiffs brought an action against a county after their five-year-old son was killed by a juvenile offender within 24 hours of the offender's release on temporary leave. The plaintiffs alleged that the county was negligent in releasing the juvenile into the community and for failing to warn parents in the vicinity of the juvenile's release. The trial court sustained the county's demurrer and the California Supreme Court affirmed. The Court distinguished ***Johnson v. State of California***, *supra*, noting that the county neither had a special and continuous relationship with the plaintiffs nor knowingly placed the decedent into a foreseeably dangerous position. The Court distinguished ***Tarasoff v. Regents of University of California***, *supra*, on the basis that the decedent was not a foreseeable or readily identifiable target of the juvenile's threats. In summary, the Court held: "[P]ublic entities and employees have no affirmative duty to warn of the release of an inmate with a violent history who has made *nonspecific threats of harm directed at nonspecific victims*." (Italics in original;

Thompson v. County of Alameda (1980) 27 Cal.3rd 741, 751-754.)

Where the assailant was under surveillance by two police officers for the purpose of preventing assaults and apprehending a man who had previously stabbed other women in the area, the officers were aware of the plaintiff's presence but did not warn him. Eventually, the assailant stabbed the plaintiff. The trial court sustained the defendant City's demurrer. The California Supreme Court affirmed. The Court held that the officers had no duty to warn the plaintiff because there was no special relationship between the officers and the plaintiff. The court recognized a common theme running through cases in which a special relationship had been found, and where there "was the voluntary assumption by the public entity or official of a duty toward the injured party." "'Absent an indication that the police had induced decedent's reliance on a promise, express or implied, that they would provide her with protection, it must be concluded that no special relationship existed and that appellant has not stated a cause of action.'" (***Davidson v. City of Westminster*** (1982) 32 Cal.3rd 197, 203-206; quoting ***Hartzler v. City of San Jose*** (1975) 46 Cal.App.3rd 6, 10.)

California's Supreme Court has also recognized that a special relationship may be predicated on a victim's dependence upon the police for protection. But the Court distinguished ***Johnson v. State of California***, *supra*, by concluding that in this case the victim's peril was not created by the officers, and the victim did not rely on the officers for protection. The court emphasized: "There is simply no reason to speculate that anyone . . . would have acted differently had the officers not placed the laundromat under surveillance." (***Davidson v. City of Westminster*** (1982) 32 Cal.3rd 197, 207-208.)

Where a witness testified in criminal proceedings after a hearing, the witness who had just testified against the defendant asked a police detective if he should be concerned for his safety. The detective told the witness "*he did not have anything to worry about*." The witness relied on the detective's statement and did not act to protect himself. The police learned that the suspect had put "'a contract hit'" on the witness but failed to warn him, and the witness was later shot. (***Id.*** at pp. 927–929.) The appellate

court recognized that a plaintiff may establish a special relationship by showing reliance on the officers' conduct and statements, which induced a false sense of security and thereby worsened the plaintiff's position. (***Carpenter v. City of Los Angeles*** (1991) 230 Cal.App.3rd 923, 927, 931-932.)

"(A)lthough **§§ 815.2** and **820.2** may limit liability for discretionary acts such as a government agency's decision to investigate, subsequent illegal actions taken in the course of carrying out such a discretionary decision are not similarly shielded. In ***Johnson*** (*v.* ***State*** (1968) 69 Cal.2nd 782), the California Supreme Court noted that although a determination of which governmental actions are 'discretionary' and therefore immune from liability would have to occur on a case by case basis, the distinction 'between the "planning" and "operational" levels of decision making . . . offers some basic guideposts' for making that determination. . . . In general, the court suggested, policy decisions would be protected by **§ 820.2**, while the steps taken in implementing those decisions, though involving an exercise of discretion at some level, would not be. . . . Thus, in that case, the State of California could be held liable for the negligent actions of a placement officer of the Youth Authority in failing to warn foster parents that the child placed with them had a history of violence and cruelty." (***Rattray v. City of National City*** (9th Cir. 1994) 51 F.3rd 793, 798.)

See **Gov't. Code §§ 815.2** & **820.2**, under "*Statutory Immunity from Civil Liability as it Relates to Criminal Cases*." below.

The trial court erred by denying the Department of Corrections and Rehabilitation's motions for nonsuit and judgment notwithstanding the verdict after a jury found the Department was partially at fault for a parolee's crimes based upon the Department's failure to warn the victim of the parolee's dangerous propensities. The Court ruled that the evidence was insufficient to establish that a "*special relationship*" existed between the parole agents and the victim. Absent evidence that either agent who had been assigned to supervise the parolee had made an express or implied promise of protection causing detrimental reliance by the victim, who was the parolee's grandmother, in opening her home to the parolee, the Department had no civil liability. The evidence also did not demonstrate that

either agent had created a foreseeable peril that was not readily discoverable by the victim because neither agent was shown to have been aware that the parolee posed a particularized threat of harm to the victim. (***Russell v. Department of Corrections and Rehabilitation*** (2021) 72 Cal.App.5th 916.)

> In evaluating whether a special relationship between the victim and parole agents, the ***Russell*** Court (at pp. 936-937) noted the following limitations:
>
> > A special relationship between the victim and one agent does not transfer to another agent. (Citing ***Baker v. City of Los Angeles*** (1986) 188 Cal.App.3rd 902, 908.)
> >
> > A special relationship established by one officer's voluntary act does not obligate the entire department. (***Ibid***.)
> >
> > "(A) government employee's conduct establishing a special relationship 'on one occasion does not, by itself, give rise to a continuing special relationship and duty at a later date—or with other [employees].'" (Quoting ***Zelig v. County of Los Angeles*** (2002) 27 Cal.4th 1112, 1129–1130.)

***Statutory Immunity from Civil Liability as it Relates to Criminal Cases; The Government Claims Act*:**

> *The* ***Government Claims Act***: "The **Government Claims Act** abolished common law tort liability and immunity for public entities, replacing it with 'a comprehensive statutory scheme governing the liabilities and immunities of public entities and public employees for torts.'" (***Leon v. County of Riverside*** (2023) 14 Cal.5th 910, at p. 918, quoting ***Quigley v. Garden Valley Fire Protection Dist.*** (2019) 7 Cal.5th 798, at p. 803.)
>
> > "As a general rule, **the Act** makes public entities liable for injuries proximately caused by their employees in the course of employment but immunizes the public entity from liability when the employee is immune." (***Leon v. County of Riverside***, *supra*, at p. 918; citing **Gov't. Code § 815.2**, **subds**. **(a)**, **(b)**.)

Gov't. Code § 815(a): Public entities are immune from civil liability except as provided by statute.

> See ***Richardson v. Department of Motor Vehicles*** (2018) 25 Cal.App.5th 102.

Gov't. Code § 815.1(b): Public entities are immune where their employees are immune, except as otherwise provided by statute.

Gov't. Code § 815.2:

> **(a)** A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.
>
> **(b)** Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.
>
> > "**Government Code section 815.2**, **subdivision (b)**, extends an employee's immunity to the public entity in certain circumstances." (***Silva v. Langford*** (2022) 79 Cal.App.5th 710, 720.)
> >
> > See ***Leon v. County of Riverside*** (2023) 14 Cal.5th 910, at pp. 917-918, for the history leading up to the enactment of **Government Claims Act**, including **Gov't. Code § 815.2**.

Gov't. Code § 818.4: Determination as to issuance, denial, suspension or revocation of license or similar authorization A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.

> See ***Richardson v. Department of Motor Vehicles*** (2018) 25 Cal.App.5th 102.

Gov't. Code § 820(a): Public employees are liable for their torts except as otherwise provided by statute.

Gov't. Code § 820.2: "(A) public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

See ***Conway v. County of Tuolumne*** (2014) 231 Cal.App.4th 1005, 1013-1021: Under the circumstances of this case, the defendant county of Tuolumne was held to be immune from civil liability for the discretionary (as opposed to ministerial) conduct of its officers. Once officers decided to arrest plaintiff's son, they were vested with the discretion in determining the best way to accomplish that goal, using personal deliberation, decision, and professional judgment. This discretion included the possible use of tear gas as a way to determine whether plaintiff's son was in plaintiff's mobile home. Given the potential impact of liability on such decisions, **Gov't. Code § 820.2** provided immunity for the officers' actions. (See also ***Caldwell v. Montoya*** (1995) 10 Cal.4th 972, 980.)

In a **42 U.S.C. § 1983** civil action against a city (Clovis) and a county (Fresno), whose SWAT teams had caused substantial damage to plaintiffs' property while attempting to make an arrest, the federal district court was held to have properly found that the plaintiffs' evidence failed to create a genuine issue of fact because record evidence showed that the city and county defendants had a general policy of obtaining warrants prior to entry, of using reasonable force, and the reasonable use of tear gas. The plaintiffs failed to establish a triable issue that any of these policies caused any constitutional injuries, or that there was a persistent and widespread violation of these policies. The district court did not err in concluding that the defendants were immune from liability for negligence because public entities like defendants were immune if the alleged injuries were caused by the officers' "discretionary acts," pursuant to **Cal. Gov't Code §§ 820.2** and **815.2(b)**. (***Jessen v. County of Fresno*** (9th Cir. 2020) 808 F. Appx. 432; unpublished.)

"'The immunity applies even to "lousy" decisions in which the worker abuses his or her discretion.' ***Christina C. v. Cty. of Orange***, 220 Cal.App.4th 1371, 1381, . . . (2013). But 'to be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place.' ***Johnson v. State***, 69 Cal.2nd 782, 794 n.8, . . . (1968)." (***Recchia v. City of Los Angeles Department of Animal Services*** (9th Cir. 2018) 889 F.3rd 553, 563-564; finding Animal Welfare Officers' decision to seize 20 sick and injured birds from plaintiff (a homeless person living on the street) to be within their discretion under **P.C. § 597(a)(1)**, for which no statutory tort action is available.)

P.C. § 597(a)(1) reads as follows: "(W)hen [an] officer has reasonable grounds to believe that very prompt action is required

> to protect the health or safety of the animal or the health or safety of others, the officer shall immediately seize the animal."

"(A)lthough **§§ 815.2** and **820.2** may limit liability for discretionary acts such as a government agency's decision to investigate, subsequent illegal actions taken in the course of carrying out such a discretionary decision are not similarly shielded. In ***Johnson*** (v. ***State*** (1968) 69 Cal.2nd 782), the California Supreme Court noted that although a determination of which governmental actions are 'discretionary' and therefore immune from liability would have to occur on a case by case basis, the distinction 'between the "planning" and "operational" levels of decision making . . . offers some basic guideposts' for making that determination. . . . In general, the court suggested, policy decisions would be protected by **§ 820.2**, while the steps taken in implementing those decisions, though involving an exercise of discretion at some level, would not be. . . . Thus, in that case, the State of California could be held liable for the negligent actions of a placement officer of the Youth Authority in failing to warn foster parents that the child placed with them had a history of violence and cruelty." (***Rattray v. City of National City*** (9th Cir. 1994) 51 F.3rd 793, 798.)

See ***Sharp v. County of Orange*** (9th Cir. 2017) 871 F.3rd 901, 920-921; discussing (1) "discretionary" immunity under **Cal. Gov't. Code § 820.2**; (2) "prosecutorial" immunity under **Cal. Gov't. Code § 821.6**; (3) arrest-warrant immunity under **Cal. Civ. Code § 43.55(a)**; and (4) false-arrest immunity under **Cal. Penal Code § 847(b)**, in an "unlawful retaliation" case.

> "'As a matter of law, **section 820.2** ["discretionary"] immunity does not apply to an officer's decision to detain or arrest a suspect.' (fn. omitted) ***Liberal v. Estrada***, 632 F.3d 1064, 1084 (9th Cir. 2011). Nor would this immunity extend to any other police action in this case because **Cal. Gov. Code § 820.2** covers only 'policy' decisions made by a 'coordinate branch[] of government,' not 'operational decision[s] by the police purporting to apply the law.' ***Id.*** at 1084-85 (internal quotation marks omitted). The district court thus correctly denied discretionary immunity." (pg. 920.)

Gov't. Code § 820.4: *Non-Negligent Law Execution or Enforcement*; *Absence of Immunity for False Arrest or Imprisonment*:

> A public employee is *not* liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment.

Gov't. Code § 820.6: *Good Faith Action Under Unconstitutional, Invalid, or Inapplicable Enactment*:

> If a public employee acts in good faith, without malice, and under the apparent authority of an enactment that is unconstitutional, invalid or inapplicable, he is not liable for an injury caused thereby except to the extent that he would have been liable had the enactment been constitutional, valid and applicable.

Gov't. Code § 820.8: *Act or Omission of Another Person*; *Absence of Immunity from Liability for Own Act or Omission*:

> Except as otherwise provided by statute, a public employee is *not* liable for an injury caused by the act or omission of another person. Nothing in this section exonerates a public employee from liability for injury proximately caused by his own negligent or wrongful act or omission.

Gov't. Code § 821.6: A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.

> Where a plaintiff brought an action for false imprisonment against the Los Angeles County Sheriff, asserting the plaintiff was jailed for longer than his sentence due to administrative errors, the California Supreme Court reversed the trial court's judgment for the county based on section **821.6** immunity. The Supreme Court held that the section did not immunize the sheriff for liability for false imprisonment, and accordingly, the county could be liable for the sheriff's conduct under **section P.C. 815.2(b)**. The Court's reasoning what that: "[T]he history of **section 821.6** demonstrates that the Legislature intended the section to protect public employees from liability only for malicious prosecution and not for false imprisonment. … [¶] … [T]he suits against government employees or entities cited by the Senate Committee in commenting upon **section 821.6** all involve the government employees' acts in filing charges or swearing out affidavits of criminal activity against the plaintiff. No case has predicated a finding of malicious prosecution on the holding of a person in jail beyond his term or beyond the completion of all criminal proceedings against him." (***Sullivan v. County of Los Angeles*** (1974) 12 Cal.3rd 710, 719-720.)
>
> > Subsequent cases have, for the most part, followed this mandate. See ***Baughman v. State of California*** (1995) 38 Cal.App.4th 182, 193; ***Amylou R. v. County of Riverside*** (1994) 28 Cal.App.4th 1205, 1208; **Jenkins v. County of Orange** (1989) 212 Cal.App.3rd 278, 283; ***Randle v. City and County of San Francisco*** (1986) 186

> Cal.App.3rd 449, 456; Strong v. State of California (2011) 201 Cal.App.4th 1439, 1461.
>
> And see ***Leon v. County of Riverside*** (2023) 14 Cal.5th 910, at pp. 918-919, discussed below, noting that the rule as enunciated in ***Sullivan*** (i.e., that there must be an actual prosecution for immunity under **Gov't. Code § 821.6** to apply) is not limited to a false imprisonment scenario.

But see ***Asgari v. City of Los Angeles*** (1997) 15 Cal.4th 744, at p. 748, where the Court held immunity under **section 821.6** extended to prevent a plaintiff from recovering damages for false arrest attributable to the period in which the plaintiff was incarcerated after he was arraigned on criminal charges. The court observed that although **section 821.6** had been primarily applied to immunize prosecuting attorneys and similarly-situated individuals, it also "applies to police officers as well as public prosecutors since both are public employees within the meaning of the **Government Code**." (***Id.*** at p. 757.)

"(A)lthough the Courts of Appeal had primarily applied **section 821.6** to immunize prosecuting attorneys, the section had been construed broadly to immunize torts committed in the course of police investigations, including by police officers, citing ***Lawrence v. Superior Court*** (2018) 21 Cal.App.5th 513, 526. . . . (where) **§ 821.6** immunized CHP from liability for releasing a vehicle impounded during an investigation to the wrong claimant." (***Silva v. Langford*** (2022) 79 Cal.App.5th 710, 715; the Court reversing the trial court's granting of a demurrer in favor of the civil defendants.)

> In ***Silva***, the Ninth Circuit Court of Appeal held that the trial court had erroneously granted the civil defendant CHP officer's demurrer where it was alleged that the officer, traveling over the speed limit and without lights or siren, hit and killed the plaintiffs' deceased son. However, the Court declined to decide whether **821.6** immunized the officer in that the Court also held that the officer was immune from suit under **Vehicle Code Section 17004** as an emergency responder.)

The California Supreme Court has since taken a more restrictive view:

> In ***Leon v. County of Riverside*** (2023) 14 Cal.5th 910, plaintiff's husband was shot and killed in the driveway of a mobile home lot near his home. When sheriff's deputies arrived on the scene, they heard additional shots. The deputies dragged the husband to where he was shielded by a vehicle, where they unsuccessfully attempted to revive him. That movement, however, had caused the victim's

pants to slide down to his ankles, exposing his naked body. The victim's body remained in that uncovered state for approximately eight hours while officers searched for the shooter and investigated the shooting. Plaintiff sued the county of Riverside, asserting a single cause of action for the "negligent infliction of emotional distress." Plaintiff's complaint alleged that the deputies failed to exercise reasonable care when they left her husband's body exposed and uncovered for hours, in view of both plaintiff and the general public. The trial court granted the county's motion for summary judgment and entered judgment for the county. The Court of Appeal, Fourth District, Div. Two, affirmed, holding that because the deputies' negligence, if any, in failing to promptly cover or remove plaintiff's husband's body from the scene occurred during the course of the their performance of their official duties and their investigation of the shooting, both the deputies and the county were immune. The California Supreme Court reversed the judgment of the Court of Appeal and remanded the matter for further proceedings. The court concluded the Court of Appeal erred in finding **Gov't. Code § 821.6** conferred absolute immunity on the county for negligent infliction of emotional distress arising out of the alleged mishandling of plaintiff's husband's body. Because plaintiff's claim did not concern alleged harms from the institution or prosecution of judicial or administrative proceedings, **§ 821.6** did not apply. While other provisions of the **Government Claims Act** *may* confer immunity for certain investigatory actions, **§ 821.6**, does not broadly immunize police officers or other public employees for any and all harmful actions they may take in the course of investigating crime. (Overruling ***Leon v. County of Riverside*** (2021) 64 Cal.App.5th 837, which had held to the contrary.)

The Court also held that to the extent that they are inconsistent with this decision, the following cases are disapproved:

> ***Doe v. State of California*** (2017) 8 Cal.App.5th 832;
> ***Strong v. State of California*** (2011) 201 Cal.App.4th 1439;
> ***County of Los Angeles v. Superior Court*** (2009) 181 Cal.App.4th 218;
> ***Paterson v. City of Los Angeles*** (2009) 174 Cal.App.4th 1393;
> ***Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE)*** (2007) 157 Cal.App.4th 1056;
> ***Gillan v. City of San Marino*** (2007) 147 Cal.App.4th 1033;
> ***Javor v. Taggart*** (2002) 98 Cal.App.4th 795;
> ***Ingram v. Flippo*** (1999) 74 Cal.App.4th 1280;

Baughman v. State of California (1995) 38 Cal.App.4th 182;
Amylou R. v. County of Riverside (1994) 28 Cal.App.4th 1205;
Jenkins v. County of Orange (1989) 212 Cal.App.3rd 278; *and*
Citizens Capital Corp. v. Spohn (1982) 133 Cal.App.3rd 887.

See ***Sharp v. County of Orange*** (9th Cir. 2017) 871 F.3rd 901, 920-921; discussing (1) "discretionary" immunity under **Cal. Gov't. Code § 820.2**; (2) "prosecutorial" immunity under **Cal. Gov't. Code § 821.6**; (3) arrest-warrant immunity under **Cal. Civ. Code § 43.55(a)**; and (4) false-arrest immunity under **Cal. Penal Code § 847(b)**, in an "unlawful retaliation" case.

> "The 'prosecutorial' immunity under **Cal. Gov. Code § 821.6** does not apply because it is limited to malicious-prosecution claims. (fn. omitted) In 1974, the California Supreme Court held that § 821.6 immunity does not extend beyond malicious-prosecution claims. ***Sullivan v. Cty. of Los Angeles***, 12 Cal. 3d 710, . . . (Cal. 1974). Since then, intermediate appellate courts have expanded the immunity to investigative steps taken prior to a judicial proceeding, including action by police officers. *E.g.*, ***Gillian v. City of San Marino***, 147 Cal. App. 4th 1033, 1048, . . . (2007). But '[w]hen interpreting state law, a federal court is bound by the decision of the *highest* state court.' ***Hewitt v. Joyner***, 940 F.2d 1561, 1565 (9th Cir. 1991) (emphasis added) (internal quotation marks omitted). Thus, because California's highest court has not extended **§ 821.6** immunity to actions outside of malicious prosecution, this immunity does not apply here." (pgs. 920-921.)

Gov't. Code § 825: *Duty of Public Entity to Pay Judgment, Compromise, or Settlement*:

> **(a)** Except as otherwise provided in this section, if an employee or former employee of a public entity requests the public entity to defend him or her against any claim or action against him or her for an injury arising out of an act or omission occurring within the scope of his or her employment as an employee of the public entity and the request is made in writing not less than *10 days* before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.

If the public entity conducts the defense of an employee or former employee against any claim or action with his or her reasonable good–faith cooperation, the public entity *shall* pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed. However, where the public entity conducted the defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise, or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his or her employment as an employee of the public entity, the public entity is required to pay the judgment, compromise, or settlement only if it is established that the injury arose out of an act or omission occurring in the scope of his or her employment as an employee of the public entity.

Nothing in this section authorizes a public entity to pay that part of a claim or judgment that is for *punitive or exemplary damages*.

(b) Notwithstanding subdivision (a) or any other provision of law, a public entity is authorized to pay that part of a judgment that is for punitive or exemplary damages if the governing body of that public entity, acting in its sole discretion except in cases involving an entity of the state government, finds all of the following:

(1) The judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment as an employee of the public entity.

(2) At the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity.

(3) Payment of the claim or judgment would be in the best interests of the public entity.

As used in this subdivision with respect to an entity of state government, "*a decision of the governing body*" means the approval of the Legislature for payment of that part of a judgment that is for punitive damages or exemplary damages, upon recommendation of the appointing power of the employee or former employee, based upon the finding by the Legislature and the appointing authority of the existence of the three conditions for payment of a punitive or exemplary damages claim. The provisions of **subdivision (a)** of **Section 965.6** shall apply to the payment of any claim pursuant to this subdivision.

The discovery of the assets of a public entity and the introduction of evidence of the assets of a public entity shall not be permitted in an action in which it is alleged that a public employee is liable for punitive or exemplary damages.

The possibility that a public entity may pay that part of a judgment that is for punitive damages shall not be disclosed in any trial in which it is alleged that a public employee is liable for punitive or exemplary damages, and that disclosure shall be grounds for a mistrial.

(c) Except as provided in **subdivision (d)**, if the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to **Chapter 10** (commencing with **Section 3500**) of **Division 4** of **Title 1**, the memorandum of understanding shall be controlling without further legislative action, except that if those provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual **Budget Act**.

(d) The subject of payment of punitive damages pursuant to this section or any other provision of law shall not be a subject of meet and confer under the provisions of **Chapter 10** (commencing with **Section 3500**) of **Division 4** of **Title 1**, or pursuant to any other law or authority.
(e) Nothing in this section shall affect the provisions of **Section 818** prohibiting the award of punitive damages against a public entity. This section shall not be construed as a waiver of a public entity's immunity from liability for punitive damages under **Section 1981**, **1983**, or **1985** of **Title 42** of the **United States Code**.

(f)

(1) Except as provided in **paragraph (2)**, a public entity *shall not* pay a judgment, compromise, or settlement arising from a claim or action against an elected official, if the claim or action is based on conduct by the elected official by way of tortiously intervening or attempting to intervene in, or by way of tortiously influencing or attempting to influence the outcome of, any judicial action or proceeding for the benefit of a particular party by contacting the trial judge or any commissioner, court–appointed arbitrator, court–appointed mediator, or court–appointed special referee assigned to the matter, or the court clerk, bailiff, or marshal after an action has been filed, unless he or she was counsel of record acting lawfully within the scope of his or her employment on behalf of that party.

Notwithstanding **Section 825.6**, if a public entity conducted the defense of an elected official against such a claim or action and the elected official is found liable by the trier of fact, the court shall order the elected official to pay to the public entity the cost of that defense.

(2) If an elected official is held liable for monetary damages in the action, the plaintiff shall first seek recovery of the judgment against the assets of the elected official. If the elected official's assets are insufficient to satisfy the total judgment, as determined by the court, the public entity may pay the deficiency if the public entity is authorized by law to pay that judgment.

(3) To the extent the public entity pays any portion of the judgment or is entitled to reimbursement of defense costs pursuant to **paragraph (1)**, the public entity shall pursue all available creditor's remedies against the elected official, including garnishment, until that party has fully reimbursed the public entity.

(4) This subdivision shall not apply to any criminal or civil enforcement action brought in the name of the people of the State of California by an elected district attorney, city attorney, or attorney general.

Gov't. Code § 825.2: *Right of Employee or Former Employee to Recover Amount of Payment from Public Entity*:

(a) Subject to **subdivision (b)**, if an employee or former employee of a public entity pays any claim or judgment against him, or any portion thereof, that the public entity is required to pay under **Section 825**, he is entitled to recover the amount of such payment from the public entity.

(b) If the public entity did not conduct his defense against the action or claim, or if the public entity conducted such defense pursuant to an agreement with him reserving the rights of the public entity against him, an employee or former employee of a public entity may recover from the public entity under **subdivision (a)** only if he establishes that the act or omission upon which the claim or judgment is based occurred within the scope of his employment as an employee of the public entity and the public entity fails to establish that he acted or failed to act because of actual fraud, corruption or actual malice or that he willfully failed or refused to conduct the defense of the claim or action in good faith or to reasonably cooperate in good faith in the defense conducted by the public entity.

(c) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to **Chapter 12** (commencing with **Section 3560**) of **Division 4** of **Title 1**, the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual **Budget Act**.

Gov't. Code § 825.4: *Indemnification of Public Entity Paying Claim or Judgment*; *When Public Employee Not Liable to Indemnify*:

Except as provided in **Section 825.6**, if a public entity pays any claim or judgment against itself or against an employee or former employee of the public entity, or any portion thereof, for an injury arising out of an act or omission of the employee or former employee of the public entity, he is not liable to indemnify the public entity.

Gov't. Code § 825.6: *When Public Entity May Recover from Employee or Former Employee*:

(a)

(1) Except as provided in **subdivision (b)**, if a public entity pays any claim or judgment, or any portion thereof, either against itself or against an employee or former employee of the public entity, for an injury arising out of an act or omission of the employee or former employee of the public entity, the public entity *may* recover from the employee or former employee the amount of that payment if he or she acted or failed to act because of actual fraud, corruption, or actual malice, or willfully failed or refused to conduct the defense of the claim or action in good faith. Except as provided in **paragraph (2)** or **(3)**, a public entity *may not* recover any payments made upon a judgment or claim against an employee or former employee if the public entity conducted his or her defense against the action or claim.

(2) If a public entity pays any claim or judgment, or any portion thereof, against an employee or former employee of the public entity for an injury arising out of his or her act or omission, and if the public entity conducted his or her defense against the claim or action pursuant to an agreement with him or her reserving the rights of the public entity against him or her, the public entity may recover the amount of the payment from him or her unless he or she establishes that the act or omission upon which the claim or judgment is based occurred within the scope of his or her

employment as an employee of the public entity and the public entity fails to establish that he or she acted or failed to act because of actual fraud, corruption, or actual malice or that he or she willfully failed or refused to reasonably cooperate in good faith in the defense conducted by the public entity.

(3) If a public entity pays any claim or judgment, or any portion thereof, against an employee or former employee of the public entity for an injury arising out of his or her act or omission, and if the public entity conducted the defense against the claim or action in the absence of an agreement with him or her reserving the rights of the public entity against him or her, the public entity may recover the amount of that payment from him or her if he or she willfully failed or refused to reasonably cooperate in good faith in the defense conducted by the public entity.

(b)

(1) Upon a felony conviction for a violation of **Section 1195** of this code, or of **Section 68**, **86**, **93**, **165**, **504**, or **518** of the **Penal Code**, by an elected official or former elected official of a public entity for an act or omission of that person while in office, the elected official or former elected official shall forfeit any rights to defense or indemnification under **Section 825** with respect to a claim for damages for an injury arising from that act or omission.

(2) If a public entity pays any claim or judgment, or any portion thereof, either against itself or against an elected official or former elected official of the public entity, for an injury arising out of an act or omission of the elected official or former elected official of the public entity, which act or omission constituted a felony violation of **Section 1195** of this code, or of **Section 68**, **86**, **93**, **165**, **504**, or **518** of the **Penal Code**, the public entity shall recover from the elected official or former elected official the amount of that payment upon the felony conviction of the elected official or former elected official for that act or omission. Upon that conviction, the public entity shall also recover from the elected official the costs of any defense to a civil action filed against the elected official for that act or omission.

(c) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to **Chapter 12** (commencing with **Section 3560**) of **Division 4** of **Title 1**, the memorandum of understanding shall be controlling without further legislative action, except that if the provisions of a memorandum of understanding require the expenditure of funds,

the provisions shall not become effective unless approved by the Legislature in the annual **Budget Act**.

Gov't. Code § 850.4: "Neither a public entity, nor a public employee acting in the scope of his employment, is liable for any injury resulting from the condition of fire protection or firefighting equipment or facilities or, except as provided in **Article 1** (commencing with **Section 17000**) of **Chapter 1** of **Division 9** of the **Vehicle Code**, for any injury caused in fighting fires."

The Department of Forestry and Fire Protection was held to be immune from tort liability under **Government Code section 850.4**—which immunizes public entities and employees from liability "'for any injury caused in fighting fires,'" "'except as provided in'" **Vehicle Code section 17000 et sequitur**—where the plaintiffs were engulfed in a wildfire after their vehicle broke down and the firefighters placed them inside the firefighter's fire truck. The court reasoned there was a "latent ambiguity" in **Government Code section 850.4** because "a literal interpretation of statute would . . . produce absurd consequences the Legislature did not intend" and "eliminate a very large portion of the immunity the Legislature intended to confer under section 850.4." (***Varshock v. Department of Forestry & Fire Protection*** (2011) 194 Cal.App.4th 635, 643-644.)

"**Government Code section 850.4** immunity exists 'when a firefighter operates a motor vehicle at the scene of a fire as part of efforts to rescue persons or property from the fire or otherwise combat the fire,' but 'immunity under **section 850.4** does not apply, and potential liability under the **Vehicle Code section 17001** exception exists, if injury results from a firefighter's tortious act or omission in the operation of a motor vehicle while proceeding from another location to a fire in response to an emergency call'" (***Silva v. Langford*** (2022) 79 Cal.App.5th 710, 722-723.)

Civ. Code § 43.55(a): "There shall be no liability on the part of, and no cause of action shall arise against, any peace officer who makes an arrest pursuant to a warrant of arrest regular upon its face if the peace officer in making the arrest acts without malice and in the *reasonable belief that the person arrested is the one referred to in the warrant*."

See ***Sharp v. County of Orange*** (9th Cir. 2017) 871 F.3rd 901, 920-921; discussing (1) "discretionary" immunity under **Cal. Gov't. Code § 820.2**; (2) "prosecutorial" immunity under **Cal. Gov't. Code § 821.6**; (3) arrest-warrant immunity under **Cal. Civ. Code § 43.55(a)**; and (4) false-arrest immunity under **Cal. Penal Code § 847(b)**, in an "unlawful retaliation" case.

> "The arrest-warrant immunity under **Cal. Civ. Code § 43.55(a)** shields officers from suit when executing an arrest warrant when they act with a 'reasonable belief' that the arrestee is the subject of the warrant. (fn. omitted) As we have already explained, however, the deputies *unreasonably* assumed that Sharp III was the warrant subject. This immunity therefore does not apply." (pg. 821.)

Pen. Code § 836(a), **(b)**: Such arrest was lawful or when the officer, at the time of the arrest, had *reasonable* or *probable cause* to believe the arrest was lawful.

Pen. Code § 838: A magistrate orally ordered the officer to arrest a person who was committing a public offense in the magistrate's presence.

Pen. Code § 839: An officer was responding to an oral request for assistance in making an arrest.

Pen. Code § 847(b)(1): "There shall be no civil liability on the part of, and no cause of action shall arise against, any peace officer . . . for false arrest or false imprisonment arising out of any arrest under any of the following circumstances: [] The arrest was lawful, or the peace officer, at the time of the arrest, *had reasonable cause to believe the arrest was lawful*."

> See ***Sharp v. County of Orange*** (9th Cir. 2017) 871 F.3rd 901, 920-921; discussing (1) "discretionary" immunity under **Cal. Gov't. Code § 820.2**; (2) "prosecutorial" immunity under **Cal. Gov't. Code § 821.6**; (3) arrest-warrant immunity under **Cal. Civ. Code § 43.55(a)**; and (4) false-arrest immunity under **Cal. Penal Code § 847(b)**, in an "unlawful retaliation" case.
>
> > "The false-arrest immunity under **Cal. Penal Code § 847(b)(1)** protects officers from suit when they make an arrest that they had 'reasonable cause' to believe was lawful. (fn. omitted) As with the previous immunity, our conclusion that the arresting deputies lacked such a reasonable belief precludes the application of state-law immunity under **Cal. Penal Code § 847(b)(1)**." (pg. 921.)

Veh. Code § 17001: A statutory exception to public entities' general tort immunity: "A public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment.

Veh. Code § 17004: A public employee is *not liable* for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle while responding to an emergency call or when in the immediate pursuit

of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm or other emergency call.

> However, a public entity's argument that *the entity* was also immunized from liability under **Vehicle Code section 17001** for injuries caused by its police officers during a high-speed chase, even though the police officers enjoyed first-responder immunity under **Vehicle Code § 17004**, was rejected by the California Supreme Court. The Court explained that in considering whether **Government Code § 815.2(b)** applies, "[t]he question . . . is whether liability is 'otherwise provided by statute.' The Court held that it must be answered in the affirmative. (***Brummett v. County of Sacramento*** (1978) 21 Cal.3rd 880, 885-886.)
>
> > **Veh. Code § 17001:** "A public entity *is liable* for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment."
>
> The City of Sacramento was held not to be immune from suit under **Gov. Code, § 815.2(b)** for its police officers' alleged negligence in a vehicle pursuit, explaining "[t]he specific provision for public entity liability in V**ehicle Code section 17001** overrides the general derivative immunity provided by **Government Code section 815.2**." (***City of Sacramento v. Superior Court*** (1982) 131 Cal.App.3rd 395, 400.) 443]
>
> See ***Silva v. Langford*** (2022) 79 Cal.App.5th 710, 716-717, where the defendant CHP officer was operating his patrol car in the line of duty and was responding to an emergency call when he struck and killed the plaintiffs' son. As such, the plaintiffs conceded on appeal that the officer was therefore immune from civil liability under **Veh. Code § 17004**. (pgs. 716-717.) However, the Court also noted that the officer's employing agency may not be: "(I)t appears to be desirable to provide by statute that a public entity is liable even when the employee is immune." (pg. 721.)

Veh. Code § 17004.7: Immunity of a Public Agency Employing Peace Officers in Civil Action Resulting From a Vehicular Pursuit:

> Limits the liability that **§ 17001** otherwise permits by affording immunity to public agencies that adopt and implement appropriate vehicle pursuit policies. (***Ramirez v. City of Gardena*** (2018) 5 Cal.5th 995, 999.)
>
> **Veh. Code § 17004.7(b)(1):** A public agency employing peace officers that adopts and promulgates a written policy on, and provides regular and periodic training on an annual basis for, vehicular pursuits complying with **subdivisions (c)** and **(d)** is immune from liability for civil damages for

personal injury to or death of any person or damage to property resulting from the collision of a vehicle being operated by an actual or suspected violator of the law who is being, has been, or believes he or she is being or has been, pursued in a motor vehicle by a peace officer employed by the public entity.

Because Sheriff's Deputies had been trained in accordance with the sheriff's vehicle pursuit policy, which included adequate consideration of speed limits under **Pen. Code, § 13519.8(b)**, the sheriff's office was entitled to immunity under **Veh. Code § 17004.7** in a personal injury suit brought by a motorcyclist who had been struck by fleeing suspects. The policy satisfied the promulgation requirement of **V.C. § 17004.7(b)(2)** because a general order requiring officers to sign off on all policies adequately ensured certification, an electronic sign-off procedure provided certification in writing consistent with **Evid. Code § 250**, and noncompliance by some officers did not amount to a failure to implement the policy. The policy complied with **subdivision (c)(8)** of **V.C. § 17004.7** because it did not give officers unfettered discretion in determining whether to request air support. (***Riley v. Alameda County Sheriff's Office*** (2019) 43 Cal.App.5th 492.)

Summary judgment was improperly entered in favor of a city in a wrongful death and negligence action against it arising from the death of a motorcyclist who was the subject of a police vehicle pursuit when he crashed. In so holding, it was noted that the city was not entitled to immunity under **Veh. Code § 17004.7**, given the absence of vehicle pursuit training that met the standards imposed by **Cal. Code Regs.**, **tit. 11**, **§ 1081**, because not only did the city fail to present undisputed evidence that the training it provided in the year prior to the incident at issue met the annual one-hour standard, the city failed to dispute the fact, put forth by plaintiffs, that the training implemented by the city comprised a single video of less than half the required one-hour duration. (***Flores v. City of San Diego*** (2022) 83 Cal.App.5th 360.)

Public Entities: Under California law, public entities are liable for violation of state law only as provided by statute. (***Eastburn v. Reg'l Fire Prot. Auth.*** (2003) 31 Cal.4th 1175, 1183.)

Federal Immunity under the ***Public Readiness and Emergency Preparedness*** (**"*PREP*"**) ***Act*: *42 U.S.C. § 247d-6d*:**

Reversing the district court's denial of Oregon State Governor Kate Brown and Director of the Oregon Health Authority Patrick Allen's motion to dismiss a claim brought by Oregon state inmates for damages stemming from defendants' assignment of a lower priority COVID-19 vaccination tier to state inmates than to correctional officers, the panel held that the civil defendants were immune from liability for the vaccination

prioritization claim under the **Public Readiness and Emergency Preparedness** ("**PREP**") **Act**. At the start of the COVID-19 pandemic, Governor Brown and Director Allen, both responsible for crafting the state's response to the virus's spread, established priority tiers to guide the state's vaccine rollout, and assigned state prison inmates to a lower priority vaccination tier than correctional officers. On March 17, 2020, the Secretary of Health and Human Services issued a declaration announcing that COVID-19 constituted a public health emergency and that immunity as prescribed in the **PREP Act** was in effect for the "manufacture, testing, development, distribution, administration, and use of" covered countermeasures. The Ninth Circuit Court of Appeal held that the statutory requirements for the **PREP Act** immunity were met with respect to the vaccine prioritization damages claim because the "administration" of a covered countermeasure includes prioritization of that countermeasure when its supply was limited. The panel further concluded that the **PREP Act's** provisions extend immunity to persons who make policy-level decisions regarding the administration or use of covered countermeasures. The Ninth Circuit next held that the **PREP Act** provides immunity from suit and liability for constitutional claims brought under **42 U.S.C. § 1983**. Although the **PREP Act** does not specifically mention **§ 1983**, Congress used terms that plainly and unambiguously define a broad scope of immunity that includes claims brought under **§ 1983**. Congress, therefore, intended to expressly immunize covered persons from **§ 1983** actions for claims covered by the **PREP Act**, even if those claims are federal constitutional claims. (***Maney v. Brown*** (9th Cir. 2024) 91 F.4th 1296.)

***Case Law Immunity*:**

Case Law Immunity from Civil Liability and the Requirement of a "Special Relationship:"

"As a general rule, a person who has not created a peril has no duty to come to the aid of another 'no matter how great the danger in which the other is placed, or how easily he could be rescued, unless there is some relationship between them which gives rise to a duty to act. [Citations.]' [Citation.] This rule applies to police officers as well as to other citizens: The police owe duties of care only to the public at large and, except where they enter into a 'special relationship,' have no duty to offer affirmative assistance to anyone in particular." (***Benavidez v. San Jose Police Dept.*** (1999) 71 Cal.App.4th 853, 859–860.)

In a case in which a decedent's wife and family sued a county for wrongful death, negligence, negligent infliction of emotional distress, and a deprivation of constitutional rights, the trial court erred by ruling the county did not owe a duty of care. The sheriff's department, through its

actions, undertook the responsibility of rescuing the lost decedent because the sheriff's department was actively involved in all aspects of locating the decedent, and by appointing an incident commander, the sheriff's department signaled that it was taking control of the rescue. (***Arista v. County of Riverside*** (2018) 29 Cal.App.5th 1051, 1060-1066.)

In a wrongful death case, the Appellate Court concluded that an arrestee's negligence in swallowing methamphetamine was not relevant to the CHP officers' response, while his post-ingestion negligence was relevant. The trial court properly excluded evidence of the former and permitted the jury to consider evidence of the latter. The trial court did not err in denying defendants' motion in limine to exclude evidence or argument that the officers attempted to coerce the arrestee's confession to drug possession. It was relevant for the jury to understand that the arrestee had an incentive to lie about what he ingested and decline medical care in order to avoid admitting the crime of possession of a controlled substance, and to assess whether and how a reasonable officer would have taken this into account in responding to the situation. As a rule, one has no duty to come to the aid of another. A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act. There is a special relationship between a jailer and prisoner. It has been observed that a typical setting for the recognition of a special relationship is where the plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly, has some control over the plaintiff's welfare. Therefore, once in custody, an arrestee is vulnerable, dependent, subject to the control of the officer and unable to attend to his or her own medical needs. Due to this special relationship, the officer owes a duty of reasonable care to the arrestee. (***Frausto v. Department of the California Highway Patrol*** (2020) 53 Cal.App.5th 973.)

The trial court erred by denying the Department of Corrections and Rehabilitation's motions for nonsuit and judgment notwithstanding the verdict after a jury found the Department was partially at fault for a parolee's crimes based upon the Department's failure to warn the victim of the parolee's dangerous propensities. The Court ruled that the evidence was insufficient to establish that a "*special relationship*" existed between the parole agents and the victim. Absent evidence that either agent who had been assigned to supervise the parolee had made an express or implied promise of protection causing detrimental reliance by the victim, who was the parolee's grandmother, in opening her home to the parolee, the Department had no civil liability. The evidence also did not demonstrate that either agent had created a foreseeable peril that was not readily discoverable by the victim because neither agent was shown to have been aware that the parolee posed a particularized threat of harm to the victim.

(***Russell v. Department of Corrections and Rehabilitation*** (2021) 72 Cal.App.5th 916.)

Effect of an Employer-Employee Relationship:

A police officer employed by the police department of the City and County of San Francisco (City) left his department-approved firearm unsecured in his vehicle after returning home from an assigned training session. That evening his vehicle was burglarized and the firearm stolen. Soon thereafter, plaintiff's son was killed with that weapon. Plaintiff sued the City, but the trial court granted the City's motion for summary judgment, finding as a matter of law the officer's conduct was not within the scope of his employment. The Appellate Court reversed, holding that in the context of the enterprise of policing, a jury could reasonably find the officer's failure to safely secure his weapon was "not so unusual or startling that it would seem unfair to include the loss (of an employee's firearm) resulting from it among other costs of the employer's business." (***Perez v. City and County of San Francisco*** (2022) 75 Cal.App.5th 826; citing ***Farmers Ins. Group v. County of Santa Clara*** (1995) 11 Cal.4th 992, 1003.)

***Effect of a Prior Conviction, Sentence, or Probable Cause Determination*:**

Rule: ***Heck v. Humphrey*** (1994) 512 U.S. 477 [114 S.Ct. 2364; 129 L.Ed.2nd 383] bars a **42 U.S.C. § 1983** civil rights lawsuit if the lawsuit is inconsistent with a prior criminal conviction or sentence arising out of the same facts, unless the conviction or sentence has been subsequently resolved in the plaintiff's favor. (***Id***., at pp. 486-487.)

Heck requires the reviewing court to answer three questions:

(1) Was there an underlying conviction or sentence relating to the **section 1983** claim?

(2) Would a "judgment in favor of the plaintiff in the **section 1983** action necessarily imply the invalidity of the prior conviction or sentence?"

(3) If so, was the prior conviction or sentence already invalidated or otherwise favorably terminated?

(***Fetters v. County of Los Angeles*** (2016) 243 Cal.App.4th 825, 834-835; citing ***Magana v. County of San Diego*** (S.D.Cal. 2011) 835 F.Supp.2nd 906, 910.)

> See also ***Yount v. City of Sacramento*** (2008) 43 Cal.4th 885, 893-894; extending ***Heck*** to California state law claims.

The Rule Under ***Heck***: "'When a plaintiff who has been convicted of a crime under state law seeks damages in a **§ 1983** suit, "the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.'" . . . If it would, the civil action is barred." (***Reese v. County of Sacramento*** (9th Cir. 2018) 888 F.3rd 1030, 1045-1046; quoting ***Hooper v. County of San Diego*** (9th Cir. 2011) 629 F.3rd 1127, 1130.)

> In ***Reese***, plaintiff was shot by a sheriff's deputy after displaying a knife. He later pled guilty to the misdemeanor crime of exhibiting a weapons in a rude and threatening manner, per **P.C. § 417(a)(1)**. Upon suing the deputy in federal court pursuant to **18 U.S.C. § 1983**, for using unnecessary force in arresting him, the Court held that ***Heck*** did not prevent the plaintiff from bringing the lawsuit in that the deputy failed to identify anything in the record showing the specific factual basis for the plaintiff's misdemeanor conviction. "Without such information, this Court cannot determine that Reese's claim of excessive force in this case would call into question the validity of his misdemeanor weapon conviction." (***Id***., at p. 1046.)

The defendant's later withdrawal of his plea and dismissal of the case, following the completion of his sentence, does not negate the applicability of the rule of ***Heck***. (***Fetters v. County of Los Angeles*** (2016) 243 Cal.App.4th 825, 834-835, and fn. 6.)

However, a subsequent dismissal of the civil plaintiff's criminal conviction under **P.C. § 1203.4** (permitting the dismissal of a guilty verdict after a person has successfully fulfilled their term of probation) does not invalidate the conviction for purposes of removing the ***Heck*** bar, and thus prevents the plaintiff from bringing a civil action under **42 U.S.C. § 1983** where it was alleged that the plaintiff was the victim of excessive force used by a police officer/civil defendant and the criminal jury's guilty verdict necessarily found that the force used was not unreasonable under the circumstances. (***Baranchik v. Fizulich*** (2017) 10 Cal.App.5th 1210.)

Heck's holding has been extended to claims for declaratory relief. (***Edwards v. Balisok*** (1997) 520 U.S. 641, 648 [117 S.Ct. 1584; 137 L.Ed.2nd 906].)

> The plaintiff in ***Edwards*** alleged that he had been deprived of earned good-time credits without due process of law, because the decision-maker in disciplinary proceedings had concealed

> exculpatory evidence. Because the plaintiff's claim for declaratory relief was "based on allegations of deceit and bias on the part of the decision-maker that necessarily imply the invalidity of the punishment imposed," ***Edwards*** held, it was "not cognizable under **§ 1983**." ***Id***. ***Edwards*** went on to hold, however, that a requested injunction requiring prison officials to date-stamp witness statements was not ***Heck***-barred, reasoning that a "prayer for such prospective relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits, and so may properly be brought under **§ 1983**." (***Ibid***.)

Heck bars **42 U.S. C. § 1983** suits even when the relief sought is prospective injunctive or declaratory relief, "if success in that action would necessarily demonstrate the invalidity of confinement or its duration." (***Wilkinson v. Dotson*** (2005) 544 U.S. 74, 81-82 [125 S.Ct. 1242; 161 L.Ed.2nd 253].)

> However, ***Wilkinson*** also held that the plaintiffs in that case could seek a prospective injunction compelling the state to comply with constitutional requirements in parole proceedings *in the future*. The Court observed that the prisoners' claims for future relief, "if successful, will not necessarily imply the invalidity of confinement or shorten its duration." (***Id***., at 82.)

Although the ***Heck*** line of cases precludes most—but not all—requests for retrospective relief, that doctrine has no application to a request for an injunction enjoining prospective enforcement of the ordinances. (***Martin v. City of Boise*** (9th Cir. 2019) 920 F.3rd 584, 611-613.)

> Certiorari has been granted in this case and is currently pending before the U.S. Supreme Court.

The theory of ***Heck*** prevented a plaintiff's **42 U.S.C. § 1983** suit for wrongful incarceration (I.e., 42 years) where, although pursuant to a plea bargain his prior 1972 jury conviction was vacated, plaintiff entered a new "no contest" plea in 2013 to the same charges for which he was sentenced to "time served." Allowing plaintiff's lawsuit to go forward "would necessarily imply the invalidity of his [2013] conviction or sentence," in violation of the rule of ***Heck***. (***Taylor v. County of Pima*** (9th Cir. 2019) 913 F.3rd 930, 935.)

A federal district court's dismissal of defendant's **Fourth Amendment** excessive force **§ 1983** civil rights complaint was affirmed because it was barred by ***Heck v. Humphrey*** (1994) 512 U.S. 477 [114 S.Ct. 2364; 129 L.Ed.2nd 383]. Defendant had been charged with resisting arrest under **Cal. Penal Code § 148(a)(1)**. Per the court, ***Hooper v. County of San***

Diego (9th Cir. 2011) 629 F.3rd 1127 (see below), did not help him in that the court could not separate out which of his obstructive acts led to his conviction since all of them did. The dog bite was unquestionably part of the actions that formed the basis of his conviction. The Court also ruled that he could not stipulate to the lawfulness of the dog bite as part of his **§ 148(a)(1)** guilty plea and then use the very same act to allege an excessive force claim under **§ 1983** as success on such a claim would necessarily imply that his conviction was invalid. (***Sanders v. City of Pittsburg*** (9th Cir. 2021) 14 F.4th 968.)

Exceptions:

Plaintiff appealed from the judgment of the United States District Court for the Southern District of California, which granted summary judgment to defendant on her excessive force claims, holding that the claims were barred as a result of her conviction for resisting a peace officer under **Cal. Penal Code § 148(a)(1)**. The Ninth Circuit reversed. **Cal. Penal Code § 148(a)(1)** does not require that an officer's lawful and unlawful behavior be divisible into two discrete "phases," or time periods. It was sufficient for a valid conviction under **Cal. Penal Code § 148(a)(1)** that at some time during a continuous transaction an individual resisted, delayed, or obstructed an officer when the officer was acting lawfully. It did not matter that the officer might also, at some other time during that same "continuous transaction," have acted unlawfully. Accordingly, success in plaintiff's **later 42 U.S.C.S. § 1983** excessive force claim would not necessarily have implied the invalidity of her **Cal. Penal Code § 148** conviction. So plaintiff's excessive force claim was not barred by ***Heck***. (***Hooper v. County of San Diego*** (9th Cir. 2011) 629 F.3rd 1127.) Pleading guilty to a charge (possession of firearms on the grounds of the U.S. Capital) does not prevent defendant from challenging on appeal the constitutionality of the statute to which he pled guilty. (***Class v. United States*** (2018) 583 U.S. 174 [138 S.Ct. 798; 200 L.Ed.2nd 37].)

Heck does not apply where the written record of a prior conviction fails to show the factual basis for that conviction. (***Reese v. County of Sacramento*** (9th Cir. 2018) 888 F.3rd 1030, 1045-1046.)

The appellate court held that ***Heck*** did not bar a civil suit alleging the police use of excessive force after the person had been convicted in criminal court of disturbing the peace because the past conviction did not establish whether or not the officer used only reasonable force. The first criminal conviction thus is consistent with the second civil case. Whether the force used against plaintiff was reasonable remained unresolved. Therefore, plaintiff's excessive force suit could proceed. (***Kon v. City of Los Angeles*** (2020) 49 Cal.App.5th 858.)

Reversing its own 3-justice decision (see 9th Cir. 2021) 5 F.4th 979), an en banc panel of the Ninth Circuit Court of Appeal held that the district court erred in granting a sheriff's deputy, county sheriff, and county, summary judgment under ***Heck v. Humphrey*** in an arrestee's (plaintiff's) action under **42 U.S.C. § 1983** where she alleged that the deputy used excessive force in arresting her because the action was not barred on the basis that the plaintiff had been convicted under **Penal Code § 148(a)(1)** for willfully resisting, delaying, or obstructing the deputy during the same interaction. Because the record did not show the plaintiff's **§ 1983** action necessarily rested on the same event as her criminal conviction, success in the former would not necessarily imply the invalidity of the latter. The jury was told that it could find the arrestee guilty based on any one of four acts she committed during the course of her interaction with the deputy. Because the jury returned a general verdict, it was not know which act it thought constituted an offense. (***Lemos v. County of Sonoma*** (9th Cir. 2022) 40 F.4th 1002.)

Where plaintiff's criminal charges were dismissed after entry of a plea was held in abeyance pending compliance with certain conditions, the district court erred in dismissing plaintiff's **42 U.S.C § 1983** claims because plaintiff pled no contest to the resisting arrest charge and the state court never entered an order finding him guilty. (***Duarte v. City of Stockton*** (9th Cir. 2023) 60 F.4th 566, 570-573.]

***Civil Suits Based Upon an Alleged Retaliation Theory*:**

In the civil (**42 U.S.C. § 1983**) context, even if retaliation might have been a substantial motive for a city's Board of Education's action in failing to rehire the untenured plaintiff, because there were other incidents which, standing alone, would have justified the dismissal, there was no liability unless the alleged action committed by plaintiff was a "*but-for cause*" of the employment termination. There being other reasons cited for dismissing the plaintiff, the city had no liability. (***Mt. Healthy City Bd. of Ed.* v. *Doyle*** (1977) 429 U.S. 274 [97 S.Ct. 568; 50 L.Ed.2nd 471]; see also ***Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*** (1996) 518 U.S. 668 [116 S.Ct. 2342; 135 L.Ed.2nd 843].)

Where plaintiff was prosecuted for violating various criminal statutes allegedly committed during his lobbying activities that were critical of the Postal Service, following his acquittal of those charges, it was held that whether or not plaintiff could maintain a civil lawsuit against the Postal Service for an alleged violation of his **First Amendment** freedom of expression rights hinged on whether or not there was probable cause to support the alleged criminal charges. "(A) plaintiff alleging a retaliatory prosecution must show the absence of probable cause for the underlying criminal charge." ***(Hartman* v. *Moore*** (2006) 547 U.S. 250 [126 S.Ct. 1695; 164 L.Ed.2nd 441].)

> It was further noted in ***Hartman*** that "(a)n action for retaliatory prosecution 'will not be brought against the prosecutor, who is absolutely immune from liability for the decision to prosecute.' . . . 'Instead, the plaintiff must sue some other government official and prove that the official 'induced the prosecutor to bring charges that would not have been initiated without his urging.'" (***Id***., at pp. 261-262.)

However, while a finding of probable cause may be a bar to a *retaliatory prosecution*, per ***Hartman***, *supra*, the Supreme Court has held that the fact that plaintiff was *arrested* with probable cause is *not* a bar to civil suit alleging a *retaliatory arrest*. (***Lozman v. City of Riviera Beach*** (June 18, 2018) __ U.S.__, __ [138 S.Ct. 1945; 201 L.Ed.2nd 342].)

> In ***Lozman***, the plaintiff alleged "more governmental action than simply an arrest. His claim (was) that the City itself retaliated against him pursuant to an 'official municipal policy' of intimidation," under ***Monell v. Department of Social Services of the City of New York*** (1978) 436 U.S. 658 [98 S.Ct. 2018; 56 L.Ed.2nd 611]; (see "*Civil Liability of an Employing Government Entity*," below), thus separating his claim from the typical retaliatory arrest claim. (***Lozman v. City of Riviera Beach***, *supra*, at p. __.)
>
> "(W)hen retaliation against (**First Amendment**) protected speech (and *the right to petition government* for *redress of grievances)* is elevated to the level of official policy, there is a compelling need for adequate avenues of redress," thus allowing for a federal **42 U.S.C. § 1983** lawsuit. (***Id***., at p. __.)
>
> In ***Lozman***, where it was assumed, without deciding, that the City maintained an official policy discriminating against the plaintiff, the case was remanded to the Court of Appeal for a determination whether (among other issues) under ***Mt. Healthy***, *supra*, *the City had* proved that it "would have arrested Lozman regardless of any retaliatory animus." (***Id***., at p. __.)

Sheriff's deputies who allegedly made defamatory statements and unlawfully entered a residence while attempting to execute a bench warrant that had been recalled were not acting in furtherance of the exercise of the constitutional right of petition under **Code of Civ. Proc. § 425.16(e)(4)** (**Strategic Lawsuit Against Public Participation**, or "**Anti-SLAPP**") with regard to executing the warrant, nor was any connection with an issue of public interest shown. Also, the alleged defamatory statements were not protected under **Code of Civ. Proc. § 425.16(e)(1)** because they were not made in a judicial proceeding or in preparation for litigation. Accordingly, the deputies did not meet their burden to show that the claims arose from protected activity, the burden never shifted to the claimant to establish a probability of prevailing on the merits, and the deputies'

anti-SLAPP motion was properly denied. (***Anderson v. Geist*** (2015) 236 Cal.App.4th 79, 84-90.)

Defendant's claim that two police officers retaliated against him for his protected **First Amendment** speech by arresting him for disorderly conduct and resisting arrest during a winter sports festival could not survive summary judgment. The only evidence of retaliatory animus identified by the court of appeals was defendant's affidavit alleging that one of the officers said; "*Bet you wish you would have talked to me now*." But that allegation said nothing about what motivated the second officer, who had no knowledge of defendant's prior run-in with the first officer. In any event, defendant's retaliatory arrest claim against both officers could not succeed *because they had probable cause to arrest him*. The existence of probable cause to arrest defendant defeated his **First Amendment** claim as a matter of law. (***Nieves v. Bartlett*** (May 28, 2019) __ U.S. __ [139 S.Ct. 1715; 204 L.Ed.2nd 1].)

> Like retaliatory prosecution cases, evidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case. Because probable cause speaks to the objective reasonableness of an arrest, its absence will--as in retaliatory prosecution cases--generally provide weighty evidence that the officer's animus caused the arrest, whereas the presence of probable cause will suggest the opposite. (***Id.***, at p. __.)
>
> See ***Ballentine v. Tucker*** (9th Cir. 2022) 28 F.4th 54, at p. 62, for an exception to the general rule that the existence of probable cause to arrest typically precludes a finding of unconstitutional retaliation.

Plaintiff father sufficiently stated a **First Amendment** retaliation claim by alleging that a social worker coerced his former wife into filing an ex parte custody application, because his criticism of the agency was protected activity, the threat of losing custody would chill a person of ordinary firmness from voicing criticism of official conduct, and the social worker allegedly lacked any substantiated concern for the children's safety and treated him differently than his former wife. The social worker was not entitled to qualified immunity because a reasonable official would have known that threatening to terminate a parent's custody of his children, when such step would not have been taken absent retaliatory intent, violated the **First Amendment**. However, the father's **Fourth Amendment** claim failed because he failed to show interviews of the children at their school were seizures. (***Capp v. County of San Diego*** (9th Cir. 2019) 940 F.3rd 1046.)

The Ninth Circuit Court of Appeals affirmed in part and vacated in part a federal district court's order dismissing a complaint on qualified immunity grounds, and remanded, in an action brought pursuant to **42 U.S.C. § 1983** against the Los Angeles County Department of Children and Family Services and four individual

employees alleging sexual harassment in violation of the **Equal Protection Clause** of the **Fourteenth Amendment**, retaliation under the **First Amendment**, and related constitutional claims. Department of Children and Family Services social workers were *not* entitled to qualified immunity on a guardian's **First Amendment** retaliation claim because it was clearly established at the time of the workers' conduct that the **First Amendment** prohibited them from threatening to remove the child from her custody to chill her protected speech about her having been sexually harassed. The Court reluctantly affirmed qualified immunity for the social workers on the guardian's **Fourth Amendment** equal protection claim because the right of private individuals to be free from sexual harassment at the hands of social workers was not clearly established at the time of their conduct even though the social workers clearly violated the **Equal Protection Clause** when they sexually harassed plaintiff while providing her with social services. (***Sampson v. County of Los Angeles*** (9th Cir. 2020) 974 F.3rd 1012.)

The U.S. Supreme Court held that the Ninth Circuit Court of Appeals plainly erred when it created a cause of action for the bed-and-breakfast owner's **Fourth Amendment** excessive force claim because Congress was better positioned to create remedies in the border-security context, and the Government already had provided alternative remedies that protected plaintiffs like the owner. Because matters intimately related to foreign policy and national security were rarely proper subjects for judicial intervention, a ***Bivens*** cause of action may *not* lie where national security was at issue. The Ninth Circuit also plainly erred when it created a cause of action for the bed-and-breakfast owner's **First Amendmen**t retaliation claim because there was no ***Bivens*** action for **First Amendment** retaliation. There were many reasons to think that Congress, not the courts, was better suited to authorize such a damages remedy. **(*Egbert v. Boule*** (June 8, 2022) __ U.S. __ [142 S.Ct. 1793; 213 L.Ed.2nd 54], reversing ***Boule v. Egbert*** (9th Cir. 2020) 980 F.3rd 1309**.)**

Official reprisal for protected speech offends the Constitution because it threatens to inhibit exercise of the protected right, and the law is settled that as a general matter the **First Amendment** prohibits government officials from subjecting an individual to retaliatory actions for speaking out. A plaintiff in a civil suit making a **First Amendment** retaliation claim must allege that (1) he was engaged in a constitutionally protected activity, (2) the defendant's actions would chill a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant's conduct. In this case, the district court erred in denying the illegal alien's habeas petition because the U.S. Supreme Court in ***Nieves v. Bartlett*** (May 28, 2019) __ U.S. __ [139 S.Ct. 1715; 204 L.Ed.2nd 1] (see above), a suit for damages brought under **42 U.S.C.S. § 1983** and arising out of a criminal arrest, did not extend to an alien's habeas challenge to his bond revocation. Also, the district court failed to apply the proper burden-shifting standard to the alien's retaliation claim. (***Bello-Reyes v. Gaynor*** (9th Cir. 2021) 985 F.3rd 696.)

In a case involving practicing Muslims who sued under **Religious Freedom Restoration Act** (**RFRA**), claiming that federal FBI agents placed them on the "No Fly List" in retaliation for their refusal to act as informants against their religious communities, the Court held that **RFRA's** express remedies provision permits litigants, when appropriate, to obtain money damages against federal officials in their individual capacities. Under **RFRA's** definition, relief that can be executed against an "official of the United States" is relief against a government. Given that **RFRA** reinstated pre-***Smith*** (see below) protections and rights, parties suing under **RFRA** must have at least the same avenues for relief against officials that they would have had before **Smith.** That means **RFRA** provides, as one avenue for relief, a right to seek damages against government employees. (***Tanzin v. Tanvir*** (Dec. 10, 2020) __ U.S. __ [141 S.Ct. 486; 208 L.Ed.2nd 295].)

> "**The Religious Freedom Restoration Act of 1993** (**RFRA**) was enacted in the wake of ***Employment Div., Dept. of Human Resources of Ore.* v. *Smith*** (1990) 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2nd 876, to provide a remedy to redress Federal Government violations of the right to free exercise under the **First Amendment**." (***Id***., at p. __.)

In a **42 U.S.C. § 1983** suit, arrestees/plaintiffs, who were engaged in protesting police activities by writing messages in chalk on police and other public property, sufficiently showed that their arrests were done in retaliation for their exercise of their **First Amendment** rights because a reasonable factfinder could conclude that the anti-police content of the arrestees' chalk messages was a substantial or motivating factor for their arrests, particularly as the arresting officer knew that the arrestees were activists that were vocally critical of the police. The arresting officer was not entitled to qualified immunity because it was clearly established at the time of the arrests that an arrest, even though supported by probable cause, but made in retaliation for protected speech, violated the **First Amendment**. (***Ballentine v. Tucker*** (9th Cir. 2022) 28 F.4th 54.)

> The Court in ***Ballentine*** (at p. 62) notes an exception to the general rule that the existence of "probable cause" to arrest generally defeats any argument that the arrest was in retaliation for the plaintiff's acts. Per the Ninth Circuit: "(T)he Supreme Court also carved out a "narrow" exception for cases where "officers have probable cause to make arrests, but typically exercise their discretion not to do so. . . . To be sure, the *Nieves* exception applies only 'when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.'" (Citing ***Capp v. County of San Diego*** (9th Cir. 2019) 940 F.3d 1046, 1056, and *quoting* ***Nieves v. Bartlett*** (May 28, 2019) __ U.S. __, at p. __ [139 S.Ct. 1715, at p. 1727; 204 L.Ed.2nd 1].)

In a suit under **42 U.S.C.S. § 1983** involving a school district that severed its longstanding business relationship with a company that provided field trip venues

for public school children following the company's owner making allegedly controversial social media postings, there was a genuine issue of material fact existed as to whether plaintiffs' **First Amendment** rights were violated. However, the school officials were entitled to qualified immunity as to plaintiffs' damages claims because the right at issue was not clearly established when the conduct took place. The court therefore reversed the district court's grant of summary judgment to the school officials on plaintiffs' claim for injunctive relief, because there was a genuine issue of material fact whether the school officials were maintaining an unconstitutional, retaliatory policy barring future patronage to the vendor. (***Riley's American Heritage Farms v. Elsasser*** (9th Cir. 2022) 29 F.4th 484.)

Doctrine of "Issue Preclusion" or "Collateral Estoppel."

Rule:

> Based upon the United States Constitution's "***Full Faith and Credit Clause***," recognition must be given by each state and the federal government to each other states' public acts, records, and judicial Proceedings. (**U.S. Const. art. IV, § 1**.)
>
> "*Issue preclusion*," or "*collateral estoppel*," precludes relitigation of an issue already litigated and determined in a previous proceeding between the same parties. ***Clark (v. Bear Stearns & Co., Inc.*** (9th Cir. 1992) 966 F.2nd 1318,) at 1320. A federal court applying issue preclusion 'must give state court judgments the preclusive effect that those judgments would enjoy under the law of the state in which the judgment was rendered.' ***Far Out Prods., Inc. v. Oskar***, 247 F.3rd 986, 993 (9th Cir. 2001)." (***Pike v. Hester*** (9th Cir. 2018) 891 F.3rd 1131, 1138; finding the issue of an alleged Fourth Amendment violation to have been decided on the merits by a Nevada State Justice Court, preventing its relitigation in federal court upon the filing of a federal civil suit. Pgs. 1137-1141.)

The Doctrine:

> "'The law of preclusion helps to ensure that a dispute resolved in one case is not relitigated in a later case. Although the doctrine has ancient roots [citation], its contours and associated terminology have evolved over time. We now refer to "claim preclusion" rather than 'res judicata' [citation], and use "issue preclusion" in place of "direct or collateral estoppel" [citations].' (***Samara v. Matar*** (2018) 5 Cal.5th 322, 326. . . .) [⁋] 'Claim and issue preclusion have different requirements and effects.' (***Samara***, *supra*, 5 Cal.5th at p. 326.) '*Claim preclusion* "prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them."' (***DKN Holdings LLC v. Faerber*** (2015) 61 Cal.4th 813, 824. . . . .) 'Claim preclusion arises if a second suit involves (1) the

same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit.' (***Ibid.***) [⁋] '*Issue preclusion* prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action. [Citation.] Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action.' (***DKN Holdings***, *supra*, 61 Cal.4th at p. 824.) '[I]ssue preclusion applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party.' (***Id***. at p. 825.) [⁋] Even if these threshold requirements are satisfied, courts may consider the public policies underlying issue preclusion in determining whether the doctrine should be applied. (***Murray v. Alaska Airlines, Inc.*** (2010) 50 Cal.4th 860, 879. . . .) These policies include 'conserving judicial resources and promoting judicial economy by minimizing repetitive litigation, preventing inconsistent judgments which undermine the integrity of the judicial system, and avoiding the harassment of parties through repeated litigation.' (***Ibid***.)" (***Meridian Financial Services v. Phan*** (2021) 67 Cal.App.4th 657, 686-687.) Pursuant to **28 U.S.C. § 1738**, federal courts must "give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." (***Rodriguez v. City of San Jose*** (9th Cir. July 23, 2019) 930 F.3rd 1123, 1130; quoting ***Migra v. Warren City Sch. Dist. Bd. of Educ.*** (1984) 465 U.S. 75, 81 [104 S.Ct. 892; 79 L.Ed.2nd 56].).

> This requirement has equal force in federal civil suits brought under the authority of **42 U.S.C. § 1983**. (***Rodriguez v. City of San Jose***, *supra*, citing ***Allen v. McCurry*** (1980) 449 U.S. 90, 97-98 [101 S.Ct. 411; 66 L.Ed.2nd 308].)

Two Forms: There are two forms of "*preclusion*" (***Rodriguez v. City of San Jose*** (9th Cir. 2019) 930 F.3rd 1123, 1130):

1. "*Claim*," also known as "*Res Judicata*."

> "*Claim preclusion*" provides that a final judgment forecloses successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit. (***Id.***, *citing* ***White v. City of Pasadena*** (9th Cir. 2012) 671 F.3rd 918, 926; see also ***Parkford Owners for a Better Community v. Windeshausen*** (2022) 81 Cal.App.5th 216.)
>
> > "'The law of preclusion helps to ensure that a dispute resolved in one case is not relitigated in a later case. Although the doctrine has ancient roots [citation], its

contours and associated terminology have evolved over time.' (***Samara v. Matar*** (2018) 5 Cal.5th 322, 326 . . . . Courts have at times used "res judicata"—"Latin for 'a thing adjudicated'"—as an umbrella term, encompassing both the primary aspect of claim preclusion and the secondary aspect of issue preclusion." (***Parkford Owners for a Better Community v. Windeshausen***, supra, at pp. 224-225.)

"As generally understood, '[t]he doctrine of *res judicata* gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy.'" (Italics added; ***State Compensation Insurance fund v. ReadyLink Healthcare, Inc.*** (2020) 50 Cal.App.5th 422, 446; quoting ***People v. Barragan*** (2004) 32 Cal.4th 236, 252.)

2. "*Issue*," also known as "*Collateral Estoppel*."

"*Issue preclusion*," in contrast, bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment in prior, separate proceeding, even if the issue recurs in the context of a different claim." (***Rodriguez v. City of San Jose***, *supra*, quoting ***Taylor v. Sturgell*** (2008) 553 U.S. 880, 892 [128 S.Ct. 2161; 171 L.Ed.2nd 155].)

Issue preclusion applies when six criteria are satisfied:

1. The issue sought to be precluded from relitigation must be identical to that decided in a former proceeding;

2. The issue to be precluded must have been actually litigated in the former proceeding;

3. The issue to be precluded must have been necessarily decided in the former proceeding;

4. The decision in the former proceeding must be final and on the merits;

5. The party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding; and

6. Application of issue preclusion must be consistent with the public policies of preservation of the integrity of the

judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation.

(***Lucido v. Superior Court*** (1990) 51 Cal.3rd 335; see also *Rodriguez v. City of San Jose*, *infra*, at p. 1131, referring to the above as the "*Lucido* factors.")

In denying defendant's petition to vacate a murder conviction under **Pen. Code § 1172.6**, the trial court's finding that defendant was the actual killer should not have been based on facts stated in the appellate opinion affirming his conviction, but the error was harmless because standard principles of *issue preclusion* applied and the issue of whether defendant was the shooter was actually litigated. The firearm enhancements were alleged in the information; they were submitted to the jury for determination; and the jury made a true finding on them. In addition, the prosecution introduced evidence that defendant was the shooter. Moreover, trial counsel did have an incentive to contest the issue but made a tactical decision not to; it did not matter that it was unforeseeable that the issue would have additional future consequences. (***People v. Bratton*** (2023) 95 Cal.App.5th 1100.)

Forfeiture: The Ninth Circuit has also found "*issue preclusion*" arguments less likely to be forfeited by a party's failure to raise the issue on appeal than "*claim preclusion*," given the stronger public interest in the former to have the matter litigated and settled. (***Rodriguez v. City of San Jose*** (9th Cir. 2019) 930 F.3rd 1123, 1030-1131.)

Case Law:

Defendant had been charged with several other men of robbing six men, but was acquitted at trial on one of the robbery counts based on insufficient evidence that he was one of the robbers. He was then retried and convicted under a separate robbery count, unsuccessfully appealing his conviction and unsuccessfully seeking a writ of habeas corpus to hear his claim that his second prosecution violated his right not to be put in jeopardy twice. On appeal, the Supreme Court concluded that "*collateral estoppel*," or "*issue preclusion*," was a part of the guarantee under the **Fifth Amendment** against double jeopardy. The Court reviewed the record to determine if defendant's criminal conviction could have been decided upon any issue other than that which he sought to foreclose from consideration. The Court found that the only rationally conceivable issue in dispute before the jury in defendant's first trial was whether he was one of the robbers. Since the jury had concluded that he was not, collateral estoppel made his second prosecution for the robbery unconstitutional and

impermissible. (***Ashe v. Swenson*** (1970) 397 U.S. 436 [90 S.Ct. 1189; 25 L.Ed.2nd 469].)

The question of whether a finding of probable cause in a preliminary hearing precludes a subsequent false arrest civil suit (i.e., "*collateral estoppel*," or "*issue preclusion*") has been certified to the California Supreme Court by the federal Ninth Circuit Court of Appeal for decision, given the conflict in the case law. (***Patterson v. City of Yuba City*** (2018) 884 F.3rd 838; citing ***McCutchen v. City of Montclair*** (4th Dist. 1999) 73 Cal.App.4th 1138, 1146 [*Yes*, "*in some situations*"], and ***Schmidlin v. City of Palo Alto*** (6th Dist. 2007) 157 Cal.App.4th 728, 767 [*No*].)

In *Rodriguez v. City of San Jose* (9th Cir. 2019) 930 F.3rd 1123, 1130-1136, plaintiff sued the City of San Jose in federal court, seeking the return of firearms seized when her husband was taken into custody for a mental health evaluation pursuant to **W&I Code § 5150**, claiming that the City's refusal to return the firearms was a violation of her Second Amendment rights. Prior to her seeking the return of the firearms, the City had petitioned in California Superior Court to retain the firearms under **W&I Code § 8102(c)** on the ground that the firearms would endanger plaintiff's husband or another member of the public. Plaintiff had objected at the hearings on that petition, arguing that the confiscation and retention of the firearms, in which she had ownership interests, violated her **Second Amendment** rights. The court granted the City's petition over petitioner's objection; a decision that was upheld on appeal in an unpublished decision. (See **C*ity of San Jose v. Rodriguez*** (2015) 2015 Cal.App. Unpub. LEXIS 2315.) Plaintiff, after reregistering the firearms under her own name alone, and obtaining gun release clearances from the Department of Justice, then filed this federal lawsuit seeking the return of the firearms to her custody. The federal district court granted the City's summary judgement motion. The Ninth Circuit affirmed, ruling that the issue had already been decided by the California state courts and that under the doctrine of "*issue preclusion*," the federal courts would not re-decide the issue.

Where a Pakistani alien, who was granted asylum, was denied adjustment of status on the basis that he was inadmissible for having supported a Tier III terrorist organization, collateral estoppel did not apply during the adjustment of status hearing to preclude litigation of the alien's terrorism-related activities because the issue of terrorism-related inadmissibility was not actually litigated at the asylum proceedings. An issue is actually litigated for purposes of collateral estoppel only if it was raised, contested, and submitted for determination in the prior adjudication. (***Janjua v. Neufeld*** (9th Cir. 2019) 933 F.3rd 1061.)

When defendant is found not guilty on a traffic citation after having testified that he was not the driver of the car involved, but there is evidence that he testified falsely (i.e., committed perjury), he cannot later be prosecuted for that perjury. To do so violates the **Fifth Amendment's** double jeopardy protections. (***Wilkinson v. Magrann*** (9th Cir. 2019) 781 F.3rd Appx 669 (unpublished).)

Claim preclusion was held in a civil case not to bar a competitor from asserting its settlement agreement defense in a third action with the trademark holder where that case involved different marks, different legal theories, and different conduct occurring at different times. Thus, the third action and the previous action lacked a common nucleus of operative facts. Moreover, case law did not support a version of defense preclusion doctrine that extended to the facts of the instant case in that the competitor's defense in the third action did not threaten the judgment issues in the prior action. (***Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.*** (May 14, 2020) __ U.S. __ [140 S.Ct. 1589; 206 L.Ed.2nd 893].)

The trial court in Santa Clara County did not err in giving preclusive effect to an Orange County's judge's unclean hands finding and granting summary judgment to respondents based on that finding. The Orange County decision was sufficiently firm, and therefore final for purposes of issue preclusion notwithstanding a stipulated order partly vacating it. The unclean hands finding was not dicta. The evidence of appellants' misconduct and the determination that appellants acted with unclean hands were a substantial focus of the decision and not mere commentary on extraneous issues of fact or law. (***Meridian Financial Services v. Phan*** (2021) 67 Cal.App.4th 657.)

The Ninth Circuit Court of Appeal, in a split, 2-to-1 decision, vacated the district court's dismissal of a 42 U.S.C. § 1983 action brought against the City of Pasadena and several of its police officers. In 2018, petitioner Shane Love filed a federal ***Terry*** action against the Defendants, seeking to recover for the death of Reginald Thomas, a father figure to petitioner. The ***Terry*** action, which included a **section 1983** claim, was dismissed with prejudice for lack of **Article III** standing in 2019. Petitioner then filed a nearly identical lawsuit in California state court, which the defendants removed to federal court and successfully moved to dismiss based on *issue preclusion*. The Ninth Circuit held that a plain reading of the first district court's judgment established that **Article III** standing was actually litigated and decided, although erroneously. However, erroneous, unappealed judgments are still owed preclusive effect. The Court concluded that issue preclusion was available, and petitioner was bound by the prior standing determination. While issue preclusion was available, the Court held that the defendants waived issue preclusion by removing

the refiled case to federal court because a removing defendant voluntarily invokes and acquiesces to the federal courts and bears the burden of establishing subject-matter jurisdiction and **Article III** standing. Accordingly, the Court vacated and remanded to the second and current district court to determine, in the first instance, whether jurisdiction lies in the federal courts and whether petitioner adequately stated a claim, if the defendants pursue such an argument on remand. (***Love v. Villacana*** (9th Cir. 2023) 73 F.4th 751.)

See also ***Wilkinson v. Gingrich*** (9th Cir. 2015) 806 F.3rd 511, under "*Double Jeopardy*" (Chapter 1), above.

Examples Where Issue Preclusion Found Not to Apply:

The district court was held to have erred in holding that the probable cause determination made at a prior preliminary hearing precluded plaintiff from asserting in his federal lawsuit under **42 U.S.C. § 1983**, alleging that the defendant officers lacked probable cause to arrest and detain him because plaintiff's argument alleged that the officers fabricated evidence or undertook other wrongful conduct in bad faith, such allegations creating a triable issue of material fact as to whether or not probable cause in fact existed. The district court's grant of summary judgment to the police defendants was reversed because the officers did not offer any evidence that negated the evidence in defendant's sworn statement. (***Scafidi v. Las Vegas Metropolitan Police Department*** (9th Cir. 2020) 966 F.3rd 960.)

A trial court erred in denying a wife's request to renew a restraining order against her former husband under California's **Domestic Violence Prevention Act** based on "*issue preclusion*" because issue preclusion *did not apply*. The court thus erroneously considered only whether the husband committed acts of domestic violence during a narrow window of time when the original restraining order was in effect, and not whether the wife had a reasonable fear of future abuse in light of all relevant facts and circumstances. The trial court then compounded its error in granting the motion in limine by also excluding evidence underlying the original restraining order (even though the husband did not request that relief) because it wrongly believed that it could not consider that evidence. (***Marriage of Brubaker and Strum*** (2021) 73 Cal.App.5th 525.)

"Law of the Case" Doctrine:

"The law-of-the-case doctrine generally provides that 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" ***Musacchio v. United States*** (2016) 577 U.S. 237 [136 S.Ct. 709, 716; 193 L.Ed.2nd 639]; quoting ***Pepper v. United States*** (2011) 562 U.S. 476, 506 [131 S.Ct. 1229; 179 L. Ed.2nd 196].)

"The law of the case doctrine does not preclude a court from reassessing its own legal rulings in the same case. The doctrine applies most clearly where an issue has been decided by a higher court; in that case, the lower court is precluded from reconsidering the issue and abuses its discretion in doing so except in the limited circumstances the district court identified." (***Askins v. United States Department of Homeland Security*** (9th Cir. 2018) 899 F.3rd 1035, 1042, citing ***United States v. Cuddy*** (9th Cir. 1987) 147 F.3rd 1111, 1114; ***United States v. Miller*** (9th Cir. 1987) 822 F.2nd 828, 832; and ***United States v. Houser*** (9th Cir. 1986) 804 F.2nd 565, 567.)

> In ***Askins***, it was held that the trial court erroneously held that "the law of the case" doctrine precluded the court from reconsidering the issues upon the filing of an amended complaint, holding that: "Once the plaintiff elects to file an amended complaint, the new complaint is the only operative complaint before the district court." (at p. 1043; citing ***Ferdik v. Bonzelet*** (9th Cir. 1992) 963 F.2nd 1258, 1262.)
>
> "The rule is that the mandate of an appeals court precludes the district court on remand from reconsidering matters which were either expressly or implicitly disposed of upon appeal. (***United States v. Miller***, *supra*.)
>
> "The legal effect of the doctrine of the law of the case depends upon whether the earlier ruling was made by a trial court or an appellate court. . . . A trial court may *not*, however, reconsider a question decided by an appellate court." (***United States v. Houser***, *supra*.)

"A court may also decline to revisit its own rulings where the issue has been previously decided and is binding on the parties—for example, where the district court has previously entered a final decree or judgment. . . . The law of the case doctrine does not, however, bar a court from reconsidering its own orders before judgment is entered or the court is otherwise divested of jurisdiction over the order." (***Askins v. United States Department of Homeland Security***, *supra*, at pp. 1042-1043; citing ***City of Los Angeles v. Santa Monica Baykeeper*** (9th Cir. 2001) 254 F.3rd 882, 888-889; ***United States v. Houser***, *supra*, at p. 567; *and* **Fed. R. Civ. P. 54(b)** "[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.")

Summary Judgment:

An Appellate Court is to review a trial court's granting of summary judgment in a civil case "de novo." The Court is to determine whether "taking the evidence and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party, there are no genuine issues of material fact." In the absence of

material factual disputes, the objective reasonableness of a police officer's conduct is "a pure question of law." (***Lowry v. City of San Diego*** (9th Cir. 2017) 858 F.3rd 1248, 1254; citing and quoting ***Torres v. City of Madera*** (9th Cir. 2011) 648 F.3rd 1119, 1123; and ***Scott v. Harris*** (2007) 550 U.S. 372, 381 n.8 [127 S.Ct. 1769; 167 L. Ed.2nd 686].)

"A motion for summary judgment shall be granted when 'all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' [Citation.] A summary adjudication is properly granted only if a motion therefor completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty. [Citation.] Motions for summary adjudication proceed in all procedural respects as a motion for summary judgment." (***Jameson v. Desta*** (2015) 241 Cal.App. 4th 491, 497; quoting ***Jameson v Desta*** (2013) 215 Cal.App.4th 1144, 1163.)

"On appeal, the reviewing court makes 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.'" (***Jameson v. Desta***, *supra*, 241 Cal.App.4th 491; citing ***Trop v. Sony Pictures Entertainment, Inc.*** (2005) 129 Cal.App.4th 1133, 1143; which quotes ***Iverson v. Muroc Unified School Dist.*** (1995) 32 Cal.App.4th 218, 222-223.)

In a summary judgment finding favoring the civil defendants, the appellate court is to "independently review the record that was before the trial court when it ruled on defendants' motion. [Citations.] In so doing, (the Court will) view the evidence in the light most favorable to plaintiffs as the losing parties, resolving evidentiary doubts and ambiguities in their favor." (***B.H. v. County of San Bernardino*** (2015) 62 Cal.4th 168, 178; quoting ***Elk Hills Power, LLC v. Board of Equalization*** (2013) 57 Cal.4th 593, 605-606.)

Directed Verdict:

"A directed verdict (in a civil suit) in favor of a (civil) defendant (or a civil plaintiff) is proper if, after disregarding conflicting evidence and drawing every legitimate inference in favor of the plaintiff, there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff (or defendant). (***Wolf v. Walt Disney Pictures & Television*** (2008) 162 Cal.App.4th 1107, 1119 . . . .) In ruling on the motion, the trial court may not weigh the evidence, consider conflicting evidence or judge the credibility of witnesses. (***Hilliard v. A.H. Robines Co.*** (1938) 148 Cal.App.3rd 374, 395 . . . .) Appellate review of an order granting a directed verdict is quite strict, with all inferences and presumption drawn against such orders. (***Alshafie v. Lallande*** (2009) 171 Cal.App.4th 421, 432 . . . .) The reviewing court must view the evidence in the light most favorable to the plaintiff (or defendant), resolve all conflicts in the evidence and draw all inferences in the plaintiff's (or defendant's) favor, and disregard conflicting

evidence. (***Wolf***, *supra,* at p. 1119.) (***Guillory v. Hill*** (2015) 233 Cal.App.4th 240, 249.)

In federal court, see **Federal Rules of Civil Procedure, Rule 50(a)**: "(I)f, under the governing law, there can be but one reasonable conclusion as to the verdict." (***Anderson v. Liberty Lobby, Inc.*** (1986) 477 U.S. 242, 250 [91 L.Ed.2nd 202] Conversely, "[i]f reasonable minds could differ as to the import of the evidence, . . . a verdict should not be directed." (***Id.***, at pp. 250-251.) When deciding whether to grant a **Rule 50(a)** motion, "[t]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." (***Reeves v. Sanderson Plumbing Prods., Inc.*** (2000) 530 U.S. 133, 150 [120 S.Ct. 2097; 147 L.Ed.2nd 105].)

Civil Liability of an Employing Government Entity:

Monell v. Department of Social Services of the City of New York (1978) 436 U.S. 658 [98 S.Ct. 2018; 56 L.Ed.2nd 611].): Municipalities may *not* be held vicariously liable for the unconstitutional acts of their employees under the theory of "*respondeat superior*."

> "To prevail on a municipal liability claim, a plaintiff must show that the city 'had a deliberate policy, custom, or practice that was the 'moving force' behind the constitutional violation he suffered.' ***Galen v. Cnty. of Los Angeles***, 477 F.3d 652, 667 (9th Cir. 2007) (quoting ***Monell v. Dep't of Soc. Servs.***, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)). 'To meet this causation requirement, the plaintiff must establish both causation-in-fact and proximate causation.' ***Harper v. City of Los Angeles***, 533 F.3d 1010, 1026 (9th Cir. 2008). 'The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the [government] actor knows or reasonably should know would cause others to inflict the constitutional injury.' ***Lacey v. Maricopa Cnty.***, 693 F.3d 896, 915 (9th Cir. 2012) (quoting ***Johnson v. Duffy***, 588 F.2d 740, 743-44 (9th Cir. 1978))." (***Sinclair v. City of Seattle*** (2023) 61 F.4th 674, 680, fn. 3.)
>
> A governmental entity may be held liable for the torts of its employees:
>
> > (1) When the individual who committed the constitutional tort was an official with final policy-making authority or such an official ratified a subordinate's unconstitutional decision or action and the basis for it;
> >
> > (2) When implementation of its official policies or established customs inflicts the constitutional injury; *and*

(3) When "omissions," including the failure to train employees, "amount to the local government's own official policy."

(***Wheatcroft v. City of Glendale*** (U.S. Dist. AZ 2022) 2022 U.S. Dist. LEXIS 57006.), citing ***Clouthier v. County of Contra Costa*** (9th Cir. 2010) 591 F.3rd 1232, 1249, and finding that a reasonable jury could find liability under the first category above.)

In ***Wheatcroft***, the Court discussed three possible theories for finding ***Monell*** liability, with the findings, as indicated:

> *Ratification*: "Here, no triable issue of fact exists as to the City of Glendale's ratification of the Officers' conduct, so summary judgment is granted for Defendant City of Glendale." (pgs. 43-45.)
>
> *Policies, Customs, Practices*: Although "(a) municipality may be held liable if a plaintiff can 'prove that (1) he was deprived of a constitutional right; (2) the municipality had a policy; (3) the policy amounted to deliberate indifference to [plaintiff's] constitutional right; and (4) the policy was the moving force behind the constitutional violation," (Citing ***Lockett v. County. of Los Angeles*** (9th Cir. 2020) 977 F.3rd 737, 741.), (and a) policy within the meaning of ***Monell*** exists where official policy makers 'consciously' choose a particular course of action or procedure 'from among various alternatives,'" in this case, plaintiff was not the driver of the car stopped by the defendant police officers, but rather a mere passenger. Plaintiff's allegation, therefore, that defendants had "the practice of stopping vehicles for turn signal violations even when the elements [of a turn signal violation] were not met" in that it was not plaintiff who was stopped for making an illegal turn. (pgs. 46-47.)
>
> *Failure to Train and Supervise*: To find this element to be relevant, it must be shown that the defendant officers' supervisors showed "*deliberate indifference*" in a failure to train or supervise the officers, and that there is a "direct causal link between a municipal policy or custom and the alleged constitutional deprivation." Here, the plaintiff was held to have failed to "provide any specific allegations or facts that would support a claim that the City of Glendale was deliberately indifferent to the rights of citizens in failing to train or supervise its police officers in a manner that would give rise to liability under **§ 1983**." Summary

> judgment was therefore granted to the City of Glendale. (pgs. 47-49.)

"(I)n a (**42 U.S.C.**) **§ 1983** case a city or other local governmental entity cannot be subject to liability at all unless the harm was caused in the implementation of 'official municipal policy.'" (***Monell v. Department of Social Services of the City of New York***, *supra*, at p. 691; citing also ***Los Angeles County* v. *Humphries*** (2010) 562 U.S. 29, 36 [131 S.Ct. 447; 178 L.Ed.2nd 460]; see also ***Lozman v. City of Riviera Beach*** (June 18, 2018) __ U.S.__, __ [138 S.Ct. 1945; 201 L.Ed.2nd 342].)

"A municipality may be liable under **42 U.S.C. § 1983** for constitutional violations inflicted by its employees 'when the execution of the government's policy or custom . . . inflicts the injury.' (Citations)" (***Lowry v. City of San Diego*** (9th Cir. 2017) 858 F.3rd 1248, 1266.)

"Municipalities and other local governmental units are 'persons' subject to suit under (**42 U.S.C.**) **§ 1983**, but to prevail on a claim against a municipal entity for a constitutional violation, a plaintiff must also show that his or her injury is attributable 'to official municipal policy of some nature.'" (***Kirkpatrick v. County of Washoe*** (9th Cir. 2016) 843 F.3rd 784, 788.)

> A government entity may be civilly liable when the plaintiff's constitutional injury (i.e., a warrantless seizure of an infant from her mother, in this case) was the result of a "systemic failure to train" its officers, "pursuant 'to (an) official . . . policy of some nature.'" Liability exists only where the failure to properly train its employees reflects a "conscious choice" by the government; i.e., it is intentional. "In other words, the government's omission must amount to a 'policy' of deliberate indifference to constitutional rights." In proving a deliberate indifference, a "showing of 'obviousness' can substitute for the pattern of violations ordinarily necessary to establish municipal culpability." (***Id.***, at pp. 793-794.)

"A **§ 1983** plaintiff can establish municipal liability in three ways: (1) the municipal employee committed the constitutional violation pursuant to an official policy; (2) the employee acted pursuant to a longstanding practice or custom; and (3) the employee functioned as a final policymaker." (***Barone v. City of Springfield*** (9th Cir. 2018) 902 F.3rd 1091, 1107; citing ***Lytle v. Carl*** (9th Cir. 2004) 382 F.3rd 978, 982.)

However, it was not err for a trial court to sustain the county's demurrer to the deprivation of rights cause of action in that the plaintiffs' ***Monell*** claim failed to allege facts supporting a finding of deliberate indifference. (***Arista v. County of Riverside*** (2018) 29 Cal.App.5th 1051, 1060-1066.)

To establish ***Monell*** liability, the Court need not apply a "*shocks the conscience*" standard in order for the parents of children taken by the County, where child abuse was suspected, to establish a **Fourteenth Amendment** substantive due process claim. A ***Monell*** claim may be based on the County's undisputed policy or practice of failing to notify parents of medical examinations of the children, for which the parents are only required to prove that the County acted with "the state of mind required to prove the underlying violation." (See ***Gibson v. County of Washoe, Nev.*** (9th Cir. 2002) 290 F.3rd 1175, 1185-1186.) The County's deliberate adoption of its policy or practice "establishes that the municipality acted culpably." (***Mann v. County of San Diego*** (9th Cir. 2018) 907 F.3rd 1154, 1163-1164.)

The federal government properly prevailed in a civil action under the **Violent Crime Control and Law Enforcement Act**, **34 U.S.C. § 12601**, which prohibits any governmental authority from engaging in a pattern or practice of conduct by law enforcement officers or government agents that deprive persons of constitutional rights. **Section 12601** specifically allows for *respondeat superior* liability. The record here shows that the town had a practice of discrimination against residents who were not members of a particular church. Unlike claims under **§ 1983**, **§ 12601** does not require a showing of an official municipal policy of violating residents' constitutional rights, and thus, ***Monell*** does not apply to **§ 12601** claims because the statute does not explicitly limit liability to those who caused citizens or persons to be subjected to a deprivation of their constitutional rights. (***United States v. Town of Colorado City*** (9th Cir. 2019) 935 F.3rd 804.)

To establish ***Monell*** liability, it is not necessary that a civil plaintiff show evidence of a department's formal policy or deficient training. Evidence of an informal practice or custom will suffice. (***Nehad v. Browder*** (9th Cir. 2019) 929 F.3rd 1125, 1141-1142; reversing the trial court's granting of summary judgment, holding that plaintiff was at least entitled to a jury determination of the existence of an informal policy or practice relating to the use of deadly force.)

Gov't. Code § 945.3 provides that a plaintiff (criminal defendant) may not file a civil ***Monell*** claim while the underlying criminal charges, related to the plaintiff's claim that officers used excessive force, are pending. Thus the statute of limitation is tolled on the plaintiff's ***Monell*** lawsuit (i.e., that the officers' government employer is responsible) for that period of time that those charges are pending, up until when the criminal charges against the plaintiff are dismissed. (***Lockett v. County of Los Angeles*** (2020) 977 F.3rd 737.)

A federal district court did not err by dismissing the decedent's son's **42 U.S.C.S. § 1983** claim against the city (a "***Monell*** claim") because he alleged no facts that indicated that any deficiency in training actually caused the police officers' alleged indifference to the decedent's medical needs. The district court did not err by dismissing the decedent's son's claims against the individual officers because he did not plausibly allege a violation of the decedent's constitutional rights. Before falling unconscious, defendant gave alternative explanations for having vomited, denied having ingested anything, and insisted she did not want to go to jail. In addition, the officers were entitled to qualified immunity because the officers' failure to recognize and respond to the decedent's serious medical need was not clearly established under the facts of the case. (***J.K.J. v. City of San Diego*** (9th Cir. 2021) 17 F.4th 1247.)

In an action brought by plaintiffs, a journalist and a magazine, alleging that city police officers violated their **First Amendment** rights when they prevented the journalist from engaging in dialogue with a protester under threat of arrest, the officer was entitled to qualified immunity because plaintiffs had not identified any clearly established right that the officer violated in enforcing separate protest zones. Also, the city could not be held liable under a ***Monell*** theory because even assuming city police officers violated the journalist's **First Amendment** rights, nothing in the complaint plausibly alleged a policy, custom, or practice leading to that violation, and plaintiffs' allegations amounted to no more than an isolated or sporadic incident that could not form the basis of ***Monell*** liability for an improper custom. (***Saved Magazine v. Spokane Police Department*** (9th Cir. 2021) 19 F.4th 1193.)

Where the law is not well settled on the issue with which the plaintiff alleges the officers failed to comply (i.e., whether a detained suspect refusing to identify himself is a violation of **P.C. § 148(a)(1)**; obstructing an officer in the performance of his duties), plaintiff cannot show a "pattern of similar constitutional violations by untrained employees," which is a necessary element of an alleged ***Monell*** violation. (***Vanegas v. City of Pasadena*** (9th Cir. 2022) 46 F.4th 1159, 1167.)

***Police Power*:**

Rule: The police power of a state has been held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. The state may invest local administrative bodies with authority to safeguard the public health and the public safety. The mode or manner is within the discretion of the state, subject only to the condition that no rule prescribed by a state, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States or infringe any right granted or

secured by that instrument. A local enactment or regulation must always yield in case of conflict with the exercise by the general government of any power it possesses under the Constitution, or with any right which that instrument gives or secures. (***Jacobson v. Massachusetts*** (1905) 197 U.S. 11 [25 S.Ct. 358; 49 L.Ed. 643]; upholding a Massachusetts state law authorizing forced small pox vaccinations, absent evidence that such a vaccination was hazardous to a specific individual's health, finding that such a mandatory vaccination program did *not* violate the **Fourteenth Amendment's** due process clause.

> Per the Court: "The authority of the State to enact this statute is to be referred to what is commonly called the police power. . . . (T)he police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." (***Id***., at pp. 24-25.)
>
> Note: One's "*religion*," by the way (along with "personal wishes, . . . pecuniary interests, . . . or political convictions"), was only mentioned in relation to one's refusal to submit to a military draft, indicating that religious scruples are not an excuse to refuse "to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense." (***Id***., at p. 29, citing ***Allgeyer v. Louisiana*** (1897) 165 U.S. 578 [17 S.Ct. 427; 42 L.Ed. 832].)
>
> But the Supreme Court (citing ***Jacobson v. Massachusetts***, *supra*, with approval) has ruled (in a 5-to-4 decision) that a state governor has the power by executive order to restrict access to "places of worship" to 25% of capacity, up to a maximum of 100 people, during a pandemic (COVID-19; i.e., the "coronavirus;" "a novel severe acute respiratory illness that has killed thousands of people in California and more than 100,000 nationwide."), holding that such an executive order appears consistent with the **Free Exercise of Religion Clause** of the **First Amendment**. (***South Bay United Pentecostel Church v. Newsom*** (May 29, 2020) __ U.S.__ [140 S.Ct. 1613; 207 L.Ed.2nd 254.)

Police Power vs. Fifth Amendment Eminent Domain:

> *Rule*: Where there is a government required "forfeited as a public nuisance" (or other destruction) of personal (or real) property (e.g., a vehicle [or one's home; see below]), the state is not required to compensate plaintiff (who shared ownership of the vehicle with her husband), reasoning that when state acquires property "under the exercise of governmental authority *other than* the power of eminent domain," government is not "required to compensate an owner for [that] property." (Italic added; ***Bennis v. Michigan*** (1996) 516 U.S. 442, 443–444, 452–353 [116 S.Ct. 994; 134 L.Ed.2nd 68].)

> "Police power should not be confused with (**Fifth Amendment**) eminent domain, in that the former controls the use of property by the owner for the public good, authorizing its regulation and destruction without compensation, whereas the latter takes property for public use and compensation is given for property taken, damaged[,] or destroyed."). (***Lamm v. Volpe*** (10th Cir. 1971) 449 F.2nd 1202, 1203.)

Examples:

> No **Fifth Amendment** taking (i.e., eminent domain) occurs where the government physically seized (and ultimately "rendered worthless") the plaintiff's pharmaceuticals "in connection with [a criminal] investigation" because "the government seized the pharmaceuticals in order to enforce criminal laws," an action the Federal Circuit said fell well "within the bounds of the police power." (***AmeriSource Corp. v. United States*** (Ct. of Fed. Claims 2008) 525 F.3rd 1149.)
>
> "When private property is damaged incident to the exercise of the police power, such damage," even when physical in nature, "is not a taking for the public use, because the property has not been altered or turned over for public benefit" (***Bachmann v. United States*** (Fed. Cl. 2017) 134 Fed. Cl. 694, 696.)
>
> Plaintiff failed to establish a **Fifth Amendment** Takings Clause violation where federal agents physically damaged his property by, for example, tearing out door jambs and removing pieces of interior trim from his home, while executing a search warrant. (***Lawmaster v. Ward*** (10th Cir. 1997) 125 F.3rd 1341.)

Public Safety Officers Procedural Bill of Rights Act*, or* "***POBRA***" (***Gov't. Code §§ 3300 et seq.***):

> "**POBRA** 'provides a catalog of basic rights and protections that must be afforded all peace officers by the public entities which employ them.' (***California Correctional Peace Officers Assn. v. State of California*** (2000) 82 Cal.App.4th 294, 304. . . .) The **Act's** purpose is 'to maintain stable employer-employee relations and thereby assure effective law enforcement.' (***Lybarger v. City of Los Angeles*** (1985) 40 Cal.3rd 822, 826. . . .) 'Although notions of fundamental fairness for police officers underlie the **Act**, a number of its provisions also reflect the Legislature's recognition of the necessity for internal affairs investigations to maintain the efficiency and integrity of the police force serving the community.' (***Pasadena Police Officers Assn. v. City of Pasadena*** (1990) 51 Cal.3rd 564, 572. . . .) **POBRA** thus reflects the Legislature's balancing of two competing interests: 'the public interest in maintaining the efficiency and integrity of its police force,

which, in enforcing the law, is entrusted with the protection of the community it serves'; and the peace officer's 'personal interest in receiving fair treatment' during an investigation that may subject the officer to punitive action. (***Pasadena Police***, at p. 569; see ***White v. County of Sacramento*** (1982) 31 Cal.3rd 676, 681. . . .)" (***Lozano v. City of Los Angeles*** (2022) 73 Cal.App.5th 711, 729-730.)

> "Like **POBRA** generally, **section 3303**, **subdivision (i)** balances an officer's interest in a fair disciplinary process with the public's interest in maintaining an efficient police force. The statute protects the officer's interest by affording an officer the right to have a representative of his or her choosing present 'whenever an interrogation focuses on matters that are likely to result in punitive action against' the officer. (fn. omitted) (**§ 3303**, **subd. (i)**.) But, critically, the statute also ensures that this protection does not generate needless inefficiency by expressly specifying that the right to representation does 'not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer.' (**§ 3303**, **subd. (i)**.) This provision 'was included to avoid claims that almost any communication is elevated to an "investigation"' by expressly 'exclud[ing] routine communication within the normal course of administering the department,' as well as 'innocent preliminary or casual questions and remarks between a supervisor and officer.' (***City of Los Angeles v. Superior Court* (*Labio*)** (1997) 57 Cal.App.4th 1506, 1514. . . .)" (***Id***., at p. 730.)
>
> > "*Punitive action*" is defined in **Gov't. Code § 3303** as "any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment." (***Id.***, at fn. 8.)
> >
> > In ***Labio***, it was held that an officer was entitled to have a representative present and to be informed of his rights before being questioned by his supervisor for having passed a serious vehicle accident—while driving a vehicle he was not authorized to drive—and instead driving to a donut shop in that the supervisor knew ahead of time that the offense was serious enough to warrant discipline if found to be true, the Court concluding that "the questioning [could] only be characterized as part of an investigation of Officer Labio for sanctionable conduct." (***Ibid***.)
>
> In ***Lozano***, it was held that two officers' sergeant, meeting the officers in the field to ask about why they had not responded to a high priority robbery call, resulting in an admonishment that they pay more attention to their radio, was not a communication that required the officers to have present a representative under **POBRA**. (pgs. 730-731; "the 'meeting did

not violate **POBRA**' because it "'was in the normal course of Sergeant Gomez'[s] duty [to provide] counseling [and] instruction and was routine and expected of a supervisor.'")

***Standards of Proof*:**

Reasonable Suspicion:

Information which is sufficient to cause a reasonable law enforcement officer, taking into account his or her training and experience, to *reasonably believe* that the person to be detained is, was, or is about to be, involved in criminal activity. The officer must be able to articulate more than an "*inchoate and unparticularized suspicion or* '*hunch*' *of criminal activity*." (***Terry v. Ohio*** (1968) 392 U.S. 1, 27 [88 S.Ct. 1868; 20 L.Ed.2nd 889, 909].)

The "*reasonable suspicion*" standard is "not a particularly demanding one, but is, instead, 'considerably less than proof of wrongdoing by a preponderance of the evidence,'" (***People v. Letner and Tobin*** (2010) 50 Cal.4th 99, 146; quoting ***United States v. Sokolow*** (1989) 490 U.S. 1, 7 [109 S.Ct. 1581; 104 L. Ed. 2nd 1]; and citing ***United States v. Valdes-Vega*** (9th Cir. 2013) 738 F.3rd 1074, 1078.)

See "*Reasonable Suspicion*," under "*Detentions*" (Chapter 4), below.

Preponderance of the Evidence:

"A preponderance of the evidence standard . . . 'simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence'" (***Lillian F. v. Superior Court*** (1984) 160 Cal.App.3d 314, 320.)

"Proof by a 'preponderance of the evidence' for an uncharged offense is a considerably lower burden of proof than the due process requirement of proof beyond a reasonable doubt for a charged offense. (Citation)" (***People v. Nicolas*** (2017) 8 Cal.App. 5th 1165, 1177.)

Probable Cause:

"Probable cause means 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] belief or suspicion' that the person is mentally disordered. [Citation.]" (***In re Azzarella*** (1989) 207 Cal.App.3rd 1240.)

"[P]robable cause means 'fair probability,' not certainty or even a preponderance of the evidence." (***United States v. Gourde*** (9th Cir. 2006) 440 F.3rd 1065, 1069.)

"Reasonable or probable cause is shown if a *man of ordinary care* (or *caution*) *and prudence* (or a *reasonable and prudent person*) would be led to believe and conscientiously entertain *an honest and strong suspicion* that the accused is guilty." (See ***People v. Lewis*** (1980) 109 Cal.App.3rd 599 608-609; ***People v. Campa*** (1984) 36 Cal.3rd 870, 879; ***People v. Price*** (1991) 1 Cal.4th 324, 410.)

"'Reasonable or probable cause' means such a state of facts as would lead a [person] of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused." (***People v. Garcia*** (2018) 29 Cal.App.5th 864, 870, quoting ***People v. Mower*** (2002) 28 Cal.4th 457, 473.)

> *Note*: The terms "*reasonable*" and "*probable*" cause are used interchangeably in both the codes (see **P.C. § 995(a)(1)(B)**) and case law, but (when properly used) mean the same thing. "*Reasonable cause*" and *"reasonable suspicion*" (i.e., the standard of proof for a detention), on the other hand, *do not* mean the same thing, and are not to be confused.
>
> "(R)easonable cause"—a synonym for "probable cause . . . ." (***Heien v. North Carolina*** (2014) 574 U.S. 54, 62 [135 S.Ct. 530; 190 L.Ed.2nd 475, 483].)

"'[P]robable cause is a flexible, common-sense standard. It merely requires that facts available to the officer would "warrant a man of reasonable caution in the belief," [citation], that certain items may be contraband or stolen property or useful as evidence of a crime.'" (***People v. Tran*** **(**2019) 42 Cal.App.5th 1, 9; quoting ***Texas v. Brown*** (1983) 460 U.S. 730, 742 [75 L.Ed.2nd 502; 103 S.Ct. 1535].)

See "*Standard of Proof*," under "*Arrests*" (Chapter 5), and "*Probable Cause*," under "*The Affidavit to the Search Warrant*," under "*Searches with a Search Warrant*" (Chapter 10), below.

Clear and Convincing Evidence:

"Clear and convincing" evidence requires a finding of high probability. Such a test requires that the evidence be "so clear as to leave no substantial doubt"; "sufficiently strong to command the unhesitating assent of every reasonable mind." (***People v. Mary H.*** (2016) 5

Cal.App.5th 246, 256; quoting ***Lillian F. v. Superior Court*** (1984) 160 Cal.App.3rd 314, 320.)

> See also ***San Diego Police Department v. Geoffrey S.*** (2022) 86 Cal.App.5th 550, adding (at pg. 576): " . . . and sufficiently strong to command the unhesitating assent of every reasonable mind." (Citing ***In re Angelia P.*** (1981) 28 Cal.3rd 908, 919.)
>
> > "When reviewing a finding that a fact has been proved by clear and convincing evidence, the question before the appellate court is whether the record as a whole contains substantial evidence from which a reasonable fact finder could have found it highly probable that the fact was true." (***San Diego Police Department***, ***supra***, quoting ***Conservatorship of O.B.*** (2020) 9 Cal.5th 989, 1011.)
>
> "This standard, which 'is less commonly used' (Citation), tends to be seen in civil cases involving 'interests . . . deemed to be more substantial than mere loss of money." (***People v. Mary H.***, *supra*.)

"The standard of proof known as clear and convincing evidence demands a degree of certainty greater than that involved with the preponderance standard, but less than what is required by the standard of proof beyond a reasonable doubt. This intermediate standard 'requires a finding of high probability.'" (***Conservatorship of O.B.*** (2020) 9 Cal.5th 989, 998; citing (***In re Angelia P.*** (1981) 28 Cal.3d 908, 919; see also **CACI No. 201**.)

Proof Beyond a Reasonable Doubt:

> **CALCRIM No. 220**: "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true."
>
> All persons are presumed innocent in the absence of sufficient evidence to the contrary, proving his or her guilt beyond a reasonable doubt. (*See* ***Morrisette v. United States*** (1952) 342 U.S. 246 [72 S.Ct. 240; 96 L.Ed.2nd 288]; ***Herrera v. Collins*** (1993) 506 U.S. 390, 398-399 [113 S.Ct. 853; 122 L.Ed.2nd 203.)
>
> > An inmate convicted of first degree murder was entitled to **28 U.S.C. § 2254** federal habeas corpus relief because, in overruling defense counsel's objection to the prosecutor's statements in closing argument that the presumption of innocence no longer applied, the state court violated defendant's due process rights under ***Darden***. The state appellate court was objectively unreasonable in holding that any error was harmless beyond a reasonable doubt in light of the fact that the weight of the evidence

against the inmate was not great, but rather circumstantial, incomplete, and in conflict in a very close case. (***Ford v. Peery*** (9th Cir. 2020) 976 F.3rd 1032.)

Pursuant to ***Darden v. Wainwright*** (1986) 477 U.S. 168 [106 S.Ct. 2464, 91 L.Ed.2nd 144], in evaluating whether a prosecutor violated due process in closing arguments, the so-called ***Darden*** factors are as follows; the weight of the evidence, the prominence of the comment in the context of the entire trial, whether the prosecution misstated the evidence, whether the judge instructed the jury to disregard the comment, whether the comment was invited by defense counsel in its summation and whether defense counsel had an adequate opportunity to rebut the comment. Courts are to place improper argument in the context of the entire trial to evaluate whether its damaging effect was mitigated or aggravated.

In "a criminal case, … [in which] the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt." (***People v. Mary H.*** (2016) 5 Cal.App.5th 246, 256; quoting ***Addington v. Texas*** (1979) 441 U.S. 418, 423 [99 S.Ct. 1804; 60 L.Ed.2nd 323].)

The California Supreme Court has commented more than once that in discussing "reasonable doubt" with a jury, "modifying the standard instruction [on reasonable doubt] is perilous, and generally should not be done . . . ." (***People v. Daveggio and Michaud*** (2018) 4 Cal.5th 790, 844; citing ***People v. Freeman*** (1994) 8 Cal.4th 450, 504.)

In ***Daveggio and Michaud***, the Court had talked about the reasonable doubt standard during jury selection, months before the jury was formally instructed just prior to jury deliberations. The Court ruled that if the prior discussions were improper, the error was harmless in light of the standard jury instruction (CALJIC 2.90) being also given. (***Id.***, at pp. 838-844.)

"*Burden of proof*" *Defined*: This term refers to the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. (**Evid. Code § 115**)

Plea Bargaining and Cooperation Agreements:

Police Officers Plea Bargaining:

Rule: A police officer has no independent authority to plea bargain with criminal suspects or their attorneys. (See below) Only the prosecuting attorney, with the approval of the Court, has the authority to plea bargain. (See **Pen. Code §§ 1192.1 et seq**.)

Case Law:

"A cooperation agreement generally involves 'an agreement between a defendant and a law enforcement agency." ((***People v.***) ***C.S.A.*** ((2010)) 181 Cal.App.4th (773) at p. 778.) 'As with a plea agreement, "[t]he government is held to the literal terms of [a cooperation] agreement … ." [Citation.] And, like a plea agreement, "an agreement to cooperate may be analyzed in terms of contract law standards."' (***Id.*** a pp. 778-779.) However, and of particular importance to this case, '"[a] defendant who seeks specifically to enforce a promise, whether contained in a plea agreement or a freestanding cooperation agreement, must show … that the promisor had actual authority to make the particular promise … ."' (***C.S.A.***, *supra*, 181 Cal.App.4th at p. 779.) (fn. omitted.) In California, '"state and local prosecutors are invested with the prosecutorial power of the state." (***C.S.A.***, *supra*, at p. 783.) "'And just as federal law enforcement officers have no independent authority to make promises about the filing and prosecution of federal criminal charges, state and local law enforcement officers have no independent authority to make promises about the filing and prosecution of state criminal charges."' (***Ibid***.) Thus, in order to enforce a cooperation agreement in California, the defendant must show that a state or local prosecutor authorized the agreement, thereby granting the law enforcement officer '"'actual authority'"' to enter into the agreement. (***Id.*** at p. 779; see also ***Id.*** at p. 784 [concluding that trial court erred in dismissing charges based on law enforcement officer's '"'apparent authority'"' to enter into cooperation agreement].)" (***People v. Perez*** (2016) 243 Cal.App.4th 863, 879-880.)

"'[T]he remedy for breach of an unauthorized cooperation agreement usually is a sanction short of dismissal.' ((***People v.***) ***C.S.A.*** ((2010)) 181 Cal.App.4th (773), 780, citing, inter alia, ***State of North Carolina v. Sturgill*** (1996) 121 N.C.App. 629 [469 S.E.2d 557, 568] [concluding exclusion of evidence, rather than dismissal of charges, was

proper remedy for defendant's reliance on unauthorized cooperation agreement and stating, '[W]e are not required, as a result of the "constable's blunder," to place defendant in a better position than he enjoyed prior to making the agreement with the police.'" (***Id.***, at p. 881, fn. 12.)

Plea Bargaining by the Court:

"[O]nly the prosecutor is authorized to negotiate a plea agreement on behalf of the state. '[T]he court has no authority to substitute itself as the representative of the People in the negotiation process and under the guise of "plea bargaining" to "agree" to a disposition of the case over prosecutorial objection. Such judicial activity would contravene express statutory provisions requiring the prosecutor's consent to the proposed disposition, would detract from the judge's ability to remain detached and neutral in evaluating the voluntariness of the plea and the fairness of the bargain to society as well as to the defendant, and would present a substantial danger of unintentional coercion of defendants who may be intimidated by the judge's participation in the matter. [Citation.]' [Citations.]" (***People v. Hernandez*** (2020) 55 Cal.App.5th 942, 948; quoting ***People v. Segura*** (2008) 44 Cal.4th 921, at p. 930.)

Review was granted in ***Hernandez*** by the California Supreme Court, with this decision eventually being vacated. (See ***People v. Hernandez***, 2021 Cal. LEXIS 8869 (Cal., Dec. 22, 2021).)

See also ***People v. Perez*** (2016) 243 Cal.App.4th 863, 879-881, above.

***The Trial Court and Prosecutor's Immunity*:**

The Court:

"'Judges . . . are absolutely immune from damage[s] liability for acts performed in their official capacities.' ***Ashelman v. Pope***, 793 F.2nd 1072, 1075 (9th Cir. 1986). Judicial immunity is only overcome in two circumstances: when the judge 'acts in the clear absence of all jurisdiction or performs an act that is not judicial in nature.' ***Schucker v. Rockwood***, 846 F.2nd 1202, 1204 (9th Cir. 1988)." (***Harper v. Wright*** (9th Cir. 2021) 956 F.4th Appx.653; an unpublished decision.

In ***Harper***, an attorney sued federal District Court Judge Otis D. Wright after Judge Wright held attorney Caree Harper in contempt for refusing to answer questions about exorbitant attorney's fees (42%) in a civil suit. Harper claimed that the judge authorized bailiffs to use excessive force in taking her into custody, and committed other un-judicial-like acts. Plaintiff Harper appealed

from an order by the district court dismissing her lawsuit with prejudice.

The Ninth Circuit Court of Appeals affirmed the district court's dismissal of two putative class actions brought pursuant to **42 U.S.C. § 1983** against the Superior Court of Los Angeles County and Judge Eric C. Taylor, alleging that defendants set cash bail that plaintiffs could not afford and therefore unlawfully detained them pretrial. The Court held that actions against state courts and state court judges in their judicial capacity are barred by **Eleventh Amendment** immunity. The Superior Court of the State of California had sovereign immunity as an arm of the state. The exception in ***Ex parte Young*** (1908) 209 U.S. 123 [28 S.Ct. 441; 52 L.Ed. 714], did not apply because the Superior Court cannot be sued in an individual capacity. Judge Taylor had **Eleventh Amendment** immunity because state court judges cannot be sued in federal court in their judicial capacity under the **Eleventh Amendment**. To the extent that ***Wolfe v. Strankman*** (9th Cir. 2004) 392 F.3rd 358, can be read to hold that the ***Ex parte Young*** exception allows injunctions against judges acting in their judicial capacity, that conclusion is clearly irreconcilable with ***Whole Woman's Health v. Jackson*** (2021) 595 U.S. 30 [142 S.Ct. 522; 211 L.Ed.2nd 316], and is thus overruled. (***Munoz v. Superior Court*** (9th Cir. 2024) 91 F.4th 977.)

The Prosecutor:

Absolute Immunity:

Prosecutors enjoy absolute immunity from civil liability so long as the forced detention of a victim, done for the purpose of interviewing her, is considered to be "advocacy conduct that is intimately associated with the judicial phase of the criminal process." (***Giraldo v. Kessler*** (2nd Cir. 2012) 684 F.3rd 161.)

However, the federal Fifth Circuit Court of Appeal has held that immunity for prosecutors, at least in the 5th Circuit's jurisdiction, is limited. In so ruling, it noted that a state prosecutor was not entitled to dismissal of **42 U.S.C.S. §§ 1983**, 1988 civil rights claims because absolute prosecutorial immunity did not apply to alleged fabrication of evidence that deprived a criminal defendant of due process and a fair trial where such activity was "*investigative*" (i.e., the prosecutor acting as a DA investigator or police officer) and not "*prosecutorial*." A detective also was not absolutely immune. (***Wearry v. Foster*** (5th Cir. 2022) 33 F.4th 260.)

Ethical Considerations:

"(B)ecause of the unique function prosecutors perform in representing the interests of—and exercising the power of—the state, they 'are held to an elevated standard of conduct.'" (***People v. Zarazua*** (2022) 85 Cal.App.5th 639, 645, fn. 2; quoting ***People v. Peoples*** (2016) 62 Cal.4th 718, 792.)

> ***People v. Zarazua***, *supra*, dealt with a prosecutor's ethical obligation to not engage in "*misgendering*," which is defined as; "the assignment of a gender with which a party does not identify, through the misuse of gendered pronouns, titles, names, and honorifics." (Citing *McNamarah*; Misgendering (2021) 109 Cal. L.Rev. 2227, 2232.)

"(A prosecutor) . . . is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. (The prosecutor's) . . . chief business is not to achieve victory but to establish justice. . . . '(T)he Government wins its point when justice is done in its courts.'" (***Brady v. Maryland*** (1963) 373 U.S. 83, 87, fn. 2 [10 L.Ed.2nd 215; 83 S.Ct. 1194], referencing Judge Simon E. Sobeloff's comments, made when he was Solicitor General (i.e., the lawyer responsible for arguing cases for the Government before the Supreme Court), in addressing the duties of a solicitor general before the Judicial Conference of the Fourth Circuit Court of Appeal on June 29, 1954, and quoting his predecessor, Solicitor General Frederick William Lehmann. "*Prosecutor*" has been substituted for "*solicitor general*," the two being substantially the same from an ethical standpoint.)

The United States Supreme Court pointedly held as long as over 85 years ago that a prosecutor, ". . . is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (***Berger* v. *United States*** (1935) 295 U.S. 78, 88 [79 L.Ed. 1314; 55 S.Ct. 629].)

Aside from civil liability issues, prosecutors are held to a higher standard of professional ethics. For instance, in a hearing on a sexually violent predator's petition to be placed in conditional release program, where the prosecutor discouraged a defendant from testifying by inferring that he might be subject to a perjury charge if he did so (thus violating his **Sixth Amendment** right to testify), the Fourth District Court of Appeal (Div. 3), in holding that "(p)rosecutors . . . are not allowed to engage in conduct that undermines the willingness of a defense witness to take the stand," and reversing defendant's conviction, had this to say: "It's not about convictions, it's not about courtroom mastery, it's not about prison sentences. And it's certainly not about won/lost records. It's about fair trials. Fairness is the sine qua non of the criminal justice system, and no amount of technical brilliance or advocative skill can make up for a failure to provide it." (***People v. Force*** (2019) 39 Cal.App.5th 506, 511-519.)

"A prosecutor's conduct 'violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." [Citation.] But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"'" (***People v. Zarazua*** 2022) 85 Cal.App.5th 639, 644; quoting ***People v. Rhoades*** (2019) 8 Cal.5th 393, 418.)

> In ***Zarazua***, at p. 644, the Court notes that: "Prosecutorial misconduct may result in reversal under federal law if the error "was not 'harmless beyond a reasonable doubt,'" and it may result in reversal "under state law if there was a 'reasonable likelihood of a more favorable verdict in the absence of the challenged conduct.'" (Quoting ***People v. Rivera*** (2019) 7 Cal.5th 306, 333–334.)

Malicious Prosecution:

"To prevail on their malicious prosecution claim, Plaintiffs 'must show that the [D]efendants prosecuted [Wheatcroft] with malice and without probable cause, and that they did so for the purpose of denying [him] equal protection or another specific constitutional right.' ***Freeman v. City of Santa Ana***, 68 F.3d 1180, 1189 (9th Cir. 1995) (citations omitted)." (⁋) "'Even assuming that the malice and lack of probable cause elements can be met, the presumption of prosecutorial independence must still be rebutted.' Ordinarily, the decision to file a criminal complaint is presumed to result from an

independent determination of the prosecutor, and, thus, precludes liability for those who participated in the investigation or filed a report that resulted in initiation of proceedings. However, the presumption of prosecutorial independence does not bar a subsequent **§ 1983** claim against state or local officials who improperly exerted pressure on him, knowingly provided misinformation to the prosecutor, concealed exculpatory evidence, or otherwise engaged in wrongful or bad faith conduct that was actively instrumental in causing the initiation of legal proceedings. ***Awabdy*** (***v. City of Adelanto*** (9th Cir. 2004)) 368 F.3rd (1062) at 1067. Malicious prosecution actions are not limited to suits against prosecutors and may also be "brought against other persons who have wrongfully caused the charges to be filed.' ***Id.*** at 1066." (***Wheatcroft v. City of Glendale*** (U.S. Dist. AZ 2022) 2022 U.S. Dist. LEXIS 57006.)

> Finding no evidence of the officers pressuring the prosecutor to charge defendant, the Court held that the officers were entitled to summary judgment on the allegation. (***Ibid***.)

In a 6-to-3 decision, the United States Supreme Court has held that in order for a "*malicious prosecution*" allegation under the Fourth Amendment, brought via 42 U.S.C. § 1983, to be sustained, the plaintiff need *not* show that the criminal prosecution ended with some affirmative indication of innocence. A plaintiff need only show that the criminal prosecution ended without a conviction, overruling the Second Circuit Court of Appeal's decision on this issue. (***Thompson v. Clark*** (Apr. 4, 2022) __ U.S. __ [142 S.Ct. 1332; 212 L.Ed.2nd 382]; finding that the plaintiff in this case had satisfied this requirement.)

Plaintiffs' malicious prosecution complaint was fatally defective because a warrantless arrest—or any other event lacking some adjudicatory involvement by a court—could not constitute an action for purposes of malicious prosecution, and because neither bail nor search warrant proceedings could support a malicious prosecution claim. The trial court properly denied the plaintiffs' leave to amend because the proposed factual allegations they proffered they could allege if given leave to amend would not address the deficiency in the only cause of action alleged in the complaint. Plaintiffs were not entitled to add an abuse of process claim they had not previously alleged, as that claim was time-barred and did not relate back to the sole cause of action in the operative complaint. (***Bidari v. Kelk*** (2023) 90 Cal.App.5th 1152.)

***Brady v. Maryland**; Due Process and Discovery Obligations*:

General Rule: Prosecutors, as "*agents of the sovereign*," must honor the **Fourteenth Amendment's** due process obligations. (See ***Kyles v. Whitley*** (1995) 514 U.S. 419, 438 [131 L.Ed.2nd 490; 115 S.Ct. 1555]; ***Mooney v. Holohan*** (1935) 294 U.S. 103, 112–113 [79 L.Ed. 791; 55 S.Ct. 340].) "A prosecutor must refrain from using evidence that the prosecutor knows to be false. (***Mooney***, at pp. 112–113; see also ***Pyle v. State of Kansas*** (1942) 317 U.S. 213, 216 [87 L.Ed. 214; 63 S.Ct. 177].) A prosecutor must correct false evidence 'when it appears.' (***Napue v. Illinois*** (1959) 360 U.S. 264, 269 [3 L.Ed.2nd 1217; 79 S.Ct. 1173].) And, under ***Brady***, a prosecutor must disclose to the defense evidence that is 'favorable to [the] accused' and 'material either to guilt or to punishment.' (***Brady***, (*infra*), 373 U.S. at p. 87.)" (***Association for Los Angeles Deputy Sheriffs v. Superior Court*** (2019) 8 Cal.5th 28, 40; referring to ***Brady v. Maryland*** (1963) 373 U.S. 83 [10 L.Ed.2nd 215; 83 S.Ct. 1194].)

Brady v. Maryland:

General Rules: "A prosecutor in a criminal case must disclose to the defense certain evidence that is favorable to the accused. (***Brady v. Maryland*** (1963) 373 U.S. 83 [10 L.Ed.2nd 215; 83 S.Ct. 1194] . . .) This duty sometimes requires disclosure of evidence that will impeach a law enforcement officer's testimony. (***Giglio v. United States*** (1972) 405 U.S. 150, 154–155 [31 L.Ed.2nd 104; 92 S.Ct. 763] . . .) Such disclosure may be required even if the prosecutor is not personally aware that the evidence exists. (***Kyles v. Whitley*** (1995) 514 U.S. 419, 437 [131 L.Ed.2nd 490; 115 S.Ct. 1555] . . .) Because the duty to disclose may sweep more broadly than the prosecutor's personal knowledge, the duty carries with it an obligation to 'learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.' (*Ibid.*)" (***Association for Los Angeles Deputy Sheriffs v. Superior Court*** (2019) 8 Cal.5th 28, 36.)

Per ***Napue v. Illinois*** (1959) 360 U.S. 264, 269 [3 L.Ed.2nd 1217; 79 S.Ct. 1173], a prosecutor is precluded from knowingly using false testimony. Per ***Brady***, failing to provide the defense with material information related to that false testimony is a **due process** violation, and grounds for reversal. (***Dickey v. Davis*** (9th Cir. 2023) 69 F.4th 624. 636-648.)

"Under ***Brady***, '[t]he prosecution has a duty under the **Fourteenth Amendment's** due process clause to disclose evidence to a criminal defendant when the evidence is both favorable to the

defendant and material on either guilt or punishment.'" (***People v. Fultz*** (2021) 69 Cal.App.5th 395, 415; quoting ***People v. Stewart*** (2020) 55 Cal.App.5th 755, 769.)

Under ***Brady*** and its progeny, the prosecution has a constitutional duty to disclose to the defense material exculpatory evidence, including potential impeaching evidence. The duty extends to evidence known to others acting on the prosecution's behalf, including the police. Thus, the prosecution is responsible not only for evidence in its own files but also for information possessed by others acting on the government's behalf that were gathered in connection with the investigation. But the prosecution cannot reasonably be held responsible for evidence in the possession of all governmental agencies, including those not involved in the investigation or prosecution of the case. Conversely, a prosecutor does not have a duty to disclose exculpatory evidence or information to a defendant unless the prosecution team actually or constructively possesses that evidence or information. Thus, information possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecutor does not have the duty to search for or to disclose such material. Therefore, the Drug Enforcement Administration's (DEA's) refusal to produce potentially exculpatory evidence did not deprive defendants of a fair trial because DEA was not working on behalf of the prosecution and was not part of the investigation. (***People v. Aguilera*** (2020) 50 Cal.App.5th 894.)

"In order to comply with ***Brady***, . . . 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'" (***People v. Fultz*** (2021) 69 Cal.App.5th 395, 415; quoting ***People v. Salazar*** (2005) 35 Cal.4th 1031, 1042.)

A jury found defendant guilty of voluntary manslaughter. The Court of Appeal, Second Dist., Div. One, denied defendant's petition for writ of habeas corpus, finding that evidence allegedly suppressed by the People was not material under ***Brady***. On appeal to the California Supreme Court, the Supreme Court granted defendant's petition for review on the limited issue of whether the Attorney General had a duty, in response to the petition for writ of habeas corpus, to disclose the same evidence that formed the basis of her ***Brady*** claim. Defendant's ***Brady*** claim was remanded for the Court of Appeal to consider the petition for writ of habeas corpus on a record prepared in accordance with clarification of the Attorney General's disclosure duties. Where

allegedly suppressed evidence forming the basis of a claim in a petition for writ of habeas corpus is in fact subject to ***Brady***, the Attorney General has a constitutional duty of disclosure that exists as of the time of the filing of the petition. Where such evidence is not subject to ***Brady***, but is subject to **Rules Prof. Conduct**, **rule 3.8(d)**, the Attorney General has an ethical duty of disclosure as of the time of the filing of the petition. Where such evidence is neither subject to **Brady** nor subject to disclosure under **Rule 3.8(d)**, the respondent has a duty to disclose the existence of the evidence that arises after the issuance of an order to show cause. The judgment of the court of appeal was therefore reversed, and the matter was remanded to that court for further proceedings. (***In re Jenkins*** (2023) 14 Cal.5th 493.)

The Issue of Materiality:

"(E)vidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" (***People v. Fultz*** (2021) 69 Cal.App.5th 395, 415.)

"'For ***Brady*** purposes, evidence is favorable if it helps the defense or hurts the prosecution, as by impeaching a prosecution witness.' (***People v. Zambrano*** (2007) 41 Cal.4th 1082, 1132 . . . ; see also ***United States v. Bagley*** (1985) 473 U.S. 667, 676 [87 L.Ed.2nd 481; 105 S. Ct. 3375]; ***Giglio (v. United States*** (1972) 405 U.S. 150), 154–155 ([31 L.Ed.2nd 104; 92 S.Ct. 763].) Evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" (***Kyles (v. Whitley*** (1995) 514 U.S. 419, 433-434 [131 L.Ed.2nd 490, 115 S.Ct. 1555].)) Evaluating materiality requires consideration of the collective significance of the undisclosed evidence (***Kyles***, at p. 436), as well as 'the effect of the nondisclosure on defense investigations and trial strategies' (***Zambrano***, at p. 1132). (See also ***Kyles***, at p. 439; ***Bagley***, at p. 701 (dis. opn. of Marshall, J.).) 'A reasonable probability does not mean that the defendant "would more likely than not have received a different verdict with the evidence," only that the likelihood of a different result is great enough to "undermine[] confidence in the outcome of the trial.' (***Smith v. Cain*** (2012) 565 U.S. 73, 75 [181 L.Ed.2nd 571; 132 S. Ct. 627].) (¶) This materiality standard applies both after judgment, when evaluating whether ***Brady*** was violated, and before judgment, when evaluating whether evidence favorable to the defense must be disclosed. (See ***Kyles***, supra, 514 U.S. at pp. 437–438; ***United States v. Agurs*** (1976) 427 U.S. 97, 108 [49 L.Ed.2nd 342; 96 S. Ct. 2392].) Because it may be difficult

to know before judgment what evidence will ultimately prove material, 'the prudent prosecutor will resolve doubtful [***Brady***] questions in favor of disclosure.' (***Agurs***, at p. 108; see also ***Kyles***, at pp. 438–439.) Statutory and ethical obligations may require even more. (See, e.g., **Pen. Code**, **§ 1054.1**, **subds. (d)–(e)** [statutory disclosure obligation]; **Rules Prof. Conduct**, **rule 3.8(d)** & **com. [3]** [ethical disclosure obligation].)" (***Association for Los Angeles Deputy Sheriffs v. Superior Court*** (2019) 8 Cal.5th 28, 40.)

"Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" (***People v. Fultz*** (2021) 69 Cal.App.5th 395, 415; evidence of the terms of a plea bargain offered to two codefendants held to be material, and thus ***Brady*** error for the prosecution's failure to advise defense counsel before trial. Pgs. 418-420.)

However, where a federal investigative agency (i.e., the FBI and DEA, in this case) have declined to provide the prosecution with requested information, such as information related to a drug cartel's drug-smuggling business and a target of defendant's "third party culpability" defense in this case, the Ninth Circuit held that neither ***Brady*** nor **Federal Rules of Criminal Procedure, Rule 16** requires the prosecution to provide such evidence. A defendant must show that the prosecution has both knowledge of, and access to, such information. Another federal agencies refusal to comply denies the prosecution to "access" to such information. (***United States v. Cano*** (9th Cir. 2019) 934 F.3rd 1002, 1022-1026.)

The federal district court properly denied defendant's request for habeas corpus relief under **28 U.S.C.S. § 2254(d)(1)**, **(2)**. Although the prosecution had an obligation under ***Brady*** to disclose jailhouse informants' statements known to law enforcement, the California Supreme Court's conclusion that statements were not material was not contrary to, or an unreasonable application of, ***Brady***. The co-defendant's credibility was heavily bolstered by fact he knowingly subjected himself to criminal liability. Also, the informants lacked credibility and the jury heard other impeachment evidence regarding the co-defendant. The Court therefore concluded that the undisclosed evidence was not material at the guilt or penalty phase of the proceedings was not contrary to or an unreasonable application of ***Brady***, nor did it amount to an unreasonable determination of the facts in light of the circumstances. (***Ochoa v. Davis*** (9th Cir. 2021) 16 F.4th 1314.)

In a murder trial, redacted portions of the district attorney's confidential, internal memoranda, particularly those parts describing past incidents with factual similarities to the current case, could have had impeachment value supporting defendant's contentions that the medical examiner displayed confirmation bias, failed to gather key evidence, and did not consider potential alternative causes of death. However, the failure to disclose this information was held *not* to be material for purposes of ***Brady*** or **Pen. Code § 1054.1**, because the jury *did not* accept the medical examiner's testimony that the victim was beaten to death. The jury convicted defendant of involuntary manslaughter, not murder, suggesting that they agreed with the defense characterization that the victim died from a fall. Further, the defense effectively utilized the portion of impeachment evidence that had been disclosed. (***People v. Deleoz*** (2022) 80 Cal.App.5th 642.)

See also the dissenting opinion in a U.S. Supreme Court's denial of certiorari, where the issue was whether a third person's confession to committing a murder with another co-suspect, when that confession failed to mention whether or not the petitioner was present at all (the petitioner arguing that he was not), was sufficiently material to constitute exonerating evidence to be ***Brady*** error when the petitioner's attorney wasn't told about the confession until after petitioner's sentence of death. The majority of the Court did not feel that it was. (***Brown v. Louisiana*** (Apr. 3, 2023) __ U.S. ___ [143 S.Ct. 886; 215 L.Ed.2nd 404].)

*Elements of a **Brady** Violation*:

"There are three components to a true ***Brady*** violation: '[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.'" (***Benson v. Chappell*** (9th Cir. 2020) 958 F.3rd 801, 837; quoting ***Strickler v. Greene*** (1999) 527 U.S. 263, 281-282 [119 S.Ct. 1936, 144 L.Ed.2nd 286].)

"A ***Brady*** violation is 'material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome."'" (***Benson v. Chappell***, *supra*; quoting ***Amado v. Gonzalez*** (9th Cir. 2014) 758 F.3rd 1119, 1139; which, in turn, quotes ***United States v. Bagley*** (1985) 473 U.S. 667, 682 [105 S. Ct. 3375, 87 L.Ed.2nd 481].)

> Because there was a reasonable likelihood that undisclosed evidence impeaching a witness could have affected the judgment of the jury, defendants' convictions for federal mortgage fraud were overturned by the Ninth Circuit Court of Appeal in a split, two-to-one decision. The district court's instruction to disregard the witness's testimony did not fully cure the prejudice that resulted from the government's ***Brady*** violation. While the instruction informed the jury that the government had erred and that it should disregard the witness's testimony and argument about her, it did not tell the jury that the government's powerful closing argument was premised on a false narrative; i.e., the witness's reliability. Nor did it explain how defense counsel had presented the case one way, only to learn afterwards that the truth was something else. (***United States v. Obagi*** (2020) 965 F.3rd 993.)
>
> The district court properly dismissed "with prejudice," due to ***Brady*** violations, an indictment charging defendants with obstructing federal law enforcement officials carrying out lawful court orders because given the evidence that the government acted with at least reckless disregard for the ***Brady*** value of some evidence that prejudiced the defense's ability to marshal their case, the district court's findings of substantial prejudice and flagrant misconduct in part were not clear error. (***United States v. Bundy*** (9th Cir. 2020) 968 F.3rd 1019.)

Confidential Records and ***Brady*****:** For some time, prosecutors were unsure how to satisfy their ***Brady*** obligations while also complying with the statutory confidentiality restrictions contained in **Penal Code §§ 832.7 and 832.8**, and the procedural requirements under the **Evidence Code**, as mandated under ***Pitchess v. Superior Court*** (1974) 11 Cal.3rd 531 (see below). The California Supreme Court finally solved (or at least discussed) this dilemma in 2015 in the case of ***People v. Superior Court* (*Johnson*** (2015) 61 Cal.4th 696.

> The major procedural difference between ***Brady*** and ***Pitchess*** is that under ***Brady***, the prosecution must produce any "material evidence favorable to the defense" even though no request for such information has been made. Under ***Pitchess***, it is the defense's obligation to affirmatively seek discovery of "potentially exculpatory information" in an officer's personnel records which a court will grant only after the defense makes a "threshold showing" of the existence of such information and its relevance to the instant case, following the procedures as set out in **Evidence Code §§ 1043 et seq**. "The relatively relaxed standards for a showing of good cause under [**Evidence Code**] **section 1043**,

subdivision (b)—'materiality' to the subject matter of the pending litigation and a 'reasonable belief' that the agency has the type of information sought—insure the production for inspection of all potentially relevant documents." **(*City of Santa Cruz v. Municipal Court*** (1989) 49 Cal.3rd 74, 84.)

The issue presented in ***People v. Superior Court* (*Johnson*)** was who—the prosecution or the trial court—has the responsibility for examining an officer's confidential personnel file for ***Brady*** material.

The California Supreme Court in ***Johnson*** overruled the trial court's finding that **P.C. § 832.7(a)** was unconstitutional to the extent that it prevented the prosecution from examining a police department's confidential personnel files. To the contrary: "(T)he prosecution does not have unfettered access to confidential personnel records of police officers who are potential witnesses in criminal cases." If the prosecution wishes to obtain information from such files, "it must follow the same procedures that apply to criminal defendants, i.e., file a ***Pitchess*** motion, in order to seek information in those records." (***Id.***, at p. 705.)

Whenever the prosecution is put on notice, as it was in the ***Johnson*** case, that there is information that is potentially favorable to the defendant in an officer's personnel file, it fulfills its ***Brady*** obligations not by rummaging through such files itself, nor by filing a motion with the trial court to review the files (as was done in *Johnson*), but rather by merely informing the defense of what the police department informed the prosecutor; i.e., that the specified records might contain exculpatory information. This way, a defendant may then decide for himself whether to seek discovery, following the ***Pitchess*** (**Evid. Code §§ 1043, 1045**) procedures if he does. The information the police department has provided to the prosecution, as it is relayed to the defense, together with some explanation of how the officers' credibility might be relevant to the case, satisfies the threshold showing a defendant must make in order to trigger judicial review of the records under *Pitchess*. When such a showing is made, the trial court is then obligated to sit down with the law enforcement custodian of such records, reviewing those records itself for any relevant, discoverable information, which it may then provide to the defense subject to any protective orders necessary to protect the officer's privacy interests to the extent possible. (***Id.***, at pp. 715-722.) This, of course, puts the onus on law enforcement to notify the prosecution when a police officer witness in a pending criminal litigation has potential ***Brady*** material in his or her confidential personnel file. The California Supreme Court, in the case of

Association for Los Angeles Deputy Sheriffs v. Superior Court (2019) 8 Cal.5th 28, has authorized law enforcement to make such a notification, holding that while a police department's list of officers with ***Brady*** information in their respective personnel file is confidential, a law enforcement agency does not violate that confidentiality by sharing with prosecutors the identity of an officer on its so-called "***Brady*** list" who is a potential witness in a specific pending case.

Therefore, a law enforcement agency may (and under ***Brady***, must) disclose to the prosecution the name and identifying number of an officer who is a potential witness in any pending criminal litigation, along with the fact that that officer may have relevant exonerating or impeaching material in his or her confidential personnel file, without the prosecution first having had to comply with the statutory procedures (**Evid. Code §§ 1043-1047**; a "***Pitchess*** motion") for the release of such information. (***Id.***, at pp. 43-56.)

Additional Case Law:

The Ninth Circuit Court of Appeal reversed the district court's denial of defendants' motion for judgment on the pleadings, and remanded, in an action brought pursuant to **42 U.S.C. § 1983** alleging defendants violated plaintiff's due process rights under ***Brady v. Maryland*** (1963) 373 U.S. 83 [83 S.Ct. 1194; 10 L.Ed.2nd 215], by suppressing another person's confession to a murder for which plaintiff was arrested and held for almost four years before the charges were dismissed. The Court held that plaintiff could not show prejudice from the nondisclosure of the confession. A ***Brady*** violation requires that the withheld evidence have a reasonable probability of affecting a judicial proceeding. Plaintiff did not state a *Brady* claim because he did not assert the nondisclosure would have changed the result of any proceeding in his criminal case. The Court rejected plaintiff's contention that the prejudice inquiry should be whether the withheld evidence had a reasonable probability of affecting counsel's strategy. The Court noted that no court has adopted plaintiff's proposed rule, and most other courts require a conviction to establish prejudice. Moreover, here, the cause of plaintiff's continued detention was not the suppression of the confession, but the District Attorney's continued prosecution even after receiving the confession. The Court held that plaintiff might be able to establish a different due process claim, as recognized in ***Tatum v. Moody*** (9th Cir. 2014) 768 F.3rd 806, arising out of his continued detention after it was or should have been known that he was entitled to release. In this interlocutory appeal, however, the Court was not asked to address

the merits of such a claim. Plaintiff can seek leave to amend his complaint to assert that claim on remand. Concurring, Judge R. Nelson wrote separately to address why ***Brady*** should not be extended to pretrial proceedings, explaining that the Supreme Court has framed ***Brady*** as a trial right and has never extended ***Brady*** to pretrial hearings. (***Parker v. County of Riverside*** (9th Cir. 2023) 78 F.4th 1109.)

Pen. Code § 141: *A Prosecutor Withholding Exculpatory Evidence*:

Addition of new **subdivision (c)** in 2017 provides that "(a) prosecuting attorney who intentionally and in bad faith alters, modifies, or withholds any physical matter, digital image, video recording, or relevant exculpatory material or information, knowing that it is relevant and material to the outcome of the case, with the specific intent that the physical matter, digital image, video recording, or relevant exculpatory material or information will be concealed or destroyed, or fraudulently represented as the original evidence upon a trial, proceeding, or inquiry, is guilty of a felony . . . ."

Punishment: *Felony*; 16 months, 2 or 3 years in prison or county jail pursuant to **P.C. § 1170(h)**.

While already grounds for reversal of a conviction or other court-imposed sanctions against the prosecution (See ***Brady v. Maryland*** (1963) 373 U.S. 83 [10 L.Ed.2nd 215; 83 S.Ct. 1194]; generically referred to as a "***Brady*** *Violation*.), a prosecutor intentionally withholding exculpatory evidence is now a felony offense. Peace officers doing the same (per **subd. (b)**) is already a felony offense, but with a greater punishment; 2, 3 or 5 years in prison. For anyone else, the offense is a misdemeanor (**subd. (a)**).

Juvenile Court Records: A similar problem occurs when the potential ***Brady*** material is contained in Juvenile Court records; an issue that was recently addressed by California's First District Court of Appeal (Div. 2) in ***People v. Stewart*** (2020) 55 Cal.App.5th 755.

A juvenile's Juvenile Court records are private. Obtaining access to such records without a court order is a violation of the juvenile's right to privacy. (See ***Gonzalez v. Spencer*** (9th Cir 2003) 336 F.3rd 832.)

However, the Ninth Circuit also held in a subsequent decision that the rule in ***Gonzalez*** was too "*opaque*" to clearly establish this right, thus resulting in a subsequent decision holding that attorneys for the county who obtained plaintiff's juvenile court records without judicial

authorization were entitled to qualified immunity from civil liability. (***Nunes v. Arata, Swingle, Van Egmond & Goodwin*** (9th Cir. 2020) 983 F.3rd 1108.)

Citing U.S. Supreme Court authority (See ***Pennsylvania v. Ritchie*** (1987) 480 U.S. 39 [94 L.Ed.2nd 40; 107 S.Ct. 989], the ***Stewart*** Court noted that a state's interest in the confidentiality of certain records *does not* take precedence over a criminal defendant's **Sixth** and **Fourteenth Amendment** rights to discover favorable evidence. An in camera review of such records by the court is sufficient to protect the interests of both the defendant with a pending criminal case and who is seeking access to such records, as well as the person who's confidential records are being sought. (***People v. Stewart***, *supra*, at pp. 771-772.)

As noted in ***Stewart***, when it is determined that ***Brady*** information is contained in a witness' juvenile court records, for instance, ***Pitchess*** does not apply. Rather, the **Welfare and Institutions Code**, **section 827**, puts the onus for protecting from disclosure, and authorizing exceptions, on the Juvenile Court as opposed to an adult trial court. (***Id.***, at p. 773.)

Although ***Pitchess*** does not apply to the juvenile records situation, the procedures for a criminal defendant to obtain *Brady* information from those records are similar. When a criminal defendant files a **section 827** petition with the Juvenile Court requesting that the court review a confidential juvenile file—the petition to include information establishing a reasonable basis to support the defendant's claim that the file contains ***Brady*** exculpatory or impeachment material—the Juvenile Court must then conduct an in camera review, releasing only those records the court finds to be relevant to the ***Brady*** issue. (See ***J.E. v. Superior Court*** (2014) 223 Cal.App.4th 1329, 1333.)

As for the prosecutor's ***Brady*** obligations, it is noted that although **section 827** authorizes a prosecutor to inspect juvenile files without a court order, neither he nor any other person who is entitled to inspect such records without a court order is permitted to disseminate confidential information contained in juvenile files to a person not so authorized. (**W&I § 827, subd. (a)(1)(B)**.) Instead, others (such as the defense counsel in ***Stewart***) are required, as noted above, to take the initiative and file a petition with the Juvenile Court, asking for permission to obtain access to the records in issue. **W&I § 827(a)(3)(A)**; see also **W&I § 827(a)(1)(Q)**.

Upon learning that relevant ***Brady*** material is held in a witness' juvenile court records, the prosecutor meets his ***Brady*** obligations

merely by informing the defense of this fact. "(T)the government's ***Brady*** obligations with respect to juvenile records are satisfied if the prosecutor informs the defendant that there is ***Brady*** material in the relevant files and the defense can then avail itself of juvenile court review of the relevant files under **section 827** to identify and turn over to the defense any exculpatory or impeachment material." (***People v. Stewart***, *supra*, at p. 774.)

Infractions:

A trial court was held to have appropriately dismissed an infraction case against defendant as a sanction under **Pen. Code § 1054.5(c)**, where defendant's federal constitutional rights under ***Brady*** were violated because substantial evidence supported an inference that the city attorney made no efforts to learn and disclose ***Brady***-required materials. (***People v. Houser*** (2022) 78 Cal.App.5th Supp. 1.)

Note: The Reporter of Decisions was directed not to publish in the Official Appellate Reports the opinion in this case, per **Cal. Const.**, **art. VI**, **section 14**; **Cal. Rules of Court**, **rule 8.1125(c)(1)**.

Federal Law Enforcement and Prosecutor's Obligations: Federal law enforcement officers and federal prosecutors do not have to be concerned with California's statutory requirements, but rather have their own statutes with which to contend; specifically, **Federal Rule of Criminal Procedure 16**. Under **Rule 16**, the government, upon request, has an obligation to turn over any documents within its "possession, custody, or control" that are "material to preparing the defense." (**Fed. R. Crim. Pro. 16(a)(1)(E)(i)**.)

Similar to the procedures as set out under ***Pitchess*** and the **California Evidence Code**, in order to trigger this requirement, the defendant "must make a threshold showing of materiality, which requires a presentation of facts which would tend to show that the Government is in possession of information helpful to the defense." (***United States v. Muniz-Jaquez*** (9th Cir. 2013) 718 F.3rd 1180, 1183-1184; quoting ***United States v. Stever*** (9th Cir. 2010) 603 F.3rd 747, 752.)

It has also been held that because "[i]nformation that is not exculpatory or impeaching may still be relevant to developing a possible defense," **Rule 16** is "broader than ***Brady***." (***United States v. Muniz-Jaquez***, *supra,* at 1183. See also ***United States v. Cano*** (9th Cir. 2019) 934 F.3rd 1002, 1022-1026.)

Pitchess v. Superior Court *and* ***Evidence Code §§ 1043*** *et seq.*:

Rule: Under ***Pitchess***; A "criminal defendant may, in some circumstances, compel the discovery of evidence in the arresting law enforcement officer's personnel file that is relevant to the defendant's ability to defend against a criminal charge." (***People v. Mooc*** (2001) 26 Cal.4th 1216, 1219; referring to ***Pitchess v. Superior Court*** (1974) 11 Cal.3rd 531.)

Statutory Procedures: ***Pitchess*** procedures and discovery requirements have since been codified in:

Evid. Code § 1043: Discovery or Disclosure of Peace Officer's Personnel Records:

(a) In any case in which discovery or disclosure is sought of peace or custodial officer personnel records or records maintained pursuant to **Section 832.5** of the **Penal Code** or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records. The written notice shall be given at the times prescribed by **subdivision (b)** of **Section 1005** of the **Code of Civil Procedure.** Upon receipt of the notice the governmental agency served shall immediately notify the individual whose records are sought.

(b) The motion shall include all of the following:

(1) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace or custodial officer whose records are sought, the governmental agency which has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard.

(2) A description of the type of records or information sought.

(3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.

(c) No hearing upon a motion for discovery or disclosure shall be held without full compliance with the notice provisions of this section except upon a showing by the moving party of good cause for noncompliance, or upon a waiver of the hearing by the governmental agency identified as having the records.

Evid. Code § 1044: Access to Medical or Psychological History:

Nothing in this article shall be construed to affect the right of access to records of medical or psychological history where such access would otherwise be available under (**Evid. Code**) **Section 996** or **1016**.

Evid. Code § 1045: Access to Records of Complaints Where Investigations or Discipline Concern a Peace Officer:

(a) Nothing in this article shall be construed to affect the right of access to records of complaints, or investigations of complaints, or discipline imposed as a result of those investigations, concerning an event or transaction in which the peace officer or custodial officer, as defined in **Section 831.5** of the **Penal Code**, participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties, provided that information is relevant to the subject matter involved in the pending litigation.

(b) In determining relevance, the court shall examine the information in chambers in conformity with (**Evid. Code**) **Section 915**, and shall exclude from disclosure:

(1) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought.

(2) In any criminal proceeding the conclusions of any officer investigating a complaint filed pursuant to **Section 832.5** of the **Penal Code**.

(3) Facts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit.

(c) In determining relevance where the issue in litigation concerns the policies or pattern of conduct of the employing agency, the court shall consider whether the information sought may be obtained from other records maintained by the employing agency in the regular course of agency business which would not necessitate the disclosure of individual personnel records.

(d) Upon motion seasonably made by the governmental agency which has custody or control of the records to be examined or by the officer whose records are sought, and upon good cause showing the necessity thereof, the court may make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression.

(e) The court shall, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested pursuant to (**E.C.**) **Section 1043**, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law.

> "'When a defendant shows good cause for the discovery of information in an officer's personnel records, the trial court must examine the records in camera to determine if any information should be disclosed. [Citation.] The court may not disclose complaints over five years old, conclusions drawn during an investigation, or facts so remote or irrelevant that their disclosure would be of little benefit. [Citations.] ***Pitchess*** rulings are reviewed for abuse of discretion.' (Citation) Although **Evidence Code section 1045**, **subdivision (b)(1)** excludes from disclosure "[i]nformation consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought," disclosure of such information may still be required under ***Brady v. Maryland*** (1963) 373 U.S. 83 [10 L.Ed.2nd 215; 83 S.Ct. 1194]. (See ***City of Los Angeles v. Superior Court*** (2002) 29 Cal.4th 1, 13–15 & fn. 3 . . . .)" (***People v. McDaniel*** (2021) 15

Cal.5th 97, 134; quoting ***People v. Rivera*** (2019) 7 Cal.5th 306, 338.)

Evid. Code § 1046: Motion to Include Copy of Police Report in Excessive Force Case:

> In any case, otherwise authorized by law, in which the party seeking disclosure is alleging excessive force by a peace officer or custodial officer, as defined in **Section 831.5** of the **Penal Code**, in connection with the arrest of that party, or for conduct alleged to have occurred within a jail facility, the motion shall include a copy of the police report setting forth the circumstances under which the party was stopped and arrested, or a copy of the crime report setting forth the circumstances under which the conduct is alleged to have occurred within a jail facility.

Evid. Code § 1047: Police Records not Subject to Disclosure:

> Records of peace officers or custodial officers, as defined in **Section 831.5** of the **Penal Code**, including supervisorial officers, who either were not present during the arrest or had no contact with the party seeking disclosure from the time of the arrest until the time of booking, or who were not present at the time the conduct is alleged to have occurred within a jail facility, shall not be subject to disclosure.

Pen. Code § 832.5: Procedure for Investigation of Citizens' Complaints Against Personnel:

> **(a)**
>
> > **(1)** Each department or agency in this state that employs peace officers shall establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies, and shall make a written description of the procedure available to the public.
> >
> > **(2)** Each department or agency that employs custodial officers, as defined in (**P.C.**) **Section 831.5**, may establish a procedure to investigate complaints by members of the public against those custodial officers employed by these departments or agencies, provided however, that any procedure so

established shall comply with the provisions of this section and with the provisions of (**P.C.**) **Section 832.7**.

(b) Complaints and any reports or findings relating to these complaints shall be retained for a period of at least five years. All complaints retained pursuant to this subdivision may be maintained either in the peace or custodial officer's general personnel file or in a separate file designated by the department or agency as provided by department or agency policy, in accordance with all applicable requirements of law. However, prior to any official determination regarding promotion, transfer, or disciplinary action by an officer's employing department or agency, the complaints described by **subdivision (c)** shall be removed from the officer's general personnel file and placed in separate file designated by the department or agency, in accordance with all applicable requirements of law.

(c) Complaints by members of the public that are determined by the peace or custodial officer's employing agency to be frivolous, as defined in **Section 128.5** of th**e Code of Civil Procedure**, or unfounded or exonerated, or any portion of a complaint that is determined to be frivolous, unfounded, or exonerated, shall not be maintained in that officer's general personnel file. However, these complaints shall be retained in other, separate files that shall be deemed personnel records for purposes of the **California Public Records Act** (**Chapter 3.5** (commencing with **Section 6250)** of **Division 7** of **Title 1** of the **Government Code**) and **Section 1043** of the **Evidence Code**.

(1) Management of the peace or custodial officer's employing agency shall have access to the files described in this subdivision.

(2) Management of the peace or custodial officer's employing agency shall not use the complaints contained in these separate files for punitive or promotional purposes except as permitted by **subdivision (f)** of **Section 3304** of the **Government Code**.

(3) Management of the peace or custodial officer's employing agency may identify any officer who is

subject to the complaints maintained in these files which require counseling or additional training. However, if a complaint is removed from the officer's personnel file, any reference in the personnel file to the complaint or to a separate file shall be deleted.

(d) As used in this section, the following definitions apply:

(1) "*General personnel* file" means the file maintained by the agency containing the primary records specific to each peace or custodial officer's employment, including evaluations, assignments, status changes, and imposed discipline.

(2) "*Unfounded*" means that the investigation clearly established that the allegation is not true.

(3) "*Exonerated*" means that the investigation clearly established that the actions of the peace or custodial officer that formed the basis for the complaint are not violations of law or department policy.

Pen. Code § 832.7: Confidentiality of Peace Officer Records: Exceptions:

(a) Except as provided in **subdivision (b)**, the personnel records of peace officers and custodial officers and records maintained by any state or local agency pursuant to (**P.C.**) **Section 832.5**, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to **Sections 1043 and 1046** of the **Evidence Code**. This section shall not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office.

(b)

(1) Notwithstanding **subdivision (a)**, **subdivision (f)** of **Section 6254** of the **Government Code**, or any other law, the following peace officer or custodial officer personnel records and records

maintained by any state or local agency shall *not* (Italics added) be confidential and shall be made available for public inspection pursuant to the **California Public Records Act** (**Chapter 3.5** (commencing with **Section 6250)** of **Division 7** of **Title 1** of the **Government Code**):

> **(A)** A record relating to the report, investigation, or findings of any of the following:
>
> > **(i)** An incident involving the discharge of a firearm at a person by a peace officer or custodial officer.
> >
> > **(ii)** An incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury.
>
> **(B)**
>
> > **(i)** Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public.
> >
> > **(ii)** As used in this subparagraph, "*sexual assault*" means the commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, offer of leniency or other official favor, or under the color of authority. For purposes of this definition, the propositioning for or commission of any sexual act while on duty is considered a sexual assault.
> >
> > **(iii)** As used in this subparagraph, "*member of the public*" means any person not employed by the officer's

employing agency and includes any participant in a cadet, explorer, or other youth program affiliated with the agency.

(C) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.

(2) Records that shall be released pursuant to this subdivision include all investigative reports; photographic, audio, and video evidence; transcripts or recordings of interviews; autopsy reports; all materials compiled and presented for review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident, or whether the officer's action was consistent with law and agency policy for purposes of discipline or administrative action, or what discipline to impose or corrective action to take; documents setting forth findings or recommended findings; and copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to the ***Skelly*** or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action.

Note: Referring to ***Skelly* v. *State Personnel Board*** (1975) 15 Cal.3rd 194, dealing with due process and disciplinary proceedings.

(3) A record from a separate and prior investigation or assessment of a separate incident shall not be released unless it is independently subject to disclosure pursuant to this subdivision.

(4) If an investigation or incident involves multiple officers, information about allegations of misconduct by, or the analysis or disposition of an investigation of, an officer shall not be released pursuant to **subparagraph (B)** or **(C)** of **paragraph (1)**, unless it relates to a sustained finding against that officer. However, factual information about that action of an officer during an incident, or the statements of an officer about an incident, shall be released if they are relevant to a sustained finding against another officer that is subject to release pursuant to **subparagraph (B)** or **(C)** of **paragraph (1)**.

(5) An agency shall redact a record disclosed pursuant to this section only for any of the following purposes:

> **(A)** To remove personal data or information, such as a home address, telephone number, or identities of family members, other than the names and work-related information of peace and custodial officers.
>
> **(B)** To preserve the anonymity of complainants and witnesses.
>
> **(C)** To protect confidential medical, financial, or other information of which disclosure is specifically prohibited by federal law or would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about misconduct and serious use of force by peace officers and custodial officers.
>
> **(D)** Where there is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of

the peace officer, custodial officer, or another person.

(6) Notwithstanding **paragraph (5)**, an agency may redact a record disclosed pursuant to this section, including personal identifying information, where, on the facts of the particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information.

(7) An agency may withhold a record of an incident described in **subparagraph (A)** of **paragraph (1)** that is the subject of an active criminal or administrative investigation, in accordance with any of the following:

(A)

(i) During an active criminal investigation, disclosure may be delayed for up to *60 days* from the date the use of force occurred or until the district attorney determines whether to file criminal charges related to the use of force, whichever occurs sooner. If an agency delays disclosure pursuant to this clause, the agency shall provide, in writing, the specific basis for the agency's determination that the interest in delaying disclosure clearly outweighs the public interest in disclosure. This writing shall include the estimated date for disclosure of the withheld information.

(ii) After *60 days* from the use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against an officer who used the force. If an agency delays disclosure pursuant to this clause, the

agency shall, at *180-day* intervals as necessary, provide, in writing, the specific basis for the agency's determination that disclosure could reasonably be expected to interfere with a criminal enforcement proceeding. The writing shall include the estimated date for the disclosure of the withheld information. Information withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than *18 months* after the date of the incident, whichever occurs sooner.

(iii) After *60 days* from the use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against someone other than the officer who used the force. If an agency delays disclosure under this clause, the agency shall, at *180-day* intervals, provide, in writing, the specific basis why disclosure could reasonably be expected to interfere with a criminal enforcement proceeding, and shall provide an estimated date for the disclosure of the withheld information. Information withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than *18 months* after the date of the incident, whichever occurs sooner, unless extraordinary circumstances warrant continued delay due to the ongoing criminal investigation or proceeding. In that case, the agency must show by clear and convincing

evidence that the interest in preventing prejudice to the active and ongoing criminal investigation or proceeding outweighs the public interest in prompt disclosure of records about use of serious force by peace officers and custodial officers. The agency shall release all information subject to disclosure that does not cause substantial prejudice, including any documents that have otherwise become available.

(iv) In an action to compel disclosure brought pursuant to **Section 6258** of the **Government Code**, an agency may justify delay by filing an application to seal the basis for withholding, in accordance with **Rule 2.550** of the **California Rules of Court**, or any successor rule thereto, if disclosure of the written basis itself would impact a privilege or compromise a pending investigation.

(B) If criminal charges are filed related to the incident in which force was used, the agency may delay the disclosure of records or information until a verdict on those charges is returned at trial or, if a plea of guilty or no contest is entered, the time to withdraw the plea pursuant to (**P.C.**) **Section 1018**.

(C) During an administrative investigation into an incident described in **subparagraph (A)** of **paragraph (1)**, the agency may delay the disclosure of records or information until the investigating agency determines whether the use of force violated a law or agency policy, but no longer than *180 days* after the date of the employing agency's discovery of the use of force, or allegation of use of force, by a person authorized to initiate an investigation, or *30 days* after the close of

any criminal investigation related to the peace officer or custodial officer's use of force, whichever is later.

(8) A record of a civilian complaint, or the investigations, findings, or dispositions of that complaint, shall *not* be released pursuant to this section if the complaint is *frivolous*, as defined in **Section 128.5** of the **Code of Civil Procedure**, or if the complaint is *unfounded*. (Italics added)

(c) Notwithstanding **subdivisions (a)** and **(b)**, a department or agency shall release to the complaining party a copy of his or her own statements at the time the complaint is filed.

(d) Notwithstanding **subdivisions (a)** and **(b)**, a department or agency that employs peace or custodial officers may disseminate data regarding the number, type, or disposition of complaints (sustained, not sustained, exonerated, or unfounded) made against its officers if that information is in a form which does not identify the individuals involved.

(e) Notwithstanding **subdivisions (a)** and **(b)**, a department or agency that employs peace or custodial officers may release factual information concerning a disciplinary investigation if the officer who is the subject of the disciplinary investigation, or the officer's agent or representative, publicly makes a statement he or she knows to be false concerning the investigation or the imposition of disciplinary action. Information may not be disclosed by the peace or custodial officer's employer unless the false statement was published by an established medium of communication, such as television, radio, or a newspaper. Disclosure of factual information by the employing agency pursuant to this subdivision is limited to facts contained in the officer's personnel file concerning the disciplinary investigation or imposition of disciplinary action that specifically refute the false statements made public by the peace or custodial officer or his or her agent or representative.

(f)

(1) The department or agency shall provide written notification to the complaining party of the

disposition of the complaint within *30 days* of the disposition.

(2) The notification described in this subdivision shall not be conclusive or binding or admissible as evidence in any separate or subsequent action or proceeding brought before an arbitrator, court, or judge of this state or the United States.

(g) This section does not affect the discovery or disclosure of information contained in a peace or custodial officer's personnel file pursuant to **Section 1043** of the **Evidence Code**.

(h) This section does not supersede or affect the criminal discovery process outlined in **Chapter 10** (commencing with **Section 1054**) of **Title 6** of **Part 2**, or the admissibility of personnel records pursuant to **subdivision (a)**, which codifies the court decision in ***Pitchess v. Superior Court*** (1974) 11 Cal.3rd 531.

(i) Nothing in this chapter is intended to limit the public's right of access as provided for in ***Long Beach Police Officers Association v. City of Long Beach*** (2014) 59 Cal.4th 59.

Note: In ***Long Beach Police Officers Association v. City of Long Beach***, *supra*, a trial court denied appellant police union's request for a permanent injunction against disclosure of the names of police officers involved in certain shootings while on duty pursuant to exemptions set forth in the **California Public Records Act**. The California Court of Appeal, Second Appellate District (Div. 2), affirmed the denial of the request for injunctive relief (***Long Beach Police Officers Assn. v. City of Long Beach*** (2012) 203 Cal.App.4th 292.); a decision in which the California Supreme Court granted review. The Supreme Court affirmed, concluding that the particularized showing necessary to outweigh the public's interest in disclosure was not made in this case, where the union and appellant city, which aligned itself with the union (opposing disclosure), relied on only a few vaguely worded declarations making only general assertions about the risks officers face after

a shooting. In weighing the competing interests, the balance tipped strongly in favor of identity disclosure and against the personal privacy interests of the officers involved.

The California Department of Justice is required to disclose as public records under the **California Public Records Act**; specifically, **Gov't. Code, §§ 6252(e)**, and **6253(a)**, all responsive officer-related records in its possession that are subject to disclosure under **Pen. Code § 832.7(b)(1)**, regardless of whether it was the employing agency or whether it created the records, because the plain statutory language does not limit disclosure obligations to an officer's employing agency and the right of access under **Cal. Const., art. I, § 3, subd. (b)(1)**, merits a broader interpretation. The catchall exemption in **Gov't. Code, § 6255(a)** can apply to officer-related records subject to disclosure because no statutory conflict exists; The department failed to demonstrate a basis for applying the catchall exemption because its evidence does show undue burden and duplicative efforts. (***Becerra v. Superior Court*** (2020) 44 Cal.App.5th 897.)

Pen. Code § 832.8: Definitions:

As used in (**P.C.**) **Section 832.7**, the following words or phrases have the following meanings:

(a) "*Personnel records*" means any file maintained under that individual's name by his or her employing agency and containing records relating to any of the following:

(1) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information.

(2) Medical history.

(3) Election of employee benefits.

(4) Employee advancement, appraisal, or discipline.

> **(5)** Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.
>
> **(6)** Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy.

> **(b)** "*Sustained*" means a final determination by an investigating agency, commission, board, hearing officer, or arbitrator, as applicable, following an investigation and opportunity for an administrative appeal pursuant to **Sections 3304** and **3304.5** of the **Government Code**, that the actions of the peace officer or custodial officer were found to violate law or department policy.
>
> **(c)** "*Unfounded*" means that an investigation clearly establishes that the allegation is not true.

Case Law:

> The trial court did not err in denying defendant's ***Pitchess*** motion. The proffered justification for the motion was not "plausible" in light of surveillance videos of the event. The videos did not leave in question the nature of the force used or conduct of defendant that preceded the use of that force. (***People v. Mackreth*** (2020) 58 Cal.App.5th 317, 341-342.)

Limitation: "(T)he ***Pitchess*** statutes 'must be viewed against the larger background of the prosecution's" ***Brady*** obligation "so as not to infringe the defendant's right to a fair trial.'" (***Association for Los Angeles Deputy Sheriffs v. Superior Court*** (2019) 8 Cal.5th 28, 41; quoting ***People v. Mooc*** 26 Cal.4th 1216, 1225.)

Procedure: The California Supreme Court, in ***Association for Los Angeles Deputy Sheriffs v. Superior Court*** (2019) 8 Cal.5th 28, 40-43, provides an excellent review of the ***Pitchess*** motion procedures, necessary before a law enforcement officer's confidential personnel file information will be released to a defendant:

"**Penal Code section 832.7** renders confidential certain personnel records and records of citizens' complaints, as well as information 'obtained from' those records. (**Pen. Code, § 832.7, subd. (a)** . . . Upon a motion showing good cause, a litigant may obtain a court's in camera inspection of the confidential information and, possibly, win the information's disclosure. But the less reason there is to believe that an officer has engaged in misconduct, the harder it is to show good cause." (***Id***., at p. 36.)

"The threshold question under the ***Pitchess*** statutes is whether the information requested is confidential. (See **Pen. Code, § 832.7, subds. (a)–(b)**.) If it is, the information may generally be disclosed only 'by discovery pursuant to' **Evidence Code sections 1043**, **1045**, and **1046**. (**§ 832.7(a)**; see ***Johnson*** (***v. Superior Court*** (2015)) 61 Cal.4th (696) at p. 712, fn. 2.). Requests for disclosure are ordinarily made in criminal cases but may also arise in connection with civil or quasi-criminal proceedings. (See **§ 832.7(a)**; see also, e.g., (***Riverside County Sheriff's Dept. v.***) ***Stiglitz*** 60 Cal.4th (624) at p. 628 [appeal of employee discipline]; ***City of San Jose v. Superior Court*** (1993) 5 Cal.4th 47, 53 . . . [juvenile wardship proceeding].)" (***Id.***, at p. 41.)

"A party seeking disclosure under the ***Pitchess*** statutes must file a written motion and give notice to the agency with custody and control of the records. (**Evid. Code, § 1043, subd. (a)**.) Among other things, the motion must identify the officer or officers at issue (***id***., **§ 1043, subd. (b)(1)**); describe 'the type of records or information' desired (***id***., **§ 1043, subd. (b)(2)**); and, by affidavit, show 'good cause for the discovery or disclosure sought' (***id***., **§ 1043, subd. (b)(3)**). (footnote 2)." (***Id.***, at p.41.)

> *Footnote 2*: "The affidavit may be executed by an attorney based on information and belief; personal knowledge is not required. (See ***Garcia v. Superior Court*** (2007) 42 Cal.4th 63, 74 . . . ; see also ***City of Santa Cruz v. Municipal Court*** (1989) 49 Cal.3rd. 73, 86 . . . ; ***People v. Memro*** (1985) 38 Cal.3rd 658, 676 . . . .)"

"This '*good cause*' (Italics added) requirement has two components. First, the movant must set forth 'the materiality' of the information sought 'to the subject matter involved in the pending litigation.' (**Evid. Code, § 1043, subd. (b)(3)**.) The function of this requirement is to 'exclude[] requests for officer information that are irrelevant to the pending charges.' (***Warrick v. Superior Court*** (2005) 35 Cal.4th 1011, 1021 . . . .) If the movant shows that the request is 'relevant to the pending charges, and

explains how, the materiality requirement will be met.' (***Johnson***, supra, 61 Cal.4th at p. 721; see also ***Richardson v. Superior Court*** (2008) 43 Cal.4th 1040, 1048–1049 . . .] ['The materiality standard is met if evidence of prior complaints is admissible or may lead to admissible evidence'].) If information is 'material' within the meaning of ***Brady***, it is necessarily material 'to the subject matter involved in' a criminal prosecution. (**Evid. Code, § 1043, subd. (b)(3)**; see ***City of Los Angeles*** (***v. Superior Court***) 29 Cal.4th (1), at p. 10.)" (***Id.***, at pp. 41-42; see also ***People v. Mackreth*** (2020) 58 Cal.App.5th 317, 339-342.)

"Second, the "*good cause*" (Italics added) requirement obliges the movant to articulate 'a "reasonable belief" that the agency has the type of information sought.' (***City of Santa Cruz***, *supra*, 49 Cal.3rd at p. 84; see also **Evid. Code, § 1043, subd. (b)(3)**.) This belief 'may be based on a rational inference' (***Johnson***, supra, 61 Cal.4th at p. 721); for example, that because officers allegedly used excessive force in a pending case, 'other complaints of excessive force "may have been filed'" (**City *of Santa Cruz***, at p. 90; see also ***id***., at p. 93, fn. 9). Certainly, a movant is not required "'to allege with particularity the very information'" sought. (***Johnson***, at p. 721, quoting ***Memro***, *supra*, 38 Cal.3rd at p. 684.) At the least, the requisite 'reasonable belief' exists when a movant declares that the agency from which the movant seeks records has placed the officer at issue on a ***Brady*** list. (See ***ibid***.)" (***Id.***, at p. 42.)

"The function of the "*good cause*" (Italics added) requirement at this stage of the ***Pitchess*** process is not to determine whether documents will be disclosed to the movant; it is to determine whether information will be reviewed in camera. Accordingly, the burden imposed by the requirement 'is not high.' (***Johnson***, *supra*, 61 Cal.4th at p. 720; see **City *of Santa Cruz***, *supra*, 49 Cal.3rd at p. 84 [requirement is designed to ensure 'the production for inspection of all potentially relevant documents'].)" (***Id.***, at p. 42.)

"When a court determines that a movant has made a showing sufficient to justify in camera inspection, 'the custodian of records should bring to court all documents "potentially relevant" to the . . . motion.' ((***People v.***) ***Mooc*** 26 Cal.4th (1216) at p. 1226.) '[I]f the custodian has any doubt whether a particular document is relevant, [the custodian] should present it to the trial court.' (***Id***., at p. 1229.) The court must examine those documents 'in conformity with [**Evidence Code**] **section 915** (i.e., out of the presence of all persons except the person authorized to claim the privilege and such other[s as that person] is willing to have present).' (***City of Santa Cru***z, *supra*, 49 Cal.3rd at p. 83; see **Evid. Code, §§ 915**,

1045, subd. (b).) To facilitate appellate review, the court should make a record of what it has examined. (See ***People v. Townsel*** (2016) 63 Cal.4th 25, 69 . . . ; see also ***Mooc***, at p. 1229–1230; see generally ***People v. Gaines*** (2009) 46 Cal.4th 172 . . . .) Questioning the custodian of records under oath regarding which documents were produced helps both to facilitate appellate review and to ensure that information is not withheld from the movant improperly. (See ***Mooc***, at p. 1229 & fn. 4.)" (***Id.***, at pp. 42-43.)

"After conducting in camera review, a court has discretion regarding which documents, if any, it will disclose to a movant. (See, e.g., ***People v. Myles*** (2012) 53 Cal.4th 1181, 1209.) **Evidence Code section 1045** guides the exercise of that discretion, requiring the court to "exclude from disclosure" certain information (***id***., **§ 1045, subd. (b)(1)–(3)**) and to 'consider' whether the movant could obtain certain other information without disclosure of individual personnel records (***id***., **§ 1045, subd. (c)**). (See also **Evid. Code, § 1047**; ***Stiglitz***, *supra*, 60 Cal.4th at pp. 641–642.) Notwithstanding these provisions, however, the court must disclose information that is favorable to the defense and "material" within the meaning of ***Brady***. (***Johnson***, *supra*, 61 Cal.4th at p. 720.)" (***Id.***, at p. 43.)

"Finally, the ***Pitchess*** statutes protect information that is disclosed to a movant from further dissemination. 'The court shall, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested pursuant to [**Evidence Code**] **Section 1043**, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law.' (**Evid. Code, § 1045, subd. (e)**; see generally ***Chambers v. Superior Court*** (2007) 42 Cal.4th 673 . . . ; ***Alford v. Superior Court*** (2003) 29 Cal.4th 1033 . . . .) Upon a proper motion by the custodian or the officer at issue, the court may also 'make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression.' (**Evid. Code, § 1045, subd. (d)**.)" (***Id.***, at p. 43.)

Confidentiality: Based upon an analysis of the above statutes and case law, specifically ***Brady*** and ***Pitchess***, the California Supreme Court held that a police department's ***Brady*** list is confidential to the extent it is derived from confidential personnel records. However, a law enforcement agency does not violate that confidentiality by sharing with prosecutors the identity of law enforcment officers on their ***Brady*** list who are potential witnesses in a specific pending case. Therefore, when a peace officer on a department's ***Brady*** list is a potential witness in a specific pending criminal prosecution, that department may disclose to the prosecution the name and identifying number of the officer and the fact that the

officer may have relevant exonerating or impeaching material in his or her confidential personnel file without the prosecution first having had to comply with the statutory procedures (**Evid. Code §§ 1043-1047**) for the release of such information. (***Association for Los Angeles Deputy Sheriffs v. Superior Court*** (2019) 8 Cal.5th 28.)

***Duty to Preserve Evidence*:**

Rule: "Law enforcement agents have a constitutional duty to preserve evidence, but that duty is limited to evidence that might be expected to play a significant role in the suspect's defense. (***California v. Trombetta*** (1984) 467 U.S. 479, 488 [81 L.Ed.2nd 413; 104 S Ct. 2528]) To reach this standard of constitutional materiality, the evidence must both possess an exculpatory value that was apparent before it was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. (***Id***. at p. 489; accord, ***People v. Carte****r* (2005) 36 Cal.4th 1215, 1246 . . . .) (¶) The defendant bears a higher burden to establish a constitutional violation when no more can be said of the evidence than that it could have been subjected to tests, the results of which might have exonerated the defendant. (***Arizona v. Youngblood*** (1988) 488 U.S. 51, 57 [102 L.Ed.2nd 281; 109 S.Ct. 333]. . . .) In such cases, unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. (***Id.*** at p. 58; accord, (***People v.***) ***Duff*** (2014) . . . 58 Cal.4th (527) at p. 549.) The assessment of bad faith must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed. (***Youngblood***, at p. 57 [fn. omitted].)" (***People v. Flores*** (2020) 9 Cal.5th 371, 394.)

> "To establish a due process violation, defendant therefore must prove that the police acted in bad faith." (***Id***., at p. 395; citing ***Youngblood***, *supra*, 488 U.S. at p. 57; and ***Duff***, *supra*, 58 Cal.4th at p. 549.)
>
> Bad faith in the destruction of evidence requires more than mere negligence or recklessness. An adverse inference jury instruction regarding the government's destruction of evidence need not be given where no bad faith failure to preserve the evidence was shown. (***Id***., at p. 397; fingerprints on a firearm used in a murder were wiped off by a Mexican law enforcement officer.)

Case Law:

> "'Due process does not impose upon law enforcement "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." [Citation.] At most, the state's obligation to preserve evidence extends to "evidence that might be expected to play a significant role in the suspect's

defense." (***People v. Duff*** ((2014)) 58 Cal.4th (527,) at p. 549.) Whether the loss of evidence rises to the level of a due process violation is governed by the principles set forth by the United States Supreme Court in ***Trombetta*** and ***Youngblood.*** (***People v. Alvarez*** (2014) 229 Cal.App.4th 761, 771 . . . .) Under ***Trombetta***, law enforcement agencies must preserve evidence only if the evidence possesses exculpatory value that was apparent before it was destroyed and if the evidence is of a type not obtainable by other reasonably available means. (***People v. Velasco*** (2011) 194 Cal.App.4th 1258, 1262 . . . ; ***California v. Trombetta***, *supra*, 467 U.S. at pp. 488–489.) As an alternative to establishing the apparent exculpatory value of the lost evidence, ***Youngblood*** provides that a defendant may show that 'potentially useful' evidence was destroyed as a result of bad faith. (fn. omitted) (***Velasco***, at p. 1262; see ***Arizona v. Youngblood***, *supra*, 488 U.S. at p. 58.)" (***People v. Fultz*** (2021) 69 Cal.App.5th 395, 424.)

"'(D)ue process does not require the police to collect particular items of evidence. [Citation.] "The police cannot be expected to] gather up everything which might eventually prove useful to the defense."' (***People v. Montes*** (2014) 58 Cal.4th 809, 837 . . . [no duty to collect blood samples]; see ***People v. Mills*** (1985) 164 Cal.App.3rd 652, 656 . . . [no duty to collect breath samples]; see also ***People v. Harris*** (1985) 165 Cal.App.3rd 324, 329 . . . ['To date there is no authority for the proposition that sanctions should be imposed for a failure to *gather* evidence as opposed to a failure to preserve evidence']; ***People v. Bradley*** (1984) 159 Cal.App.3rd 399, 406 . . . ['[W]e have found no cases of precedential value which squarely hold that the prosecution's duty to preserve material evidence encompasses an initial duty to affirmatively collect or gather or seize potentially material evidence in the course of an investigation for defendant's use'].)'" (***People v. Fultz***, *supra*, at p. 425; noting, however, that "there may be an appropriate case where the failure to collect evidence might warrant due process considerations," citing ***People v. Montes***, *supra*, at p. 838; and ***Miller v. Vasquez*** (9th Cir. 1989) 868 F.2nd 1116, 1119.)

> In ***Fultz***, two co-defendants accepted plea agreements on the condition that they testify against the sole remaining defendant (i.e., Fultz), and that they do so truthfully. Unfortunately, the pre-trial interview of these two co-defendants, although recorded, was muted. Law enforcement argued that the muting was accidental. The trial court disbelieved them, finding the muting to have occurred in bad faith. The Appellate Court upheld the trial court's determination that this constituted a "due process" violation, and a failure to preserve relevant evidence in violation of ***Trombetta***. (***Id.***, at pp. 426-429.)

> The ***Fultz*** Court made similar findings as to law enforcement's loss of a photograph of a co-conspirator's (who testified with immunity) shoes and her taped interview. (***Id.***, at p. 430.)

The trial court dismissed three felony charges against defendant due to the loss of dashcam evidence which occurred during the prosecution's five-year delay in prosecuting the case after filing charges against defendant (**Cal. Const., art. I, § 15**). The Court of Appeal reversed the judgment, finding that there was no evidence that the loss of evidence prejudiced defendant. Defendant offered only unsupported speculation that dashcam footage had exculpatory value, in that it might have contradicted the arresting officer's version of events. (***People v. Manzo*** (2023) 96 Cal.App.5th 538; petition for review denied, Jan. 10, 2024; 2024 Cal. LEXIS 33.)

Defendant argued that the charges against him should be dismissed because the officer failed to preserve the dashboard footage from the traffic stop, thus depriving him of due process. The Fourth Circuit Court of Appeal held that spoliation of evidence, or the destruction of or failure to preserve evidence, can indeed be a due-process violation. However, to rise to the level of a due process violation, the defendant must show that the unpreserved evidence had "an exculpatory value that was apparent before the evidence was destroyed and was of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." In addition, the defendant must establish that the police acted in "bad faith" in failing to preserve the evidence. Thus, spoliation will only violate due process where the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant" yet still failed to preserve it. In this case, defendant failed to satisfy any of these elements. Here, the officer and a dashboard-camera expert both testified that the officer's bodycam captured the same, if not better, footage of the traffic stop. The jury watched that video and found nothing exculpatory. The record further suggests the dashcom video would have confirmed what the bodycam video already captured. The fact that the two videos were duplicative also prevents defendant from arguing that "comparable evidence" was not reasonably available. Finally, defendant failed to show that the officer did not preserve potentially exculpatory evidence in bad faith. Therefore, his due-process argument failed. (***United States v. Perry*** (4th Cir. 2024) 92 4th 500.)

***Case Law Priorities*:**

The Courts' Order of Priority: Federal and California law is cited in this outline. In reviewing the cases listed, it must be remembered that tactical decisions and actions of state and local law enforcement officers, as well as state and local

prosecutors, are bound, and must be guided, *in order of priority*, by the decisions of:

1. The *United States Supreme Court*
2. The *California Supreme Court*
3. The various state *District Courts of Appeal* (Districts 1 through 6)
4. The various state *Appellate Departments of the Superior Court*
5. Opinions of the *California Attorney General*
6. The *Ninth Circuit Court of Appeal*
7. All other *Federal Circuit Courts of Appeal*
8. The *Federal District Courts*
9. Decisions from *other states*.

Decisions from the United States Supreme Court; *The Doctrine of Stare Decisis*: California's courts, interpreting the **U.S. Constitution**, federal statutes, etc., must abide by decisions in prior cases when based upon similar facts as announced by the U.S. Supreme Court. (***Auto Equity Sales v. Superior Court*** (1962) 57 Cal.2nd 450, 454, 456.)

> The **United States Constitution** is the "*Supreme Law of the Land*, and therefore takes precedence over any contrary rules from the states. (**U.S. Const. Art VI, clause 2**: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.")
>
> See also **Cal. Const., Art. III, § 1**: "The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land."
>
> "I fully recognize that under the doctrine of stare decisis, I must follow the rulings of the Supreme Court, and if that court wishes to jump off a figurative Pali, I, lemming-like, must leap right after it. However, I reserve my **First Amendment** right to kick and scream on my way down to the rocks below." (***People v. Musante*** (1980) 102 Cal.App.3d 156, 159; conc. opn. of Gardner, P.J.)
>
> Lower appellate courts, state and federal, are, of course, bound by decisions from the U.S. Supreme Court, even if inconsistent with prior decisions from that lower court: "[W]here the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior

circuit opinion as having been effectively overruled." (***Miller v. Gammie*** (9th Cir. 2003) 335 F.3rd 889, 893.)

Decisions from the California Supreme Court:

"(W)e follow the path staked out for us by our Supreme Court . . . because it is the Supreme Court's role to blaze the trails and our role to follow the trail so blazed. (***Auto Equity Sales, Inc. v. Superior Court*** (1962) 57 Cal.2d 450, 455–456 . . . 'Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction.')" (***In re J.W.*** (2020) 56 Cal.App.5th 355, 361-362.)

From the federal Ninth Circuit Court of Appeals: "When interpreting state law, we are bound to follow the decisions of the state's highest court, and when the state supreme court has not spoken on an issue, we must determine what result the court would reach based on state appellate court opinions, statutes and treatises." ***Diaz*** (***v. Kubler Corp.*** (9th Cir. 2015)) 785 F.3rd (1326) at 1329 (cleaned up). "We will ordinarily accept the decision of an intermediate appellate court as the controlling interpretation of state law," ***Tomlin v. Boeing Co***., 650 F.2nd 1065, 1069 n.7 (9th Cir. 1981), "unless the federal court finds convincing evidence that the state's supreme court likely would not follow it," ***Ryman v. Sears, Roebuck & Co.***, 505 F.3rd 993, 994 (9th Cir. 2007)" (***Tabares v. City of Huntington Beach*** (9th Cir. 2021) 988 F.3rd 1119, 1124.)

Decisions from lower Federal Courts:

Rule: Decisions of the *Federal District* (i.e., trial) *Courts*, and *federal Circuit Courts of Appeal* (including the Ninth Circuit Court of Appeal), while entitled to "*great weight*," are considered to be "*persuasive*" only, and *are not controlling* in California state courts. (***Raven v. Deukmejian*** (1990) 52 Cal.3rd 336, 352; ***People v. Bradley*** (1969) 1 Cal.3rd 80, 86; ***In re Tyrell J.*** (1994) 8 Cal.4th 68, 79; ***People v. Zapien*** (1993) 4 Cal.4th 929, 989; ***Clark v. Murphy*** (9th Cir. 2003) 317 F.3rd 1038, 1044; ***Tully v. World Savings & Loan Assn.*** (1997) 56 Cal.App.4th 654, 663; ***People v. Noriega*** (2015) 237 Cal.App.4th 991, 1003.)

> A federal district court decision is not controlling authority in any jurisdiction. (***Ashcroft v. al-Kidd*** (2011) 563 U.S. 731, 741 [131 S.Ct. 2074; 179 L.Ed.2nd 1149].)

State Court Interpretation taking Precedence: For state and local law enforcement officers, a state court interpretation of the various **Fourth Amendment** rules will take precedence over *Federal District* (i.e., trial) and *Circuit Court of Appeal* decisions. (See ***People v. Middleton*** (2005) 131 Cal.App.4th 732, 738, fn. 3.)

> "Where California intermediate appellate court cases conflict, any trial court may choose the decision it finds most persuasive." (***Sears v. Morrison*** (1999) 76 Cal.App.4th 577, 587.)
>
> *Note*: Federal decisions cannot be ignored. Even purely state cases may eventually end out in a federal court, where federal rules will be applied, through a *Writ of Habeas Corpus* or in a civil rights lawsuit pursuant to **42 U.S.C. § 1983**.
>
> "A federal court may grant habeas relief to a state prisoner if a state court's adjudication of his constitutional claim was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" (***Middleton v. McNeil*** (2004) 541 U.S. 433, 436 [158 L.Ed.2nd 701]; citing **28 U.S.C. § 2254(d)(1)**.)
>
> *Note*: **Title 42 United States Code § 1983:** Provides for *federal civil liability* for "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ." subjects, or causes to be subjected any person within the United States to the deprivation of any rights, privileges, or immunities secured by the United States Constitution and laws.

Federal Decisions From Other Circuits:

> "[T]he prior precedent must be 'controlling'—from the Ninth Circuit or Supreme Court—or otherwise be embraced by a 'consensus' of courts outside the relevant jurisdiction." (***West v. City of Caldwell*** (9th Cir. 2019) 831 F.3rd 978, 986; quoting ***Wilson v. Layne*** (1999) 526 U.S. 603, 617 [119 S.Ct. 1692; 143 L.Ed.2nd 818].)

Decisions From Other States: California courts are not bound by case decisions from other states (***J.C. Penney Casualty Ins. Co. v. M.K.*** (1991) 52 Cal.3rd 1009, 1027.), although they may be considered absent any direct California case law on the issue. (***People v. Valencia*** (2011) 201 Cal.App.4th 922, 932.)

> Where "no California cases have decided the issue presented, we may look to other jurisdictions *for guidance*." (Emphasis added: ***Rappaport v. Gelfand*** (2011) 197 Cal.App.4th 1213, 1227.)
>
> "(O)ut-of-state decisions . . . *have persuasive value*. 'In resolving questions of statutory construction, the decisions of other jurisdictions interpreting similarly worded statutes, although not controlling, can provide valuable insight.'" (Italics added: ***People v. Wade*** (2016) 63 Cal.4th 137, 141; quoting ***In re Joyner*** (1989) 48 Cal.3rd 487, 491.)

> Prior precedent may be reconsidered when the "the clear consensus of . . . out-of-state cases" suggests such precedence falls well outside the mainstream. (***Moradi-Shalal v. Fireman's Fund Ins. Companies*** (1988) 46 Cal.3rd 287, 298. See also ***People v. Lopez*** (2019) 8 Cal.5th 353, 379.)

Equally Split Decisions:

> "Opinions which are affirmed by an equally divided en banc Court of Appeals have no precedential value." (***United States v. Yarbrough*** (9th Cir. 1988) 852 F.2nd 1522, 1538, fn. 8.)
>
> "Decisions by an equally divided en banc court have no value as binding precedent." (***United States v. Mendoza-Gonzalez*** (5th Cir. 2003) 318 F.3rd 663, 667 fn. 5.)
>
> See ***West v. City of Caldwell*** (9th Cir. 2019) 831 F.3rd 978, 985-896, citing the above.)

Opinions of the California Attorney General: A published opinion of the California Attorney General is apparently on about equal footing with federal appellate court decisions, it having been held that these opinions are "*entitled to great weight in the absence of controlling state statutes and court decisions*" to the contrary. (***Phyle v. Duffy*** (1948) 334 U.S. 431, 441 [68 S.Ct. 1131; 92 L.Ed. 1494, 1500].)

Writs of Habeas Corpus: When a defendant claims to be in actual or constructive custody in violation of the **United States Constitution** (e.g., as the result of a **Fourth Amendment** violation), a *Writ of Habeas Corpus* filed in state (**P.C. §§ 1473 et seq.**) or federal (**28 U.S.C. § 2254**) court (see ***Wright v. West*** (1992) 505 U.S. 277 [120 L.Ed.2nd 225].) is the vehicle by which he or she may test the issue.

> A prisoner in state custody cannot use a civil **42 U.S.C. § 1983** action to challenge the fact or duration of his or her confinement, but must instead seek federal habeas corpus relief or analogous state relief. (***Preiser v. Rodriguez*** (1973) 411 U.S. 475, 477, 500 [93 S.Ct. 1827; 36 L.Ed.2nd 439]; barring inmates from obtaining an injunction to restore good-time credits via a **§ 1983** action.)
>
> > "***Preiser*** (however, does) not 'preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations.'" (***Martin v. City of Boise*** (2019) 920 F.3rd 584, 611; quoting ***Wolff v. McDonnell*** (1974) 418 U.S. 539, 555 [94 S. Ct. 2963; 41 L.Ed.2nd 935].)

Certiorari has been granted in ***Boise*** and is currently pending before the U.S. Supreme Court.

With regard to retrospective relief, as a general rule, any petition for a writ of habeas corpus must be filed while the petitioner is "in custody pursuant to the judgment of a State court." (See **28 U.S.C. § 2254(a)**; ***Spencer v. Kemna*** (1998) 523 U.S. 1, 7, 17-18 [118 S.Ct. 978; 140 L.Ed.2nd 43].).

When a habeas corpus remedy is sought in federal court, the United States Supreme Court has noted that: "(W)here the State has provided an opportunity for full and fair litigation of a **Fourth Amendment** claim, a state prisoner *may not* be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." (fns. omitted; ***Stone v. Powell*** (1976) 428 U.S. 465, 494 [49 L.Ed.2nd 1067, 1088]; see also ***Allen v. McCurry*** (1980) 449 U.S. 90 [101 S.Ct. 411; 66 L.Ed.2nd 308].)

Also, pursuant to **28 U.S.C. § 2254(d)**, a federal court "may not grant habeas relief from a state court conviction unless the state court proceedings were 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[,]' or if the state court's conclusions were 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.'" (***Jackson v. Giurbino*** (9th Cir. 2004) 364 F.3rd 1002, 1005 (reversed on other grounds), quoting ***Killian v. Poole*** (9th Cir. 2002) 282 F.3rd 1204, 1207.)

Also see **28 U.S.C. § 2255**: "**Section 2255** is a substitute for habeas corpus relief for federal prisoners . . . and allows a petitioner to file a motion to 'vacate, set aside or correct' the petitioner's conviction or sentence 'upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.' **28 U.S.C. § 2255(a)**." (See ***United States v. Swisher*** (9th Cir. 2014) 771 F.3rd 514, 519.)

Note: See "*Habeas Corpus*," above.

Unpublished Decisions:

Cal. Rules of Court, ***Rule 8.1115(a)***: "(A)n opinion of a California Court of Appeal . . . that is not certified for publication or ordered published must *not* be cited or relied on by . . a party in any other action." (Italics added) (See ***People v. Williams*** (2009) 176 Cal.App.4th 1521, 1529.)

(b) Exceptions: An unpublished opinion may be cited or relied on:

(1) When the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; *or*

(2) When the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action.

Federal Rules of Appellate Proc., Rule 32.1:

Federal Rule of Appellate Procedure 32.1 permits attorneys to cite to federal courts of appeals their unpublished opinions issued 2007 or later. Unpublished opinions issued before 2007 may be cited to the courts if permitted by the courts' local rules.

***Federal Officers; a Bivens Cause of Action*:**

General Rule: While **42 U.S.C. § 1983** is available when suing *state* officers, the U.S. Supreme Court has held that there is an *implied right* of action for civil damages against *federal* officers alleged to have violated a citizen's constitutional rights. (***Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*** (1971) 403 U.S. 388 [91 S.Ct. 1999; 29 L.Ed.2nd 619].)

In ***Bivens***, the U.S. Supreme Court held that it had authority to create "a cause of action under the **Fourth Amendment**" against federal agents who *allegedly* manacled the plaintiff and threatened his family while arresting him for narcotics violations. (***Id.***, at p. 397.)

42 U.S.C. § 1983 does not apply to civil suits against federal officers. (***Id.***, at p. 398, fn. 1; concurring opinion.)

The Supreme Court first recognized an implied right of action for damages against federal officers in ***Bivens.*** The Court held that damages were recoverable directly under the **Fourth Amendment** when federal officers arrested and searched plaintiff Webster Bivens without a warrant or probable cause, and when they allegedly employed unreasonable force in making the arrest. "In ***Bivens***, the Supreme Court recognized, for the first time, an implied cause of action arising directly under the Constitution for damages against federal officers alleged to have violated a plaintiff's constitutional rights." (***Hoffman v. Preston*** (9th Cir. 2022) 26 F.4th 1059, 1064, citing ***Bivens***, 403 U.S. at 389.)

Limitations:

However, a ***Bivens*** theory of liability has been held to be a "more limited" "federal analog" to **42 U.S.C. § 1983** statutory liability. (***Hernandez v. Mesa*** (Feb. 25, 2020) __ U.S. __ [140 S.Ct. 735; 747; 206 L.Ed.2nd 29], citing ***Hartman* v. *Moore*** (2006) 547 U.S. 250, 254, fn. 2 [126 S.Ct. 1695; 164 L.Ed.2nd 441].)

Only twice since ***Bivens*** was decided has the Court fashioned new causes of action under the Constitution:

1. For a former congressional staffer's **Fifth Amendment** sex-discrimination claim. (***Davis. v. Passman*** (1979) 442 U.S. 288 [99 S.Ct. 2264; 60 L.Ed.2nd 846].)

   However, see ***Egbert v. Boule*** (June 8, 2022) __ U.S. __, at p. __ [142 S.Ct. 1793; 213 L.Ed.2nd 54]**,** questioning whether, in light of subsequent Supreme Court decisions, ***Passman*** was appropriately decided.

2. For a federal prisoner's inadequate-care claim under the **Eighth Amendment**. (***Carlson* v. *Green*** (1980) 446 U. S. 14 [100 S.Ct. 1468; 64 L.Ed.2nd 15].)

The Issue:

Taking the above into consideration, it has been held that a ***Bivens*** cause of action is appropriate where:

> Damages were sought against federal officers who violated the **Fourth Amendment's** prohibition against unreasonable searches and seizures. (***Bivens***, *supra*.)
>
> Damages are sought under the **Fifth Amendment's** "due process" clause for gender discrimination by a member of the United States Congress. (***Davis v. Passman*** (1979) 442 U.S. 228, 239 [99 S.Ct. 2264; 60 L.Ed.2nd 846].)
>
> An implied claim under the **Eighth Amendment's** cruel and unusual punishment clause for prison officials' failure to provide adequate medical care to a severely asthmatic prisoner, resulting in the prisoner's death. (***Carlson v. Green*** (1980) 446 U.S. 14, 16-18, & fn. 1. [100 S.Ct. 1468; 64 L. Ed.2nd 15].)
>
> In the unpublished decision of ***Martinez v. U.S. Bureau of Prisons*** (9th Cir. 2020) 830 F. App'x 234, 235, a previously incarcerated

plaintiff sought a ***Bivens*** remedy under ***Carlson*** for an **Eighth Amendment** claim for inadequate exercise. Although both the claims in ***Martinez*** and those in ***Carlson*** arose under the **Eighth Amendment**, the court affirmed the district court's finding that the plaintiff's claim in this case was a "*new context*," because the inadequate exercise claim was "demonstrably different in kind . . . from that of ***Carlson***." A ***Bivens*** remedy was therefore denied.

Bivens *Actions as a Disfavored Remedy*:

Per the U.S. Supreme Court; "*special factors . . . counsel hesitation*" in over-using a ***Bivens*** theory of liability, concentrating on whether the judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed. (***Ziglar v. Abbasi*** (June 19, 2017) __ U.S. __ [137 S.Ct. 1843, 1848-1849; 198 L.Ed.2nd 290].)

The Supreme Court made it clear in ***Ziglar*** that "expanding the ***Bivens*** remedy is now a disfavored judicial activity," although a ***Bivens*** remedy is still available in appropriate cases where there are "powerful reasons" to retain it in its "common and recurrent sphere of law enforcement." (***Id***., at 137 S.Ct. at p. 1857.)

However, it has been ruled that "***Abbasi*** makes clear that, though disfavored, ***Bivens*** may still be available in a case against an individual federal officer who violates a person's constitutional rights while acting in his official capacity." (See ***Lanuza v. Love*** (9th Cir. 2018) 899 F.3rd 1019, 1028.)

Note: See ***Hernandez v. Mesa***, below, for the "*special factors*" identified by the U.S. Supreme Court.

Where a U.S. Border Patrol agent, in reaction to subjects throwing rocks at him while he attempted to detain a subject who had illegally crossed the international border with Mexico, shot across the border into Mexico, killing a Mexican national standing on the Mexico side, the U.S. Supreme Court (reversing the Fifth Circuit Court of Appeal's holding that the agent was entitled to qualified immunity; see ***Hernandez v. Mesa*** (5th Cir. 2015) 785 F.3rd 117.) remanded the case to reconsider the viability of a civil suit on **Fourth Amendment** (excessive force) grounds in light of the Court's decision in ***Ziglar v. Abbasi***, *supra*, which discussed various "special factors" that "counsel hesitation" in allowing a federal civil action per ***Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics***, *supra*, against a federal officer for his alleged use of excessive force. (***Hernandez v. Mesa*** (2017) 582 U.S. 548 [137 S.Ct. 2003; 198 L.Ed.2nd 625].)

> The ***Hernandez*** Court also ruled that granting the federal agent qualified immunity from **Fifth Amendment** "due process" liability was inappropriate when the nationality and the extent of the victim's ties to the United States were unknown to the agent at the time of the shooting. "The qualified immunity analysis thus is limited to the facts that were knowable to the defendant officers at the time they engaged in the conduct in question." (***Id.***, at p. 554.)

On ***Hernandez's*** second trip to the U.S. Supreme Court, after remand back to the Fifth Circuit Court of Appeal, the High Court ruled that the decedent's family in this cross-border shooting could *not* bring ***Bivens*** claims against the agent for alleged **Fourth** and **Fifth Amendment** violations because the Court refused to extend ***Bivens*** (***Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*** (1971) 403 U.S. 388 [91 S.Ct. 1999; 29 L.Ed.2nd 619].) into that new field of legal liability. Factors that counseled hesitation included the potential effect on foreign relations, the risk of undermining border security, and the fact that when Congress had enacted statutes creating a damages remedy for persons injured by U.S. government officers, it had precluded claims for injuries that occurred abroad. (***Hernandez v. Mesa*** (2017) 582 U.S. 548 [137 S.Ct. 2003; 198 L.Ed.2nd 625].)

> See ***Egbert v. Boule*** (June 8, 2022) __ U.S. __, at p. __ [142 S.Ct. 1793; 213 L.Ed.2nd 54], quoting ***Haig v. Agee*** (1981) 453 U.S. 280, at p. 292 [101 S.Ct. 2766; 69 L.Ed.2nd 640]; **"**Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention. In ***Harisiades v. Shaughnessy***, 342 U.S. 580 (1952), the Court observed that matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.' ***Id.***, at 589."

See also ***Elhady v. Unidentified CBP Agents*** (6th Cir. MI 2021) 18 F.4th 880, where the Sixth Circuit declined to extend ***Bivens*** to a **Fifth Amendment** due process claim, defendant suing over having been left in an allegedly freezing holding cell by Border Patrol agents without blankets or sufficient clothing to the point where he was hospitalized, citing ***Hernandez v. Mesa*** (5th Cir. 2015) 785 F.3rd 117.

The U.S. Supreme Court held that the Ninth Circuit Court of Appeals plainly erred when it created a cause of action for the bed-and-breakfast owner's **Fourth Amendment** excessive force claim because Congress was better positioned to create remedies in the border-security context, and the Government already had provided alternative remedies that

protected plaintiffs like the owner. Because matters intimately related to foreign policy and national security were rarely proper subjects for judicial intervention, a ***Bivens*** cause of action may *not* lie where national security was at issue. The Ninth Circuit also plainly erred when it created a cause of action for the bed-and-breakfast owner's **First Amendmen**t retaliation claim because there was no ***Bivens*** action for **First Amendment** retaliation. There were many reasons to think that Congress, not the courts, was better suited to authorize such a damages remedy. **(*Egbert v. Boule*** (June 8, 2022) __ U.S. __ [142 S.Ct. 1793; 213 L.Ed.2nd 54], reversing the Ninth Circuit at ***Boule v. Egbert*** (9th Cir. 2020) 980 F.3rd 1309**.)**

> *Note*: See the concurring opinion in *Egbert* at pp. __-__, where Justice Gorsuch questions whether the Court shouldn't just quit beating around the bush and overrule *Bivens* altogether, leaving it up to Congress to enact penalties for when U.S. officers violate anyone's constitutional rights.

The Ninth Circuit Court of Appeal reversed the denial of a Federal Protective Service officer's motion to dismiss a protester's action because the Court found no ***Bivens*** cause of action was available in this case. The officer was directing a multi-agency operation to protect federal property and carrying out an executive order. Allowing a ***Bivens*** action to proceed in this case could expose sensitive communications between the officer and other high-level executive officers regarding the implementation of policy. Furthermore, Congress afforded plaintiffs like the protester an alternative remedy that independently foreclosed a ***Bivens*** action; i.e.; "(A)ggrieved parties can report any alleged misconduct to the Inspector General of the Department of Homeland Security, who must either investigate or refer the matter to the Officer for Civil Rights and Civil Liberties. **5 U.S.C. app. 3 § 8I(f)(2)(B)-(C), (F)-(G)**; *see also* **6 U.S.C. § 345(a)(1), (4), (6)** (requiring Officer for Civil Rights and Civil Liberties to investigate alleged misconduct)." (***Pettibone v. Russell*** (9th Cir. 2023) 59 F.4th 449.)

Bivens *Extension Issues*:

Bivens protections extended to a damages remedy for a gender discrimination claim against a United States Congressman under the *equal protection component* of the **Fifth Amendment Due Process Clause**. (***Davis v. Passman*** (1979) 442 U.S. 228 [99 S.Ct. 2264; 60 L.Ed.2nd 846].)

A ***Bivens*** damages remedy was recognized against federal prison officials for failure to provide *adequate medical treatment* under the **Eighth Amendment's Cruel and Unusual Punishment Clause**. (***Carlson v. Green*** (1980) 446 U.S. 14 [100 S.Ct. 1468; 64 L.Ed.2nd 15].)

See also ***Elhady v. Unidentified CBP Agents*** (6th Cir. MI 2021) 18 F.4th 80, where the Sixth Circuit declined to extend ***Bivens*** to a **Fifth Amendment** due process claim, defendant suing over having been left in an allegedly freezing holding cell by Border Patrol agents without blankets or sufficient clothing to the point where he was hospitalized.

But see ***Hoffman v. Preston*** (9th Cir. 2022) 26 F.4th 1059, where, in a split 2-to-1 decision, the Ninth Circuit held that ***Bivens*** applied to a federal prisoner's claims that a federal prison guard intentionally targeted him for harm by spreading malicious rumors about and offering bribes to other inmates to attack him, the inmate was attacked because of the officer's conduct, and the officer failed to protect the inmate against the known risk of harm that the officer himself created.

> At pgs. 1069-1070, the ***Hoffman*** Court notes that the **Prison Litigation Reform Act** ("**PLRA**"), **28 U.S.C. § 1915A(a)** was not intended to be a substitute for in-court litigation of an alleged wrong done to prison inmates. "(T)he **PLRA** makes clear that a prisoner may bring a federal action after he exhausts the grievance process. **42 U.S.C. § 1997e(a)**. The Supreme Court has acknowledged as much, explaining that 'federal prisoners suing under [***Bivens***] must first exhaust inmate grievance procedures.' ***Porter v. Nussle***, 534 U.S. 516, 524, 122 S. Ct. 983, 152 L. Ed. 2d 12 (2002). The purpose of this exhaustion requirement is to 'promote administrative redress, filter out groundless claims, and foster better prepared litigation of claims aired in court,' ***id.*** at 528 (citation omitted)—not to exclude from federal court meritorious claims that cannot be resolved by the grievance process. ***Bistrian*** (***v. Levi***) (3rd Cir. 2018)) 912 F.3rd (79) at 92 (citation omitted); *see also* ***Bivens***, 403 U.S. at 410 (Harlan, J., concurring) (the remedy is available for cases in which 'it is damages or nothing')."

However, a non-statutory ***Bivens*** cause of action, although possible under the right circumstances, remains a "*disfavored remedy*," per the U.S. Supreme Court:

> "(R)ather than dispense with ***Bivens*** altogether, we have emphasized that recognizing a cause of action under ***Bivens*** is ***Bivens*** is 'a disfavored judicial activity.' ***Ziglar***, 582 U.S. 120, at 121, 137 S.Ct. 1843, 198 L.Ed.2nd 290 (slip op., at 11) (internal quotation marks omitted); ***Hernández***, 589 U.S., at ___, 140 S.Ct. 735, 206 L.Ed.2nd 29 (slip op., at 7) (internal quotation marks omitted). When asked to imply a ***Bivens*** action, 'our watchword is

caution.' ***Id.***, at ___, 140 S.Ct. 735, 206 L.Ed.2nd 29 (slip op., at 6).

'[I]f there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy[,] the courts must refrain from creating [it].' ***Ziglar***, 582 U.S., at 121, 137 S.Ct. 1843, 198 L.Ed.2nd 290 (slip op., at 13). '[E]ven a single sound reason to defer to Congress' is enough to require a court to refrain from creating such a remedy. ***Nestlé USA, Inc.* v. *Doe***, 593 U. S. ___, ___, 141 S.Ct. 1931, 210 L.Ed.2nd 207 (2021) (plurality opinion) (slip op., at 6). Put another way, 'the most important question is who should decide whether to provide for a damages remedy, Congress or the courts?' ***Hernández***, 589 U.S., at ___-___, 140 S.Ct. 735, 206 L.Ed.2nd 29 (slip op., at 19-20) (internal quotation marks omitted). If there is a rational reason to think that the answer is 'Congress'—as it will be in most every case, see ***Ziglar***, 582 U. S., at 121-122, 137 S.Ct. 1843, 198 L.Ed.2nd 290 (slip op., at 12)—no ***Bivens*** action may lie. Our cases instruct that, absent utmost deference to Congress' preeminent authority in this area, the courts 'arrogat[e] legislative power.' ***Hernández***, 589 U.S., at ___, 140 S.Ct. 735, 206 L.Ed.2nd 29 (slip op., at 5)." (***Egbert v. Boule*** (June 8, 2022) __ U.S. __. __ [142 S.Ct. 1793; 213 L.Ed.2nd 54].)

In determining whether a ***Bivens*** cause of action is appropriate, the U.S. Supreme Court (at ***Egbert v. Boule*** (June 8, 2022) __ U.S. __. __ [142 S.Ct. 1793; 213 L.Ed.2nd 54].) has noted that a court is to consider two steps:

> "*First*, we ask whether the case presents 'a new *Bivens* context'—*i.e.*, is it "meaningful[ly]" different from the three cases in which the Court has implied a damages action. ***Ziglar***, 582 U. S., at ___, 137 S.Ct. 1843, 198 L.Ed. 2nd 290 (slip op., at 16). *Second*, if a claim arises in a new context, a Bivens remedy is unavailable if there are 'special factors' indicating that the Judiciary is at least arguably less equipped than Congress to 'weigh the costs and benefits of allowing a damages action to proceed.' ***Ziglar***, 582 U. S., at 121-122, 137 S.Ct. 1843, 198 L.Ed.2nd 290 (slip op., at 12) (internal quotation marks omitted). If there is even a single 'reason to pause before applying ***Bivens*** in a new context,' a court may *not* recognize a ***Bivens*** remedy. ***Hernández***, 589 U. S., at ___, 140 S.Ct. 735, 206 L.Ed.2nd 29 (slip op., at 7)." (Italics added)
>
> The ***Egbert*** Court also noted, however, that the above two "steps often resolve to a single question: whether there is

> any reason to think that Congress might be better equipped to create a damages remedy." (***Id***., at p. __.)
>
> Finally, the Egbert Court also recognized that "a court may not fashion a ***Bivens*** remedy if Congress already has provided, or has authorized the Executive to provide, 'an alternative remedial structure.'" (***Id***., at p. __; quoting ***Ziglar v. Abbasi*** (June 19, 2017) 582 U.S. 120, 121 [137 S.Ct. 1843; 198 L.Ed.2nd 290].)
>
> Summarizing the above, the Supreme Court in ***Egbert*** noted that it is important to remember that "the relevant question is not whether a ***Bivens*** action would 'disrup[t]' a remedial scheme, ***Schweicker***, 487 U.S., at 426, 108 S.Ct. 2460, 101 L.Ed.2nd 370, or whether the court 'should provide for a wrong that would otherwise go unredressed.' ***Bush***, 462 U.S., at 388, 103 S.Ct. 2404, 76 L.Ed.2nd 648. Nor does it matter that 'existing remedies do not provide complete relief.' ***Ibid***. Rather, the court must ask only whether it, rather than the political branches, is better equipped to decide whether existing remedies 'should be augmented by the creation of a new judicial remedy.' ***Ibid***; see also ***id***., at 380, 103 S.Ct. 2404, 76 L.Ed.2nd 648 ('the question [is] who should decide')." (***Egbert v. Boule***, *supra*, at p. __.)
>
> *In sum*, the Supreme Court in ***Egbert*** rejected a ***Bivens*** remedy for a **Fourth Amendment**, international border use of excessive force claim (pgs. _) as well as a **First Amendment**, retaliation claim (pgs. __).

In an interlocutory appeal, the Ninth Circuit Court of Appeal reversed the district court's denial of defendants' motion to dismiss an action alleging due process violations and seeking damages pursuant to ***Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*** (1971) 403 U.S. 388 [91 S.Ct. 1999 [29 L.Ed.2nd 619]. In this case, David Harper, a former Bureau of Land Management ("BLM") Law Enforcement Ranger in Idaho, challenged adverse employment actions taken against him by the Department of the Interior and BLM officials. He sued defendants alleging a violation of his **Fifth Amendment** right to due process. The Court held that Harper had no claim for money damages under ***Bivens***. Citing ***Egbert v. Boule*** (2022) __ U.S. __ [142 S.Ct. 1793; 213 L.Ed.2nd 54], noting that the Supreme Court means what it says: ***Bivens*** claims are limited to the three contexts the Court has previously recognized and are not to be extended unless the Judiciary is better suited than Congress to provide a remedy. Here, Harper's claims arose in a different context than what the

Court has recognized. Congress has also already provided a remedy in this context under the **Civil Service Reform Act of 1978**. Because this case involves an alternative remedial structure, this case exists in a novel context outside the preexisting ***Bivens*** framework. Extending ***Bivens*** here would risk impermissible intrusion into the functioning of both the Legislative and Executive Branches. (***Harper v. Nedd*** (9th Cir. 2023) 71 F.4th 1181.)

In ***Chambers v. Herrera*** (9th Cir. 2023) 78 F.4th 1100, the Ninth Circuit Court of Appeal affirmed in part, reversed in part, and vacated in part the district court's order dismissing for failure to state a claim a federal prisoner's **First** and **Eighth Amendment** claims brought under ***Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*** (1971) 403 U.S. 388 [91 S.Ct. 1999; 29 L.Ed.2nd 619], and remanded.

> In evaluating plaintiff's claims, the Court applied the two-part framework set forth in ***Ziglar v. Abbasi*** (2017) 582 U.S. 120 [137 S.Ct. 1843; 198 L.Ed.2nd 290, and ***Hernandez v. Mesa*** (2020) __ U.S.__ [140 S.Ct. 735; 206 L.Ed.2nd 29, asking first whether the claim arose in a new context, and second, if so, whether other special factors counseled hesitation against the extension of ***Bivens***. Affirming the dismissal of the **First Amendment** retaliation claim, the panel agreed with plaintiff that the Supreme Court's decision in ***Egbert v. Boule*** (2022) __ U.S.__ [142 S.Ct. 1793; 213 L.Ed.2nd 54, explicitly disavowed any ***Bivens*** claims based on First Amendment retaliation. The Court held that plaintiff's **Eighth Amendment** failure to protect claim failed to state a claim under ***Egbert*** because: (1) the claim represented a new ***Bivens*** context, noting that no case has extended *Bivens* to claims that Bureau of Prisons employees violated the **Eighth Amendment** by failing to protect an inmate from other staff members. Also, (2) Congress was better suited than the Judiciary to construct a damages remedy. The panel held that plaintiff's **Eighth Amendment** excessive force claim similarly failed under *Bivens*, but dismissal of that claim should be with prejudice because even plausible allegations could not constitute a ***Bivens*** claim for excessive force under ***Egbert*** and amendment would be futile. Addressing plaintiff's **Eighth Amendment** claim for medical indifference, the panel determined that it was unclear whether the ***Bivens*** claim was viable because plaintiff failed to allege any facts about his injuries, examination, or treatment. The panel remanded the claim for the district court to consider whether plaintiff, proceeding pro se, should be allowed to amend his complaint and the potential merits of any amended claim.

In an action brought pursuant to ***Bivens***, alleging that federal correctional officials failed to protect plaintiff from other detainees at a jail, the panel reversed the district court's denial of defendant officers' motion to dismiss and declined to extend a ***Bivens*** action to include a **Fifth Amendment** failure-to-protect claim. When a party seeks to bring a ***Bivens*** action, courts apply a two-step test; i.e., whether the case presents a new ***Bivens*** context, and, if so, whether there "special factors" that counsel against extending ***Bivens***. Applying the first step, the panel held that this case presents a new ***Bivens*** context that the Supreme Court has not recognized in its ***Bivens*** jurisprudence. The panel declined to recognize an implied ***Bivens*** context arising from ***Farmer v. Brennan*** (1994) 511 U.S. 825, which involved an **Eighth Amendment** failure-to-protect claim by a female-presenting transsexual individual who was assaulted by other inmates. The panel noted that nearly thirty years have passed since the Supreme Court decided ***Farmer*** and if the Court were inclined to recognize it as one of the few acceptable ***Bivens*** contexts, it would have done so. The panel further determined that plaintiff's claim was meaningfully distinguishable from ***Farmer***, which involved an **Eighth Amendment** rather than a **Fifth Amendment** claim, alleged a different category of harm, and arose in a different factual setting. Applying the second step, the panel held that special factors counsel against extending ***Bivens*** to this case. The legislature and executive were best positioned to address plaintiff's interest, and have, in fact, provided alternative remedies through administrative review procedures offered by the Board of Prisons. Accordingly, the panel declined to overstep its constitutional role to create a new damages action. Concurring in the judgment, Judge W. Fletcher noted that had a state prisoner made the same factual allegations as plaintiff did here, he would have a cause of action for damages. Denying a damages remedy to a federal prisoner while granting it to a state prisoner in the same circumstance constitutes a miscarriage of justice. (***Marquez v. Rodriguez*** (9th Cir. 2023) 81 F.4th 1027.)

Additional Case Law:

Respondent former inmate sued petitioner halfway house operator for negligence. Treating the complaint as a ***Bivens*** action, the district court dismissed the cause of action. The United States Court of Appeals for the Second Circuit reversed, finding that the former inmate could bring a ***Bivens*** action against the halfway house operator. The halfway house operator's petition for certiorari to the appellate court was granted. In this case, the halfway house operator, a private corporation under contract with the federal Bureau of Prisons (BOP), operated a halfway house at which the former inmate resided. The former inmate alleged that an employee of the halfway house operator forbade him to use the elevator to reach his fifth-floor bedroom, even though he was supposed to be allowed to use the

elevator due to a heart condition. The former inmate suffered a heart attack after climbing the stairs. In the former inmate's negligence action, which was treated as a ***Bivens*** action, the Supreme Court declined to extend the implied damages action recognized in Bivens to allow recovery against the halfway house operator. The former inmate did not lack effective remedies, and he had full access to remedial mechanisms established by the BOP. The former inmate's suit would not have advanced Bivens' core purpose of deterring individual officers from engaging in unconstitutional wrongdoing. The Supreme Court therefore reversed the Second Circuit Court of Appeals. (***Correctional Services Corp.* v. *Malesko*** (2001) 534 U.S. 61 [122 S.Ct. 515; 151 L.Ed.2nd 456].)

The federal district court properly denied qualified immunity to a U.S. Border Patrol agent who, while standing on American soil, shot and killed a teenage Mexican citizen who was walking down a street on the Mexico side of the border. The use of force was held to be unreasonable under the **Fourth Amendment** given that the teenager was not suspected of any crime, was not fleeing or resisting arrest, and did not pose a threat to anyone. No reasonable officer could have thought that he could shoot the teenager if, as pleaded, the teenager was innocently walking down a street in Mexico. (***Rodriguez v. Swartz*** (9th Cir. 2018) 899 F.3rd 719, 728-734.)

> Plaintiff was also held to be entitled to bring a "***Bivens*** cause of action" for money damages, per ***Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*** (1971) 403 U.S. 388 [91 S.Ct. 1999; 29 L.Ed.2nd 619]. (***Id***., at pp. 734-739.)

"The **Fourth Amendment's** particularity requirement is not a mere technicality; it is an express constitutional command. The particularity requirement 'confines an officer executing a search warrant strictly within the bounds set by the warrant.' ***Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics***, 403 U.S. 388, 394 n.7, 91 S.Ct. 1999, 29 L.Ed.2nd 619 (1971). 'To the extent [government] agents want[] to seize relevant information beyond the scope of the warrant, they should [seek] a further warrant.' ***United States v. Sedaghaty***, 728 F.3rd 885, 914 (9th Cir. 2013)." (⁋) "The particularity requirement serves foundational constitutional interests and must be zealously protected. 'The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another.' ***Marron v. United States***, 275 U.S. 192, 196, 48 S. Ct. 74, 72 L.Ed. 231, Treas. Dec. 42528 (1927). In addition, the particularity requirement 'assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search,' ***Groh v. Ramirez***, 540 U.S. 551, 561, 124 S. Ct. 1284, 157 L.Ed.2nd 1068 (2004) (citation omitted), and 'greatly reduces the perception of unlawful

or intrusive police conduct,' ***Illinois v. Gates***, 462 U.S. 213, 236, 103 S. Ct. 2317, 76 L.Ed.2nd 527 (1983). To serve these ends, the particularity requirement leaves nothing 'to the discretion of the officer executing the warrant.' ***Marron***, 275 U.S. at 196. 'Absent some grave emergency, the **Fourth Amendment** has interposed a magistrate between the citizen and the police.' ***McDonald v. United States***, 335 U.S. 451, 455, 69 S.Ct. 191, 93 L.Ed. 153 (1948)." (***United States v. Ramirez*** (9th Cir. 2020) 976 F.3rd 946, 951-952.)

See also ***Perez v. United States*** (9th Cir. 2021) 8 F.4th 1095, where an officer fatally shot a Mexican national at the border. This allegation was determined to be "different in a meaningful way" from ***Bivens***, which involved an officer arresting the plaintiff in, and searching, his home.

In a split 2-to-1 decision, the Ninth Circuit held that ***Bivens*** applied to a federal prisoner's claims that a federal prison guard intentionally targeted him for harm by spreading malicious rumors about and offering bribes to other inmates to attack him, the inmate was attacked because of the officer's conduct, and the officer failed to protect the inmate against the known risk of harm that the officer himself created. (***Hoffman v. Preston*** (9th Cir. 2022) 26 F.4th 1059.)

Before the 2016 Democratic National Convention, the Secret Service announced that access to certain areas would be restricted. Graber, a paramedic, joined political protests outside the Restricted Area. When protestors breached the gated perimeter, the Philadelphia Police Department apprehended those within the Restricted Area. Graber was one of seven individuals taken into custody although the police did not prepare any arrest paperwork for Graber. Special Agent Boresky was charged with serving as an affiant for a criminal complaint against the arrestees. Another agent e-mailed Boresky a synopsis of the events and photographs. Boresky later appeared before a Magistrate and signed an affidavit for an arrest warrant identifying Graber as having been arrested inside the Restricted Area, based upon his "personal knowledge," "information developed during the course of this investigation," and information imparted by other officers. Boresky was not present at the arrest, did not view any video evidence, and did not write the affidavit. Graber was detained overnight. Graber's counsel provided news video clips confirming that Graber never passed through the fence, resulting in the charges against Graber being dismissed. Citing "***Bivens***," Graber sued Boresky for false arrest, unlawful detention, and false charges. Denying a motion to dismiss, the district court held that a ***Bivens*** claim could be brought against Boresky. The court later dismissed Boresky's qualified immunity summary judgment motion. The Third Circuit dismissed an appeal for lack of jurisdiction noting that the Bivens *ruling* is not a final

decision and is not appealable under the collateral order doctrine. (***Graber v. Boresky*** (3rd Cir. 2023) 59 F.4th 603.)

Federal Civil 42 U.S.C. § 1983 *Civil Liability and Qualified Immunity*:

In a civil **42 U.S.C. § 1983** lawsuit (which provides a cause of action for the deprivation of constitutional rights by persons acting under color of state law) for the use of excessive, deadly force, where the defendant/officer moved for summary judgment, the trial court must look at the evidence in the light most favorable to the plaintiff/non-moving party with respect to the central facts of the case. In this case, where the defendant/officer shot the plaintiff in the chest, the Fifth Circuit failed to acknowledge and credit plaintiff's evidence with regard to the lighting, his mother's demeanor, whether he shouted words that were an overt threat, and his positioning during the shoot. The case was remanded for a consideration of these facts. (***Tolan v. Cotton*** (2014) 572 U.S. 650 [134 S.Ct. 1861; 188 L.Ed.2nd 895].)

On appeal, an appellate court is required to recount the facts in the light most favorable to petitioner. (***Torres v. Madrid*** (Mar. 25, 2021) __ U.S. __, __ [141 S.Ct. 989; 209 L.Ed.2nd 190].)

In contrast, a ***Bivens*** theory of liability has been held to be a "more limited" "federal analog" to **§ 1983**. ("***Hernandez v. Mesa*** (Feb. 25, 2020) __ U.S. __ [140 S.Ct. 735; 747; 206 L.Ed.2nd 29], citing ***Hartman* v. *Moore*** (2006) 547 U.S. 250, 254, fn. 2 [126 S.Ct. 1695; 164 L.Ed.2nd 441].)

See "*Federal Officers; a **Bivens** Cause of Action*," above.

"Public officials are immune from suit under **42 U. S. C. § 1983** unless they have 'violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.' (***Plumhoff v. Rickard*** (2014) 572 U.S. 756, 766-767 [134 S.Ct. 2012; 188 L.Ed.2nd 1056].) An officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it,' (***Ibid***.), meaning that 'existing precedent . . . placed the statutory or constitutional question beyond debate.' (***Ashcroft v. al-Kidd*** (2011) 563 U.S. 731, 741 [131 S.Ct. 2074; 179 L.Ed.2nd 1149, 1159].). This exacting standard 'gives government officials breathing room to make reasonable but mistaken judgments' by 'protect[ing] all but the plainly incompetent or those who knowingly violate the law.' (***Id***., at 743 [131 S.Ct. 2074; 179 L.Ed.2nd 1149, 1160].)" (***City & County of San Francisco v. Sheehan*** (2015) 575 U.S. 600, 610 [135 S.Ct. 1765, 1775-1776; 191 L.Ed.2nd 856].)

The U.S. Supreme Court severely criticized the Ninth Circuit Court of appeal for using the general rationale of prior decisions in holding that officers should have been aware of any particular rule. "We have repeatedly told courts—and the

Ninth Circuit in particular—not to define clearly established law at a high level of generality." (***City & County of San Francisco v. Sheehan***, *supra* at p. 614 [135 S.Ct. at pp.1775-1776; quoting and citing ***Ashcroft v. al-Kidd*** (2011) 563 U.S. 731, 742 [131 S.Ct. 2074; 179 L.Ed.2nd 1149, 1159]; and ***Lopez v. Smith*** (2014) 574 U.S. 1, 6 [135 S.Ct. 1; 190 L.Ed.2nd 1, 5]; see also ***Kisela v. Hughes*** (2018) 584 U.S. 100, 104 [200 L.Ed.2nd 449; 138 S.Ct. 1148]; noting that the Ninth Circuit Court of Appeal is a frequent offender of this rule. See also ***Felarca v. Birgeneau*** (2018) 891 F.3rd 809, 816.)

> It was also noted in ***Sheehan*** that the fact that officers may violate or ignore their training and written policies in forcing entry and using force does not itself negate qualified immunity where it would otherwise be warranted. (***City & County of San Francisco v. Sheehan***, *supra*, at p. 617 [135 S.Ct. at p. 1777].)
>
> See also ***Messerschmidt et al. v. Millender*** **(2012) 565 U.S. 535, 546-556 [132 S.Ct. 1235;** 182 L.Ed.2nd 47]; ***Carroll v. Carman*** (2014) 574 U.S. 13, 16 [135 S.Ct. 348, 350; 190 L.Ed.2nd 311]; and ***Guillory v. Hill*** (2015) 233 Cal.App.4th 240, 250-252.)

Note also the dissenting opinion to the Ninth Circuit's denial of a motion for rehearing and for a decision en banc, reported at ***Slater v. Deasey*** (9th Cir. 2019) 943 F.3rd 898, where a four-justice dissent written by Justice Collins, joined by Justices Bea, Ikuta, and Bress, noted that in holding that the police officers in this case violated clearly established law when they restrained Plaintiff Joseph Slater in the back of a patrol car, allegedly causing his death, the panel continued the Ninth Circuit's troubling pattern of ignoring the Supreme Court's controlling precedent concerning qualified immunity in **Fourth Amendment** cases. It was noted that Plaintiffs had the burden to find a controlling precedent that squarely governed the specific facts of this case. They failed to carry that burden, per the dissent, and the district court's grant of summary judgment on qualified immunity grounds should have been affirmed. The dissenting justices criticized the majority's finding of "*sufficiently analogous*" authority a single Ninth Circuit decision—***Drummond v. City of Anaheim*** (9th Cir. 2003) 343 F.3rd 1052. In applying this lesser "*sufficiently analogous*" standard, the panel committed the very same error for which the Court was summarily reversed in ***Kisela v. Hughes*** (2018) 584 U.S. 100 [200 L.Ed.2nd 449; 138 S.Ct. 1148], where Ninth Circuit had denied qualified immunity "because of Circuit precedent that the court perceived to be analogous." Secondly, the panel violated governing Supreme Court authority when it extracted from ***Drummond*** a "*clearly established*" rule that is framed at a much higher level of generality than was the ***Drummond*** case itself.

> Justice Bea added: "In holding that the police officers in this case violated clearly established law when they restrained Joseph Slater in the back of a patrol car, allegedly causing his death, the panel continues this court's troubling pattern of ignoring the Supreme Court's controlling precedent

> concerning qualified immunity in Fourth Amendment cases. Indeed, over just the last ten years alone, the Court has reversed our denials of qualified immunity in **Fourth Amendment** cases at least a half-dozen times, often summarily. By repeating—if not outdoing—the same patent errors that have drawn such repeated rebukes from the high Court, the panel here once again invites summary reversal. I respectfully dissent from our failure to rehear this case en banc." (***Id***., at pp. 898-899.)
>
> See the Ninth Circuit's unpublished decision for the case in chief at ***Slater v. Deasey*** (9th Cir. June 20, 2019) 776 Fed. Appx. 942.
>
> In this case, officers used handcuffs and three "hobble" belts to restrain the physically resisting decedent, who was under the influence of a methamphetamine overdose (suffering from "*acute methamphetamine intoxication*") and totally irrational, in order to get him into the back seat of a patrol vehicle. Per the Plaintiffs' expert, Slater died from "respiratory compromise, vomiting with aspiration of vomit into his airway, and loss of consciousness," happening "within seconds of the final hobbles being attached and pulled tight. The prone and hobbled position Mr. Slater was in compromised his ability to breathe, compressed his abdomen and chest, and led to his vomiting and aspirating the vomit into his lungs. This prevented sufficient breathing, leading to loss of consciousness and resulting in death." (***Id***., at pp. 899-900.)

After shooting and killing the decedent (plaintiff's son) when he was confronted by a state trooper and refused to comply with the trooper's commands to put down his weapon, the trooper was held to be entitled to qualified immunity where he knew that (1) the decedent had violated a restraining order within the last hour; (2) was in possession of a firearm that he had brandished at the victim during that contact; and (3) was reportedly mentally ill and may not have been taking his medication. The Third Circuit Court of Appeals held that the trooper did not violate a clearly established right because at the time of the incident no Supreme Court precedent, Third Circuit precedent, or other persuasive case law had held that an officer acting under similar circumstances as the trooper violated the **Fourth Amendment**. As a result, the court held that the trooper was entitled to qualified immunity. (***James v. N.J. State Police*** (3rd Cir. 2020) 957 F.3rd 165.)

Plaintiffs failed to establish that an officer violated "clearly established" law when he shot and killed plaintiffs' adult son where the civil defendant officer had twice broken up fighting in which the decedent was involved, and the officer was soon after told that someone in the adjacent parking lot had a gun. When the officer went to investigate, he saw the decedent, with a gun in his hand, walking towards other people in the parking lot. When the officer ordered the decedent to drop the gun, the decedent ignored him, ducked between parked vehicles, and tried to give the gun to someone else. The court found that, even under the plaintiffs' version of events, it was undisputed that the decedent refused to drop the gun when

ordered to do so by the officer and that the decedent could have quickly pointed it at him. The court stated, "[w]e have never required officers to wait until a defendant turns towards them, with weapon in hand, before applying deadly force to ensure their safety." Consequently, the court held that the officer was entitled to qualified immunity because he did not violate clearly established law. (***Garcia v. Blevins*** (5th Cir. 2020) 957 F.3rd 596.)

***Chapter 3*:**

Consensual Encounters:

General Rule: Contrary to a not uncommonly held belief that law enforcement contacts with private citizens require some articulable reason to be lawful, it is a general rule that any peace officer may approach and contact any person in public, or anywhere else the officer has a legal right to be, and engage that person in conversation without necessarily having to justify such a contact. (***Wilson v. Superior Court*** (1983) 34 Cal.3rd 777; ***People v. Brown*** (2015) 61 Cal.4th 968, 974; ***People v. Parrott*** (2017) 10 Cal.App.5th 485, 492; ***In re Edgerrin J.*** (2020) 57 Cal.App.5th 752, 759; ***People v. Cuadra*** (2021) 71 Cal.App.5th 348, 352; ***People v. Tacardon*** (2022) 14 Cal.5th 235, 241.)

> "The Supreme Court has held that 'a seizure does not occur simply because a police officer approaches an individual and asks a few questions.'" (***United States v. Brown*** (9th Cir. 2021) 996 F.3rd 998, 1005, quoting ***Florida v. Bostick*** (1991) 501 U.S. 429, 434 [111 S.Ct. 2382; 115 L.Ed.2nd 389]; see also ***People v. Tacardon***, *supra*, at p. 241.)
>
> > As a common example, in ***United States v. Brown***, the Ninth Circuit found the officer's initial contact with the defendant to be a consensual encounter only, based upon the following circumstances:
> >
> > - The encounter occurred in the middle of the day, in public view.
> > - Defendant was seated on a block wall when the police arrived and from which he showed no inclination to depart.
> > - The officers' initial approach was casual and nonthreatening, opening with the greeting, "Howdy, guys" and an open-ended question about what they were doing.
> > - The officers told defendant and his acquaintance why they were there (a report of urinating in public), accusing the acquaintance of doing that.
> > - Most of the questioning was directed at the acquaintance.
> > - Questions directed at defendant were "generic," asking for identification and whether he was staying at a nearby motel.
> > - It was never suggested that defendant was not free to leave or to decline to answer questions.
> > - Defendant felt free to take a personal cellphone call.
> > - The officers never drew attention to their weapons.
> >
> > In ***United States v. Brown***, defendant was not held to be detained until the officer directed him to stand up and turn around, after seeing defendant reach for his pocket.

In ***United States v. Brown***, *supra*, where an officer's use of his vehicle's emergency lights was held to constitute a detention, the California Supreme Court noted the use of the red and blue emergency lights is but one factor to consider. In so holding, the California Supreme Court noted that "a motorist whose car had broken down on the highway might reasonably perceive an officer's use of emergency lights as signaling that the officer has stopped to render aid or to warn oncoming traffic of a hazard, rather than to investigate crime. Ambiguous circumstances may be clarified by whether other cars are nearby or by the officer's conduct when approaching." (***Id.***, at p. 980.)

In ***Tacardon***, *supra*, an officer stopped behind an already stopped (parked) vehicle, shined his patrol car's spotlight into the back window of defendant's car (it being at night and dark out), and then walked up to the vehicle and its occupants. Despite telling a passenger to stand near the sidewalk at the rear of the vehicle where he could watch her, the Court held that, when considering the "*totality of the circumstances*," defendant was not detained until after the point where the officer observed marijuana in plain sight in the vehicle. (***Id.***, at pp. 242-253.)

Other Examples and General Rules:

"A police officer is allowed to question people on the street, who themselves are free both to refuse to answer the officer and to refuse even to listen to the officer. People are fully at liberty merely to go on their way." (***People v. Flores*** (2021) 60 Cal.App.5th 978, 981, citing ***Florida v. Royer*** (1983) 460 U.S. 491, 497–498 [75 L. Ed.2nd 229, 103 S.Ct. 1319].)

"A consensual encounter between a police officer and a citizen does not implicate the **Fourth Amendment**." (***People v. Chamagua*** (2019) 33 Cal.App.5th 925, 928; citing ***Florida v. Bostick*** (1991) 501 U.S. 429 [115 L.Ed.2nd 389, 434; 111 S.Ct. 2382].)

"[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." (***Terry v. Ohio*** (1968) 392 U.S. 1, 19, fn. 16 [20 L.Ed.2nd 889; 88 S.Ct. 1868]; see also ***People v. Tacardon*** (2022) 14 Cal.5th 235, 240, 241.)

The law does not prohibit an officer from approaching any person in a public place and engaging that person in uncoerced conversation. (***People v. Divito*** (1984) 152 Cal.App.3rd 11, 14; ***Florida v. Royer*** (1983) 460 U.S. 491 [103 S.Ct. 1319; 75 L.Ed.2nd 229]; ***People v. Mendoza*** (2011) 52 Cal.4th 1056, 1081.)

"(L)aw enforcement officers do not violate the **Fourth Amendment** by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, (or) by putting questions to him if the person is willing to listen." (***Florida v. Royer***, *supra*, at p. 497 [103 S.Ct. 1319; 75 L.Ed.2nd 229]; ***People v. Parrott***, *supra*, at pp. 492-493.)

It does not become a detention (see below) merely because an officer approaches an individual on the street and asks a few questions. (***In re Manuel G.*** (1997) 16 Cal.4th 805, 821.)

But: The person contacted is free to leave and need not respond to an officer's inquiries. (See below)

"'It is well established that law enforcement officers may approach someone on the street or in another public place and converse if the person is willing to do so' without having any 'articulable suspicion of criminal activity.'" (***People v. Kidd*** (2019) 36 Cal.App.5th 12, 20; quoting ***People v. Parrott*** (2017) 10 Cal.App.5th 485, 492.)

"The Supreme Court has held 'that the **Fourth Amendment** permits police officers to approach individuals at random in airport lobbies and other public places to ask them questions . . . so long as a reasonable person would understand that he or she could refuse to cooperate.' (***Florida v. Bostick*** (1991) 501 U.S. 429, 431 [115 L. Ed. 2d 389, 111 S. Ct. 2382].) 'The citizen participant in a consensual encounter may leave, refuse to answer questions or decline to act in the manner requested by the authorities.' (***People v. Franklin*** (1987) 192 Cal.App.3d 935, 941 . . . ." (***People v. Paul*** (2024) 99 Cal.App.5th 832, 838.)

Test: Would a "*reasonable person*" under the same or similar circumstances feel that he or she is free to leave? (***Wilson v. Superior Court***, *supra*, at p. 790, quoting from ***United States v. Mendenhall*** (1980) 446 U.S. 544, 554 [100 S.Ct. 1870; 64 L.Ed.2nd 497, 509]; ***Desyllas v. Bernstine*** (9th Cir. 2003) 351 F.3rd 934, 940; ***Martinez-Medina v. Holder*** (9th Cir 2010) 616 F.3rd 1011, 1015; ***People v. Kidd*** (2019) 36 Cal.App.5th 12, 20; ***United States v. Brown*** (9th Cir. 2021) 996 F.3rd 998, 1005.)

It is *not* what the defendant himself believes or should believe. (***In re Manuel G.***, *supra*, at p. 821.)

"The test is 'objective,' not subjective; it looks to 'the intent of the police as objectively manifested' to the person confronted. [Citation.] Accordingly, an 'officer's uncommunicated state of mind and *the individual citizen's subjective belief are irrelevant . . . .*'" (***People v. Cuadra*** (2021) 71 Cal.App.5th 348, 352 & 353; quoting ***People v. Zamudio*** (2008) 43 Cal.4th 327, 341.)

> "The officer's state of mind is not relevant … except insofar as his overt actions would communicate that state of mind." (***People v. Tacardon*** (2022) 14 Cal.5th 235, 242; quoting ***People v. Franklin*** (1987) 192 Cal.App.3rd 935, at p. 940.)

If a reasonable person would *not* feel like he has a choice under the circumstances, then the person contacted is being *detained*, and absent sufficient legal cause to detain the person, it is an illegal detention. (***People v. Bailey*** (1985) 176 Cal.App.3rd 402.)

"(T)he officer's uncommunicated state of mind and the individual citizen's subjective belief are irrelevant in assessing whether a seizure triggering **Fourth Amendment** scrutiny has occurred. (***In re Christopher B.*** (1990) 219 Cal.App.3rd 455, 460.)" (***In re Manuel G.***, *supra*, at p. 821 see also ***Whren v. United States*** (1996) 517 U.S. 806 [116 S.Ct. 1769; 135 L.Ed.2nd 89]; (**People *v.* Linn** (2015) 241 Cal.App.4th 46; noting that the test is an "objective one." See also ***United States v. Magallon-Lopez*** (9th Cir. 2016) 817 F.3rd 671, 675; and **People *v.* Arebalos-Cabrera** (2018) 27 Cal.App.5th 179, 186-187; ***People v. Chamagua*** (2019) 33 Cal.App.5th 925, 929; ***People v. Tacardon*** (2022) 14 Cal.5th 235, 242.)

"The test is necessarily imprecise because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than focus on particular details of that conduct in isolation." (***People v. Verin*** (1990) 220 Cal.App.3rd 551 556.)

The "*reasonable person*" test presupposes an "*innocent person*." (***Florida v. Bostick*** (1991) 501 U.S. 429, 438 [111 S.Ct. 2382; 115 L.Ed.2nd 389, 400]; ***United States v. Drayton*** (2002) 536 U.S. 194, 202 [122 S.Ct. 2105; 153 L.Ed.2nd 242, 252]; ***People v. Chamagua*** (2019) 33 Cal.App.5th 925, 928-929.)

"The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation.'" (***Michigan v. Chesternut*** (1988) 486 U.S. 567, 573 [100 L.Ed.2nd 565; 108 S.Ct. 1975].)

The circumstances which a court will take into account in determining whether a person is detained include (but are not limited to):

1. The threatening presence of several officers;
2. The display of a weapon by an officer;
3. Some physical touching of the person of the citizen;
4. The use of language or tone of voice indicating that compliance with the officer's request might be compelled;
5. The time and place of the encounter;
6. Whether the police indicated the defendant was suspected of a crime;

7. Whether the police retained the defendant's documents; *and*
8. Whether the police exhibited other threatening behavior.

(***People v. Linn*** (2015) 241 Cal.App.4th 46, 58; see also ***In re Manuel G.*** (1997) 16 Cal.4th 805, 821; ***People v. Parrott*** (2017) 10 Cal.App.5th 485, 493.)

"In situations involving *a show of authority* (italics added), a person is seized 'if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,"' or '"otherwise terminate the encounter."'" (***People v. Cuadra*** (2021) 71 Cal.App.5th 348, 352; quoting ***People v. Brown*** (2015) 61 Cal.4th 968, at p. 974.)

Unless lawfully detained, a person is free to refuse to identify himself and may lawfully walk away. (***People v. Thomas*** (2018) 29 Cal.App.5th 1107, 1117.)

> "Refusal to cooperate with police, without more, does not create an objective justification for an investigative detention." (***People v. Flores*** (2021) 60 Cal.App.5th 978, 981, citing ***Florida v. Bostick*** (1991) 501 U.S. 429, 437 [115 L.Ed.2nd 389; 111 S.Ct. 2382].)
>
> Absent a sufficient reasonable suspicion justifying a lawful detention, a person under such circumstances "may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." (***Ibid***., quoting ***Florida v. Royer*** (1983) 460 U.S. 491, 498 [75 L.Ed.2nd 229, 236; 103 S.Ct. 1319]; see also ***Illinois v. Wardlow*** (2000) 528 U.S. 119, 125 [145 L.Ed.2nd 570, 577; 120 S.Ct. 673].)

Note: Courts tend to ignore the inherent coerciveness of a police uniform and/or badge and gun, and the fact that most people are reluctant to ignore a police officer's questions.

> *However*, see ***People v. Linn*** (2015) 241 Cal.App.4th 46, 68, fn. 10, where the Court notes that: "These and similar cases are particularly noteworthy in light of recent empirical research suggesting that a significant number of people do not feel free to leave when approached by police, and even less so when police assert even mild forms of authority." (See *Casual or Coercive*? *Retention of Identification in Police-Citizen Encounters* (2013) 113 Colum. L.Rev. 1283, 1313, noting studies such as one in which half the respondents indicated that they would feel either not free to leave or less than somewhat free to leave in a mere conversation with police on a sidewalk and concluding, "[t]hus, it appears that any interaction with a police officer, even at the lowest level of intrusiveness, makes most citizens feel that they are not free to leave;" *Smith et al*., *Testing Judicial Assumptions of the* "*Consensual*" *Encounter*: *An Experimental Study*

(2013) 14 Fla. Coastal L.Rev. 285, 319–320, noting that while nearly three-quarters of the sample used in the study perceived the encounters with sworn, armed security as consensual, 45 percent also believed they had no right to walk away or ignore the security officers' requests. See also *Ross, Can Social Science Defeat a Legal Fiction*? *Challenging Unlawful Stops Under the* ***Fourth Amendment*** (2012) 18 Wash. & Lee J. Civil Rts. & Soc. Just. 315, 331–339 [discussing empirical studies].)

Limitations: A contact that is intended to be a consensual encounter may degrade into a detention or even an arrest if not handled properly. (***People v. Cuadra*** (2021) 71 Cal.App.5th 348, 352; "A consensual encounter may ripen into a seizure for **Fourth Amendment** purposes 'when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.'" Quoting ***People v. Brown*** (2015) 61 Cal.4th 968, at p. 974.)

Searches, Frisks and Detentions Not Allowed: Obviously, there being no "*probable cause*" or "*reasonable suspicion*" to believe any criminal activity is occurring during a consensual encounter, no search, frisk, or involuntary detention is allowed absent additional information amounting to at least a "*reasonable suspicion*" to believe that the person contacted is, was, or is about to be involved in criminal activity. (***Terry v. Ohio*** (1968) 392 U.S. 1, 27 [88 S.Ct. 1868; 20 L.Ed.2nd 889, 909]; and see below)

Unintended Detentions*:** "If the consensual encounter has ripened into an investigatory detention under ***Terry, then the officer must have 'reasonable suspicion'—that is, 'a particularized and objective basis for suspecting the particular person stopped' of breaking the law.'" (***United States v. Brown*** (9th Cir. 2021) 996 F.3rd 998, 1005, quoting ***Heien v. North Carolina*** (2014) 574 U.S. 54, 60 [135 S.Ct. 530; 190 L.Ed.2nd 475].)

"In distinguishing a detention from a consensual encounter, 'a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.'" (***In re T.F.-G.*** (2023) 94 Cal.App.5th 893, 903; quoting ***Florida v. Bostick*** (1991) 501 U.S. 429, 439 [115 L. Ed.2nd 389; 111 S.Ct. 2382].)

Elevating a "*consensual encounter*" into a "*detention*" without legal cause may result in one or more of the following legal consequences:

Suppression of any resulting evidence under the "*Exclusionary Rule*." (See "*The Exclusionary Rule*," under "*The Constitutional Basis For Searches and Seizures*," Chapter 1, above.)

Criminal prosecution of the offending law enforcement officer(s) for false imprisonment, pursuant to **P.C. §§ 236** and **237**.

Civil liability and/or criminal prosecution for violation of the subject's civil rights. (E.g.; **P.C. § 422.6**, **Cal. Civil Code § 52.1**, **42 U.S.C. § 1983**, **18 U.S.C. §§ 241**, **242**.)

See "*Consensual Encounters vs. Detentions or Arrests*," below.

"'(W)hen the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen,' the officer effects a seizure of that person, which must be justified under the **Fourth Amendment** to the United States Constitution." (***People v. Tacardon*** (2022) 14 Cal.5th 235, ruling that an officer merely putting on his vehicle's spotlight on the rear of defendant's vehicle, without more, was *not* such a "show of authority" so as to convert a consensual encounter into a detention, the Court noting that: "A detention occurs, not the moment a person knows an officer would like to interact, but when a person would reasonably believe he or she 'was not free to leave' or 'otherwise terminate the encounter,' and submits to the officer's show of authority." (***Id***., at p. 250; quoting ***People v. Brown*** (2015) 61 Cal.4th 968, 974.)

Defendant was convicted of possession of a firearm with a prior violent conviction pleading no contest following the denial of his motion to suppress evidence of a firearm. He contended that the evidence of the firearm should have been excluded because law enforcement officers discovered it only after they unlawfully detained him to verify his parole status. Reversing the trial court, the Court of Appeal found that the initial encounter between defendant and the officers was indeed an unlawful detention. The court pointed to several factors leading to this conclusion such as the positioning of the officers that blocked defendant from leaving, the officers approaching defendant from both sides of his car and shining their flashlights into his car, and the fact that the officers approached him while he was on his phone in a legally parked vehicle. The court held that these factors would lead a reasonable person to believe they are not free to leave, thus constituting a detention. Therefore, the court reversed the trial court's judgment and vacated its order denying defendant's motion to suppress evidence. The court concluded that the officers would not have obtained defendant's parole status if they had not first unlawfully detained him and thus, the firearm was not lawfully obtained and should be suppressed. (***People v. Paul*** (2024) 99 Cal.App.5th 832, 837-841.)

> "The test is 'not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person.'" (***Id.***, at pp. 838-839; quoting ***People v. Garry*** (2007) 156 Cal.App.4th 1100 at p. 1106.)

No Detention: Consensual encounters may involve *investigative functions* without necessarily converting the contact into a detention or arrest. *Examples*:

Obtaining Personal Identification Information from a person and *running a warrant check*, so long as nothing is done which would have caused a reasonable person to feel that he was not free to leave, does not, by itself, convert the contact into a detention. (***People v. Bouser*** (1994) 26 Cal.App.4th 1280; ***People v. Gonzalez*** (1985) 164 Cal.App.3rd 1194, 1196-1197; ***Florida v. Rodriguez*** (1984) 469 U.S. 1, 5-6 [105 S.Ct. 308; 83 L.Ed.2nd 165, 170-171]; ***United States v. Mendenhall*** (1980) 446 U.S. 544 [100 S.Ct. 1870; 64 L.Ed.2nd 497].)

However, a person who has been "*consensually encountered*" only, need not identify himself, nor even talk to a police officer if he so chooses. (***Kolender v. Lawson*** (1983) 461 U.S. 352 [103 S.Ct. 1855; 75 L.Ed.2nd 903]; ***Brown v. Texas*** (1979) 443 U.S. 47, 52 [99 S.Ct. 2637; 61 L.Ed.2nd 357].)

In consensually talking to a non-detained person, an officer's reasonable suspicion may be aroused through inconsistent responses, allowing for additional questioning, a patdown, and an eventual arrest. (E.g., see ***United States v. Clark*** (1st Cir. ME 2018) 879 F.3rd 1.)

Asking for Identification, by itself, is not usually a detention. (***People v. Gonzales*** (1985) 164 Cal.App.3rd 1194; ***People v. Ross*** (1990) 217 Cal.App.3rd 879; ***People v. Lopez*** (1989) 212 Cal.App.3rd 289; ***People v. Terrell*** (1999) 69 Cal.App.4th 1246, 1251; ***People v. Bouser*** (1994) 26 Cal.App.4th 1280, 1287; ***People v. Parrott*** (2017) 10 Cal.App.5th 485, 494.)

"In the ordinary course a police officer is free to ask a person for identification without implicating the **Fourth Amendment**." (***Hiibel v. Sixth Judicial District Court of Nevada*** (2004) 542 U.S. 177, 185 [124 S.Ct. 2451; 159 L.Ed.2nd 292].)

But; retaining the identification longer than necessary *is* a detention, and illegal unless supported by a reasonable suspicion the detainee is engaged in criminal conduct. (***United States v. Chan-Jimenez*** (9th Cir. 1997) 125 F.3rd 1324: The consent to search obtained during this illegal detention, therefore, was also illegal.)

Asking for defendant's identification and holding onto it while running a check for warrants would cause a reasonable person to believe he was not free to leave. The detention, however, was held to be reasonable under the circumstances. (***People v. Castaneda*** (1995) 35 Cal.App.4th 1222, 1227.)

Merely requesting identification from a suspect, or even retaining it, absent more coercive circumstances, does not by itself convert a

consensual encounter into a detention. (***People v. Leath*** (2013) 217 Cal.App.4th 344, 350-353.)

> However, where a robbery had just occurred in the vicinity with the suspect and vehicle description, although not perfect, very close, and with defendant having just parked his car "weirdly," not quite at the curb, with a door left open, and defendant apparently attempting to separate himself from his car, the officers had a reasonable suspicion to detain defendant anyway. (***Id***., a pp. 353-356.)

However, in suppressing evidence related to defendant's DUI arrest, it was held that although the taking of a person's identification does not necessarily result in a detention, under the "totality of the circumstances" (which included the officer stopping his marked police motorcycle within three feet of defendant's already stopped vehicle as she exited her vehicle, talk with her about her passenger flicking ashes out of the vehicle's window as defendant drove, asking her for her driver's license without explanation as he commanded her to put out her cigarette and put down her soda can, retaining her driver's license as he conducted an unexplained record check, and questioning of the passenger for personal details that the officer recorded on a form), defendant had been detained, and such detention was unsupported by reasonable suspicion in that the officer did not notice the odor of alcohol on her until after all the above had occurred. "No objectively reasonable person would believe she was free to end this encounter under the totality of these circumstances, regardless of the officer's polite demeanor and relatively low-key approach." (***People v. Linn*** (2015) 241 Cal.App.4th 46, 50.)

> *Tip*: Ask for identification, transfer the necessary information to a notebook without leaving the person's immediate presence, and promptly return the identification to the person. (See ***People v. Linn***, *supra*., at p. 67: "The taking of defendant's driver's license would be less significant if (the officer) . . . had merely taken defendant's driver's license, examined it, and promptly returned it to her.")

> Note that in ***United States v. Ahmad*** (7th Cir. 2021) 21 F.4th 475, defendant argued that his consent to search his RV was obtained while his driver's license and rental agreement were in a deputy sheriff's possession. The Court noted, however, in upholding defendant's conviction, that while the retention of a person's identification documents could turn a consensual encounter into a seizure, it was critical to analyze how long, and under what circumstances, the person's documents were retained. Here, the deputy held onto defendant's driver's license and RV rental

agreement for only a few minutes before defendant consented to the search.

"(*M*)*ere Police Questioning* does not constitute a seizure." (***Desyllas v. Bernstine*** (9th Cir. 2003) 351 F.3rd 934, 940; quoting ***Florida v. Bostick*** (1991) 501 U.S. 429, 434 [111 S.Ct. 2382; 115 L.Ed.2nd 389, 398]; ***Martinez-Medina v. Holder*** (9th Cir 2010) 616 F.3rd 1011, 1015.)

> Contacting and questioning a person without acting forcefully or aggressively will, in the absence of any other factors which would have indicated to a reasonable person that he was not free to leave, be a consensual encounter only. (***United States v. Summers*** (9th Cir. 2001) 268 F.3rd 683, 686.)
>
> Generally, a conversation that is non-accusatory, routine, and brief, will not be held to be anything other than a consensual encounter. (***People v. Hughes*** (2002) 27 Cal.4th 287, 328.)
>
> "Asking questions, including incriminating questions, does not turn an encounter into a detention. (Citation omitted) People targeted for police questioning rightly might believe themselves the object of official scrutiny. Such directed scrutiny, however, is not a detention. (Citation omitted)" (***People v. Chamagua*** (2019) 33 Cal.App.5th 925, 929.)
>
> Defendant was observed by officers walking alone in a housing complex on the city's south side. Defendant appeared surprised to see the officer, turned sharply, and walked in the opposite direction into a housing complex. One of the officers "jogged" after defendant, finding him at the front of a residences, ringing the doorbell. The officer approached defendant and promptly asked him if he had drugs or a gun on him, to which he admitted that he had a gun in his pocket. Arrested for being a felon in possession of a firearm, the Seventh Circuit Court of Appeal held the encounter to be consensual in that the officer was alone when he jogged after the defendant, he did not draw his firearm nor touch the defendant, and did not order defendant to put his hands up. A reasonable person in defendant's position would have felt free to disregard the officer and leave. (***United States v. Holly*** (7th Cir. 2019) 940 F.3rd 995.)
>
> In contacting defendants in their vehicle in a school parking lot for the purpose of telling them to leave (there having been recent incidents of theft in that parking lot), the officer did no more than consensually encounter them. In making this determination, the Court noted that first, the officer was alone, she did not display a weapon, she did not touch the defendants, and she did not use forceful language. Second, she parked her vehicle 10 to 15 feet away, beside the defendants' car rather than in front of or behind it so the driver would have been able to drive away. Third,

she did not ask the occupants to get out of the car until she knew they had provided false names. Finally, the officer's request for identification, and her questions to the defendants, did not convey a message that their compliance was required. (***United States v. Campbell-Martin*** (8th Cir. IA 2021) 17 F.4th 807.)

Upon contacting defendants at a roadside gas station/truck stop by a deputy sheriff, they were both told individually that they were not being detained and were free to leave whenever they wished. Upon being asked for identification and a rental agreement for the defendant's RV, the deputy retained the documents while talking to both defendants further. During this time, the defendant gave his consent to have a drug-sniffing dog sniff his RV, resulting in the dog alerting on what was soon determined to be a large amount of marijuana. Both defendants were arrested and charged in federal court. Upon appeal from defendant's conviction, he argued that he was unlawfully seized under the **Fourth Amendment** when the deputy retained his driver's license and the rental agreement, and that his consent to the dog-sniff was obtained during that time he was unlawfully detained. As a result, defendant argued that this consent to the dog-sniff was involuntary. The Court disagreed based upon the following: (1) The deputy's initial questioning up until defendant's arrest occurred in a public place, a truck stop parking lot. (2) The deputy spoke in normal, conversational tones, never raised his voice, and made no verbal commands. (3) The deputy did not physically touch defendant or restrain his movement. (4) The deputy did not draw his weapon and he was the only officer on the scene until the K-9 officer, by which time defendant had already consented to the search. (5) The deputy told defendant that he was free to leave and never indicated otherwise until after the dog alerted on his RV. (6) The deputy's retention of defendant's license and rental agreement did not automatically transform the otherwise consensual encounter into a Fourth Amendment seizure. (***United States v. Ahmad*** (7th Cir. 2021) 21 F.4th 475.)

> Note also that while the court recognized that the retention of a person's identification documents could turn a consensual encounter into a seizure, it was critical to analyze how long, and under what circumstances, the person's documents were retained. Here, the deputy held onto defendant's driver's license and RV rental agreement for only a few minutes before defendant consented to the search.

Walking Along With (***People v. Capps*** (1989) 215 Cal.App.3rd 1112.), *or Driving Next To* (***Michigan v. Chesternut*** (1988) 486 U.S. 567 [108 S.Ct. 1975; 100 L.Ed.2nd 565].), *a Subject While Asking Questions*, but without interfering with the person's progress, is *not* a detention.

See ***United States v. Gross*** (D.C. Cir. 2015) 784 F.3rd 784, where it was held that driving alongside the defendant who was walking down the sidewalk, flashlighting him, and, and while the officer was still inside his car, asking him, "*Hey, . . . how are you doing*? *Do you have a gun*?", and then, "*Can I see your waistband*?", and then, when defendant lifted only one side of his jacket, "*Can I check you out for a gun*?", causing defendant to flee, all held *not* to be a detention, and lawful.

But, in a "close case," the act of asking a subject to stop walking, after the officers had been driving parallel to him while talking to him and asking him questions, was held to be a detention without the necessary reasonable suspicion. The later discovered firearm was suppressed. (***United States v. Hernandez*** (10th Cir. Colo. 2017) 847 F.3rd 1257; a questionable decision, depending upon how the defendant was "*asked*.")

Parking Nearby and Approaching the Occupant of a Vehicle, without spotlighting the subject or using a police vehicle's light bar or siren, and while leaving him enough room to drive away if he so chose, and where the officers did not display their weapons, issue any commands, or otherwise communicate to the defendant that he was not free to leave, is not a detention, thus not requiring any suspicion in order to be lawful. (***United States v. Knights*** (11th Cir. 2020) 967 F.3rd 1266.)

Asking a Vehicle Passenger to Step Out of the Vehicle is *not* a detention. (***Pennsylvania v. Mimms*** (1977) 434 U.S. 106 [98 S.Ct. 330; 54 L.Ed.2nd 331]; ***People v. Padilla*** (1982) 132 Cal.App.3rd 555, 557-558.)

But see ***Brendlin v. California*** (2007) 551 U.S. 249 [127 S.Ct. 2400; 168 L.Ed.2nd 132], below.

Asking a person to remove his hands from his pockets (when done for officers' safety), or asking him to keep his hands away from his pocket, without exhibiting a "show of authority such that (a person) reasonably might believe he had to comply," is *not*, necessarily, a detention. (***People v. Franklin*** (1987) 192 Cal.App.3rd 935, 941; ***In re Frank V.*** (1991) 233 Cal.App.3rd 1232; ***People v. Parrott*** (2017) 10 Cal.App.5th 485, 494.)

During a lawful search, although commanding a person to show his hands is a "*meaningful interference*" with a person's freedom, and thus technically a "*seizure*" for purposes of the **Fourth Amendment**, it is such a "*de minimis*" seizure that, when balanced with the need for a police officer to protect himself, it is allowed under the **Constitution**. (***United States v. Enslin*** (9th Cir. 2003) 315 F.3rd 1205, 1219-1227.)

"*Flashlighting*" *or* "*Spotlighting*" *a Person, by itself,* is *not* a detention. (***People v. Franklin*** (1987) 192 Cal.App.3rd 935; ***People v. Rico*** (1979) 97 Cal.App.3rd 124, 130.)

An officer walking up to defendant as defendant crouched behind a car with the officer's flashlight trained on him was held *not* to constitute a detention. Defendant was not detained until the officer told defendant to stand and put his hands behind his head, preparatory to putting handcuffs on him as a safety measure. (***People v. Flores*** (2021) 60 Cal.App.5th 978, 988-990.)

> See dissenting opinion (at pp. 990-994), however, noting many facts and some on-point case law that were left out of the majority opinion. Among the facts ignored by the majority was that as defendant was in the process of moving around to the back side of his car, the officers drove up and parked their patrol car "a little askew to and behind" defendant's vehicle. The officers then shined their vehicle's spotlight on defendant as he bent over behind his car. The dissent also cites two cases totally ignored by the majority: ***People v. Garry*** (2007) 156 Cal.App.4th 1100, and ***People v. Roth*** (1990) 219 Cal.App.3rd 211. Both cases are spotlight cases which are nearly identical to Flores' situation, where spotlighting the suspect while (in ***Garry***) the officer "briskly" approached the suspect, and (in ***Roth***) "commanding" the suspect to approach the officer, respectively, were held to constitute detentions. Also not mentioned by the majority was the fact that while the one officer approached defendant (commanding him to stand up) from the rear of defendant's vehicle, the ofther officer was walking around the front of defendant's car, boxing him in between the two officers, his vehicle, and an iron spiked fence running parallel to the sidewalk, creating a situation where it is certainly arguable that defendant would have reasonably believed that with all that attention directed at him (spotlights, flashlights, being approached from both sides, with at least one officer issuing commands to stand up), and nowhere to go, he was in fact detained before ever being told to put his hands behind his head; i.e., that he could not have reasonably felt free to just walk away.

Where an officer investigating a recent shooting saw a car driving on the freeway that matched the description of a suspect vehicle, the officer pulled alongside the car and shined a spotlight on it. He then dropped back and followed the car for approximately five minutes without activating his emergency lights. The driver eventually pulled over on his own, and the officer stopped several car lengths behind, again turned on his spotlight, and engaged the car's occupants. He ultimately recovered a rifle, the butt of which he saw sticking out from under the driver's seat. The Appellate Court concluded that the officer's initial "*momentary use of the spotlight*" to observe the suspect vehicle's occupants as he was driving next to them

was *not* a detention "in the absence of flashing lights, sirens or a directive over the loudspeaker." Indeed, the officer "immediately pulled back without any show of authority." (***People v. Rico***, *supra*, at pp. 129-130.)

Where an officer saw the defendant walking in a high crime area wearing a full-length camouflage jacket on a warm summer evening, and finding this odd, the officer shined a spotlight on the defendant and parked the patrol car directly behind him. The defendant approached the officer and asked, "What's going on?" Defendant appeared to the officer to be sweaty and "'jittery.'" When the officer asked the defendant to remove his hands from his pockets, he saw what appeared to be blood on the defendant's hands and a vial in his pocket containing white powder. The defendant fled and was detained. The Court of Appeal concluded that shining a spotlight on the defendant and parking behind him was *not* a detention in that "the officer did not block [the defendant's] way; he directed no verbal requests or commands to [the defendant]. Further, the officer did not alight immediately from his car and pursue [the defendant]. Coupling the spotlight with the officer's parking the patrol car, [the defendant] rightly might feel himself the object of official scrutiny. However, such directed scrutiny does *not* amount to a detention." (Italics added; ***People v. Franklin*** (1987) 192 Cal.App.3rd 935, 938-941.)

See ***United States v. Gross*** (D.C. Cir. 2015) 784 F.3rd 784, where it was held that driving alongside the defendant who was walking down the sidewalk, flashlighting him, and, and while the officer was still inside his car, asking him, "*Hey, . . . how are you doing*? *Do you have a gun*?", and then, "*Can I see your waistband*?", and then, when defendant lifted only one side of his jacket, "*Can I check you out for a gun*?", causing defendant to flee, all held *not* to be a detention, and lawful.

A deputy sheriff parked 15 to 20 feet behind a lawfully parked car, shined a spotlight into the interior, and approached. When a female suddenly got out, he ordered her to remain at the curb. At about that point the deputy smelled marijuana and observed large marijuana bags on the floorboard. Defendant, in the driver's seat, proved to be on probation. A subsequent search produced additional contraband evidencing drug sales. The Third District Court of Appeal reversed a superior court ruling that defendant had been unlawfully detained. Disagreeing with ***People v. Kidd*** (2019) 36 Cal.App.5th 12 (see below), the court held that while the use of a spotlight might cause someone to feel "scrutiny, such directed scrutiny does not amount to a detention." Although the female who had gotten out of the car was detained, "there is no evidence defendant observed the deputy's interaction with [her] . . . ." By the time the deputy addressed defendant, having smelled marijuana and having seen the large bags of marijuana, defendant was appropriately and lawfully detained. Significantly, the deputy never blocked defendant's egress, he never used emergency lights,

and his approach to the car was casual. (***People v. Tacardon*** (2022) 14 Cal.5th 235, 253-256.)

And see ***People v. Perez*** (1989) 211 Cal.App.3rd 1492, where a police officer parked his patrol car in front of Perez's vehicle, leaving "plenty of room" for Perez to drive away, and activated both spotlights on the patrol car "to get a better look at the occupants and gauge their reactions." (***Id.*** at p. 1494.) The officer then walked over to the car, tapped on the window, and asked the driver to roll down the window. (***Ibid.***) The appellate court concluded: "[T]he conduct of the officer here did *not* manifest police authority to the degree leading a reasonable person to conclude he was not free to leave. While the use of high beams and spotlights might cause a reasonable person to feel himself [or herself] the object of official scrutiny, such directed scrutiny *does not* amount to a detention. [Citations.]" (Italics added; ***Id.*** at p. 1496.)

See "*Use of Emergency Lights*," under "*Detentions*" (Chapter 4), below.

However, see also:

> When an officer shines the spotlight of his car on defendant, while stopping his patrol car, getting out, and commanding defendant to approach, defendant was in fact detailed. (***People v. Roth*** (1990) 219 Cal.App.3rd 211.)
>
> See ***People v. Garry*** (2007) 156 Cal.App.4th 1100, where it was held to be a detention when the officer spotlighted the defendant and then walked "briskly" towards him, asking him questions as he did so. (See also "*Detentions*," below.)
>
> Also, taking into account of the "*totality of the circumstances*," it was held that defendant was detained when the officer made a U-turn to pull in behind him and then trained the patrol car's spotlights on his car. (***People v. Kidd*** (2019) 36 Cal.App.5th 12, 21-22.)
>
> And see ***People v. Paul*** (2024) 99 Cal.App.5th 832, 837-841, where despite officers parking their car behind and to the side of the defendant's parked vehicle without using their spotlight or vehicle lights to light up defendant's car, the Court held that defendant was unlawfully detained merely by the officers walking up on both sides of his car while training their flashlights into his car—common practice by police officers for safety reasons when approaching a subject in a car at night in the dark—and standing so close to the driver's side door that defendant was unable to get out of the car without hitting the officer.

Other state courts and federal circuits:

> No detention where officer parked two spots away from the defendant's car, shined a spotlight on it, and approached on foot. (***United States v. Campbell-Martin*** (8th Cir. 2021) 17 F.4th 807, 811–812, 814.)
>
> No detention where officer parked with his patrol car at an angle to the defendant's driver's side door, activated a bar of "takedown" lights, and approached the defendant's car. (***United States v. Tafuna*** (10th Cir. 2021) 5 F.4th 1197, 1199, 1201–1202; citing other cases from the 1st, 7th, 8th, and 9th Circuits.)
>
> No detention where officer parked about 10 feet behind the defendant's car, activated his floodlights, and approached on foot. (***United States v. Tanguay*** (1st Cir. 2019) 918 F.3d 1, 2–3, 7–8.)
>
> No detention where two deputies parked about 10 feet behind defendant's van, trained a spotlight on it, and approached on foot. Applying the totality of the circumstances test to the record before the Court, it was held there had been no detention despite the use of a spotlight. (***People v. Cascio*** (Colo. 1997) 932 P.2nd 1381, 1382–1383, 1386–1388.)
>
> *But see* ***United States v. Delaney*** (D.C. Cir. 2020) 955 F.3rd 1077, 1079–1080, 1082–1083, where the Court held that a detention occurred where officers parked within a few feet of the nose of the defendant's car in a narrow parking lot, significantly restricting the defendant's movement, and activated their "take-down light."

See "'*Flashlighting*' *or* '*Spotlighting*' *a Person*," under "*New and Developing Law Enforcement Tools and Technology*" (Chapter 14), below.

Parking a Patrol Car Behind the Suspect's Vehicle: "Without more, a law enforcement officer simply parking behind a defendant would not reasonably be construed as a detention." (***People v. Kidd*** (2019) 36 Cal.App.5th 12, 21; quoting ***People v. Franklin*** (1987) 192 Cal.App.3d 935, 940; see also ***People v. Tacardon*** (2020) 53 Cal.App.5th 89; certiorari granted, and ***People v. Tacardon*** (2022) 14 Cal.5th 235.)

Inquiring Into the Contents of a Subject's Pockets (***People v. Epperson*** (1986) 187 Cal.App.3rd 118, 120.), *or Asking if the Person Would Submit to a Search* (***People v. Profit*** (1986) 183 Cal.App.3rd 849, 857, 879-880; ***Florida v. Bostick*** (1991) 501 U.S. 429 [111 S.Ct. 2382; 115 L.Ed.2nd 389].), does not necessarily

constitute a detention, so long as done in a manner that a reasonable person would have understood that he is under no obligation to comply.

Asking a Person to Remove his Hands From His Pockets (when done for officers' safety), without exhibiting a "show of authority such that (a person) reasonably might believe he had to comply," is *not*, necessarily, a detention. (***People v. Franklin*** (1987) 192 Cal.App.3rd 935, 941; ***In re Frank V.*** (1991) 233 Cal.App.3rd 1232.)

> During a lawful search, although commanding a person to show his hands is a "*meaningful interference*" with a person's freedom, and thus technically a "*seizure*" for purposes of the **Fourth Amendment**, it is such a "*de minimis*" seizure that, when balanced with the need for a police officer to protect himself, it is allowed under the **Constitution**. (***United States v. Enslin*** (9th Cir. 2003) 315 F.3rd 1205, 1219-1227.)
>
> An officer's request to defendant to take his hands out of his pockets did not constitute a **Fourth Amendment** seizure where the officer made the request in a polite and conversational tone rather than as an order for him to show his hands. (***United States v. De Castro*** (3rd Cir. PA, 2018) 905 F.3rd 676.)

A Consensual Transportation to the police station is not *necessarily* a detention. (***In re Gilbert R.*** (1994) 25 Cal.App.4th 1121.)

> However, the non-consensual transportation of a detainee is considered to be an arrest, and illegal absent probable cause. (***Dunaway v. New York*** (1979) 442 U.S. 200, 206-216 [99 S.Ct. 2248; 60 L.Ed.2nd 824, 832-838]; ***Taylor v. Alabama*** (1982) 457 U.S. 687 [102 S.Ct. 2664; 73 L.Ed.2nd 314].)
>
> See "*Indicators of an Arrest*," under "*Arrests*" (Chapter 5), below.

Inquiring Into Possible Illegal Activity: A consensual encounter does not become a detention just because a police officer enquires into possible illegal activity during an otherwise unintimidating conversation. (***United States v. Ayon-Meza*** (9th Cir. 1999) 177 F.3rd 1130.)

Displaying a Badge, or even *Being Armed*, absent active brandishing of the weapon, will not, by itself, convert a consensual encounter into a detention. (***United States v. Drayton*** (2002) 536 U.S. 194 [122 S.Ct. 2105; 153 L.Ed.2nd 242]; The Supreme Court finding no detention where there was "no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice." (***Id.***, at p. 204.)

Telling a Subject to Place His Hands on His Head has been held to be a show of authority sufficient to constitute a detention. (**United States *v. Brodie*** (D.C. Cir. 2014) 742 F.3rd 1058, 1061; see also ***United v. Brown*** (4th Cir. 2005) 401 F.3rd 588, 595.)

Contacts on Buses, as long as conducted in a non-coercive manner, do not automatically become a detention despite the relative confinement of the bus. (***United States v. Drayton***, *supra*; ***Florida v. Bostick***, *supra*.)

See "*Contacts on Buses*," under "*Specific Issues*," below.

During a "*Knock and Talk*:" Contacting a person at the front door of their residence, done in a non-coercive manner, is not a detention. (***United States v. Crapser*** (9th Cir. 2007) 472 F.3rd 1141, 1145-1147.)

Drawing a person out of his residence by simply knocking at the door and then stepping to the side for purposes of insuring the officer's safety: No detention when the officers then contacted him outside. (***People v. Colt*** (2004) 118, Cal.App.4th 1404, 1411; "The officers did not draw their weapons. (Defendant) was not surrounded. No one stood between (defendant) and the room door. No one said that (defendant) was not free to leave.")

Entering the defendant's driveway, through an open or unlocked gate to a low, chain-link fence, to contact and talk with (consensual encounter) a subject observed working in the driveway (apparently stripping copper wires from an air-conditioner), even if that area is considered to be part of the curtilage of the residence, is not illegal. (***People v. Lujano*** (2014) 229 Cal.App.4th 175, 182-185; "(T)he officers exercised no more than the same license to intrude as a reasonably respectful citizen—any door-to-door salesman would reasonably have taken the same approach the house.")

The "constitutionality of police incursion into curtilage depends on 'whether the officer's actions are consistent with an attempt to initiate consensual contact with the occupants of the home'" (***Id***., at p. 184; citing ***United States v. Perea-Rey*** (9th Cir. 2012) 680 F.3rd 1179, 1188.)

It is an open, undecided issue, with authority going both ways, as to whether it is lawful for an officer to conduct a "*knock and talk*" at other than the front door. The U.S. Supreme Court declined to resolve the issue. (***Carroll v. Carman*** (2014) 574 U.S. 13 [135 S.Ct. 348; 190 L.Ed.2nd 311]; determining that the officer was entitled to qualified immunity in that the issue is the subject of some conflicting authority.)

However, while declining to decide the correctness of the generally held opinion that a police officer, in making contact with a resident, is constitutionally bound to do no more than restrict his "movements to walkways, driveways, porches and places where visitors could be expected to go," the Court cited a number of lower federal and state appellate court decisions which have so held: E.g., ***United States v. Titemore*** (2nd Cir. 2006) 437 F.3rd 251; ***United States v. James*** (7th Cir 1994) 40 F.3rd 850, vacated on other grounds at 516 U.S. 1022; ***United States v. Garcia*** (9th Cir. 1993) 997 F.2nd 1273, 1279-1280; and ***State v. Domicz*** (2006) 188 N.J. 285, 302. (***Carroll v. Carman***, supra, at pp. 19-20.)

See "Knock and Talk," below.

Following a Lawful Detention:

Although defendant, driving a semi with an attached trailer, had initially been detained when a highway patrol officer initiated a traffic stop of his tractor-trailer and he pulled to the side of a freeway, that detention had ended by the time defendant gave his consent to search the tractor-trailer. The officer had returned defendant's documents, told him he was free to leave, and allowed him to walk partway back to his vehicle when the officer asked for consent to search his vehicle. Thus, the request for permission to search defendant's truck did not occur during a prolonged detention. (**People *v.* Arebalos-Cabrera** (2018) 27 Cal.App.5th 179, 183-190.)

Consensual Encounters vs. Detentions or Arrests:

The Three Contact Categories: "'Police contacts with individuals may be placed into three broad categories ranging from the least to the most intrusive:

Consensual encounters that result in no restraint of liberty whatsoever;

Detentions, which are seizures of an individual that are strictly limited in duration, scope, and purpose; *and*

Formal arrests or comparable restraints on an individual's liberty. [Citations.] . . . Consensual encounters do not trigger **Fourth Amendment** scrutiny. [Citation.] Unlike detentions, they require no articulable suspicion that the person has committed or is about to commit a crime.'"

See ***People v. Linn*** (2015) 241 Cal.App.4th 46, 57; quoting ***In re Manuel G.*** (1997) 16 Cal.4th 805, 821; see also ***People v. Cuadra*** (2021) 71 Cal.App.5th 348, 352.

Factors to Consider:

> However, a consensual encounter *may* be inadvertently converted into a detention, or even an arrest, by "any (or a combination of) the following: . . .
>
> > . . . the presence of several officers,
> >
> > . . . an officer's display of a weapon,
> >
> > . . . some physical touching of the person, or
> >
> > . . . the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled. [Citations]" (***In re Manuel G.***, *supra*; see also ***In re J.G.*** (2014) 228 Cal.App.4th 402, 408-413.)
>
> The Ninth Circuit Court of Appeals has added several other factors to consider (***United States v. Washington*** (9th Cir. 2007) 490 F.3rd 765, 771-772, citing ***Orhorhaghe v. INS*** (9th Cir. 1994) 38 F.3rd 488, 494-496.):
>
> > Whether the encounter occurred in a public or nonpublic setting (nonpublic being more intimidating).
> >
> > Whether the officers informed the person of his right to terminate the encounter.
>
> A consensual encounter will become an *unlawful* arrest if done without probable cause. (See ***United States v. Redlightning*** (9th Cir. 2010) 624 F.3rd 1090, 1103-1106, adding a consideration of the act of *confronting the defendant with evidence of his guilt*.)
>
> See also ***People v. Chamagua*** (2019) 33 Cal.App.5th 925, 929: "In contrast to a consensual encounter, a seizure is when an officer restrains the individual's liberty, whether by means of physical force or by a show of authority."
>
> The definition of a "seizure" was expanded a bit by the United States Supreme Court in the case of ***Torres v. Madrid*** (Mar. 25, 2021) __ U.S. __, __ [141 S.Ct. 989; 209 L.Ed.2nd 190], where the Court ruled that a "seizure" occurs when "(t)he application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person."

The ***Madrid*** Court overruled a lower court's holding that a suspect's continued flight after being shot by police negates a **Fourth Amendment** excessive-force claim.

Additional Case Law:

In ***United States v. Washington*** (9th Cir. 2007) 490 F.3rd 765, the Ninth Circuit Court of Appeal found a detention when two white police officers had contact with the black defendant late at night, and then asked him for consent to search. The consensual encounter, however, reverted to an illegal detention due to the "authoritative" manner of conducting the search, by walking defendant back to the patrol car, having him put his hands on the patrol vehicle while facing away from the officer, during a patdown, with the second officer standing between him and his car. It was also noted that the local "Police Bureau" (in Portland, Oregon) had published a pamphlet telling African-Americans to submit to a search when "ordered" to do so by the police following several instances of white police officers shooting black citizens during traffic stops.

While it is a crime to falsely identify oneself when lawfully detained, per **Pen. Code § 148.9**, this section is not violated where (1) the person is unlawfully detained, or (2) where he is the target of a consensual encounter only. (***People v. Walker*** (2012) 210 Cal.App.4th 1372, 1392.)

Because defendant discarded a firearm prior to being taken into physical custody, recovery of the gun was not a **Fourth Amendment** violation. Defendant's momentary hesitation and merely walking away from the officers instead of running as the officers approached did not constitute submission. Until a person is physically taken into custody, or submits to the officer's authority, there is no detention. (***United States v. McClendon*** (9th Cir. 2013) 713 F.3rd 1211, 1214-1217; citing ***California v. Hodari D.*** (1991) 499 U.S. 621 [111 S.Ct. 1547; 113 L.Ed.2nd 690].)

A consensual encounter developed into an illegal detention (there being no reasonable suspicion to believe defendant was engaged in any criminal activity) at some point during the encounter, and certainly upon asking defendant and his brother if they would sit on the curb, because of the number of officers present (four), a consensual patdown, and the series of other accusatory questions, so that by the time the officer asked for permission to search defendant's backpack, the defendant was being detained. The gun found in the backpack, as a product of that illegal detention, should have been suppressed in that the consent to search was involuntary. (***In re J.G.*** (2014) 228 Cal.App.4th 402, 408-413.)

Asking a person to walk to the sidewalk, reasonably under the circumstances understood for safety reasons, is not as intrusive as telling

him to sit on the curb, and does not (absent more) constitute a detention. Asking him to verbally identify himself also is not a detention. (***People v. Parrott*** (2017) 10 Cal.App.5th 485, 494.)

Where defendant was observed standing next to a vehicle at 2:15 a.m. as the officers approached, and he raised his hands and stepped back in reaction to being told to approach the hood of the officer's vehicle, the Court held that he had been unlawfully detained. Per the Court (at p. 353): "Raising one's hands and stepping back is a universally acknowledged submission to authority. It is an accepted way to reassure someone who is armed and confronting you that you pose no threat because you have no weapon in hand, your arms are not poised to attack, and you are not advancing in a menacing way. By putting up both hands appellant yielded to the officers' show of authority." Being no reasonable suspicion sufficient to justify a detention, defendant had been unlawfully detained. A budge in his waist band observed as a result was held to have been observed illegal, requiring the suppression of a handgun subsequently found during a patdown search. (***People v. Cuadra*** (2021) 71 Cal.App.5th 348, 352-354.)

An officer merely putting on his vehicle's spotlight on the rear of defendant's already parked vehicle, without more, was *not* such a "*show of authority*" so as to convert a consensual encounter into a detention. (***People v. Tacardon*** (2022) 14 Cal.5th 235, at pg. 252; noting that a court must take into consideration the "*totality of the circumstances*" in determining whether a reasonable person, in the suspect's position, would feel that he was free to leave.)

Defendant was convicted of possession of a firearm with a prior violent conviction pleading no contest following the denial of his motion to suppress evidence of a firearm. He contended that the evidence of the firearm should have been excluded because law enforcement officers discovered it only after they unlawfully detained him to verify his parole status. Reversing the trial court, the Court of Appeal found that the initial encounter between defendant and the officers was indeed an unlawful detention. The court pointed to several factors leading to this conclusion such as the positioning of the officers that blocked defendant from leaving, the officers approaching defendant from both sides of his car and shining their flashlights into his car, and the fact that the officers approached him while he was on his phone in a legally parked vehicle. The court held that these factors would lead a reasonable person to believe they are not free to leave, thus constituting a detention. Therefore, the court reversed the trial court's judgment and vacated its order denying defendant's motion to suppress evidence. The court concluded that the officers would not have obtained defendant's parole status if they had not first unlawfully detained

him and thus, the firearm was not lawfully obtained and should be suppressed. (***People v. Paul*** (2024) 99 Cal.App.5th 832, 837-841.)

Specific Issues:

Contacts on Buses:

The United States Supreme Court has repeatedly ruled that law enforcement officers checking buses for immigration or drug interdiction purposes are *not* detaining the passengers when the officers do no more than "ask questions of an individual, ask to examine the individual's identification, and request consent to search his or her luggage so long as the officers do not convey a message that compliance with their requests is required." The fact that the contact took place in the cramped confines of a bus is but one factor to consider in determining whether the encounter was in fact a detention. (***Florida v. Bostick*** (1991) 501 U.S. 429 [111 S.Ct. 2382; 115 L.Ed.2nd 389]; ***United States v. Drayton*** (2002) 536 U.S. 194 [122 S.Ct. 2105; 153 L.Ed.2nd 242].)

However, the *Ninth Circuit Court of Appeal* held to the contrary in a similar circumstance, without attempting to differentiate the facts from ***Bostick*** (the case being decided before ***Drayton***), finding that the officers should have informed passengers that they were not obligated to speak with the officers. (***United States v. Stephens*** (9th Cir. 2000) 206 F.3rd 914.)

The Supreme Court in ***Drayton***, *supra*, however, has specifically held that it is not required that officers inform citizens of their right to refuse when the officer is seeking permission to conduct a warrantless consent search. (***United States v. Drayton***, *supra*.)

Note: It is questionable whether ***Stephens*** is good law in light of ***Bostick*** and ***Drayton***.

Other circuits have upheld such a "bus interdiction," finding them lawful. (E.g., see ***United States v. Wise*** (5th Cir. TX 2017) 877 F.3rd 209.)

Flight:

Rule: The long-standing rule has always been that "*flight alone*," without other suspicions circumstances, is *not* sufficient to justify a detention. (***People v. Souza*** (1994) 9 Cal.4th 224.)

> A vehicle driver's apparent attempt to elude a police officer when there is no legal justification for making a traffic stop, is not illegal

in itself in that the driver is under no duty to stop. (***Liberal v. Estrada*** (9th Cir. 2011) 632 F.3rd 1064, 1078.)

Note: If a person may walk away from a consensual encounter (See *People v. Thomas* (2018) 29 Cal.App.5th 1107, 1117.), he or she may also leave at a full run. The courts, state and federal, have consistently held that this act, *by itself*, is not suspicious enough to warrant a detention.

Note: *However*, a defendant's flight may be used as evidence against him at trial, showing an "*awareness of guilt*." (See **P.C. § 1127c** and **CALCRIM No. 372**. See also ***People v. Price*** (2017) 8 Cal.App.5th 409, 454-458.)

Reasoning:

"(T)he high court . . . has a long history of recognizing that innocent people may reasonably flee from police: '[I]t is a matter of common knowledge that men who are entirely innocent do sometimes fly (sic) from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that "the wicked flee when no man pursueth, but the righteous are as bold as a lion." Innocent men sometimes hesitate to confront a jury—not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves.' (***Alberty v. United States*** (1896) 162 U.S. 499, 511 [40 L.Ed. 1051; 16 S.Ct. 864]; see also (***People v.***) ***Souza*** ((1994) . . . 9 Cal.4th (224,) at p. 243 (conc. opn. of Mosk, J.) [noting the 'unfortunate reality that some individuals in our society, often members of minority groups, improperly view the police more as sources of harassment than of protection. These individuals may innocently flee at the first sight of police in order to avoid an encounter that their experience has taught them might be troublesome'].)" (**People v. Flores** (2019) 38 Cal.App.5th 617, 629, 630.)

Exceptions:

Flight, however, need not be ignored. The Supreme Court has recognized that: "'[U]nprovoked flight upon noticing the police . . . is certainly suggestive' of wrongdoing and can be treated as 'suspicious behavior' that factors into the totality of the

circumstances." (***District of Columbia v. Wesby et al.*** (2018) 583 U.S. 48, 59 [138 S.Ct. 577; 199 L.Ed.2nd 453], citing ***Illinois v. Wardlow*** (2000) 528 U.S. 119, 124-125 [120 S.Ct. 673; 145 L.Ed.2nd 570].)

> "Nervous and evasive behavior is a pertinent factor in determining whether suspicion is reasonable." (***People v. Flores*** (2021) 60 Cal.App.5th 978, 990, citing ***Wardlow***, *supra,* at p. 124.)
>
> "In fact, 'deliberately furtive actions and flight at the approach of . . . law officers are strong indicia of mens rea.'" (***District of Columbia v. Wesby et al.***, *supra*, at p. 59; citing ***Sibron v. New York*** (1968) 392 U.S. 40, 66 [88 S.Ct. 1889; 20 L.Ed.2nd 917].)

Also, the U.S. Supreme Court has lowered the bar a little by holding that flight from officers while in a "*high narcotics area*" *is* sufficient in itself to justify a temporary detention (and patdown for weapons). (***Illinois v. Wardlow*** (2000) 528 U.S. 119 [120 S.Ct. 673; 145 L.Ed.2nd 570].)

Flight of two people is more suspicious than one. Added to this the fact that there appeared to be drug paraphernalia on a table where the two persons had been sitting and that defendant was carrying something in his hand as he fled, it was held that the officer had sufficient reasonable suspicion to detain them. (***People v. Britton*** (2001) 91 Cal.App.4th 1112, 1118-1119.)

Stopping, detaining, and patting down a known gang member, observed running through traffic in a gang area while looking back nervously as if fleeing from a crime (as either a victim or a perpetrator), was held to be lawful. (***In re H.M.*** (2008) 167 Cal.App.4th 136.)

Observing defendant and three others running down the street, carrying rudimentary weapons (i.e., a brick, rock and part of a lamp) in a gang area, with defendant being recognized as a member of that gang, with one of the subjects yelling "*He's over there*" and another pointing up the street, was sufficient probable cause to arrest the subjects for possession of a deadly weapon for the purpose of committing an assault, per **P.C. § 12024** (now **P.C. § 17500**). (***In re J.G.*** (2010) 188 Cal.App.4th 1501.)

Tossing an unknown object over a fence during a foot pursuit, particularly when this occurs immediately after defendant had been

seen in a vehicle that had refused to stop, and which defendant abandoned during a high speed pursuit, is sufficient to justify a detention. (***People v. Rodriguez*** (2012) 207 Cal.App.4th 1540, 1543.)

Flight, when combined with grabbing his front pants pocket while in a high-crime area, provided sufficient reasonable suspicion to justify defendant's detention and a patdown for weapons which resulted in the recovery of a firearm. Also, no detention occurred when the officers initially chased defendant who fled from the attempted contact. (***United States v. Jeter*** (6th Cir. 2013) 721 F.3rd 746, 750-755.)

Flight of a person who is subject to a lawful detention, thus avoiding a statutory requirement that he identify himself (as required under Nevada law), is probable cause to arrest him. (***United States v. Williams*** (9th Cir. 2017) 846 F.3rd 303, 310-312; discussing the interplay of Nevada statutes **N.R.S. §§ 171.123** and **199.280**, which, together, make it an arrestable offense for a lawfully detained individual to refuse to identify himself.)

There was no detention under circumstances when defendant fled from an officer, where the officer had not yet objectively communicated the use of his official authority to restrain defendant until he grabbed defendant's arm because prior to that the officer had acted on his own, he had not touched his weapon, he had not touched defendant, and he had not given any orders or made any threats even though defendant had stopped when the officer called his name. (***United States v. Belin*** (1st Cir. Mass. 2017) 868 F.3rd 43)

However, the rule of ***Wardlow*** has it limits: In a similar situation, reasonable suspicion was found to be lacking under the **Fourth Amendment** for an investigative detention where defendant's mere presence by daylight in an area frequented by a street gang, absent any reports of criminal activity at that time, did not provide specific, articulable grounds to justify his detention. The detaining officer's testimony that defendant had been "*walking briskly*" did not establish that defendant had fled from other officers investigating the gang. Even if defendant's quick pace could be characterized as flight, it did not justify a detention because it was not "*headlong flight*" as described in the case law on which the prosecution relied. Because the detention was unlawful, as was a subsequent search of defendant's residence, all evidence had to be suppressed pursuant to **Pen. Code § 1538.5**, including illegal drugs and statements. (***People v. Flores*** (2019) 38 Cal.App.5th 617.)

Defendant's immediate attempt to walk away from officers who had just arrived at a person's house to serve an arrest warrant, where the officers feared that if defendant were able to get out of their sight (as he walked towards the rear of the house), he might draw a weapon or warn the occupant of the officers' arrival, all occurring in a "high crime" area, justified defendant's detention and (upon observing several knives "hooked onto his belt") patdown for weapons. The fact that the officers did not observe defendant committing any criminal activity did not affect the reasonableness of their suspicion as **Terry v. Ohio** only requires a reasonable suspicion supported by articulable facts that criminal activity "may be afoot," and not absolute certainty that a crime is being committed. (***United States v. Darrell*** (5th Cir. 2019) 945 F.3rd 929.)

Flight, however, where there is sufficient reasonable suspicion to justify a detention, is a criminal offense, punishable under **P.C. 148(a)(1)**. (***In re T.F.-G.*** (2023) 94 Cal.App.5th 893, 993-894.)

Exception to the Exception:

The rule of ***Wardlow*** has it limits: In a similar situation, reasonable suspicion was found to be lacking under the **Fourth Amendment** for an investigative detention where defendant's mere presence by daylight in an area frequented by a street gang, absent any reports of criminal activity at that time, did not provide specific, articulable grounds to justify his detention. The detaining officer's testimony that defendant had been "*walking briskly*" did not establish that defendant had fled from other officers investigating the gang. Even if defendant's quick pace could be characterized as flight, it did not justify a detention because it was not "*headlong flight*" as described in the case law on which the prosecution relied. Because the detention was unlawful, as was a subsequent search of defendant's residence, all evidence had to be suppressed pursuant to **P.C. § 1538.5**, including illegal drugs and statements. (***People v. Flores*** (2019) 38 Cal.App.5th 617.)

> "(F)light is probative 'only in those instances in which there is other indication of criminality, such as evidence that the defendant fled from a crime scene or after being accused of a crime.'" (***People v. Flores***, *supra*, quoting ***People v. Souza***, *supra*, at pp. 235–236; and noting that there must be "*flight plus*" to justify a detention.)

Chasing the Suspect; Items Dropped During the Chase:

Trying to catch a person who runs from a consensual encounter *is not* a constitutional issue until he is actually caught and detained or arrested. A person is *not* actually detained (thus no **Fourth Amendment** violation) until he is either physically restrained or submits to an officer's authority to detain him. (***California v. Hodari D.*** (1991) 499 U.S. 621 [111 S.Ct. 1547; 113 L.Ed.2nd 690]; "*threatening an unlawful detention*," by chasing a person with whom a consensual encounter is being attempted, is not a constitutional violation in itself. See also ***United States v. Smith*** (9th Cir. 2011) 633 F.3rd 889.)

Actions taken by the subject being chased, such as *dropping contraband* prior to being caught, will, if observed by the pursuing officer, justify the detention once the subject is in fact caught. (***People v. Rodriguez*** (2012) 207 Cal.App.4th 1540, 1543-1544.)

Defendant who refused to submit to an illegal, suspicionless detention, physically threatening the officer before fleeing, could lawfully be arrested upon the making of the threat. Therefore, arresting him after a foot pursuit was lawful. (***United States v. Caseres*** (9th Cir. 2008) 533 F.3rd 1064, 1069.)

Defendant discarding a firearm as officers were attempting to (arguably) illegally arrest him, did not require the suppression of the firearm in that when the gun was discarded, defendant had not yet been "touched" nor had he "submitted" to the officers. Thus, the **Fourth Amendment** was not yet implicated. (***United States v. McClendon*** (9th Cir. 2013) 713 F.3rd 1211, 1214-1217.)

> The Court noted that neither defendant's temporary hesitation, nor the officer's use of a firearm while telling him he was under arrest, alters the rule of ***Hodari D.*** (***Id***., at pp. 1216-1217.)

Contacts with Gang Members:

Gang members may be consensually encountered like anyone else. However, membership in a street gang is not in and of itself a crime. (See **P.C. § 186.22**) The practice of stopping, detaining, questioning, and perhaps photographing a suspected gang member, based solely upon the person's suspected gang membership, is illegal. (***People v. Green*** (1991) 227 Cal.App.3rd 692, 699-700.)

Stopping and detaining gang members *for the purpose of* photographing them is illegal without a reasonable suspicion of criminal activity. Merely

being a member of a gang, by itself, is neither illegal nor cause to detain. (***People v. Rodriguez*** (1993) 21 Cal.App.4th 232, 239.)

> The ***Rodriguez*** court noted that; "While this policy (of stopping and questioning all suspected gang members) may serve the laudable purpose of preventing crime, it is prohibited by the **Fourth Amendment**." (***Id.***, at p. 239; citing ***Brown v. Texas*** (1979) 443 U.S. 47, 52 [99 S.Ct. 2637; 61 L.Ed.2nd 357, 363].)

See "*Detentions*" (Chapter 4), below.

See also "*Videotaping and Photographing*," under "*New and Developing Law Enforcement Tools and Technology*" (Chapter 14), below.

Knock and Talks:

Rule: Where the officer *does not* have probable cause prior to the contact (thus, he is not able to obtain a search warrant), there is no constitutional impediment to conducting what is known as a "*knock and talk*;" i.e., making contact with the occupants of a residence at their front door for the purpose of asking for a consent to enter and/or to question the occupants. (***United States v. Cormier*** (9th Cir. 2000) 220 F.3rd 1103.)

> State authority similarly upholds the practice. (***People v. Colt*** (2004) 118, Cal.App.4th 1404, 1410-1411.)

Case Law:

> Contacting a person at the front door of their residence, done in a non-coercive manner, is not a detention. (***United States v. Crapser*** (9th Cir. 2007) 472 F.3rd 1141, 1145-1147.)
>
> The California Supreme Court has noted that: "It is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes. Such inquiries, although courteously made and not accompanied with any assertion of a right to enter or search or secure answers, would permit the criminal to defeat his prosecution by voluntarily revealing all of the evidence against him and then contending that he acted only in response to an implied assertion of unlawful authority." (***People v. Michael*** (1955) 45 Cal.2nd 751, 754.)
>
> The key to conducting a lawful "*knock and talk*," when there is no articulable suspicion that can be used to justify an "*investigative detention*," is whether "a reasonable person would feel free 'to disregard the police and go about his business.'" [Citation] If so,

no articulable suspicion is required to merely knock on the defendant's door and inquire of him who he is and/or to ask for consent to search. (***People v. Jenkins*** (2004) 119 Cal.App.4th 368.)

But see ***United States v. Jerez*** (7th Cir. 1997) 108 F.3rd 684, where a similar situation was held to constitute an "*investigative detention*," thus requiring an "*articulable reasonable suspicion*" to be lawful, because the officers knocked on the motel room door in the middle of the night continually for a full three minutes, while commanding the occupants to open the door.

An otherwise lawful "*knock and talk*," where officers continued to press the defendant for permission to enter his apartment after his denial of any illegal activity, converted the contact into an unlawfully "extended" detention, causing the Court to conclude that a later consent-to-search was the product of the illegal detention, and thus invalid. (***United States v. Washington*** (9th Cir. 2004) 387 F.3rd 1060.)

The information motivating an officer to conduct a knock and talk may be from an anonymous tipster. There is no requirement that officers corroborate anonymous information before conducting a knock and talk. (***People v. Rivera*** (2007) 41 Cal.4th 304.)

The United States Supreme Court has found it to be an open, undecided issue, with authority going both ways, as to whether it is lawful for an officer to conduct a "*knock and talk*" at other than the front door, the Court declining to resolve the issue. (***Carroll v. Carman*** (2014) 574 U.S. 13 [135 S.Ct. 348; 190 L.Ed.2nd 311]; determining that the officer was entitled to qualified immunity in that the issue is the subject of some conflicting authority.)

> However, while declining to decide the correctness of the generally held opinion that a police officer, in making contact with a resident, is constitutionally bound to do no more than restrict his "movements to walkways, driveways, porches and places where visitors could be expected to go," the Court cited a number of lower federal and state appellate court decisions which have so held: E.g., ***United States v. Titemore*** (2nd Cir. 2006) 437 F.3rd 251; ***United States v. James*** (7th Cir 1994) 40 F.3rd 850, vacated on other grounds at 516 U.S. 1022; ***United States v. Garcia*** (9th Cir. 1993) 997 F.2nd 1273, 1279-1280; and ***State v. Domicz*** (2006) 188 N.J. 285, 302. (**Id**., 19-20.)

Conducting a "knock and talk" to ask a homeowner about the strong odor of marijuana noted during a prior contact was upheld as reasonable, the Court noting that this conduct fell "squarely within the scope of the knock and talk exception." (***United States v. White*** (8th Cir. MO 2019) 928 F.3rd 734.)

See "*Knock and Talk*," below, under "*Miscellaneous Issues*," under "*Searches of Residences and Other Buildings*" (Chapter 13), below.

***Chapter 4*:**

Detentions:

General Rule: A police officer has the right to stop and temporarily detain someone for investigation whenever the officer has a "*reasonable suspicion*" some criminal activity is afoot and that the person *was*, . . . *is*, . . . or *is about to be* involved in that criminal activity. (***Terry v. Ohio*** (1968) 392 U.S. 1, 27 [88 S.Ct. 1868; 20 L.Ed.2nd 889, 909]; ***People v. Walker*** (2012) 210 Cal.App.4th 1372, 1381; ***United States v. Williams*** (9th Cir. 2017) 846 F.3rd 303, 308-310; ***People v. Parrott*** (2017) 10 Cal.App.5th 485, 492, 494-495; **People *v.* Fews** (2018) 27 Cal.App.5th 553, 559; ***United States v. Bontemps*** (9th Cir. 2020) 977 F.3rd 909, 913.)

Often referred to as a "***Terry** stop*." (See ***Thomas v. Dillard*** (9th Cir. 2016) 818 F.3rd 864, 875; ***United States v. Brown*** (9th Cir. 2021) 996 F.3rd 998, 1004.)

"Under the authority recognized in ***Terry***, a police officer who 'observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot' may 'briefly stop the suspicious person and make "reasonable inquiries" aimed at confirming or dispelling his suspicions.'" (***United States v. Brown***, *supra*, quoting ***Minnesota v. Dickerson*** (1993) 508 U.S. 366, at p. 373 [113 S.Ct. 2130; 124 L.Ed.2nd 334], which I turn quotes ***Terry v. Ohio***, *supra*, at p. 30.)

"One of these exceptions is the ***Terry*** stop, which permits an officer with reasonable suspicion that an individual is engaged in a crime to briefly detain the individual and make 'reasonable inquiries' aimed at confirming or dispelling [the officer's] suspicions.'" (***United States v. Baker*** (9th Cir. 2023) 58 F.4th 1109, 1117.)

"Detentions are 'seizures of an individual which are strictly limited in duration, scope and purpose, and which may be undertaken by the police "if there is an articulable suspicion that a person has committed or is about to commit a crime."'" (***People v. Gutierrez*** (2018) 21 Cal.App.5th 1146, 1153; quoting *Wilson v. Superior Court* (1983) 34 Cal.3rd 777, 784.)

"Unlike consensual encounters, '[a] detention … is a seizure, albeit a limited one, for which reasonable suspicion is required.'" (***In re T.F.-G.*** (2023) 94 Cal.App.5th 893, 903; quoting ***People v. Linn*** (2015) 241 Cal.App.4th 46, 57; see also ***People v. Brown*** (2015) 61 Cal.4th 968, 981.)

"[T]o justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity." (***People v. Thomas*** (2018) 29 Cal.App.5th 1107, 1115.); citing ***In re***

Tony C. (1978) 21 Cal.3rd 888, 893; ***People v. Souza*** (1994) 9 Cal.4th 224, 231; ***People v. Flores*** (2019) 38 Cal.App.5th 617, 627; and ***Terry v. Ohio*** (1968) 392 U.S. 1, 30 [20 L.Ed.2nd 889; 88 S. Ct. 1868].)

But the other side of this coin dictates that: "The **Fourth Amendment** protects the 'right of the people to be secure in their persons . . . against unreasonable searches and seizures' by the government. **U.S. Const. amend. IV**. 'This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.'" (***Thomas v. Dillard***, *supra*, at p. 874; quoting ***Terry v. Ohio***, *supra*, at pp. 8-9.)

> In perhaps an understatement, it has been noted that; "(t)he interaction between a peace officer and a person suspected of committing a crime is not a game." (***People v. Quick*** (2016) 5 Cal.App.5th 1006, 1008; chastising a detained defendant for attempting to create his own "'do it yourself' suppression motion" by throwing his jacket containing a controlled substance into his vehicle, along with the car keys, and locking the door.)
>
> The officer's belief that two subjects are engaged in an act of domestic violence by itself is insufficient to justify a detention and a frisk for weapons absent some other facts indicating that at least one of the subjects is armed. (***Thomas v. Dillard***, *supra*, at pp. 875-886; but see dissent at pp. 892-901, arguing that the fact alone that domestic violence is involved, given the dangerousness of domestic violence incidents, is sufficient to justify a patdown for weapons.)
>
> > Nor did the suspect's non-compliance with the officer's illegal order to submit to a frisk make the subsequent continued detention lawful. (***Id***, at p. 889.)
>
> Also, merely being present at the scene of some unexplained police activity, being observed opening a garage door, appearing to be surprised, and wearing baggie clothing with the pockets apparently being "full of items," held not to justify a "***Terry*** stop" nor a patdown of the defendant's clothing. (***United States v. Job*** (9th Cir. 2017) 871 F.3rd 852, 861.)

"'A person is seized by the police and thus entitled to challenge the government's action under the **Fourth Amendment** when the officer, "by means of physical force or show of authority," terminates or restrains his freedom of movement, [citation] 'through means intentionally applied' [citation].'" (**People *v.* Arebalos-Cabrera** (2018) 27 Cal.App.5th 179, 186; quoting ***Brendlin v. California*** (2007) 551 U.S. 249, 254 [168 L.Ed.2nd 132; 127 S.Ct. 2400]; see also ***People v. Flores*** (2019) 38 Cal.App.5th 617, 626-627; ***In re T.F.-G.*** (2023) 94 Cal.App.5th 893, 903-904.)

Note: Detentions are sometimes referred to in the case law as simply "*investigative stops*," particularly by the federal courts. (See ***United States v. Kim*** (9th Cir. 1994) 25 F.3rd 1426; and ***United States v. Summers*** (9th Cir. 2001) 268 F.3rd 683.)

> But the concept of the "investigatory stop" is recognized by the state courts as well: "The **Fourth Amendment** to the United States Constitution protects against unreasonable searches and seizures, including brief investigatory stops." (***In re Edgerrin J.*** (2020) 57 Cal.App.5th 752, 759, citing the **Fourth Amendment** and ***People v. Souza*** (1994) 9 Cal.4th 224, 229.)

***Purpose*:**

A detention is allowed so a peace officer may have a reasonable amount of time to investigate a person's possible involvement in an actual or perceived criminal act, allowing the officer to make an informed decision whether to arrest, or to release, the subject. "An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." (***In re Antonio B.*** (2008) 166 Cal.App.4th 435, 440.)

See also ***United States v. Place*** (1983) 462 U.S. 696, 702-707 [103 S.Ct. 2637; 77 L. Ed.2nd 110]; apply the ***Terry*** principles to the temporary seizure and inspection of a suspect's luggage for the purpose of investigating an officer's reasonable suspicion that the luggage may contain contraband.

> However, in that the luggage seizure in this case before being subjected to the dog-sniff was 90 minutes, the Court held that **Terry v. Ohio** did not apply to such an extended time period. (***United States v. Place***, *supra*, at p. 709.)

***Seriousness of the Offense Involved*:**

Note that the Ninth Circuit Court of Appeal has attached a requirement that the suspected offense for which a person is to be detained must be "*serious*," thus apparently making it a **Fourth Amendment** violation to stop and detain someone when the offense is *not* serious. See *United States v. Vandergroen* (9th Cir. 2020) 964 F.3rd 876, 879; detaining defendant upon a reasonable suspicion that he might be in illegal possession of a firearm—a serious offense under California law—held to be justified, while noting that stopping and detaining an individual for a non-serious offense would not be lawful. Deciding what is "serious" and what is not is the unresolved issue.

> The Court cites ***United States v. Grigg*** (9th Cir. 2007) 498 F.3rd 1070, as authority for this argument. ***Griggs***, however, while discussing the issue, declines to decide where to draw the line, holding only that: "We adopt the rule that a reviewing court must consider the nature of the misdemeanor offense in question, with particular attention to the potential for ongoing or repeated danger (*e.g.*, drunken and/or reckless driving), and any risk of escalation (*e.g.*, disorderly conduct, assault, domestic violence). An assessment of the 'public safety' factor should be considered within the totality of the circumstances, when balancing the privacy interests at stake against the efficacy of a ***Terry*** stop, along with the possibility that the police may have alternative means to identify the suspect or achieve the investigative purpose of the stop." (At p. 1081.)

There does not appear to be any requirement under California law that the offense for which one is to be detained must be classified as "*serious*."

> E.g. see ***People v. Thompson*** (2006) 38 Cal.4th 811, and ***Sims v. Stanton*** (9th Cir. 2013) 706 F.3rd 954 (certiorari granted), both cases discussing the legal issues involved in detaining or arresting someone in their residence, where the Ninth Circuit Court of Appeal held in ***Sims*** that unless the offense for which one is to be detained is "*serious*," entry into a residence for that purpose is illegal. The California Supreme Court disagrees, as noted in ***Thompson***, and notes (at pp. 821-824) that the Ninth Circuit's opinion on this issue is a minority opinion.
>
> The U.S. Supreme Court has specifically declined to rule on the issue of whether it is lawful to stop and detain someone for a non-serious offense. (See ***United States v. Hensley*** (1985) 469 U.S. 221, 229 [105 S.Ct. 675; 83 L.Ed.2nd 604].)

Note: If this is an issue at all, a "*serious offense*" may be definable by whether the arrested-for offense was "jailable," or "non-jailable." (See ***People v. Thompson*** (2006) 38 Cal.4th 811, at p. 824.)

***Show of Authority*:**

"'In situations involving a *show of authority*, a person is seized "if 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,'"" or ""'otherwise terminate the encounter"'"" [citation], and if the person actually submits to the show of authority [citation].'"" (Italics added; ***People v. Arebalos-Cabrera*** (2018) 27 Cal.App.5th 179, 186; quoting ***People v. Brown*** (2015) 61 Cal.4th 968, 974: See also ***In re Edgerrin J.*** (2020) 57 Cal.App.5th 752, 760.)

> In ***Edgerrin J.***, The Juvenile Court's denial of a suppression motion was reversed for having erroneously determined that a police-defendant

encounter was consensual and not a detention. A citizen had approached four police officers, reporting to them that black males sitting in a car on the street in her neighborhood were "acting shady." In two patrol cars, the officers parked behind defendant's lawfully parked car. The first patrol car turned its emergency lights on and the four officers approached each of the car's doors. The three minors sitting in the vehicle were directed to roll down the windows and provide IDs. Defendant (in the driver's seat) was determined to have a **Fourth** waiver. A search of the car revealed an illegal loaded firearm and evidence of a robbery. The Court ruled that the officers' show of authority (i.e., turning on their emergency lights) amounted to an unlawful detention. Per the Court: "Under these facts, no reasonable person in defendant's position would feel free to leave." The citizen's tip was infirm because it "provided only a vague and highly subjective characterization of what she saw" and was therefore "insufficiently reliable as to any illegal behavior to provide a basis for a detention." The Court ordered a renewed hearing to clarify to what extent the officers previously knew about defendant's **Fourth** waiver, his gang membership, and his presence in a rival gang territory—points that the Juvenile Court had sidestepped.

The "reasonable person" test presupposes an *innocent* person. (***United States v. Brown*** (9th Cir. 2021) 996 F.3rd 998, 1005; citing ***Florida v. Bostick*** (1991) 501 U.S. 429, at p. 438 [111 S.Ct. 2382; 115 L.Ed.2nd 389].)

"A detention occurs when an officer intentionally applies physical restraint or initiates a show of authority to which an objectively reasonable person innocent of wrongdoing would feel compelled to submit, and to which such a person in fact submits." (***People v. Linn*** (2015) 241 Cal.App.4th 46, 57; see also ***People v. Parrott*** (2017) 10 Cal.App.5th 485, 492.)

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"A seizure of the person occurs '"whenever a police officer 'by means of physical force or show of authority' restrains the liberty of a person to walk away."'" (*People v. Thomas* (2018) 29 Cal.App.5th 1107, 1112-1113.); citing ***People v. Douglas*** (2015) 240 Cal.App.4th 855, 860, which in turn quoted ***People v. Ceils*** (2004) 33 Cal.4th 667, 673; see also ***People v. Brown*** (2015) 61 Cal.4th 968, 976–977.)

"A consensual encounter with a police officer ripens into a seizure when, under 'all the circumstances surrounding the encounter,' the 'police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.'" (***United States v. Brown***

(9th Cir. 2021) 996 F.3rd 998, 1005; quoting ***Florida v. Bostick*** (1991) 501 U.S. 429, at p. 439 [111 S.Ct. 2382; 115 L.Ed.2nd 389].)

Blocking a vehicle in, in which defendant was a passenger, with two police cars constitutes sufficient "*show of authority*" to deem defendant to have been detained. (***United States v. Hester*** (3rd Cir. NJ 2018) 910 F.3rd 78; the Court ruling that the detention was lawful given the suspicious circumstances of being parked illegal outside a liquor store where the officers knew drug dealing to be common.)

> See also ***People v. Wilkins*** (1986) 186 Cal.App.3d 804, 809: A detention occurred when the officer in a marked patrol car parked diagonally behind defendant's vehicle so it could not exit the parking lot.

Although "consensual encounters present no constitutional concerns and do not require justification . . . 'when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen,' the officer effects a seizure of that person, which must be justified under the **Fourth Amendment** to the **United States Constitution**." (***People v. Brown*** (2015) 61 Cal.4th 968, 974, where the officer pulled his patrol car in behind the defendant's car and activated his emergency lights, quoting ***Florida v. Bostick*** (1991) 501 U.S. 429, 434 [111 S.Ct. 2382; 115 L.Ed.2nd 389], the Court held that the stop was supported by a reasonable suspicion.)

Three officers confronting defendant and his two companions where his two companions had already been patted down for weapons, plus the persistent nature of the officer's questions which continued despite defendant's attempts to end the encounter, communicated to defendant that the officer was not going to take no for an answer. Also, the Court found that examining the officers' interaction with defendant and the other men in a broader context intensified the coercive nature of the encounter. For example, the encounter occurred at night, with the three uniformed officers all shining their flashlights at defendant and his two companions, while defendant's avenues of egress were at least partially being restricted by the officers, their car, and a fence. Considering all the circumstances, the Court concluded a reasonable person in defendant's position would not have felt free to ignore the officers and walk away. Next, the court held that by staying where he was even as the officer's questioning grew more persistent and not leaving although he clearly wanted to, defendant was submitting to the officer's show of authority, even if it was only for a brief time. As a result, the court held that defendant was seized for **Fourth Amendment** purposes prior to an attempt to flee from the officers during which he dropped a satchel he was carrying. The search of the satchel and then defendant's person violated the **Fourth Amendment**. (***United States v. Mabry*** (D.C. Cir. 2021) 997 F.3rd 1239.)

While a curfew was in effect, but which did not apply to private property, a deputy sheriff began the detention process when he approached defendant in a

hotel parking lot and "asked" him to come toward the hood of the patrol car. By raising both his hands, defendant yielded to the officers' show of authority. There was neither probable cause to arrest defendant but for the illegal detention, nor was this a consensual encounter after the officers directed defendant to the hood of the car. All the officers knew was that defendant was standing next to a car in a motel parking lot at 2:00 a.m. Under the totality of circumstances, defendant submitted to a show of authority. His detention was not founded on reasonable suspicion, consent, nor probable cause to arrest. The stop did not pass constitutional muster and a revolver seized as a result of the search should have been suppressed. (***People v. Cuadra*** (2021) 71 Cal.App.5th 348.)

An "officer's use of a sustained spotlight on an individual at night . . . [is a show of authority that] undoubtedly signals on the otherwise empty street that the individual is 'the focus of the officer's particularized suspicion'" (***People v. Kasrawi*** (2021) 65 Cal.App.5th 751, 757.)

Defendant's seizure was unreasonable under **Fourth Amendment** where officers knew defendant's home address and that he had an eight-year-old arrest for trespass. This alone failed to constitute reasonable suspicion that defendant was trespassing as a non-resident who was not a resident's guest, an employee, or pursuing a legitimate business or social purpose. The Court held that although the officers did not physically restrain defendant until he lifted his shirt high enough for the officer to see the outline of a firearm, it wasn't until some badgering that he did so. The officers seized defendant without reasonable suspicion upon "requesting" that he lift his shirt at least fifteen times, inferring that he should submit to a pat down two times, and mentioning that defendant could be taken to jail for trespass two times that. If wasn't until after all this that the officer observed "what appeared to be like the bulge or the outline of a muzzle of a pistol" below defendant's belt buckle. The Court concluded that the Government's factors—when weighed and assessed in the totality of the circumstances—do not constitute reasonable suspicion to justify the seizure. (***United States v. Peters*** (4th Cir. 2023) 60 F.4th 855.)

An officer's "systematic physical intrusion and show of authority as to" defendant's acquaintances . . . "would have objectively communicated to a reasonable person in T.F.-G.'s (the defendant) position that he was not free to go." (***In re T.F.-G.*** (2023) 94 Cal.App.5th 893, 906; his resulting attempt to flee being valid grounds to arrest him for interfering with the officers in the performance of their duties, per **P.C. § 148(a)(1)**.)

Defendant was convicted of possession of a firearm with a prior violent conviction pleading no contest following the denial of his motion to suppress evidence of a firearm. He contended that the evidence of the firearm should have been excluded because law enforcement officers discovered it only after they unlawfully detained him to verify his parole status. Reversing the trial court, the Court of Appeal found that the initial encounter between defendant and the

officers was indeed an unlawful detention. The court pointed to several factors leading to this conclusion such as the positioning of the officers that blocked defendant from leaving, the officers approaching defendant from both sides of his car and shining their flashlights into his car, and the fact that the officers approached him while he was on his phone in a legally parked vehicle. The court held that these factors would lead a reasonable person to believe they are not free to leave, thus constituting a detention. Therefore, the court reversed the trial court's judgment and vacated its order denying defendant's motion to suppress evidence. The court concluded that the officers would not have obtained defendant's parole status if they had not first unlawfully detained him and thus, the firearm was not lawfully obtained and should be suppressed. (***People v. Paul*** (2024) 99 Cal.App.5th 832, 837-841.)

> "The test for the existence of a show of authority is an objective one and does not take into account the perceptions of the particular person involved. [Citation.] The test is 'not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person.' (***People v. Garry*** (2007) . . . 156 Cal.App.4th (1100) at p. 1106.) 'This includes an examination of both an officer's verbal *and* nonverbal actions in order to "assess[ ] the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation."' (*Id.* at p. 1110.)" (***Id***, at pp. 838-839.)

See "*Overwhelming Show of Force*," under "*Indicators of an Arrest*," below.

***Standard of Proof*; "*Reasonable Suspicion*:"**

See "Reasonable Suspicion," under "Standards of Proof," under "Procedural Rules" (Chapter 2), above.

"'[T]he **Fourth Amendment** permits an officer to initiate a brief investigative traffic stop when he has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." [Citations.] "Although a mere 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause." [Citations.] [¶] Because it is a "less demanding" standard, "reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause." [Citation.] The standard "depends on the factual and practical considerations of everyday life on which *reasonable and prudent men*, not legal technicians, act." [Citation.] Courts "cannot reasonably demand scientific certainty . . . where none exists.' [Citation.] Rather, they must permit officers to make "commonsense judgments and inferences about human behavior."'" (***People v. Silveria and Travis*** (2020) 10 Cal.5th 195, 236, quoting ***Kansas v. Glover*** (Apr. 6, 2020) __ U.S. __ [206 L.Ed.2nd 412; 140 S.Ct. 1183,

1187–1188]. See also ***People v. Esparza*** (2023) 95 Cal.App.5th 1084, 1090-1093.)

"'[P]olice can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity "may be afoot," even if the officer lacks probable cause.' ***United States v. Sokolow***, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2nd 1 (1989). 'The quantum of proof needed for reasonable suspicion is less than a preponderance of evidence, and less than probable cause.' ***United States v. Tiong***, 224 F.3rd 1136, 1140 (9th Cir. 2000). 'In evaluating the validity of a [***Terry***] stop . . . , [courts] must consider the totality of the circumstances—the whole picture.' ***Sokolow***, 490 U.S. at 8 (internal quotation marks omitted)." (***Wheatcroft v. City of Glendale*** (U.S. Dist. AZ, 2022) 2022 U.S. Dist. LEXIS 57006; the Court finding sufficient reasonable suspicion to justify the plaintiff's temporary detention for investigation. See also ***People v. Esparza*** (2023) 95 Cal.App.5th 1084, 1090-1093.)

"In contrast to a full-blown arrest, an investigatory stop need only be justified by reasonable suspicion." (***Sialoi v. City of*** **San Diego** (9th Cir. 2016) 823 F.3rd 1223, 1232; see also p. 1235.)

"The **Fourth Amendment** protects against unreasonable searches and seizures. (**U.S. Const.**, **4th Amend.**; ***Terry v. Ohio***, *supra*, 392 U.S. at p. 8.) 'A detention is reasonable under the **Fourth Amendment** when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (***People v. Souza*** (1994) 9 Cal.4th 224, 231 . . . .) Such "reasonable suspicion" cannot be based solely on factors unrelated to the defendant, such as criminal activity in the area. (See ***Illinois v. Wardlow*** (2000) 528 U.S. 119, 124 . . . [individual's presence in an area of expected criminal activity not alone sufficient to support reasonable suspicion he or she is committing a crime].)" (***People v. Casares*** (2016) 62 Cal.4th 808, 837-838; see also ***People v. Chalak*** (2020) 48 Cal.App.5th Supp. 1.)

"There are two different bases for detaining an individual short of having probable cause to arrest: (1) reasonable suspicion to believe the individual is involved in criminal activity (***Terry v. Ohio*** (1968) 392 U.S. 1, 30-31 [20 L.Ed.2nd 889, 88 S.Ct. 1868) and (2) advance knowledge that the individual is on searchable probation or parole. (***In re Jaime P.*** (2006) 40 Cal.4th 128, 136, 139 . . . ; ***People v. Reyes*** (1998) 19 Cal.4th 743, 754 . . . .)" (***People v. Douglas*** (2015) 240 Cal.App.4th 855, 863-873.)

See "***Fourth*** *Waiver Searches*" (Chapter 19), below.

"A detention is reasonable under the **Fourth Amendment** when the detaining officer can point to specific articulable facts that, considered in light of the totality

of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." ***People v. Suff*** (2014) 58 Cal.4th 1013, 1053; quoting ***People v. Hernandez*** (2008) 45 Cal.4th 295, 299; see also ***People v. Fews*** (2018) 27 Cal.App.5th 553, 559-560.)

An officer "may 'draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that "might well elude an untrained person."'" (***People v. Parrott*** (2017) 10 Cal.App.5th 485, 495.)

Although "consensual encounters present no constitutional concerns and do not require justification . . . 'when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen,' the officer effects a seizure of that person, which must be justified under the **Fourth Amendment** to the **United States Constitution**." (***People v. Brown*** (2015) 61 Cal.4th 968, 974, where the officer pulled his patrol car in behind the defendant's car and activated his emergency lights, quoting ***Florida v. Bostick*** (1991) 501 U.S. 429, 434 [111 S.Ct. 2382; 115 L.Ed.2nd 389], the Court held that the stop was supported by a reasonable suspicion.)

"[A]n investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith." (***In re Tony C.*** (1978) 21 Cal.3rd 888, 893; (***People v. Thomas*** (2018) 29 Cal.App.5th 1107, 1115.): "A vague description does not provide reasonable suspicion to stop every person falling within that vague description. . . . A more detailed description, including such characteristics as age, hair or eye color, attire, height and build combined with additional suspicious circumstances, might reasonably justify a detention."

> Officers were looking for someone reported as a male, black adult wearing a gray hooded sweatshirt and black pants. Defendant (presumably a Black male), who was the only one in the area (70 to 80 yards from the complaining business) almost 2½ hours later, and was found by officers wearing "bulky clothing, bulky hooded sweatshirt and bulky pants, as well as a windbreaker jacket on top of that," in an area where there were a lot of homeless people. Add to this that defendant was not reported to be doing anything illegal, except to be "harassing" passers-by, the Court held this to be insufficient to constitute reasonable suspicion sufficient to justify a detention, or the subsequent patdown. (***Ibid.***)
>
> The Court in ***Thomas*** did note that "(a) general description combined with a close temporal and geographical connection between the crime and the suspects, may justify a detention." (***Id***., at p. 1116; citing ***People v. Conway*** (1994) 25 Cal.App.4th 385, 390 [detention lawful where stop occurred within two minutes of receiving report of a burglary]; ***People v. Lazanis*** (1989) 209 Cal.App.3rd 49, 54 [detention lawful stop occurred

within moments of burglary report]; and ***People v. McCluskey*** (1981) 125 Cal.App.3rd 220, 223 [lawful detention description included height, race, facial hair, approximate age and general clothing, stop conducted within five minutes of report of robbery]. However, in ***Thomas***, defendant was not contacted until almost 2½ hours after the 9-1-1 call to the police department, and was found some 70 to 80 yards away from where he was reported to have been, in an area with "significant foot traffic" in the middle of the day.

However, ordering a person out of his house with only a reasonable suspicion to believe that he might be involved in criminal activity, and to back up as he did so, holding onto him (albeit without handcuffs) with his hands behind his back while asking for his consent to search his person, was illegal. Full probable cause was necessary. (***People v. Lujano*** (2014) 229 Cal.App.4th 175, 185-189: The subsequent consent to search his person and his house was the product of that illegal detention and invalid.)

"Reasonable suspicion 'exists when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for *particularized* suspicion.'" (***United States v. Landeros*** (9th Cir. 2019) 913 F.3rd 862, 868; quoting ***United States v. Montero-Camargo*** (9th Cir. 2000) 208 F.3rd 1122, 1129.)

There was insufficient reasonable suspicion to justify a detention merely by defendant being parked at the side of the road with his fog lamps, but not headlights, were illuminated. (***People v. Kidd*** (2019) 36 Cal.App.5th 12, 21-23.)

> **Veh. Code § 24403(a)** provides that a motor vehicle "may be equipped with not more than two fog lamps that may be used with, but may not be used in substitution of, headlamps." It is not, however, a violation to use only fog lamps while parked. (See **Veh. Code § 24400(b)**, requiring lighted headlamps while a vehicle is "operated during darkness, or inclement weather, or both.") (***Ibid***.)

The detention of a 74-year old female resident of a mobile home for one hour while executing a search warrant was held to be reasonable. (***Blight v. City of Manteca*** (9th Cir. 2019) 944 F.3rd 1061, 1068.)

The **Fourth Amendment** was held to require suppression of drug evidence where a U.S. Customs and Border Protection agent did not have sufficient reasonable suspicion for a traffic stop based on the facts that defendant was driving in a known drug trafficking corridor in a vehicle that had crossed the U.S.-Mexico border a week earlier and that she slowed and moved over behind the agent after he pulled alongside her vehicle in an unmarked car. "(W)hen the agent pulled alongside defendant, it was his conduct that looked suspicious, not hers." It was also noted that the Customs and Border Protection agent's instinct, even though

based on training in "behavior analysis" and experience, was not enough to justify stopping a vehicle and searching it. (***People v. Mendoza*** (2020) 44 Cal.App.5th 1044.)

"'To legally detain an individual because of "suspicious circumstances," the prosecution must establish on the record that at the moment of the detention, there were specific and articulable facts, which reasonably caused the officer to believe that (1) some activity out of the ordinary had taken place or was occurring or about to occur; (2) the activity was related to crime; and (3) the individual under suspicion was connected to the activity. [Citation.]'" (**People v. Flores** (2019) 38 Cal.App.5th 617, 628; quoting ***People v. Bower*** (1979) 24 Cal.3rd 638, 644.)

The level of suspicion needed for a traffic stop is a mere "*reasonable suspicion*." (***Kansas v. Glover*** (Apr. 6, 2020) __ U.S. __, __ [140 S.Ct. 1183; 206 L.Ed.2nd 412].)

> "Because it is a 'less demanding' standard, 'reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause.' ***Alabama v. White***, 496 U.S. 325, 330 [110 S.Ct. 2412; 110 L.Ed.2nd 301 (1990). The standard 'depends on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. ***Navarette*** (***v. California*** (2014) 572 U.S. 393) at 402 ([134 S.Ct. 1683; 188 L.Ed.2nd 680]) (quoting ***Ornelas v. United States***, 517 U.S. 690, 695 [116 S.Ct. 1657; 134 L.Ed.2nd 911 (1996) . . .). Courts 'cannot reasonably demand scientific certainty . . . where none exists.' ***Illinois v. Wardlow***, 528 U.S. 119, 125 [120 S.Ct. 673; 145 L.Ed.2nd 570 (2000). Rather, they must permit officers to make 'commonsense judgments and inferences about human behavior.' ***Ibid***.; see also ***Navarette***, *supra*, at 403, 134 S. Ct. 1683; 188 L.Ed.2nd 680 (noting that an officer 'need not rule out the possibility of innocent conduct')." (***Kansas v. Glover***, *supra*, at p. __.)
>
> > The reasonable suspicion inquiry "falls considerably short" of 51% accuracy. (***Id***., at p. __, referencing ***United States v. Arvizu*** (2002) 534 U.S. 266, 274 [122 S.Ct. 744; 151 L.Ed.2nd 740].)
>
> "To satisfy the **Fourth Amendment**, 'a detention must be supported by reasonable suspicion the person is involved in criminal activity.'" (***People v. Holiman*** (2022) 76 Cal.App.5th 825; a traffic stop case, quoting ***People v. Zaragoza*** (2016) 1 Cal.5th 21, 56.)
>
> Upon observing a vehicle whose registered owner has an outstanding arrest warrant, an officer may assume the registered owner is present in the vehicle absent other information to the contrary. Stopping the vehicle and temporarily detaining its occupants is therefore lawful. (***United States***

v. Nault (9th Cir. 2022) 41 F.4th 1073, 1079, and fn. 3. See also ***Kansas v. Glover*** (2020) 140 S. Ct. 1183, 1188 [206 L.Ed.2nd 412].)

Exigent circumstances did not justify the suspicionless, investigatory stop of defendant, who was walking calmly in an open field where others were also walking, in the vicinity of an apartment complex from where shots had been heard. The trial court properly granted defendant's motion to suppress a firearm and other evidence. The exigent circumstances doctrine typically involved emergencies justifying a warrantless search of a home, not an investigatory stop of a person, other than when the government isolated a discrete area or group of people in an effort to search for a suspect implicated in a known crime in the vicinity. In the few cases that have applied the exigent circumstances doctrine to justify the suspicionless, investigatory seizure of a person, the officers; (1) had searched for a suspect implicated in a known crime, and in their search for that suspect, (2) had isolated a geographic area with clear boundaries or a discrete group of people to engage in minimally intrusive searches. For example, one line of cases found it reasonable for officers to establish vehicular checkpoints and stop all motorists along routes that they reasonably expected to be used by suspects leaving the scene of a known crime. Beyond the context of vehicular checkpoints, however, courts have similarly required that officers have specific information about the crime and suspect before conducting suspicionless stops of individuals. Defendant's detention, therefore, which led to a patdown and the recovery of a firearm, was held to have been illegal. (***United States v. Curry*** (4th Cir. 2020) 965 F.3rd 313.)

The Ninth Circuit affirmed a criminal judgment in a case in which the district court denied the defendant's motion to suppress evidence, and the defendant entered a conditional guilty plea to being a convicted felon in possession of a firearm. In this case, police detectives detained the defendant after observing a bulge under his sweatshirt that likely indicated a concealed firearm, which is presumptively unlawful to carry in California. Defendant was verbally uncooperative, yelling at the detectives. After defendant's companion was found to be in possession of a firearm, defendant was tased and searched, resulting in the recovery of a firearm in a shoulder holster. The Court held that the district court did not clearly err in crediting the detective's testimony that he observed on the defendant a "very large and obvious bulge" that suggested (in the officer's training and experience) a concealed firearm. The Court further held that reasonable suspicion supported the detention, and that the district court therefore properly denied the defendant's motion to suppress evidence found during the search. (***United States v. Bontemps*** (9th Cir. 2020) 977 F.3rd 909: "In California, evidence that a person is concealing a firearm provides an adequate basis to suspect illegal activity, and thus grounds to initiate a ***Terry*** stop." Pg. 914.)

> "That is so 'even if the tip does not state that the person is carrying the firearm illegally or is about to commit a crime.' . . . '[g]iven the insignificant number of concealed carry permits issued in California, a

reasonable officer could conclude that there is a high probability that a person identified in a 911 call as carrying a concealed handgun is violating California's gun laws.'" (***Ibid***., quoting ***Foster v. City of Indio*** (9th Cir. 2018) 908 F.3rd 1204, 1215-1216; stop based upon a reliable tip.)

A dissenting justice in ***Bontemps*** argued that, without other corroborating evidence, a sweatshirt bulge alone did not give an objectively reasonable and particularized suspicion to stop and detain the defendant. (***United States v. Bontemps***, *supra*, at pp. 919-923.)

Officers responded to the 3500 block of 13th Street Southeast in Washington D.C. based upon a "spotfinder" report of shots fired at that location, soon confirmed by persons calling into the Metropolitan Police Department (MPD). No injured persons were found at that location. But defendant was observed walking there, and that he was the only person on that block at the time. He was quickly detained. Found to be in the illegal possession of a firearm, defendant argued that his detention was illegal and that the gun should have been suppressed. The Court disagreed, finding that the officers had a reasonable suspicion to detain him based upon the following: (1) The ShotSpotter alert and dispatcher report from MPD indicating that shots were fired in the 3500 block of 13th Street Southeast; (2) the officers arrived at the location of the reported gunshots within a minute and a half of the MPD call; (3) officers observation of defendant being the only person on that block; (4) defendant was walking quickly away from the location of the shooting; and (5) defendant did not initially respond to an officer's repeated efforts to get his attention and continued to walk away. (***United States v. Jones*** (D.C. Cir. 2021) 1 F.4th 50.)

Upon patting defendant (detained for possible trespass) down for weapons, and finding none, officers seized a car key that was hanging on his belt, and used the fob attached to the key in an attempt to locate a car for which that key belonged. The Ninth Circuit ruled such use of the key fop absent any reasonable suspicion that a car might be related to the purpose of the detention was illegal, requiring the suppression of a firearm (found later to have been used in robbery) as a product of an illegal extension of the detention. Per the Court: "Where a 'protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under ***Terry*** and its fruits will be suppressed.'" (***United States v. Baker*** (9th Cir. 2023) 58 F.4th 1109, 1118; quoting ***Minnesota v. Dickerson*** (1993) 508 U.S. 366, at p. 373 [113 S.Ct. 2130; 124 L.Ed.2nd 334].)

Denial of defendant's motion to suppress under **Fourth Amendment** was proper because his answers to officer's questions about why he was at salvage lot at 3:00 a.m. were odd; he claiming to be there waiting until the lot opened so that he could inquire about a stolen car when no such theft had been reported. Under a totality of circumstances analysis, these facts were sufficient to provide officer with reasonable suspicion to conduct a ***Terry*** stop. (***United States v. Stokes*** (8th Cir. 2023) 62 F.4th 1104.)

Two Yellowstone Park rangers received information that a park employee had a conversation with an individual by the name of Michael Bullinger, giving the rangers a vehicle description of a white Toyota with Missouri license plates. Bullinger was a fugitive wanted for allegedly shooting and killing three women in Idaho. Rangers found the white Toyota with Missouri plates out of the park and stopped it some 16 miles east of the park entrance. While waiting for county law enforcement, the rangers held the occupants of the white Toyota at gunpoint, instructed the driver, over a loudspeaker, to throw out the keys, and ordered the occupants to place their hands on the ceiling of the vehicle. Once county law enforcement arrived, the rangers ordered the two adult occupants out of the vehicle, handcuffed them, and then placed them in separate police cruisers. The two occupants were subsequently released, however, upon determining that neither of them was Bullinger. Inside the white Toyota was Brett Hemry, along with his wife, Genalyn, and their seven-year-old daughter. The Hemrys sued under **42 U.S.C. § 1983** for false arrest, false imprisonment, and excessive force. On appeal, the Tenth Circuit Court of Appeals reversed the district court's denial of the civil defendant's motion for summary judgement. The court concluded the rangers were entitled to qualified immunity because, at the time of the incident, the law did not clearly establish the investigative detention of Mrs. Hemry amounted to: (1) an arrest of Mrs. Hemry without probable cause; or (2) excessive force against the Hemrys. The court recognized there are "three types of police-citizen encounters: (1) consensual encounters which do not implicate the **Fourth Amendment**; (2) investigative detentions, or ***Terry*** stops, which are **Fourth Amendment** seizures of limited scope and duration and must be supported by a reasonable suspicion of criminal activity; and (3) arrests, the most intrusive of **Fourth Amendment** seizures and reasonable only if supported by probable cause." Here, the court found that the rangers had reasonable suspicion to stop Mrs. Hemry. To satisfy the reasonable suspicion standard, court found that "an officer need not rule out the possibility of innocent conduct." Instead, the officer must only maintain a "reasonable suspicion supported by articulable facts that criminal activity may be afoot." In this case, the rangers reasonably suspected they were confronting a fugitive triple-murderer accompanied by an unknown passenger, that could have been a collaborator or a hostage. In addition, the court rejected Mrs. Hemry's claim that the rangers' use of firearms to detain her transformed the investigative detention into an arrest requiring probable cause. The court found that it was reasonable for the rangers to believe they were confronting a fugitive, triple murderer, who was accompanied by an unknown passenger. Although the information the rangers received did not include the presence of an adult passenger, the information also did not indicate that Bullinger travelled alone. In addition, given the matching vehicle and license plate number, the court added that it would have been unreasonable for the rangers to conclude they were free from danger. The court further held that the duration of Mrs. Hemry's detention did not transform the investigative detention into an arrest requiring probable cause. The court recognized that "an officer can detain a suspect without arresting him." However, an officer cannot detain a

suspect beyond the time "reasonably needed to effectuate the [purpose of the stop]." The court commented that the reasonableness of the duration of an investigative detention "is not an exercise in counting minutes." Instead, a court must analyze the factual context and the "underlying justification" for the detention. (***Hemry v. Ross*** (10th Cir. 2023) 62 F.4th 1248.)

(See "*Traffic Stops*," under "*Types of Detentions*," below.)

Test: Generally, a person is detained if a *reasonable person* in the suspect's shoes, under the circumstances, would have known that he or she is not free to leave. (***People v. Rios*** (2011) 193 Cal.App.4th 584, 592; ***People v. Walker*** (2012) 210 Cal.App.4th 1372, 1382; ***People v. Parrott*** (2017) 10 Cal.App.5th 485, 492.)

The "reasonable person" test presupposes an *innocent* person. (***United States v. Brown*** (9th Cir. 2021) 996 F.3rd 998, 1005; citing ***Florida v. Bostick*** (1991) 501 U.S. 429, at p. 438 [111 S.Ct. 2382; 115 L.Ed.2nd 389].)

However, courts also consider the reasonableness of the officer's actions, under the circumstances, and may find a detention only, despite the suspect's reasonable belief that he is under arrest. (See ***People v. Pilster*** (2006) 138 Cal.App.4th 1395, 1406, below.)

The fact that "an encounter is *not* a seizure when a reasonable person would feel free to leave do(es) not mean that an encounter *is* a seizure just because a reasonable person would not feel free to leave." There must be "an *intentional* acquisition of physical control." A detention occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied*." (***United States v. Nasser*** (9th Cir. 2009) 555 F.3rd 722; defendant stopped his vehicle on his own even though Border Patrol agents had not intended to stop him. Resulting observations, made before defendant was detained, were lawful.)

A detention is a "*seizure*" for purposes of the **Fourth Amendment**, and occurs whenever a law enforcement officer, by means of physical force or show of authority, in some way restrains the liberty of a citizen. (***Florida v. Bostick*** (1991) 501 U.S. 429, 434 [111 S.Ct. 2382; 115 L.Ed.2nd 389, 398]; ***People v. Rios***, *supra*.)

> "The **Fourth Amendment** prohibits 'unreasonable searches and seizures' by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." (***United States v. Arvizu*** (2002) 534 U.S. 266, 273 [122 S.Ct. 744; 151 L.Ed.2nd 740].)
>
> "In situations involving a show of authority, a person is seized 'if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,"'" or "'"otherwise

terminate the encounter"' (quoting ***Brendlin v. California*** (2007) 551 U.S. 249, 254-255 [127 S.Ct. 2400; 168 L.Ed.2nd 142].), and if the person actually submits to the show of authority." (***People v. Brown*** (2015) 61 Cal.4th 968, 974; see also ***People v. Linn*** (2015) 241 Cal.App.4th 46.)

> The California Supreme Court in ***Brown*** explains the analytical sequence depending upon the circumstances. Citing ***United States v. Mendenhall***, 446 U.S. 544, 554 [64 L. Ed.2nd 497], the Court held that a seizure occurs if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." If, however, the circumstances did not allow for the defendant to leave, such as when he is a passenger on a bus (see ***Florida v. Bostick*** (1991) 501 U.S. 429, 434-435 [115 L.Ed.2nd 389, 398-399]) then the test is whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." When the suspect is the passenger in a motor vehicle driven by another which is stopped by police, we must ask whether "any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission." (***Brendlin v. California*** (2007) 551 U.S. 249, 254-255 [127 S.Ct. 2400; 168 L.Ed.2nd 142].) The Court also compared the circumstances such as described in ***California v. Hodari D.*** (1991) 499 U.S. 621 [111 S.Ct. 1547; 113 L.Ed.2nd 690], where it was held that a person who lawfully runs from the police, there being no reasonable suspicion which would have allowed for his detention, a person is not actually detained (thus no **Fourth Amendment** issue) until he is either physically restrained or submits to an officer's authority to detain him. (***Id.***, at pp. 975-980.)
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> "'A seizure may occur by a show of authority alone without the use of physical force, "but there is no seizure *without actual submission*.' (***Brendlin v. California*** (2007) 551 U.S. 249, 254 [168 L. Ed.2nd 132; 127 S.Ct. 2400], italics added.) The test for existence of a show of authority is an objective one: whether the officer's words and actions would have conveyed to a reasonable person that he was being ordered to restrict his movement." (***People v. Cuadra*** (2021) 71 Cal.App.5th 348, 353.)
>
> "A seizure occurs when there is '*either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority.'" (Italics in original; ***Hill v. City of Fountain Valley*** (9th Cir. 2023) 70 F.4th 507, 514; quoting ***California v. Hodari D.*** (1991) 499 U.S. 621, 626 [111 S.Ct. 1547; 113 L.Ed.2nd 690].)

> "(T)he officer's show of authority must cause the plaintiff's submission." (***Ibid.***; citing ***California v. Hodari D.***, *supra*, at p. 596, which in turn cites ***Brower v. Inyo County*** (1989) 489 U.S. 593, 596 [109 S.Ct. 1378; 103 L.Ed.2nd 628].)

"A seizure of the person within the meaning of the **Fourth** and **Fourteenth Amendments** occurs when 'taking into account all the circumstances surrounding the encounter, the police conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business."' [Citations]" (***Kaupp v. Texas*** (2003) 538 U.S. 626, 629 [123 S.Ct. 1843; 155 L.Ed.2nd 814].)

A person is not actually detained (thus no **Fourth Amendment** issue) until he is either physically restrained or submits to an officer's authority to detain him. (***California v. Hodari D.*** (1991) 499 U.S. 621 [111 S.Ct. 1547; 113 L.Ed.2nd 690]; "*threatening an unlawful detention*," by chasing a person upon whom a consensual encounter is attempted, is not a constitutional violation in itself.)

> See also ***United States v. McClendon*** (9th Cir. 2013) 713 F.3rd 1211, 1216-1217; where defendant was threatened with an arguably illegal arrest, resulting in him discarding a firearm. The firearm was held to be admissible in that the officers had yet to "touch" defendant, nor had he yet "submitted," when the gun was tossed.
>
> The definition of a "seizure" was expanded a bit by the United States Supreme Court in the case of ***Torres v. Madrid*** (Mar. 25, 2021) __ U.S. __, __ [141 S.Ct. 989; 209 L.Ed.2nd 190], where the Court ruled that a "seizure" occurs when "(t)he application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person."
>
> > The ***Madrid*** Court overruled a lower court's holding that a suspect's continued flight after being shot by police negates a **Fourth Amendment** excessive-force claim.

"A person is seized by the police and thus entitled to challenge the government's action under the **Fourth Amendment** when the officer 'by means of physical force or show of authority' 'terminates or restrains his freedom of movement.' (Citations)" (***Brendlin v. California*** (2007) 551 U.S. 249 [127 S.Ct. 2400; 168 L.Ed.2nd 132]; ***People v. Zamudio*** (2008) 43 Cal.4th 327, 341-342; ***Nelson v. City of Davis*** (9th Cir. 2012) 685 F.3rd 867, 875.)

***Burden of Proof*:**

It is the prosecution's burden to prove "that the warrantless search or seizure was reasonable under the circumstances." (***People v. Williams*** *(1999) 20 Cal.4th 119, 130. People v. Thomas* (2018) 29 Cal.App.5th 1107, 1114.)

***Factors*:**

Factors to consider when determining whether a person has been detained include:

- The number of officers involved.
- Whether weapons were displayed.
- Whether the encounter occurred in a public or nonpublic setting.
- Whether the officers' officious or authoritative manner would imply that compliance would be compelled.
- Whether the offices advised the detainee of his right to terminate the encounter.

(***Orhorhaghe v. INS*** (9th Cir. 1994) 38 F.3rd 488, 494-496; ***United States v. Washington*** (9th Cir. 2004) 387 F.3rd 1060, 1068; (***United States v. Brown*** (9th Cir. 2009) 563 F.3rd 410, 415; ***People v. Davidson*** (2013) 221 Cal.App.4th 966, 972 ***In re J.G.*** (2014) 228 Cal.App.4th 402, 409-410; **People *v.* Arebalos-Cabrera** (2018) 27 Cal.App.5th 179, 186.)

Note: ***United States v. Brown***, *supra*, is also instructive in how an officer removing some of the above listed factors can convert what appeared to be an arrest back into merely a detention or even a consensual encounter; e.g., putting the firearms away, removing the handcuffs, telling the subject that she was not under arrest, and/or then letting her return to her apartment unaccompanied.

As analyzed by a California state court, the relevant factors also include:

- A threatening police presence;
- The display of a weapon by an officer;
- The physical touching of the citizen approached;
- The officer's language or voice indicating compliance with police demands might be compelled.

(***People v. Walker*** (2012) 210 Cal.App.4th 1372, 1382.)

"The officer's uncommunicated state of mind and the individual citizen's subjective belief are irrelevant in assessing whether a seizure triggering **Fourth Amendment** scrutiny has occurred." (**People *v.* Arebalos-Cabrera** (2018) 27 Cal.App.5th 179, 186-187; quoting ***In re Manuel G.*** (1997) 16 Cal.4th 805, 821.)

Also, "a police officer's admonition that the driver is '*free to go*' is an important factor in the **Fourth Amendment** analysis. (See, e.g., ***State v. Green*** (2003) 375 Md. 595, 618 [826 A.2d 486].) However, because courts must consider the totality of the circumstances in deciding whether a detention has occurred, the presence or absence of this admonition is not determinative if other factors show that a reasonable person would in fact feel free to leave or otherwise terminate the encounter (or not)." (***People v. Arebalos-Cabrera***, *supra*, at p. 188.)

***Significance of a Suspect's Nervousness*:**

The Ninth Circuit Court of Appeal found a consent search, obtained after the purposes of the traffic stop had been satisfied, was invalid as a product of an illegally prolonged detention, the extended detention being the result of the officer's unnecessary inquiries made during the traffic stop. The defendant's nervousness was held to be irrelevant to the detention issue, per the Court. (***United States v. Chavez-Valenzuela*** (9th Cir. 2001) 268 F.3rd 719, amended at 279 F.3rd 1062.)

"A police officer has a strong need to practice caution and self-protection when on patrol." (***People v. Parrott*** (2017) 10 Cal.App.5th 485, 495-496; a patdown for firearms was justified by a nervous suspect's continual touching of a bulge in his sweatshirt and his physical resistance to being detained.)

Handcuffing a detained suspect based upon defendant's size (6 foot, 250 pounds), the fact that he was "real nervous," and because he began to tense up as if he were about to resist, handcuffing him was held to be reasonable. (***People v. Osborne*** (2009) 175 Cal.App.4th 1052, 1062.)

Stopping defendant for a simple traffic violation (i.e., following too close), and while discussing the violation, the officer began to make inquiries into the defendant's travel plans. During these inquires, the officer became suspicious (defendant's nervousness, inconsistent and evasive answers, etc.) as to whether defendant was telling the truth. This eventually led to the use of a drug-sniffing dog and the discovery of methamphetamine and heroin. The Seventh Circuit Court of Appeal ruled that travel-plan questions are routine inquires that reasonably relate to the underlying traffic violation and roadway safety. As such, such questions ordinarily fall within "the mission of a traffic stop." First, the court found that travel-plan questions provide important context for the violation at hand. Also, a driver's travel plans may affect an officer's assessment of roadway safety concerns beyond the immediate violation. Finally, the court cautioned that an officer's travel-plan questions, like the officer's other actions during the stop, must remain reasonable based on the totality of the circumstances surrounding the stop. Applying these principles the Court held that the trooper's travel-plan questions during the initial roadside detention fell within the mission of the traffic stop and did not unlawfully prolong the traffic stop. It was only after defendant

provided evasive, confusing, inconsistent, and improbable answers to some of these questions, while appearing nervous, that the trooper asked follow-up questions. Under these circumstances, the court held that the trooper's travel-plan questions were reasonable and not just a "fishing expedition." The Court then held that based upon this, while also being told by dispatch that defendant has three prior drug-transportation convictions, it was less than nine minutes into the stop that the trooper developed a reasonable suspicion that defendant was involved in criminal activity. As a result, the trooper had a lawful basis to prolong the duration of the stop in order to conduct a dog-sniff of defendant's vehicle. (***United States v. Cole*** (7th Cir. 2021) 21 F.4th 421.)

A "*knock and talk*" at the defendant's motel room justified the eventual detention of defendant when (1) the officers had some limited information from an earlier traffic stop that defendant might be involved in the manufacturing of methamphetamine, including the presence of a pressure cooker which the officer knew could be used in the manufacturing of methamphetamine; (2) a roommate took a full two minutes to open the motel room door while the officers could hear noises like people moving things around inside; (3) when defendant was contacted, he acted extremely nervous, contrary to how he had acted during a previous contact by the same officers; and (4) the roommate admitted to being a methamphetamine user and that other people had visited the room the night before. (***United States v. Crapser*** (9th Cir. 2007) 472 F.3rd 1141, 1147-1149.)

A traffic stop was held to have been unlawfully prolonged where the officer's body camera did not show that defendant was acting any more nervously than a typical person in a traffic stop. The officer conceded on cross-examination that: "Most people are nervous when they are pulled over by the police." (***People v. Ayon*** (2022) 80 Cal.App.5th 926, 937-941.)

***Significance of a Suspect Believed to be Carrying a Firearm*:** An officer's reasonable suspicion to believe that a person might be carrying a firearm is, by itself, sufficient for the officer to believe that he might be doing so illegally, justifying a stop and detention, at least in California.

Given the insignificant number of concealed carry permits issued in California, a reasonable officer could conclude that there is a high probability that a person identified in a 911 call as carrying a concealed handgun is violating California's gun laws." (***Foster v. City of Indio*** (9th Cir. 2018) 908 F.3rd 1204, 1215-1216; stop based upon a reliable tip.)

A bar employee (who later fully identified himself) calling 911 to report that three separate customers observed defendant in possession of a firearm, and then described for the 911 operator the movements of defendant as he fled in a particularly described vehicle, held to be of sufficient reliability to supply the necessary reasonable suspicion justifying the stopping of that vehicle. (***United States v. Vandergroen*** (9th Cir. 2020) 964 F.3rd 876, 879-882.)

The Court noted that carrying a gun is not presumptively illegal in all states, citing Washington State (at p. 881) as one of those states where carrying a gun is presumptively legal. (See ***United States v. Brown*** (9th Cir. 2019) 925 F.3rd 1150, 1154.)

The Ninth Circuit affirmed a criminal judgment in a case in which the district court denied the defendant's motion to suppress evidence, and the defendant entered a conditional guilty plea to being a convicted felon in possession of a firearm. In this case, Police Detectives detained the defendant after observing a bulge under his sweatshirt that likely indicated a concealed firearm, which is presumptively unlawful to carry in California. Defendant was verbally uncooperative, yelling at the detectives. After defendant's companion was found to be in possession of a firearm, defendant was tased and searched, resulting in the recovery of a firearm in a shoulder holster. The Court held that the district court did not clearly err in crediting the detective's testimony that he observed on the defendant a "very large and obvious bulge" that suggested (in the officer's training and experience) a concealed firearm. The Court further held that reasonable suspicion supported the stop, and that the district court therefore properly denied the defendant's motion to suppress evidence found during the search. A dissenting justice argued that, without other corroborating evidence, a sweatshirt bulge alone did not give an objectively reasonable and particularized suspicion to stop and detain the defendant. (***United States v. Bontemps*** (9th Cir. 2020) 977 F.3rd 909.)

The Court in ***Bontemps***, at p. 915, cites the U.S. Supreme Court's decision in ***Pennsylvania v. Mimms*** (1977) 434 U.S. 106, 111-112 [98 S.Ct. 330; 54 L.Ed.2nd 331], where the High Court noted that; "(t)he bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the officer. In these circumstances, any man of 'reasonable caution' would likely have conducted the 'pat-down.'"

The Court in ***Bontemps*** also cites at pg. 914 ***United States v. Flatter*** (9th Cir. 2006) 456 F.3rd 1154, 1157, for the argument that observing a *visible bulge* in a person's clothing indicates the presence of a weapon. See also ***United States v. Alvarez*** (9th Cir. 1990) 899 F.2nd 833, 835, 839; ***United States v. Allen*** (9th Cir. 1980) 675 F.2nd 1373, 1383; and ***United States v. Hill*** (9th Cir. 1976) 545 F.2nd 1191, 1193.)

Also: "Considerations relevant to this inquiry typically include *visible bulges* or *baggy clothing* that suggest a hidden weapon; sudden movements or attempts to reach for an object that is not immediately visible; evasive and deceptive responses to an officer's questions about what the individual was doing; and unnatural hand postures that suggest an effort to conceal a weapon." (Italics added: ***In re Jeremiah S.*** (2019)

41 Cal.App.5th 299, 305, citing ***Thomas v. Dillard*** (9th Cir. 2016) 818 F.3rd 864, at p. 877.)

But note that the Court in ***Bontemps*** also indicates that an officer, based upon his training and experience, must be able to honestly testify that the particular bulge he observed could have been a firearm or other weapon, as opposed to something else, such as drugs or drug paraphernalia. (***Id.***, at p. 916; citing ***United States v. Job*** (9th Cir. 2017 871 F.3rd 852, 861; ***United States v. Jones*** (8th Cir. 2001) 254 F.3rd 692; and ***United States v. Eustaqui****o* (8th Cir. 1999) 198 F.3rd 1068.)

Even in a jurisdiction where carrying a firearm in the open (i.e., "open carry") is lawful, such as West Virginia, observation of a person carrying a legal assault weapon, when combined with "something more," justifies a temporary detention for investigation so that the officers can determine whether the person is in violation of the law. That "something more" was found where the plaintiff in this lawsuit appeared to possibly be under age (he was determined to be 24 years of age), he was walking (rather than driving) towards, and within a mile of, a school, he was carrying an AR-15 assault rifle (known to be the firearm of choice for many mass shooters), and plaintiff was dressed to look like a soldier in a black sleeveless shirt and camouflage pants. In combination, these factors justified plaintiff's temporary detention for investigation. (***Walker v. Donahoe*** (4th Cir. 2021) 3 F.4th 676.)

***On Appeal*:**

On appeal, an appellate court reviews reasonable suspicion determinations *de novo. (***United States *v.* Raygoza-Garcia** (9th Cir. 2018) 902 F.3rd 994, 999; citing ***United States v. Valdes-Vega*** (9th Cir. 2013) 738 F.3rd 1074, 1077).

An appellate court reviews a district court's finding of facts for clear error, giving "due weight" to the trial court's and officer's inferences drawn from those facts, deferring to the inferences drawn by the district court and the officers on the scene, not just the district court's factual findings. (**United States *v.* Raygoza-Garcia**, supra, citing ***United States v. Arvizu*** (2002) 534 U.S. 266, 278 [122 S. Ct. 744; 151 L.Ed.2nd 740].)

"'[T]o reverse a district court's factual findings as clearly erroneous, we must determine that the district court's factual findings were illogical, implausible, or without support in the record.' ***United States v. Spangle***, 626 F.3rd 488, 497 (9th Cir. 2010) (citing ***United States v. Hinkson***, 585 F.3rd 1247, 1262 (9th Cir. 2009) (en banc)). Moreover, '[w]here testimony is taken, we give special deference to the district court's credibility determinations,' ***United States v. Craighead***, 539 F.3rd 1073, 1082 (9th Cir. 2008), and generally 'cannot substitute [our] own judgment of the credibility of a witness for that of the fact-

finder.' ***United States v. Durham***, 464 F.3rd 976, 983 n.11 (9th Cir. 2006).) (***United States v. Bontemps*** (9th Cir. 2020) 977 F.3rd 909, 917.)

***Patdown* (*or "Frisks"*) *for Weapons During a Detention*:**

Rule: "In the event that, during the ***Terry*** stop, the officer justifiably believes that 'the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,' the officer 'may conduct a patdown search' or frisk 'to determine whether the person is in fact carrying a weapon.'" (***United States v. Brown*** (9th Cir. 2021) 996 F.3rd 998, 1004, quoting ***Minnesota v. Dickerson*** (1993) 508 U.S. 366, at p. 373 [113 S.Ct. 2130; 124 L.Ed.2nd 334], which in turn quotes ***Terry v. Ohio*** (1968) 392 U.S. 1, at p. 24 [88 S.Ct. 1868; 20 L.Ed.2nd 889]).

> Further noting that, "'(e)ach element, the stop and the frisk, must be analyzed separately; the reasonableness of each must be independently determined.'" (***Ibid***., quoting ***United States v. Thomas*** (9th Cir 1988) 863 F.2nd 622, 628.)

A "*Stop and Frisk*" (where a patdown for weapons is conducted during a detention) is constitutionally permissible if two conditions are met:

- The investigatory stop must be lawful; i.e., when a police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense.

- The police officer must reasonably suspect that the person stopped is armed and dangerous.

  (***Arizona v. Johnson*** (2009) 555 U.S. 323 [129 S.Ct. 781; 172 L.Ed.2nd 694].)

Case Law:

> "A police officer has a strong need to practice caution and self-protection when on patrol." (***People v. Parrott*** (2017) 10 Cal.App.5th 485, 495-496; a patdown for firearms was justified by a nervous suspect's continual touching of a bulge in his sweatshirt and his physical resistance to being detained.)
>
> See "*Frisks*," under "*Searches with Less Than Probable Cause*," under "*Searches of Persons*" (Chapter 11), below.

***Officer Safety*:**

The plight of police officers and the *dangers* they face on the streets are not lost on the courts:

> "(E)ven when a police officer is careful, he is still subject to attack. The judiciary should not 'lightly second guess' an officer's decision to conduct a 'stop and frisk . . . . (P)olice officers (are) entitled to protect themselves during a detention: 'This is a rule of necessity to which a right even as basic as that of privacy must bow. To rule otherwise would be inhumanely to add another hazard to an already very dangerous occupation. Our zeal to fend off encroachments upon the right of privacy must be tempered by remembrance that ours is a government of laws, to preserve which we require law enforcement—live ones. Without becoming a police state, we may still protect the policeman's status.' [Citation omitted]" (***In re Richard G.*** (2009) 173 Cal.App.4th 1252, 1255.)

"(L)aw enforcement officers may lawfully detain a defendant when detention is necessary to determine the defendant's connection with the subject of a search warrant and related to the need of ensuring officer safety." (**People *v.* Steele** (2016) 246 Cal.App.4th 1110, 1116-1117; recognizing "officer safety" as "a weighty public interest," and citing ***People v. Glaser*** (1995) 11 Cal.4th 354, 365.)

> ***Glaser*** involved the temporary detention of the defendant by putting him on the ground and handcuffing him when he suddenly showed up at a residence that the officers were just about to enter to execute a search warrant. The detention was upheld as necessary for officer safety under the circumstances.
>
> ***Steele*** involved the defendant's detention when he was driving a second vehicle that was caught between the officers' vehicle and another car that the officers were attempting to stop late at night in a dimly lit area. Finding that defendant had been detained, the detention was upheld for officer safety reasons.

The U.S. Supreme Court has ruled that for officer safety purposes, passengers in a lawfully stopped vehicle may be ordered to exit the vehicle. Passengers, by virtual of merely being present in a lawfully stopped vehicle, are detained. If anything, the need to protect the safety of the officers is even greater when he must deal with more than just a lone driver. (***Maryland v. Wilson*** (1997) 519 U.S. 408 [117 S.Ct. 882; 137 L.Ed.2nd 41]; see also ***Ruvalcata v. City of Los Angeles*** (9th Cir. 1995) 64 F.3rd 1323.)

> Blocking a vehicle in, in which defendant was a passenger, with two police cars constitutes sufficient "*show of authority*" to deem defendant to have been detained. (***United States v. Hester*** (3rd Cir. NJ 2018) 910 F.3rd

78; the Court ruling that the detention was lawful given the suspicious circumstances of being parked illegal outside a liquor store where the officers knew drug dealing to be common. See also ***People v. Wilkins*** (1986) 186 Cal.App.3rd 804, 809.)

An occupant of a house being subjected to a search pursuant to a *search warrant* may be detained during the search (1) in order to prevent flight, (2) to minimize the risk of harm to the officers, and (3) to facilitate an orderly search through cooperation of the residents. (***Michigan v. Summers*** (1981) 452 U.S. 692, 702-703 [101 S.Ct. 2587; 69 L.Ed.2nd 340].)

This includes those who otherwise are not necessarily involved in the suspected criminal activity. (***Bailey v. United States*** (2013) 568 U.S. 186, 192-202 [133 S.Ct. 1031, 1037-1043; 185 L.Ed.2nd 19]; citing ***Muehler v. Mena*** (2005) 544 U.S. 93 [125 S.Ct. 1465; 161 L.Ed.2nd 299].)

However, it has been held that "(c)onducting a ***Summers*** seizure incident to the execution of a warrant is not the Government's right; it is an exception—justified by necessity—to a rule that would otherwise render the [seizure] unlawful." (***Bailey v. United States*** (2013) 568 U.S. 186, 204 [133 S.Ct. 1031; 185 L.Ed.2nd 19], restricting such detentions to occupants who are still in the "immediate vicinity" of the residence being searched. See also ***United States v. Ramirez*** (9th Cir. 2020) 976 F.3rd 946, 956; finding unlawful an FBI ruse, tricking defendant into returning to his residence with his vehicle so that he could be detained and questioned and his vehicle could be searched pursuant to a search warrant.)

The Ninth Circuit has ruled that the rule of ***Summers*** does not apply to the execution of an arrest warrant. (***Sharp v. County of Orange*** (9th Cir. 2017) 871 F.3rd 901, 912-916.)

California disagrees. (***People v. Hannah*** (1997) 51 Cal.App.4th 1335.) The Eleventh Circuit also disagrees. (***United States v. Mastin*** (11th Cir. AL. 2020) 972 F.3rd 1230.)

Also, the rule of ***Summers*** cannot be used as an excuse for the mass detention and interrogation of suspected illegal aliens at a factory when the ruse used to gain access to the factory and the suspects was a search warrant for employment documents. (***Cruz v. Barr*** (9th Cir. 2019) 926 F.3rd 1128.)

With a search warrant authorizing the search of plaintiff's home, officers "had categorical authority" to detain her for the duration of the search. "The reasons for such a detention are particularly applicable in the context

of a narcotics search because there is a heightened risk that an occupant could destroy evidence." So long as probable cause existed to continue searching the residence, the officers' authority to detain the plaintiff pursuant to that search was never extinguished. Old age (74, in this case) does not make a detention *per se* unreasonable. Further, plaintiff in this case was never handcuffed, but merely held away from her residence in a patrol car for no more than an hour; circumstances the Court found to be reasonable. (***Blight v. City of Manteca*** (9th Cir. 2019) 944 F.3rd 1061, 1068-1068.)

Two subjects sitting in a vehicle within sight of the home of a suspected bank robber when a victim in the robbery had been shot, and with an unknown accomplice still outstanding, and after having watched the suspected bank robber twice come out of his house and contact the occupants of that vehicle earlier, was held to be sufficient, under ***Summers***, upon the execution of a search warrant on the residence, to block the vehicle in, thus detaining the occupants of the vehicle. (***United States v. Freeman*** (8th Cir. 2020) 964 F.3rd 774.)

***Detention Without a Reasonable Suspicion*:** In some instances, a person may be lawfully detained even though there is no reasonable suspicion to believe that he, himself, is involved in criminal activity.

See "*Officer Safety*," Above.

The United States Supreme Court has held that at least in a private motor vehicle (as opposed to a taxi, bus, or other common carrier), the passenger, by virtue of merely being in a vehicle stopped for a possible traffic infraction, is in fact detained, giving him the right to challenge the legality of the traffic stop. (***Brendlin v. California*** (2007) 551 U.S. 249 [127 S.Ct. 2400; 168 L.Ed.2nd 132].)

The test is whether, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Or, in the case where the person has no desire to leave, "whether 'a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.'" (***Id***., 127 S.Ct., at pp. 2405-2406.)

If the driver is stopped for a traffic-related offense, a "passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place." If the driver is stopped for something unrelated to his driving, a "passenger will reasonably feel subject to suspicion owning to close association" with the driver. (***Id***., 127 S.Ct., at p. 2407.)

Although ***Brendlin***, on its face, appears to deal only with the right (i.e., "*standing*") of the passenger to challenge the legality of the traffic stop (***Brendlin v. California***, *supra*., at pp. 256-259.), and arguably was not intended as authority for the continued detention of a passenger who might choose to walk away, the U.S. Supreme Court subsequently ruled quite clearly that "(t)he police need not have, in addition, cause to believe any occupant of the (lawfully stopped) vehicle is involved in criminal activity" to justify a continued detention for the duration of the traffic stop. (***Arizona v. Johnson*** (2009) 555 U.S. 323 [129 S.Ct. 781; 172 L.Ed.2nd 694].)

> *Also*; "The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop." (***Id***., at p. 325.)
>
> And then: "(A) traffic stop of a car communicates to a reasonable passenger that he or she is not free to terminate the encounter with the police and move about at will." (***Ibid***.)

The California Supreme Court is in apparent agreement with this interpretation, holding that upon ordering the passenger out of the vehicle; "there is a social expectation of unquestioned police command, which is at odds with any notion that a passenger would feel free to leave without advance permission." (***People v. Hoyos*** (2007) 41 Cal.4th 872, 892-894; brief, one-minute detention, necessitated for purposes of officer safety, held to be lawful.)

Blocking a vehicle in, in which defendant was a passenger, with two police cars, constitutes sufficient "*show of authority*" to deem defendant to have been detained. (***United States v. Hester*** (3rd Cir. NJ 2018) 910 F.3rd 78; the Court ruling that the detention was lawful given the suspicious circumstances of being parked illegal outside a liquor store where the officers knew drug dealing to be common.)

> *See* "*Show of Authority*," above.

See also ***People v. Wilkins*** (1986) 186 Cal.App.3rd 804, 809: A detention occurred when the officer in a marked patrol car parked diagonally behind defendant's vehicle so it could not exit the parking lot.

In **People *v.* Steele** (2016) 246 Cal.App.4th 1110, defendant's detention was upheld when he was driving a second vehicle that was caught between the officers' vehicle and another car that the officers were attempting to lawfully stop late at night in a dimly lit area. Finding that defendant had been detained, the detention was upheld for officer safety reasons despite the lack of any reasonable suspicion to believe that defendant himself was engaged in any criminal activity (at least until the odor of marijuana was noticed coming from defendant's car).

The Court in **Steele** (supra, at p. 1118) cited the Colorado Supreme Court case of **People v. Taylor** (Colo. 2002) 41 P.3rd 681, where the Colorado High Court balanced the interests of the government and the defendant and did not require the government to demonstrate reasonable suspicion to stop the defendant. In ***Taylor***, an officer stopped the vehicle the defendant was driving in order to arrest the defendant's passenger, for whom there were arrest warrants. The defendant did not commit a traffic violation, did not exhibit aberrant behavior, and the officer did not suspect that the defendant was engaged in criminal wrongdoing. The court in ***Taylor*** said that although the officer had seized the defendant within the meaning of the **Fourth Amendment**, the seizure was not an arrest or an investigatory stop. According to the Court, the circumstances presented "one of those rare situations . . . "in which the balance of interests precludes insistence upon some quantum of individualized suspicion" that defendant is engaged in criminal activity to justify a seizure."

Defendant as the passenger in a vehicle where the driver was being arrested on warrants was upheld on the theory that an officer may detain the passengers as well as the driver while a traffic stop is ongoing. (***United States v. Yancey*** (7th Cir. IL 2019) 928 F.3rd 627.)

***Racial Profiling and Implicit Bias*:**

***Statutory Provisions*:** California has sought to prevent racial and identity profiling through mandated written guidelines, training, and extensive reporting requirements on the details of all detentions and arrests.

Gov't. Code § 12525.5: ***The Racial and Identity Profiling Act of 2015*** (Amended Stats 2022 (**AB 2773**), effective *January 1, 2023*, operative *January 1, 2024*.):

(a)

(1) Each state and local agency that employs peace officers shall annually report to the Attorney General data on all stops conducted by that agency's peace officers for the preceding calendar year.

(2) Each agency that employs *1,000 or more* peace officers shall begin collecting data on or before *July 1, 2018*, and shall issue its first round of reports on or before *April 1, 2019*. Each agency that employs *667 or more but less than 1,000* peace officers shall begin collecting data on or before *January 1, 2019*, and shall issue its first round of reports on or before *April 1, 2020*. Each agency that employs *334 or more but less than 667* peace officers shall begin collecting data on or before *January 1, 2021*, and shall issue its first round of reports on or before *April 1, 2022*. Each agency that

employs *1 or more but less than 334* peace officers shall begin collecting data on or before *January 1, 2022*, and shall issue its first round of reports on or before *April 1, 2023*.

(b) The reporting shall include, at a minimum, the following information for each pedestrian, traffic, or any other type of stop:

(1) The time, date, and location of the stop.

(2) The reason for the stop.

(3) The reason given to the person stopped at the time of the stop.

(4) The result of the stop, such as, no action, warning, citation, property seizure, or arrest.

(5) If a warning or citation was issued, the warning provided or violation cited.

(6) If an arrest was made, the offense charged.

(7) The perceived race or ethnicity, gender, and approximate age of the person stopped, provided that the identification of these characteristics shall be based on the observation and perception of the peace officer making the stop, and the information shall not be requested from the person stopped. For motor vehicle stops, this paragraph only applies to the driver, unless any actions specified under **paragraph (8)** apply in relation to a passenger, in which case the characteristics specified in this paragraph shall also be reported for that passenger.

(8) Actions taken by the peace officer during the stop, including, but not limited to, the following:

(A) Whether the peace officer asked for consent to search the person, and, if so, whether consent was provided.

(B) Whether the peace officer searched the person or any property, and, if so, the basis for the search and the type of contraband or evidence discovered, if any.

(C) Whether the peace officer seized any property and, if so, the type of property that was seized and the basis for seizing the property.

(c) If more than one peace officer performs a stop, only one officer is required to collect and report to the officer's agency the information specified under **subdivision (b)**.

(d) State and local law enforcement agencies shall not report the name, address, social security number, or other unique personal identifying information of persons stopped, searched, or subjected to a property seizure, for purposes of this section. Notwithstanding any other law, the data reported shall be available to the public, except for the badge number or other unique identifying information of the peace officer involved. Law enforcement agencies are solely responsible for ensuring that personally identifiable information of the individual stopped or any other information that is exempt from disclosure pursuant to this section is not transmitted to the Attorney General in an open text field.

(e) Not later than *January 1, 2018*, the Attorney General, in consultation with stakeholders, including the *Racial and Identity Profiling Advisory Board* (*RIPA*) established pursuant to **paragraph (1)** of **subdivision (j)** of **Section 13519.4** of the **Penal Code**, federal, state, and local law enforcement agencies and community, professional, academic, research, and civil and human rights organizations, shall issue regulations for the collection and reporting of data required under **subdivision (b)**. The regulations shall specify all data to be reported, and provide standards, definitions, and technical specifications to ensure uniform reporting practices across all reporting agencies. To the best extent possible, the regulations should be compatible with any similar federal data collection or reporting program.

(f) All data and reports made pursuant to this section are public records within the meaning of **Section 7920.530** and are open to public inspection pursuant to **Sections 7922.500** to **7922.545,** inclusive, **7923.000**, and **7923.005**.

(g)

(1) For purposes of this section, "*peace officer*," as defined in **Chapter 4.5** (commencing with **Section 830**) of **Title 3** of **Part 2** of the **Penal Code**, is limited to members of the California Highway Patrol, a city or county law enforcement agency, and California state or university

educational institutions. "*Peace officer*," as used in this section, does *not* include probation officers and officers in a custodial setting.

(2) For purposes of this section, "*stop*" means any detention by a peace officer of a person, or any peace officer interaction with a person in which the peace officer conducts a search, including a consensual search, of the person's body or property in the person's possession or control.

(h) This section shall become operative on *January 1, 2024*.

Pen. Code § 13012: *Contents of Information on* "*Open Justice Web Portal*:"

Subd. (a)(5)(A)(iii): Civilian complaints alleging racial or identity profiling, as defined in **subdivision (e)** of **Section 13519.4**. These statistics shall be disaggregated by the specific type of racial or identity profiling alleged, including, but not limited to, based on a consideration of race, color, ethnicity, national origin, religion, gender identity or expression, sexual orientation, or mental or physical disability.

Subd. (c): Each year, on an annual basis, the racial and Identity Profiling Advisory Board (RIPA), established pursuant to **paragraph (1)** of **subdivision (j)** of **Section 13519.4**, shall analyze the statistics reported pursuant to **subparagraphs (A)** and **(B)** of **paragraph (5)** of **subdivision (a)** of this section. RIPA's analysis of the complaints shall be incorporated into its annual report as required by **paragraph (3)** of **subdivision (j)** of **Section 13519.4** and shall be published on the "OpenJustice Web portal." The reports shall not disclose the identity of peace officers.

Pen. Code § 745: ***The California Racial Justice Act of 2020*** (as amended by **AB 1118**; effective *Jan. 1, 2024*):

(a) The state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin. A violation is established if the defendant proves, by a preponderance of the evidence, any of the following:

(1) The judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin.

(2) During the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement

officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful. This paragraph does not apply if the person speaking is relating language used by another that is relevant to the case or if the person speaking is giving a racially neutral and unbiased physical description of the suspect.

(3) The defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who have engaged in similar conduct and are similarly situated, and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the county where the convictions were sought or obtained.

(4)

(A) A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where the sentence was imposed.

(B) A longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for the same offense on defendants in cases with victims of one race, ethnicity, or national origin than in cases with victims of other races, ethnicities, or national origins, in the county where the sentence was imposed.

(b) A defendant may file a motion pursuant to this section, or a petition for writ of habeas corpus or a motion under **Section 1473.7**, in a court of competent jurisdiction, alleging a violation of **subdivision (a)**. For claims based on the trial record, a defendant may raise a claim alleging a violation of **subdivision (a)** on direct appeal from the conviction or sentence. The defendant may also move to stay the appeal and request remand to the superior court to file a motion pursuant to this section. If the motion is based in whole or in part on conduct or statements by the judge,

the judge shall disqualify themselves from any further proceedings under this section.

(c) If a motion is filed in the trial court and the defendant makes a prima facie showing of a violation of **subdivision (a)**, the trial court shall hold a hearing. A motion made at trial shall be made as soon as practicable upon the defendant learning of the alleged violation. A motion that is not timely may be deemed waived, in the discretion of the court.

> **(1)** At the hearing, evidence may be presented by either party, including, but not limited to, statistical evidence, aggregate data, expert testimony, and the sworn testimony of witnesses. The court may also appoint an independent expert. For the purpose of a motion and hearing under this section, out-of-court statements that the court finds trustworthy and reliable, statistical evidence, and aggregated data are admissible for the limited purpose of determining whether a violation of subdivision (a) has occurred.
>
> **(2)** The defendant shall have the burden of proving a violation of **subdivision (a)** by a preponderance of the evidence. The defendant does not need to prove intentional discrimination.
>
> **(3)** At the conclusion of the hearing, the court shall make findings on the record.

(d) A defendant may file a motion requesting disclosure to the defense of all evidence relevant to a potential violation of **subdivision (a)** in the possession or control of the state. A motion filed under this section shall describe the type of records or information the defendant seeks. Upon a showing of good cause, the court shall order the records to be released. Upon a showing of good cause, and in order to protect a privacy right or privilege, the court may permit the prosecution to redact information prior to disclosure or may subject disclosure to a protective order. If a statutory privilege or constitutional privacy right cannot be adequately protected by redaction or a protective order, the court shall not order the release of the records.

(e) Notwithstanding any other law, except as provided in **subdivision (k)**, or for an initiative approved by the voters, if the court finds, by a preponderance of evidence, a violation of **subdivision (a)**, the court shall impose a remedy specific to the violation found from the following list:

> **(1)** Before a judgment has been entered, the court may impose any of the following remedies:
>
> > **(A)** Declare a mistrial, if requested by the defendant.

(B) Discharge the jury panel and empanel a new jury.

(C) If the court determines that it would be in the interest of justice, dismiss enhancements, special circumstances, or special allegations, or reduce one or more charges.

(2)

(A) After a judgment has been entered, if the court finds that a conviction was sought or obtained in violation of **subdivision (a)**, the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings consistent with **subdivision (a)**. If the court finds that the only violation of **subdivision (a)** that occurred is based on **paragraph (3)** of **subdivision (a)**, the court may modify the judgment to a lesser included or lesser related offense. On resentencing, the court shall not impose a new sentence greater than that previously imposed.

(B) After a judgment has been entered, if the court finds that only the sentence was sought, obtained, or imposed in violation of **subdivision (a)**, the court shall vacate the sentence, find that it is legally invalid, and impose a new sentence. On resentencing, the court shall not impose a new sentence greater than that previously imposed.

(3) When the court finds there has been a violation of **subdivision (a)**, the defendant shall not be eligible for the death penalty.

(4) The remedies available under this section do not foreclose any other remedies available under the **United States Constitution**, the **California Constitution**, or any other law.

(f) This section also applies to adjudications and dispositions in the juvenile delinquency system and adjudications to transfer a juvenile case to adult court.

(g) This section shall not prevent the prosecution of hate crimes pursuant to **Sections 422.6** to **422.865**, inclusive.

(h) As used in this section, the following definitions apply:

(1) "*More frequently sought or obtained*" or "*more frequently imposed*" means that the totality of the evidence demonstrates a

significant difference in seeking or obtaining convictions or in imposing sentences comparing individuals who have engaged in similar conduct and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity. The evidence may include statistical evidence, aggregate data, or nonstatistical evidence. Statistical significance is a factor the court may consider, but is not necessary to establish a significant difference. In evaluating the totality of the evidence, the court shall consider whether systemic and institutional racial bias, racial profiling, and historical patterns of racially biased policing and prosecution may have contributed to, or caused differences observed in, the data or impacted the availability of data overall. Race-neutral reasons shall be relevant factors to charges, convictions, and sentences that are not influenced by implicit, systemic, or institutional bias based on race, ethnicity, or national origin.

(2) "*Prima facie showing*" means that the defendant produces facts that, if true, establish that there is a substantial likelihood that a violation of **subdivision (a)** occurred. For purposes of this section, a "substantial likelihood" requires more than a mere possibility, but less than a standard of more likely than not.

(3) "*Relevant factors*," as that phrase applies to sentencing, means the factors in the California Rules of Court that pertain to sentencing decisions and any additional factors required to or permitted to be considered in sentencing under state law and under the state and federal constitutions.

(4) "*Racially discriminatory language*" means language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded language, language that compares the defendant to an animal, or language that references the defendant's physical appearance, culture, ethnicity, or national origin. Evidence that particular words or images are used exclusively or disproportionately in cases where the defendant is of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory.

(5) "*State*" includes the Attorney General, a district attorney, or a city prosecutor.

(6) "*Similarly situated*" means that factors that are relevant in charging and sentencing are similar and do not require that all individuals in the comparison group are identical. A defendant's

conviction history may be a relevant factor to the severity of the charges, convictions, or sentences. If it is a relevant factor and the defense produces evidence that the conviction history may have been impacted by racial profiling or historical patterns of racially biased policing, the court shall consider the evidence.

(i) A defendant may share a race, ethnicity, or national origin with more than one group. A defendant may aggregate data among groups to demonstrate a violation of **subdivision (a)**.

(j) This section applies as follows:

(1) To all cases in which judgment is not final.

(2) Commencing *January 1, 2023*, to all cases in which, at the time of the filing of a petition pursuant to **subdivision (f)** of **Section 1473** raising a claim under this section, the petitioner is sentenced to death or to cases in which the motion is filed pursuant to **Section 1473.7** because of actual or potential immigration consequences related to the conviction or sentence, regardless of when the judgment or disposition became final.

(3) Commencing *January 1, 2024*, to all cases in which, at the time of the filing of a petition pursuant to **subdivision (f)** of **Section 1473** raising a claim under this section, the petitioner is currently serving a sentence in the state prison or in a county jail pursuant to **subdivision (h)** of **Section 1170**, or committed to the Division of Juvenile Justice for a juvenile disposition, regardless of when the judgment or disposition became final.

(4) Commencing *January 1, 2025*, to all cases filed pursuant to **Section 1473.7** or **subdivision (f)** of **Section 1473** in which judgment became final for a felony conviction or juvenile disposition that resulted in a commitment to the Division of Juvenile Justice on or after *January 1, 2015*.

(5) Commencing *January 1, 2026*, to all cases filed pursuant to **Section 1473.7** or **subdivision (f)** of **Section 1473** in which judgment was for a felony conviction or juvenile disposition that resulted in a commitment to the Division of Juvenile Justice, regardless of when the judgment or disposition became final.

(k) For petitions that are filed in cases for which judgment was entered before *January 1, 2021*, and only in those cases, if the petition is based on a violation of **paragraph (1)** or **(2)** of **subdivision (a)**, the petitioner shall be entitled to relief as provided in **subdivision (e)**, unless the state proves

beyond a reasonable doubt that the violation did not contribute to the judgment.

Note: **Pen. Code §§ 1473** and **1473.7** add (1) grounds for permitting a writ of habeas corpus for a judgment entered on or after *January 1, 2021*, on the grounds that a criminal conviction or sentence was sought, obtained, or imposed in violation of new **Pen Code § 745**, and (2) to the list of circumstances permitting a defendant who is no longer in criminal custody to file a motion to vacate a conviction or sentence obtained in violation of new **Pen Code § 745**, respectively.

Case Law:

Denial of a discovery motion under **Pen. Code,§ 745(d)** of the **California Racial Justice Act of 2020** was not supported where defendant argued that good cause for discovery was established because he was black, studies in California have shown black drivers were more likely to be stopped by police than any other racial group, and the circumstances suggested the underlying traffic stop was racially motivated. (***Young v. Superior Court*** (2022) 79 Cal.App.5th 138; case remanded for a weighing of various factors related to whether the defendant is entitled to extensive discovery relevant to the issue of whether he was stopped, arrested, and charged in state court with possession of Ecstasy for sale.)

The factors to be considered include:

(1) Whether the material requested is adequately described;

(2) Whether the requested material is reasonably available to the governmental entity from which it is sought (and not readily available to the defendant from other sources);

(3) Whether production of the records containing the requested information would violate (i) third party confidentiality or privacy rights or (ii) any protected governmental interest;

(4) Whether the defendant has acted in a timely manner;

(5) Whether the time required to produce the requested information will necessitate an unreasonable delay of defendant's trial; and

(6) Whether the production of the records containing the requested information would place an unreasonable burden on the governmental entity involved. (***Id.***, at pp. 144-145.)

The People charged petitioner with several firearm possession crimes after police discovered a handgun during a search of his car. Petitioner filed a motion under the **California Racial Justice Act of 2020** (the **Racial Justice Act**; **Pen. Code § 745**), claiming that police stopped and searched his car because of his race. The trial court concluded that petitioner did not establish a prima facie violation of the **Racial Justice Act** and denied his motion. Petitioner challenged the trial court's ruling by filing a petition for writ of mandate in the Court of Appeal. The Court of Appeal issued a peremptory writ of mandate. In denying petitioner's motion, the trial court did not apply the correct legal standard at the prima facie stage. The trial court's review of petitioner's motion went beyond the confines of determining whether it stated a prima facie case. The trial court's statements during the hearing on petitioner's motion demonstrated that it weighed *all the evidence* presented during the earlier preliminary hearing—both favorable and unfavorable to petitioner's motion—rather than focusing on and accepting as true the evidence that supported petitioner. The focus at the prima facie stage of the **Racial Justice Act** proceedings should have been on the allegations and supporting evidence proffered by petitioner, not evidence supporting the People's argument. (***Finley v. Superior Court*** (2023) 95 Cal.App.5th 12.)

The **California Racial Justice Act of 2020** (**RJA**) is not violated when a testifying defendant follows his or her attorney's advice to speak authentically and in his or her normal manner, even if the result is that the defendant testifies using slang terms, a certain accent, or a certain linguistic style. (***People v. Coleman*** (2024) 98 Cal.App.5th 709.)

Defendant forfeited review on direct appeal of a claim under the **California Racial Justice Act**, **Pen. Code § 745**, as amended by **AB 1118** (2023-2024 Reg. Sess.), because he failed to make a motion before entry of judgment and the legislative history of amendments indicated the appellate courts retained discretionary authority to apply the general forfeiture rule to a claim that could have been, but was not, presented in the trial court. Defendant's arguments regarding constitutional issues and futility of objection did not excuse forfeiture because the claim did not present a pure question of law and the record did not demonstrate either that defendant could not object or that doing so would have been futile. There was no basis to stay and remand because defendant did not identify what factual development might be needed in the trial court. (***People v. Lashon*** (2024) 98 Cal.App.5th 804.)

Pen. Code § 13519.4(e): "'*Racial or Identity Profiling Defined*:' For purposes of this section, is the consideration of, or reliance on, to any degree, actual or perceived race, color, ethnicity, national origin, age, religion, gender identity or expression, sexual orientation, or mental or physical disability in deciding which

persons to subject to a stop or in deciding upon the scope or substance of law enforcement activities following a stop, except that an officer may consider or rely on characteristics listed in a specific suspect description. The activities include, but are not limited to, traffic or pedestrian stops, or actions during a stop, such as asking questions, frisks, consensual and nonconsensual searches of a person or any property, seizing any property, removing vehicle occupants during a traffic stop, issuing a citation, and making an arrest."

Pen. Code § 13519.4(f): *Prohibition*: "A peace officer shall not engage in racial or identity profiling."

Gov't. Code § 1031: *Minimum Standards*: In establishing *minimum standards for peace officers,*

> **Gov't. Code § 1031** was amended, effective 1/1/2021 (**AB 846**), to provide the following:
>
> > **Subd. (f)** was amended to include among the minimum standards required of peace officers that the officer "(b)e found to be free from any physical, emotional, or mental condition, including *bias against race or ethnicity, gender, nationality, religion, disability, or sexual orientation,* that might adversely affect the exercise of the powers of a peace officer." (Italics added)

Gov't. Code § 1031.3: Explicit and Implicit Bias: Enacted to provide the following relative to "*explicit and implicit bias*:"

> The Commission on Peace Officer Standards and Training (POST) is, by *January 1, 2022,* to review and update the regulations and screening materials for a peace officer emotional and mental condition evaluation, adding to the list an evaluation the identification of "*explicit and implicit bias towards race or ethnicity, gender, nationality, religion, disability, or sexual orientation*." (Italics added)

Case Law:

> While a person's race may properly be used as an identification factor when in conjunction with other factors, but standing alone, a person's race is insufficient to justify the detention of a person as the suspect in a crime. (See ***People v. Walker*** (2012) 210 Cal.App.4th 1372, 1388-1389, and the cases cited therein: "(T)here was a sense that the detaining officer relied too heavily on the common general traits of race and age in attempting to justify a stop that had no other circumstances to warrant it."

"(T)he race of an occupant (of a vehicle), without more, does not satisfy the detention standard." (***People v. Bates*** (2013) 222 Cal.App.4th 60, 67; citing ***People v. Bower*** (1979) 24 Cal.3rd 638, 644.)

The U.S. Supreme Court has ruled that a defendant's **Sixth Amendment** right to a fair trial takes precedence over a state statute that precludes or restricts inquiry into the validity of a jury's verdict (i.e., the "no impeachment rule") when there is "compelling evidence" that a juror, during deliberations, made a clear statement indicating that he or she relied upon racial stereotypes or animus to convict a defendant. (***Pena-Rodriguez v. Colorado*** (2017) 580 U.S. 206 [137 S.Ct. 855; 197 L.Ed.2nd 107].)

The U.S. Supreme Court has also held that a defendant (a black male) in a capital murder case received ineffective assistance of counsel (a Sixth Amendment violation) when his attorney called as an expert witness a psychologist who, as a part of his expert opinion as to the potential future dangerousness of the defendant, testified that black men are statistically more likely to be violent. The Court ruled that it was inappropriate for a jury to consider race no matter how it was injected into the proceeding, rejecting the argument that it was invited error because defendant's own attorney was the one who called the expert to testify. (***Buck v. Davis*** (2017) 580 U.S. 100 [137 S.Ct. 759; 197 L.Ed.2nd 1].)

In a decision where the Appellate Court reversed defendant's Juvenile Court true finding after holding that defendant, a black male, was illegally detained, a concurring opinion provided some relevant insight: "We have resolved this appeal without delving into complex issue of race and policing, but I submit that as judges we must remain mindful of the broader context in which this case arose. . . . In situations like this, law enforcement officers must be sensitive to how implicit biases might influence what passersby perceive as a threat, just as judges must appreciate how officers on the receiving end of a vague, subjective tip might interpret the information they obtain. . . . Ultimately, there are myriad ways in which racial perceptions and biases might surface in a given criminal case, as in everyday life. And while the police officers here never inquired further to find out what exactly the tipster saw that concerned her, our opinion appropriately emphasizes the perils of relying solely on this *type* of report as a basis to detain. To that end, the objective standard of reasonable suspicion, which has always required more than a mere hunch to justify a detention, remains a vital safeguard for protecting our important Fourth Amendment rights." (***In re Edgerrin J.*** (2020) 57 Cal.App.5th 752, 770-772.)

See the dissent in ***People v. Flores*** (2021) 60 Cal.App.5th 978, 993-994, which, after noting defendant's apparent Hispanic heritage, and

interjecting current racial issues into its argument, notes that the majority "ignores applicable law and the realities of twenty-first century America . . . (targeting) a person wary of police interaction, . . ." Further along, in criticizing the majority's finding relative to defendant's suspicious acts upon the approach of the officers: "Indeed, some even might instruct their children remaining still is a prudent course of action (and even then, it may not work. #BlackLivesMatter.) To hold otherwise ignores the deep-seated mistrust certain communities feel toward police and how that mistrust manifests in the behavior of people interacting with them." (Parenthesis in the original.) The dissent ends the discussion with the following: "The majority opinion (which held that defendant's detention was lawful) narrows the options for those who want to be judged 'normal' and hence beyond suspicion. They must stand erect and chat up the officers who approach them. Tell that to Eric Garner.", referencing a person who died at the hands of a New York P.D. patrol officer while being subjected to a chokehold and while repeatedly complaining that he couldn't breathe.

> In a footnote (pg. 993, fn. 3), the dissent also makes reference to Ahmaud Marquez Arbery, a black man who was shot and killed by three white citizens as he was confronted while jogging through their neighborhood, but suspected by his assailants of burglarizing a garage as he did so.
>
> *Note*: Since publication of this decision, the three defendants were convicted of Arbery's murder.

See "*Show of Authority*" under "*Illegal Detentions*," above, and "*Pretext Stops*," below.

Justice Goodwin Liu on Implicit Racial Biases: In a concurring opinion in the California Supreme Court decision of ***People v. McWilliams*** (2023) 14 Cal.5th 429, at pgs. 450-452, on the issue of whether the doctrine of "attenuation of the taint" overcomes the issue of a parole search based upon the discovery of a Black suspect's search and seizure conditions *after* he is detained illegally, Supreme Court Justice Goodwin Liu pens a short dissertation on the issue of implicit biases in cases where officers have the discretion to act (i.e., to detain, search, and/or arrest):

> "I write separately to note that in such circumstances, an officer's decision making may be vulnerable to implicit biases that result in a heightened risk of exploitation of the unlawful detention. This reality is a proper consideration under the second factor of the attenuation doctrine set out in ***Brown v. Illinois*** (1975) 422 U.S. 590, 603–604. . . . [¶] Empirical studies have shown that 'the conditions under which implicit biases translate most readily into discriminatory behavior are when people have

wide discretion in making quick decisions with little accountability.' (*Kang et al*., *Implicit Bias in the Courtroom* (2012) 59 UCLA L.Rev. 1124, 1142; see ***id.*** at pp. 1142–1150 [citing studies]; Casey et al., *Addressing Implicit Bias in the Courts* (2013) 49 Ct.Rev. 64, 68 & fn. 38 [citing studies].) As Justice Danner noted in the Court of Appeal, the issue is not racism in the sense of intentional discrimination. It is the operation of 'attitudes and stereotypes' that 'are not consciously accessible through introspection' and 'can function automatically.' (*Kang et al*., at p. 1129.) Research confirms what is no surprise as a matter of common sense: On-the-spot discretionary decisions are vulnerable to implicit bias because they are neither constrained by a clear rubric of relevant criteria nor preceded by extensive deliberation. Where a discretionary search is preceded by an unlawful detention, the very impulses that may have given rise to the initial detention may also contribute to an officer's decision to conduct the search. Such impulses may include the well-documented unconscious 'stereotype of Black Americans as violent and criminal.' (*Eberhardt et al*., *Seeing Black: Race, Crime, and Visual Processing* (2004) 87 J. Personality & Soc. Psychol. 876; see *Hetey & Eberhardt, Racial Disparities in Incarceration Increase Acceptance of Punitive Policies* (2014) 25 Psychol. Sci. 1949.) [⁋] Black individuals like McWilliams disproportionately bear the brunt of discretionary decisions by law enforcement. 'Black Californians are significantly more likely to be stopped than white Californians, and experiences during stops and outcomes afterward also vary. . . . Black individuals are more than twice as likely to be searched as white individuals.' (Lofstrom et al., Racial Disparities in Law Enforcement Stops (Oct. 2021) p. 25.) Not only are Black people stopped and searched more often, but such searches are less likely to yield evidence or contraband. (***Id.*** at pp. 14–16; see ***People v. Tacardon*** (2022) 14 Cal.5th 235, 264, . . . (dis. opn. of Liu, J.) [citing *Ayres & Borowsky, A Study of Racially Disparate Outcomes in the Los Angeles Police Department* (Oct. 2008) pp. 5–8 [Black and Hispanic residents of Los Angeles, compared to Whites, were more likely to be stopped, frisked, searched, and arrested but significantly less likely to be found with weapons or drugs]; *Gross & Barnes, Road Work: Racial Profiling and Drug Interdiction on the Highway* (2002) 101 Mich. L.Rev. 651, 668 [searches of White drivers in Maryland reveal drugs 22% more often than searches of Black drivers and over 200% more often than searches of Hispanic drivers]; Note, *Discrimination During Traffic Stops: How an Economic Account Justifying Racial Profiling Falls Short* (2012) 87 N.Y.U. L.Rev. 1025, 1040 [searches of White drivers in Illinois reveal contraband over 50% more often than searches of non-White drivers]]; cf. Lofstrom et al., at p. 15 [contraband or evidence is found in 21.4 percent of searches overall]; *Bar-Gill & Friedman, Taking Warrants Seriously* (2012) 106 Nw. U. L.Rev. 1609, 1655 ['police find evidence in only about 10% to 20% of the total traffic searches'].) For every search of a Black person that yields contraband, there are far more—and disproportionately

more—searches of Black people that turn up nothing. These practices are not only inefficient but also detrimental to building trust between minority communities and law enforcement. (***People v. Tacardon***, at p. 264 (dis. opn. of Liu, J.).) [¶] As today's decision explains, '[t]here is a danger that an officer who has unlawfully stopped a bystander without reasonable suspicion will regard the discovery of a parole search condition as a license to continue pursuing a baseless hunch, rather than fairly considering whether a search is appropriate to assess the individual's rehabilitation and monitor "his transition from inmate to free citizen." [Citation.] In other words, in the hands of the very same officer who conducted an illegal stop, there is a risk that the discretion to conduct a parole search will lead to the exploitation of that illegal conduct, rather than severing the causal connection between the stop and the search.' . . . It is appropriate for courts to recognize, in applying the second factor of ***Brown*'s** attenuation inquiry, that this risk in a given case may be heightened by the operation of implicit biases, including the unconscious association between Blackness and criminality."

Detentions vs. Arrests*:** If not handled properly, a "*detention*" could become an "*arrest*" (i.e., a "*de facto arrest*") which, if not supported by "*probable cause*" to arrest, would be illegal. (Orozco v. Texas*** (1969) 394 U.S. 324 [89 S.Ct. 1095; 22 L.Ed.2nd 311]; ***In re Antonio B.*** (2008) 166 Cal.App.4th 435; ***United States v. Redlightning*** (9th Cir. 2010) 624 F.3rd 1090, 1103-1106; ***People v. Espino*** (2016) 247 Cal.App.4th 746, 758-760.)

General Rule: "There is no bright-line rule to determine when an investigatory stop becomes an arrest." (**Sialoi *v. City of* San Diego** (9th Cir. May 24, 2016) 823 F.3rd 1223, 1232; quoting ***Washington v. Lambert*** (9th Cir. 1996) 98 F.3rd 1181, 1185. See also ***Wheatcroft v. City of Glendale*** (U.S. Dist. AZ, 2022) 2022 U.S. Dist. LEXIS 57006, finding that the Officers did not effectuate an arrest until the point where they had removed plaintiff from his vehicle and put him into the patrol vehicle which, by that time, plaintiff had engaged in activity that could constitute the crime of assaulting an officer, so probable cause had accrued.)

The use of *firearms*, *handcuffs*, putting a person into a *locked patrol car*, *transporting him without his consent*, or simply a "*show of force*," may, under the circumstances, cause the court to later find that an attempted detention was in fact *an arrest* (i.e., a "*de facto arrest*.") and, if made without "*probable cause*," illegal. (***United States v. Ramos-Zaragosa*** (9th Cir. 1975) 516 F.2nd 141, 144; ***New York v. Quarles*** (1984) 467 U.S. 649 [104 S.Ct. 2626; 81 L.Ed.2nd 550], handcuffs; ***Orozco v. Texas***, *supra*, force.)

See also ***Hopson v. Alexander*** (9th Cir. 2023) 71 F.4th 692, 698-709: Use of handcuffs and drawn firearms held not to be sufficiently coercive to deny officers qualified immunity when used to detain suspects who

appeared to be casing a convenience store in possible preparation for a possible planned armed robbery.

Factors to consider, including:

- Whether the suspect was handcuffed;
- Whether the police drew their weapons;
- Whether the police physically restrict the suspect's liberty, including by placing the suspect in a police car;
- Whether "special circumstances" (such as an uncooperative suspect or risk of violence) are present to justify the "intrusive means of effecting a stop"; *and*
- Whether the officers are outnumbered.

(***Washington v. Lambert*** (9th Cir. 1996) 98 F.3rd 1181, 1188-1190; ***Sialoi v. City of* San Diego** (9th Cir. 2016) 823 F.3rd 1223, 1232.)

Examples:

Handcuffing a detainee will *not* result in an arrest when, "at the time of the detention, the officer had a reasonable basis to believe the detainee presented a physical threat to the officer or would flee." (***In re Antonio B.*** (2008) 166 Cal.App.4th 435, 442.)

Handcuffing an otherwise compliant 11-year-old minor (even though reported to be out of control, uncooperative, and "off his meds" by school officials) and transporting him from his school to a relative held to be an excessive use of force under the circumstances, and an unlawful seizure. Officers were not entitled to qualified immunity. (***C.B. v. City of Sonora*** (9th Cir. 2014) 769 F.3rd 1005, 1029-1031, 1039-1040.)

Handcuffing the defendant and having him sit on the curb found to be a "de facto" arrest which, under the circumstances, was not supported by probable cause and also which, under the circumstances, negated his subsequent consent to search his vehicle. (***People v. Espino*** (2016) 247 Cal.App.4th 746, 758-760.)

In order for the handcuffing of a suspect during an investigatory detention to *not* convert the detention into a de facto arrest, the handcuffing must be found to be "reasonable" under the circumstances. (***United States v. Eatman*** (7th Cir. 2019) 942 F.3rd 344.)

The Eighth Circuit Court of Appeals has held that the officers who handcuffed a suspect for nearly five minutes during a traffic stop did so illegally where they were unable to articulate any specific facts to support an objective concern for their safety. The court noted that initial stop and

use of handcuffs was lawful based upon a reasonable suspicion that plaintiff may have been involved in a narcotics transaction minutes earlier and because he did not have a driver's license when stopped. However, during the stop, in which the officers outnumbered Haynes, they did not find any drugs or weapons on him nor did they see any drugs or weapons in his car. The Court added that the officers chose not to search plaintiff's car after he gave them consent to do so. Finally, according to the officers' testimony, aside from the suspected drug deal, nothing about plaintiff's behavior led them to believe that he was a safety risk or uncooperative. Consequently, the court held that keeping plaintiff in handcuffs after searching him "was not reasonably necessary to protect their personal safety or maintain the status quo during the investigatory stop." The court further held that, at the time of the incident, it was clearly established that handcuffing, "absent any concern for safety," violates the **Fourth Amendment**. (***Haynes v. Minnehan*** (8th Cir. 2021)14 F.4th 830.)

However, there is case law supporting the argument that a detention does not necessarily become an arrest when the detention is prolonged for the purpose of awaiting the arrival of specialized federal officers. (See ***United States v. O'Looney*** (9th Cir. 544 F.2nd 385; ***United States v. Moore*** (9th Cir. 1980) 638 F.2nd 1171, and the concurring opinion in ***United States v. Guerrero*** (9th Cir. 2022) 47 F.5th 984, 987-988.)

In ***Guerrero***, defendant was "detained" in handcuffs for about an hour awaiting federal officers to come and take him into custody. In the majority opinion, written in two concurring opinions, defendant was held to be either lawfully detained, or lawfully arrested (a "de facto" arrest, supported by probable cause) and searched incident to that arrest.

Indicators of an Arrest: Other courts have illustrated the relevant factors to an arrest:

The Use of Firearms. (***People v. Taylor*** (1986) 178 Cal.App.3rd 217, 229; ***United States v. Ramos-Zaragosa***, *supra*; ***Washington v. Lambert*** (9th Cir. 1996) 98 F.3rd 1181, 1185-1189; ***Green v. City & County of San Francisco*** (9th Cir. 2014) 751 F.3rd 1039, 1047-1048.)

The Use of Handcuffs. (***New York v. Quarles***, *supra*; ***United States v. Purry*** (D.C. Cir. 1976) 545 F.2nd 217, 220; ***Washington v. Lambert***, *supra*; ***Green v. City & County of San Francisco***, *supra*; ***People v. Espino***, *supra*.; ***In re K.J.*** (2018) 18 Cal.App.5th 1123, 1132.)

While putting a juvenile in a security office at the border, and frisking her, were not enough to constitute an arrest, handcuffing her shortly thereafter when contraband was found in her car *was* an

arrest. (***United States v. Juvenile* (*RRA-A*)** (9th Cir. 2000) 229 F.3rd 737, 743.)

Whether or not a detention becomes an arrest depends upon "whether the use of handcuffs during a detention was reasonably necessary under all of the circumstances of the detention." (***In re Antonio B.*** (2008) 166 Cal.App.4th 435, 441; defendant found to have been arrested, due to his handcuffing without probable cause.)

Handcuffing a person suspected of possible involvement in a narcotics transaction, but where the officer testified only that he was "uncomfortable" with the fact that defendant was tall (6'-6") and that narcotics suspects sometimes carry weapons (although the officer did not conduct a patdown for weapons), converted a detention into a "de facto" arrest, making the subsequent consent to search involuntary. (***People v. Stier*** (2008) 168 Cal.App.4th 21.)

A Locked Patrol Car. (***People v. Natale*** (1978) 77 Cal.App.3rd 568, 572; ***United States v. Parr*** (9th Cir. 1988) 843 F.2nd 1228; ***United States v. Ricardo D.*** (9th Cir. 1990) 912 F.2nd 337, 340; "Detention in a patrol car exceeds permissible ***Terry* (*v. Ohio*** (1968) 392 U.S. 1 [88 S.Ct. 1868; 20 L.Ed.2nd 889].) limits absent some reasonable justification."

During an Overwhelming Show of Force. (***Orozco v. Texas*** (1969) 394 U.S. 324 [89 S.Ct. 1095; 22 L.Ed.2nd 311]; ***United States v. Ali*** (2nd Cir. 1996) 86 F.3rd 275; defendant was asked to step away from the boarding area at an airport, his travel documents were taken, and he was surrounded by seven officers with visible handguns; and ***Kaupp v. Texas*** (2003) 538 U.S. 626, 628-630 [123 S.Ct. 1843; 155 L.Ed.2nd 814, 819-820], three officers, with three more in the next room, commanded the 17-year-old defendant to get out of bed at 3:00 a.m., and took him to the police station for questioning.)

The Physical Touching of the person of the suspect. (***Kaupp v. Texas*** (2003) 538 U.S. 626, 630 [123 S.Ct. 1843; 155 L.Ed.2nd 814].)

Non-Consensual Transportation of a Detainee. (***Dunaway v. New York*** (1979) 442 U.S. 200, 206-216 [99 S.Ct. 2248; 60 L.Ed.2nd 824, 832-838]; ***Taylor v. Alabama*** (1982) 457 U.S. 687 [102 S.Ct. 2664; 73 L.Ed.2nd 314].)

As a general rule: *Detention + nonconsensual transportation = arrest.*

See also ***People v. Harris*** (1975) 15 Cal.3rd 384, 390-392; transporting a subject from the site of a traffic stop back to the scene of the crime for a victim identification, absent one of the recognized exceptions, was held to be an arrest.

"(W)e have never 'sustained against **Fourth Amendment** challenge the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes . . . absent probable cause or judicial authorization.' [Citation]" (***Kaupp v. Texas*** (2003) 538 U.S. 626, 630 [123 S.Ct. 1843; 155 L.Ed.2nd 814, 820].)

But see "*Non-Consensual Transportation Exceptions*," below.

Use of Emergency Lights:

Even though a vehicle is already stopped without police action, merely activating emergency lights on a police vehicle as officers contact the occupants of the vehicle is automatically a detention, and illegal if made without a reasonable suspicion. (***People v. Bailey*** (1985) 176 Cal.App.3rd 402.)

Defendant was detained under the **Fourth Amendment** when a deputy sheriff investigating an emergency call of a fight in progress at 10:37 p.m. on a Sunday night, stopped his patrol car behind defendant's parked vehicle and activated his emergency lights. The Court held that a reasonable person under the circumstances would not have felt free to leave. Defendant submitted to the show of authority by remaining in his parked car. However, defendant's brief detention was supported by a reasonable suspicion based on the totality of the circumstances which included a reliable citizen's report of a violent fight potentially involving a firearm, the deputy's quick response time (3 minutes), and defendant's presence near the scene of the fight in the otherwise vacant alley. (***People v. Brown*** (2015) 61 Cal.4th 968, 974-987.)

Defendant was the driver of a vehicle that was following another vehicle. Officers determined that the owner of the lead vehicle had an outstanding warrant for his arrest. Sheriff's Deputies activated their emergency lights just as both vehicles were in the process of parking. Defendant's vehicle was caught between the officers and the lead vehicle. The Court held that defendant was necessarily detained by this action, per ***Brown***, even though there was no cause to believe that he was involved in any criminal activity. Officer safety considerations justified contacting defendant before

proceeding to the lead vehicle. The odor of marijuana and plain sight observations of marijuana in the car lawfully lead to a search of the car and discovery of more contraband. (**People *v.* Steele** (2016) 246 Cal.App.4th 1110, 1115-1120.)

The use of the "wig wag" lights on a patrol car upon pulling up behind defendant's parked vehicle, done only to identify the officer as law enforcement and without turning on the full light bar, was held *not* to be a detention. The Court held that a reasonable person seeing the wig wag lights under these circumstances would have thought that he was still free to ignore the police presence and go about his business. (***United States v. Cook*** (8th Cir. 2016) 842 F.3rd 597.)

The Juvenile Court's denial of a suppression motion was reversed for having erroneously determined that a police-defendant encounter was consensual and not a detention. Based upon a citizen's report that minors were "acting shady," four officers parked behind defendants' lawfully parked car, the first patrol car with its emergency lights on. The Court ruled that the officers' show of authority (i.e., turning on their emergency lights) amounted to an unlawful detention. Although noting that there is no "bright-line rule" that activating lights always constitutes a detention, the Court noted that the California "Supreme Court has long recognized that activating sirens or flashing lights can amount to a show of authority" sufficient to constitute a detention. (***In re Edgerrin J.*** (2020) 57 Cal.App.5th 752, 760, citing ***People v. Brown*** (2015) 61 Cal.4th 968, at p. 980.)

Exceptions: The use of firearms, handcuffing, a non-consensual transportation, and/or putting a subject into a patrol car, if necessary under the circumstances, particularly if precautions are taken to make sure that the person knows he is only being detained as opposed to being arrested, or when the use of force is necessitated by the potential danger to the officers, may be found to be appropriate and does *not* necessarily elevate the contact into an arrest. (See ***People v. Celis*** (2004) 33 Cal.4th 667, 673-676.)

In General, the investigative methods used should be *the least intrusive means reasonably available*. (***Florida v. Royer*** (1983) 460 U.S. 491, 500 [103 S.Ct. 1319; 75 L.Ed.2nd 229].) Although the use of some force does not automatically transform an investigatory detention into an arrest, any overt show of force or authority should be justified under the circumstances. (*See, e.g.,* ***United States v. Holzman*** (9th Cir. 1989) 871 F.2nd 1496, 1502, restraints justified by belief suspect was attempting to flee; ***United States v. Buffington*** (9th Cir. 1987) 815 F.2nd 1292, 1300, given officer's knowledge of suspect's history of violence, show of force

justified by fear for personal safety. (***In re Ricardo D.*** (9th Cir. 1990) 912 F.2nd 337, 340.)

> *However*: "(I)t has been held that stopping a suspect at gunpoint, handcuffing him, and placing him in a patrol car does not automatically elevate a seizure into an arrest requiring probable cause. (***Gallegos v. City of Los Angeles*** (9th Cir. 2002) 308 F.3rd 987, 991–992; ***People v. Celis*** (2004) 33 Cal.4th 667, 675 . . . ; ***People v. Soun*** (1995) 34 Cal.App.4th 1499, 1517–1520 . . . .) This is because an officer may take reasonably necessary steps to protect his or her safety and to maintain the status quo during a detention. (***Celis***, supra, 33 Cal.4th at p. 675.) The issue is whether the methods used during a detention were reasonably necessary under all of the circumstances of the detention. ([***People v.***] ***Stier*** (2008) . . . , 168 Cal.App.4th [21] at p. 27; ***In re Antonio B.*** (2008) 166 Cal.App.4th 435, 441 . . . .)" (***In re K.J.*** (2018) 18 Cal.App.5th 1123, 1132.)
>
> In order for the handcuffing of a suspect during an investigatory detention to *not* convert the detention into a de facto arrest, the handcuffing must be found to be "reasonable' under the circumstances. (***United States v. Eatman*** (7th Cir. 2019) 942 F.3rd 344.)

Factors: The courts have allowed the use of especially intrusive means of effecting a stop yet still found the intrusion to be merely a detention in special circumstances, such as:

- Where the suspect is uncooperative or takes action at the scene that raises a reasonable possibility of danger or flight;
- Where the police have information that the suspect is currently armed;
- Where the stop closely follows a violent crime; *or*
- Where the police have information that a crime that may involve violence is about to occur.

> (***Green v. City & County of San Francisco*** (9th Cir. 2014) 751 F.3rd 1039, 1047; noting that "(t)hese factors should all be considered in light of the specificity of the information law enforcement has to suggest both that the individuals are the proper suspects and that they are likely to resist arrest or police interrogation." See also ***Washington v. Lambert*** (9th Cir. 1996) 98 F.3rd 1181, 1189.)

Also relevant, per the ***Green*** Court, is;

- The number of officers present.

(***Green v. City & County of San Francisco***, *supra*.)

Examples Where No Arrest Found:

Firearms: ***United States v. Rousseau*** (9th Cir. 2001) 257 F.3rd 925; ***People v. Glaser*** (1995) 11 Cal.4th 354, 366; ***United States v. Abdo*** (5th Cir. Aug. 19, 2013) 733 F.3rd 562; ***People v. Turner*** (2013) 219 Cal.App.4th 151, 162-164; ***United States v. Edwards*** (9th Cir. 2014) 761 F.3rd 977, 981-982.

Handcuffing: ***People v. Brown*** (1985) 169 Cal.App.3rd 159, 166-167; ***United States v. Purry***, *supra*; ***United States v. Rousseau***, *supra*; ***United States v. Juvenile* (*RRA-A*)** (9th Cir. 2000) 229 F.3rd 737, 743; ***People v. Williams*** (2007) 156 Cal.App.4th 949, 960; ***People v. Davidson*** (2013) 221 Cal.App.4th 966, 970-973; ***People v. Turner***, *supra*; ***United States v. Edwards***, *supra*. 761 F.3rd 977, 981-982; ***In re K.J.*** (2018) 18 Cal.App.5th 1123, 1132; ***People v. Lopez*** (2019) 8 Cal.5th 353, 363, fn. 5; ***United States v. Guerrero*** (9th Cir. 2022) 47 F.5th 984, 987-988, concurring opinion.

> "(A) police officer may handcuff a detainee without converting the detention into an arrest if the handcuffing is brief and reasonably necessary under the circumstances." (***People v. Osborne*** (2009) 175 Cal.App.4th 1052, 1062.)
>
> Handcuffing defendant at gunpoint while making him lie on the ground held not to convert a lawful detention into a de facto arrest where defendant was suspected of possessing a handgun on school property and where it was known that defendant had threatened to carry out a threat outside the stadium after the game. Handcuffing him while attempting to determine whether he was armed was reasonable under the circumstances. (***People v. Turner*** (2013) 219 Cal.App.4th 151, 162-164.)
>
> "Handcuffing a suspect during an investigative detention does not automatically make it (a) custodial interrogation for purposes of ***Miranda***." (***People v. Davidson*** (2013) 221 Cal.App.4th 966, 972.)

> Officers are permitted to handcuff suspects when they have a reasonable basis to believe that the suspect poses a physical threat to the officer and handcuffing is the least intrusive means to protect against that threat. (***United States v. Fiseku*** (2nd Cir. N.Y., 2018) 906 F.3rd 65.)
>
> However, handcuffs should not be used as a routine, absent some reason to believe that it is necessary. "The proliferation of cases in this court in which '***Terry***' stops involve handcuffs and ever-increasing wait times in police vehicles is disturbing, and we would caution law enforcement officers that the acceptability of handcuffs in some cases does not signal that the restraint is not a significant consideration in determining the nature of the stop." (***Ramos v. City of Chicago*** (7th Cir. 2013) 716 F.3rd 1013].)
>
> Despite being forcibly pulled out from behind some boxes and then handcuffed, the subsequent un-handcuffing of the defendant and telling him he was not under arrest and was free to go, resulted in the obtaining of incriminating statements that were held to be admissible despite the lack of a ***Miranda*** admonishment and waiver. No custody. (***United States v. Treanton*** (8th Cir. 2023) 57 F.4th 638.)

Putting into a patrol car: ***People v. Natale*** (1978) 77 Cal.App.3rd 568; ***United States v. Parr*** (9th Cir. 1988) 843 F.2nd 1228.

Non-Consensual Transportation Exceptions: The Courts have found exceptions to the "*detention + transportation = arrest*" rule when the following might apply: "(T)he police may move a suspect without exceeding the bounds of an investigative detention when it is a reasonable means of achieving the legitimate goals of the detention 'given the specific circumstances' of the case." (***United States v. Charley*** (9th Cir. 2005) 396 F.3rd 1074, 1080.)

> In ***Charley***, the defendant had just murdered her three children and, after calling police from another location, encouraged law enforcement to go with her to check on their welfare without specifically telling the officer what she had done. She was also told that she was not under arrest, and was transported without handcuffs. (***United States v. Charley***, *supra*, at pp. 1077-1082.)
>
> "(T)he police may move a suspect from the location of the initial stop without converting the stop into an arrest when it is necessary for safety or security reasons." (***United States v. Ricardo D.*** (9th

Cir. 1990) 912 F.2nd 337, 340; citing ***Florida v. Royer*** (1983) 460 U.S. 491, 504-505 [103 S.Ct. 1319; 75 L.Ed.2nd 229, 241-242].)

Non-consensual transportation necessary to continue the detention out of the presence of a gathering, hostile crowd, held to be lawful under the circumstances. (***People v. Courtney*** (1970) 11 Cal.App.3rd 1185, 1191-1192.)

See also ***Michigan v. Summers*** (1981) 452 U.S. 692, 702, fn. 16 [101 S.Ct. 2587; 69 L.Ed.2nd 340, 349], where it was held that moving the detained suspect from the walkway in front of his home into the house, where he was held while the house was searched pursuant to a search warrant, was not considered constitutionally significant.

But see ***Bailey v. United States*** (2013) 568 U.S. 186, 192-202 [133 S.Ct. 1031, 1037-1043; 185 L.Ed.2nd 19], restricting such detentions to occupants who are still in the "immediate vicinity" of the residence being searched. The detention of an occupant who had just left the residence, and was already about a mile away, held to be illegal, at least under the rule of ***Summers***.

Temporarily handcuffing a smuggling suspect stopped at the International Border where escape routes were close by, particularly when the subject is told that he is not under arrest and that the handcuffs were merely for everyone's safety and would be removed momentarily, and then walking him to a security office about 30 to 40 yards (***United States v. Bravo*** (9th Cir. 2002) 295 F.3rd 1002.) or 35 feet (***United States v. Zaragoza*** (9th Cir. 2002) 295 F.3rd 1025.) away, is reasonable and does not convert a detention into an arrest. (See also ***United States v. Hernandez*** (9th Cir. 2002) 314 F.3rd 430.)

An individual is not arrested but merely detained when, at the border, he is asked to exit his vehicle, briefly handcuffed while escorted to the security office, uncuffed, patted down, and required to wait in a locked office while his vehicle is searched. (***United States v. Nava*** (9th Cir. 2004) 363 F.3rd 942.)

People v. Soun (1995) 34 Cal.App.4th 1499; defendants, removed from their vehicle at gunpoint, were forced to lie on the ground, handcuffed, put into police vehicles and transported three blocks to a safer location: Detention only, based upon the circumstances.

Gallegos v. City of Los Angeles (9th Cir. 2002) 308 F.3rd 987; where a 2-to-1 majority found that stopping a subject at gunpoint,

handcuffing him, and then transporting him back to the scene of a crime to see if the victim could identify him, a procedure which took 45 minutes to an hour, *was not* an arrest, but was no more than an "*investigative stop* (*that*) *worked as it should*."

Transporting defendant to the police station for questioning from the hospital, when he was not handcuffed nor patted down for weapons prior to entering the patrol car, and where defendant did not object, held not to be "custody" for purposes of ***Miranda***. (***People v. Kopatz*** (2015) 61 Cal.4th 62, 80-81.)

The transportation of a criminal suspect to the police station for questioning will likely convert the contact to an arrest (See "*Transporting a Detainee*," under "*Detentions vs. Arrests*," above). However, where the subject is asked to voluntarily accompany the officers to the station for an interview, he is told he is not under arrest and that the proposed interview is voluntary, that he could stop the questioning at any time, no handcuffs were used, and he is in fact driven home after the interview, it was held that the defendant was neither under arrest nor even detained. (***People v. Zaragoza*** (2016) 1 Cal.5th 21, 56-57.)

Additional Case Law:

United States v. Meza-Corrales (9th Cir. 1999) 183 F.3rd 1116; "(W)e allow intrusive and aggressive police conduct (handcuffing, in this case) without deeming it an arrest in those circumstances when it is a reasonable response to legitimate safety concerns on the part of the investigating officers."

United States v. Rousseau (9th Cir. 2001) 257 F.3rd 925, where it was held that using firearms and handcuffs did not convert a detention into an arrest when the use of force was necessitated by the potential danger to the officers.

Haynie v. County of Los Angeles (9th Cir. 2003) 339 F.3rd 1071: Handcuffing and putting an uncooperative suspect in the backseat of a patrol car while the officer checked the vehicle for weapons held *not* to be an arrest. "A brief, although complete, restriction of liberty, such as handcuffing (and, in this case, putting into a patrol car), during a ***Terry*** stop is not a de facto arrest, if not excessive under the circumstances." (***Id***., at p. 1077.)

Referring to ***Terry v. Ohio*** (1968) 392 U.S. 1 [88 S.Ct. 1868; 20 L.Ed.2nd 889].

Stopping two suspects suspected of committing felony drug offenses, with the officers displaying their firearms, handcuffing the suspects, and making them sit on the ground while a two-minute check of their house for additional suspects, did not convert what was intended to be a detention into an arrest. (***People v. Celis*** (2004) 33 Cal.4th 667, 673-676.)

> The California Supreme Court in ***Celis*** noted the below listed important factors to consider:
>
> - Whether the police diligently pursued a means of investigation reasonably designed to dispel or confirm their suspicions quickly, using the least intrusive means reasonably available under the circumstances.
>
> - The brevity of the invasion of the individual's **Fourth Amendment** interests.

Information that defendant had threatened a victim with a firearm and was presently sitting in a described vehicle justified a "*felony stop*," pulling the defendant and other occupants out of the car at gun point and making him lay on the ground until the car could be checked for weapons. Given the officers' safety issues, such a procedure amounted to no more than a detention. (***People v. Dolly*** (2007) 40 Cal.4th 458.)

"Generally, handcuffing a suspect during a detention (without converting the contact into a de facto arrest) has only been sanctioned in cases where the police officer has a reasonable basis for believing the suspect poses a present physical threat or might flee." (***People v. Stier*** (2008) 168 Cal.App.4th 21, 27.)

> Circumstances listed by the ***Stier*** court (at pp. 27-28) where handcuffing has been found to be reasonably necessary for a detention include when:
>
> - The suspect is uncooperative.
> - The officer has information the suspect is currently armed.
> - The officer has information the suspect is about to commit a violent crime.
> - The detention closely follows a violent crime by a person matching the suspect's description and/or vehicle.
> - The suspect acts in a manner raising a reasonable possibility of danger or flight.
> - The suspects outnumber the officers.

Handcuffing a detained suspect based upon defendant's size (6 foot, 250 pounds), the fact that he was "real nervous," and because he began to

tense up as if he were about to resist, handcuffing him was held to be reasonable. (***People v. Osborne*** (2009) 175 Cal.App.4th 1052, 1062.)

Confronting three people in the early morning hours, where one (defendant) had an "attitude," and another was carrying a knife on his belt in an open sheath, was sufficient cause to detain the three subjects and to initiate a patdown of the one with the knife. "A consensual encounter may turn into a lawful detention when an individual's actions give the appearance of potential danger to the officer." (***People v. Mendoza*** (2011) 52 Cal.4th 1056, 1081-1082.)

Telling a person that he is not under arrest *may not* be enough by itself to negate what is otherwise an arrest (See ***United States v. Lee*** (9th Cir. 1982) 699 F.2nd 466, 467.). But even if it is not, it is at least a factor to consider when considering the "*totality of the circumstances*." (***United States v. Bravo*** (9th Cir. 2002) 295 F.3rd 1002, 1011.)

An officer was held not to be entitled to qualified immunity from **Fourth Amendment** claims in a federal civil rights lawsuit arriving out of a detention of individuals during an investigation of a completed misdemeanor because there was no likelihood for repeated danger and there was a dispute as to whether it was reasonable to threaten to use a Taser under the circumstances. (***Johnson v. Bay Area Rapid Transit Dist.*** (9th Cir. 2013) 724 F.3rd 1159, 1168-1170.)

With information that defendant had threatened another person, and that he was armed, detaining him at gunpoint, making him lie on the ground and handcuffing him before checking him for weapons, was lawful and not a "de facto arrest." (***People v. Turner*** (2013) 219 Cal.App.4th 151, 162-164.)

Stopping defendant at gunpoint, having him kneel on the ground, and then handcuffing him, held to be a detention only in that the officers were investigating a report (anonymous, nonetheless) of someone, who matched defendant's description, shooting at vehicles. (***United States v. Edwards*** (9th Cir. 2014) 761 F.3rd 977, 981-982.)

"If a police officer knows an individual is on **PRCS**, he may lawfully detain that person for the purpose of searching him or her, so long as the detention and search are not arbitrary, capricious or harassing." (***People v. Douglas*** (2015) 240 Cal.App.4th 855, 863.)

See "***Post-Release Community Supervision Act of 2011***," under "***Fourth*** *Waiver Searches*" (Chapter 19), below.

Repeatedly attempting to access a crime scene after being told by an officer to stop and where the officer testified to his experience with individuals attempting to illegally obtain possession of abandoned vehicles during a police investigation, and where defendant gestured with his arms toward the officer while keeping his hands in his pockets while being told to take his hand out of his pockets, the court held that the combination of these facts established a reasonable suspicion to believe that defendant was involved in criminal activity, justifying his detention. (***United States v. Reddick*** (8th Cir. AR 2018) 910 F.3rd 358; patting him down for weapons was also upheld under these circumstances.)

"Generally, whether a consensual encounter escalates into a seizure depends on the totality of the circumstances surrounding the encounter. (**United States v.**) ***Brown*** (9th Cir. 221) 996 F.3rd (998) at 1005; *accord* ***United States v. Mendenhall***, 446 U.S. 544, 557-58, 100 S.Ct. 1870, 64 L.Ed.2nd 497 (1980) ('[A] person has been "seized" within the meaning of the **Fourth Amendment** only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.')." (***United States v. Estrella*** (9th Cir. 2023) 69 F.4th 958, 965, fn. 5.)

Miranda*; Custody:*

Rule: "*Custody*" for purposes of ***Miranda v. Arizona*** (1966) 384 U.S. 436, 445 [86 S.Ct. 1602; 16 L.Ed.2nd 694, 708].), under the **Fifth Amendment**, involves a different analysis than "custody" for purposes of a detention or arrest under the **Fourth Amendment**. "In contrast (to **Fourth Amendment** search and seizure issues, where the reasonableness of the officer's actions under the circumstances is the issue), **Fifth Amendment** ***Miranda*** custody claims do not examine the reasonableness of the officer's conduct, but instead examine whether a reasonable person (in the defendant's position) would conclude the restraints used by police were tantamount to a formal arrest." (***People v. Pilster*** (2006) 138 Cal.App.4th 1395, 1406.)

Case law:

Transporting defendant to the police station for questioning from the hospital, when he was not handcuffed nor patted down for weapons prior to entering the patrol car, and where defendant did not object, held not to be "custody" for purposes of ***Miranda***. (***People v. Kopatz*** (2015) 61 Cal.4th 62, 80-81.)

The fact that "custody" for purposes of the **Fifth Amendment** involves a different analysis than does custody for purposes of the **Fourth Amendment** has been recognized in by other federal

circuits as well. (See ***United States v. Sullivan*** (4th Cir. 1998) 138 F.3rd 126, 131; ***United States v. Smith*** (7th Cir. 1993) 3 F.3rd 1088, 1097.)

"'Whether an individual has been unreasonably seized for **Fourth Amendment** purposes and whether that individual is in custody for ***Miranda*** purposes are two different issues. [Citation.]'" ***(People v. Bejasa*** (2012) 205 Cal.App.4th 26, 38' quoting ***People v. Pilster***, supra, at p. 1405.)

"***Reasonable Suspicion***;" *Defined*: Less than "*probable cause*," but more than no evidence (i.e., a "*hunch*.") at all.

Defined: "*Reasonable suspicion*" is information which is sufficient to cause a reasonable law enforcement officer, taking into account his or her training and experience, to *reasonably believe* that the person to be detained is, was, or is about to be, involved in criminal activity. The officer must be able to articulate more than an "*inchoate and unparticularized suspicion or* '*hunch*' *of criminal activity*." (***Terry v. Ohio*** (1968) 392 U.S. 1, 27 [88 S.Ct. 1868; 20 L.Ed.2nd 889, 909].)

Note: "*Hunch*:" is defined as the inability to articulate reasons behind the belief. See "*A Hunch*," below.

"(O)fficers need only 'reasonable suspicion'—that is, 'a particularized and objective basis for suspecting the particular person stopped' of breaking the law." (***Heien v. North Carolina*** (2014) 574 U.S. 54, 60 [135 S.Ct. 530; 190 L.Ed.2nd 475, 482]; quoting ***Navarette v. California*** (2014) 572 U.S. 393, 396 [134 S.Ct. 1683; 188 L.Ed.2nd 680].)

Case Law:

See also ***People v. Corrales*** (2013) 213 Cal.App.4th 696, 699; a "reasonable suspicion," sufficient to justify a traffic stop, is less than "probable cause."

"(A)lthough facts, standing alone, can be 'innocent in the eyes of the untrained,' they 'may carry entirely different messages to the experienced or trained observer.'" (***Wheatcroft v. City of Glendale*** (U.S. Dist. AZ, 2022) 2022 U.S. Dist. LEXIS 57006; quoting ***Ramirez v. City of Buena Park*** (9th Cir. 2009) 560 F.3rd 1012, 1021.)

An officer's "*training and experience*" is not limited to on-the-job law enforcement experience, but includes the officer's everyday common sense. Nor is an officer required to point to "specific training materials or field experiences (in" justifying reasonable suspicion." (***Kansas v. Glover***

(Apr. 6, 2020) __ U.S. __, __ [140 S.Ct. 1183; 206 L.Ed.2nd 412]; noting that the Court was "in no way minimiz(ing) the significant role that specialized training and experience routinely play in law enforcement investigations." (***Id***., at p. __.)

"Because the 'balance between the public interest and the individual's right to personal security,' [Citation] tilts in favor of a standard less than probable cause in such cases, the **Fourth Amendment** is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity '"may be afoot,"' (***United States v. Sokolow*** (1989) 490 U.S. 1, 7 [109 S.Ct. 1581; 104 L.Ed.2nd 1, 10]; quoting ***Terry v. Ohio***, *supra*, at p. 30 [88 S.Ct. 1868; 20 L.Ed.2nd at p. 911]; see also ***People v. Osborne*** (2009) 175 Cal.App.4th 1052, 1058.)

The "*reasonable suspicion*" standard is "not a particularly demanding one, but is, instead, 'considerably less than proof of wrongdoing by a preponderance of the evidence,'" (***People v. Letner and Tobin*** (2010) 50 Cal.4th 99, 146; quoting ***United States v. Sokolow*** (1989) 490 U.S. 1, 7 [109 S.Ct. 1581; 104 L.Ed. 2nd 1]; ***United States v. Valdes-Vega*** (9th Cir. 2013) 738 F.3rd 1074, 1078.)

> "In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." (***Ibid***., quoting ***Illinois v. Wardlow*** (2000) 528 U.S. 119, 124–125 [120 S.Ct. 673; 145 L. Ed. 2nd 570].)
>
> In ***People v. Letner and Tobin***, *supra*, a majority of the Supreme Court found that the unexplained driving at 40 mph in a 55 mph zone, indicating a possible DUI driver, particularly when combined with the officer's suspicions that the car might be stolen when there were water beads on it from a storm some hours earlier, indicating that it had not been driven far, and when found in an area known for its many thefts from the nearby car lots, justified an investigative traffic stop.
>
> "The reasonable-suspicion standard is not a particularly high threshold to reach. 'Although . . . a mere hunch is insufficient to justify a (traffic) stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.'" (***United States v. Valdes-Vega***, *supra*, at p. 1078,

quoting ***United States v. Arvizu*** (2002) 534 U.S. 266, 278 [122 S.Ct. 744; 151 L.Ed.2nd 740].)

> Further, "(r)easonable suspicion is a 'commonsense, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" (***Id***, quoting ***Ornelas v. United States*** (1996) 517 U.S. 690, 699 [116 S.Ct. 1657; 134 L.Ed.2nd 911].)

"The 'reasonable suspicion' necessary to justify such a (traffic) stop 'is dependent upon both the content of information possessed by police and its degree of reliability.' [Citation] The standard takes into account 'the totality of the circumstances—the whole picture.' [Citation] Although a mere 'hunch' does not create reasonable suspicion, [Citation], the level of suspicion the standard requires is 'considerably less than proof of wrongdoing by a preponderance of the evidence,' and 'obviously less' than is necessary for probable cause. [Citation]" (***Navarette v. California*** (2014) 572 U.S. 393, 396-397 [134 S.Ct. 1683, 1688; 188 L.Ed.2nd 680].)

> However, "(r)easonable suspicion depends on 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" (***Id.***, 134 S.Ct. at p. 1690; citing ***Ornelas v. United States*** (1996) 517 U.S. 690, 696 [116 S.Ct. 1657; 134 L.Ed.2nd 911]; and ruling that the single act of running another vehicle off the road, as reported by the victim, was sufficient to cause a reasonable officer to believe that the defendant was driving while under the influence of alcohol.)

"Reasonable suspicion is a lesser standard than probable cause and can arise from less reliable information than that required for probable cause." (***People v. Espino*** (2016) 247 Cal.App.4th 746, 757; citing ***People v. Wells*** (2006) 38 Cal.4th 1078, 1083.)

Observing defendant parked in a van next to a convenience store at night, in the shadows where other marked parking stalls were available, and even with the knowledge of prior thefts from that store where getaway cars would commonly park in such a position, was not enough to justify a reasonable suspicion sufficient to justify a detention of the defendant in that van. (***People v. Casares*** (2016) 62 Cal.4th 808, 837-838; holding that the results of a patdown search of his person, and a consensual search of the van, should have been suppressed.)

The district court was held to have properly denied defendant's motion to suppress narcotics that Border Patrol agents found in defendant's vehicle because the agents, who had a particularized and objective basis for

suspecting defendant was engaged in criminal activity, had sufficient reasonable suspicion to stop defendant's vehicle. (**United States *v.* Raygoza-Garcia** (9th Cir. 2018) 902 F.3rd 994, 999-1001.)

Note: Evidence of "*unproductive stops*" by Border Patrol agents in the same area, or stops from which no federal prosecutions arose, did not constitute facts that were "not subject to reasonable dispute," and thus (under Fed. R. Evid. 201(b)) were not the proper subject for a trial court to take "*judicial notice*." (***Id.***, at pp. 1001-1002.)

"The line between a mere hunch and a reasonable suspicion based on articulable facts can be a fine one, but such a line does exist." (**People v. Ovieda** (2019) 7 Cal.5th 1034, 1047.)

"Ignorance of a fact, without more, does not raise a suspicion of its existence." (***Ibid***; quoting from the dissenting opinion in the reversed decision reached by the lower appellate court; ***People v. Ovieda*** (2018) 19 Cal.App.5th 614, 629; review granted.)

See "*Articulable Objective Suspicion*," below.

Detention of a Victim or Witness:

General Rule:

While a victim or witness, as a general rule, may not be detained or forced to cooperate in a police investigation, it is argued by some that when the governmental need is strong and the intrusion upon the victim or witness is minimal, a temporary stop or detention of the victim or witness *may* be justifiable. (See ***Illinois v. Lidster*** (2004) 540 U.S. 419 [124 S.Ct. 885; 157 L.Ed.2nd 843]; vehicle check point used to locate witnesses to a previous fatal hit and run.)

Case Law:

A traffic stop of a witness absent evidence that he himself is involved in criminal activity, is illegal. Because defendant's stop was for "generalized criminal inquiry," it was illegal. (***United States v. Ward*** (9th Cir. 1973) 488 F.2nd 162, 168-170.)

It is a "settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." (***Davis v. Mississippi*** (1969) 394 U.S. 721, 727, fn. 6 [89 S.Ct. 1394; 22 L.Ed.2nd 676].)

Detaining potential witnesses to a murder for some five hours pending being interviewed, particularly when using force, held to be an illegal *arrest* done without probable cause. (***Maxwell v. County of San Diego*** (9th Cir. 2013) 708 F.3rd 1075, 1082-1086.)

Potential civil liability was held to exist where officers forced witnesses (for whom there was no evidence that they might be co-suspects) to a stabbing to come to the police station for questioning instead of going to the hospital where the victim (a relative of each of the witnesses) had been taken. The Court held that the trial court had correctly held that the defendant police officers were not entitled to qualified immunity. (***Davis v. Dawson*** (8th Cir. 2022) 33 F.4th 993.)

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Exceptions:

"It appears the police are justified in stopping witnesses only where exigent circumstances are present, such as where a crime has recently been reported." (***Metzker v. State*** (AK. 1990) 797 P.2nd 1219.)

In deciding whether detaining a victim or witness was reasonable, a court must looks to "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." (***Brown v. Texas*** (1979) 433 U.S. 47, 51 [99 S.Ct. 2637; 61 L.Ed.2nd 357].)

As a general rule, a witness to crime may not be stopped and detained in any way, or frisked, and he may refuse to cooperate if he so chooses. A brief detention, however, may be reasonable depending upon the importance of the Government's interest. "At a minimum, officers had a right to identify witnesses to the shooting, to obtain the names and addresses of such witnesses, and to ascertain whether they were willing to speak voluntarily with the officers." (***Walker v. City of Orem*** (10th Cir. 2006) 451 F.3rd 1139, 1148-1149; 90 minute detention held to be excessive.)

It is arguably lawful to stop and detain a witness for the purpose serving him with a subpoena, at least if there is evidence that the witness has been

ducking the service of such a subpoena (which, is in itself, a criminal violation; e.g., **P.C. §§ 136.1(a)**, **166(a)(4), (5)**, both of which are misdemeanors, and **Cal. Civil Code § 1209(8)**). (See ***Duncan v. County of Sacramento*** (2008 E.D.) 2008 U.S. Dist. LEXIS 13814; see also *People v. Lewis* (2015) 2015 Cal.App. Unpub. LEXIS 4038, unpublished.)

An occupant of a house being subjected to a search pursuant to a *search warrant* may be detained during the search (1) in order to prevent flight, (2) to minimize the risk of harm to the officers, and (3) to facilitate an orderly search through cooperation of the residents. (***Michigan v. Summers*** (1981) 452 U.S. 692, 702-703 [101 S.Ct. 2587; 69 L.Ed.2nd 340, 349-350].)

> But see ***Bailey v. United States*** (2013) 568 U.S. 186, 192-202 [133 S.Ct. 1031, 1037-1043; 185 L.Ed.2nd 19], restricting such detentions to occupants who are still in the "immediate vicinity" of the residence being searched. The detention of an occupant who had just left the residence, and was already about a mile away, held to be illegal, at least under the rule of ***Summers***.
>
> Also, the rule of ***Summers*** cannot be used as an excuse for the mass detention and interrogation of suspected illegal aliens at a factory when the ruse used to gain access to the factory and the suspects was a search warrant for employment documents. (***Cruz v. Barr*** (9th Cir. 2019) 926 F.3rd 1128.)

Securing a home from the outside, detaining the occupant on his own porch pending the obtaining of a warrant, was upheld by the United States Supreme Court. (***Illinois v. McArthur*** (2001) 531 U.S. 326 [121 S.Ct. 946; 148 L.Ed.2nd 838].)

> Such a "securing" of a house, however, is in fact a **Fourth Amendment** seizure. (***United States v. Shrum*** (10th Cir. KS 2018) 908 F.3rd 1219.)

During the execution of a search warrant, until the rest of the house is checked for the suspects, other occupants may be detained. (***Los Angeles County v. Rettele*** (2007) 550 U.S. 609 [127 S.Ct. 1989; 167 L.Ed.2nd 974].)

See "*Detention of Residents* (*or Non-Resident*) *During the Execution of a Search Warrant*," and "*During Execution of a Search or Arrest Warrant, or During a* ***Fourth*** *Waiver Search*," below.

Note: No case law yet upholds more than just a minimal detention, nor the transportation, of a victim or witness without that person's consent.

Television shows depicting non-consenting victims or witnesses being transported to a police station for questioning are clearly inaccurate.

Immunity Situations:

Where a Court Marshal "shoved" the disruptive plaintiff out of a courtroom upon the order of the judge, the marshal was held *not* to be entitled to absolute immunity when sued for using excessive force. However, the marshal was entitled to *qualified immunity* from civil liability where a reasonable marshal under the circumstances could have believed that the **Fourth Amendment** permitted him to use the amount of force the plaintiff claimed the marshal used. (***Brooks v. Clark County*** (9th Cir. 2016) 828 F.3rd 910.)

Prosecutors may enjoy absolute immunity from civil liability so long as the forced detention of a victim, done for the purpose of interviewing her, is considered to be "advocacy conduct that is intimately associated with the judicial phase of the criminal process." (***Giraldo v. Kessler*** (2nd Cir. 2012) 684 F.3rd 161.)

Articulable Objective Suspicion: A detention, even if brief, is a sufficiently significant restraint on personal liberty to require "*objective justification*." (***Florida v. Royer*** (1983) 460 U.S. 491, 498 [103 S.Ct. 1319; 75 L.Ed.2nd 229, 236-237].)

"Reasonable suspicion requires specific, articulable facts which, together with objective and reasonable inferences, form a basis for suspecting that a particular person is engaged in criminal conduct. (Citations) An officer is entitled to rely on his training and experience in drawing inferences from the facts he observes, but those inferences must also be grounded in objective facts and be capable of rational explanation. (Citation)" (Internal quotation marks and citations omitted; ***People v. Nice*** (2016) 247 Cal.App.4th 928, 937: see also ***People v. Holiman*** (2022) 76 Cal.App.5th 825, 831.)

Note: Reasons which an officer feels give him or her reasonable suspicion to detain *must be articulated*, in detail, in an arrest report and later recounted in courtroom testimony.

An officer's inability to articulate those suspicious factors that give rise to the need to stop and detain a suspect is one of the more common causes of detentions being found to be illegal.

A prosecutor's failure to elicit a thorough description of all the suspicious factors by asking the right questions is another common cause.

> "(A)lthough facts, standing alone, can be 'innocent in the eyes of the untrained,' they 'may carry entirely different messages to the experienced or trained observer.'" (***Wheatcroft v. City of Glendale*** (U.S. Dist. AZ, 2022) 2022 U.S. Dist. LEXIS 57006; quoting ***Ramirez v. City of Buena Park*** (9th Cir. 2009) 560 F.3rd 1012, 1021.)

"If the detaining officer's justification for a traffic stop is based on a mistake—either factual *or* legal—then the resulting search or seizure may still be lawful under the **Fourth Amendment** as long as the officer's mistake is *objectively reasonable*. (Citation.) "To be reasonable is not to be perfect, and so the **Fourth Amendment** allows for some mistakes on the part of government officials, giving them "fair leeway for enforcing the law in the community's protection.'" (Citation.) At the same time, 'an officer can gain no **Fourth Amendment** advantage through a sloppy study of the laws he is duty-bound to enforce.'" (***People v. Holiman*** (2022) 76 Cal.App.5th 825, 831, citing and quoting **Heien *v.* North Carolina** (2014) 574 U.S. 54, 57, 60-61, 67 [135 S.Ct. 530; 190 L.Ed.2nd 475].)

> In ***Holiman***, the Court determined that the officer's mistake in her interpretation of **V.C. §§ 22107** & **22108** (signaling for the last 100 feet before turning when another car is affected thereby) was not reasonable; i.e., she believing that her patrol car, being behind defendant's was "affected" thereby. Thus, the subsequent traffic stop was illegal in that **V.C. §§ 22107/22108** was not violated, and the resulting contraband found in defendant's car should have been suppressed.

A "*Hunch*:" An officer's decision to detain cannot be predicated upon a mere "*hunch*," but must be based upon articulable facts describing suspicious behavior which would distinguish the defendant from an ordinary, law-abiding citizen. (***Terry v. Ohio*** (1968) 392 U.S. 1, 27 [88 S.Ct. 1868; 20 L.Ed.2nd 889, 909]; ***People v. Nice*** (2016) 247 Cal.App.4th 928, 937; ***United States v. Williams*** (9th Cir. 2017) 846 F.3rd 303, 308.)

> "A *hunch* may provide the basis for solid police work; it may trigger an investigation that uncovers facts that establish reasonable suspicion, probable cause, or even grounds for a conviction. A hunch, however, is not a substitute for the necessary specific, articulable facts required to justify a **Fourth Amendment** intrusion." (Italics added; ***People v. Pitts*** (2004) 117 Cal.App.4th 881, 889; quoting ***United States v. Thomas*** (9th Cir. 2000) 211 F.3rd 1186, 1192.)

A stop and detention based upon stale information concerning a threat, which itself was of questionable veracity, and with little if anything in the way of suspicious circumstances to connect the persons stopped to that threat, is illegal. (***People v. Durazo*** (2004) 124 Cal.App.4th 728: Threat was purportedly from Mexican gang members, and defendant was a Mexican male who (with his passenger) glanced at the victim's apartment as he drove by four days later where

the officer admittedly was acting on his "*gut feeling*" that defendant was involved.)

Seemingly innocuous behavior does not justify a detention of suspected illegal aliens unless accompanied by some particularized conduct that corroborates the officer's suspicions. (***United States v. Manzo-Jurado*** (9th Cir. 2006) 457 F.3rd 928; standing around in their own group, conversing in Spanish, watching a high school football game.)

Observing defendant sitting in a parked motor vehicle late at night near the exit to a 7-Eleven store parking lot, with the engine running, despite prior knowledge of a string of recent robberies at 7-Elevens, held to be not sufficient to justify a detention and patdown. (***People v. Perrusquia*** (2007) 150 Cal.App.4th 228.)

However, "the possibility of innocent explanations for the factors relied upon by a police officer does not necessarily preclude the possibility of a reasonable suspicion of criminal activity. (***People v. Letner and Tobin*** (2010) 50 Cal. 4th 99, 146; quoting ***United States v. Arvizu*** (2002) 534 U.S. 266, 274 [122 S.Ct. 744; 151 L. Ed. 2nd 740]; ***Navarette v. California*** (2014) 572 U.S. 393, 403 [134 S.Ct. 1683, 1688; 188 L.Ed.2nd 680]; also quoting ***United States v. Arvizu***, *supra*, at p. 277.)

Detaining defendant, who was 5'10" tall, well-groomed, medium to dark-complected, with a mustache and slight goatee, based upon his alleged similarity to a suspect who was described as 6'1" tall, unkempt, light-complected, and with no facial hair, held to be insufficient to justify a reasonable suspicion. The fact that the suspected crime occurred at the same location a week earlier, and that the area was known as a high crime area, added nothing. (***People v. Walker*** (2012) 210 Cal.App.4th 1372, 1381-1393.)

"[A]n investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith." (***People v. Wells*** (2006) 38 Cal.4th 1078, 1083; ***People v. Espino*** (2016) 247 Cal.App.4th 746, 757.)

> See also ***People v. Kidd*** (2019) 36 Cal.App.5th 12, 23: "We do not suggest the officer here acted in bad faith, but we find his detention of Kidd in the absence of any reasonable suspicion of wrongdoing to be deliberate, in the sense that it was not accidental or negligent conduct."

"(F)actors that would apply to a vast number of drivers and the law-abiding population. . . . (which would) include conduct that is innocent or innocuous on its own or when looked at in isolation," does not supply the necessary reasonable suspicion. "(T)o establish reasonable suspicion, an officer cannot rely solely on generalizations that, if accepted, would cast suspicion on large segments of the law-abiding population." (***United States v. Raygoza-Garcia*** (9th Cir. 2018) 902

F.3rd 994, 1000; quoting ***United States v. Manzo-Jurado*** (9th Cir. 2006) 457 F.3rd 928, 935.)

> But see concurring opinion in ***Raygoza-Garcia***, at pp. 1002-1004, criticizing what the justices consider to be putting too much emphasis on otherwise innocent behavior in establishing a reasonable suspicion of criminal activity.

"(I)n determining whether the officer acted reasonably, due weight must be given not to his unparticularized suspicions or 'hunches,' but to the reasonable inferences which he is entitled to draw from the facts in the light of his experience; in other words, he must be able to point to specific and articulable facts from which he concluded that his action was necessary." (***People v. Ovieda*** (2019) 7 Cal.5th 1034, 1043.)

The Totality of the Circumstances: The legality of a detention will be determined by considering the "*totality of the circumstances*." (***United States v. Arvizu*** (2002) 534 U.S. 266, 273 [122 S.Ct. 744; 151 L.Ed.2nd 740, 749]; see also ***People v. Dolly*** (2007) 40 Cal.4th 458; ***People v. Turner*** (2013) 219 Cal.App.4th 151, 160-161; ***United States v. Brown*** (9th Cir. 2021) 996 F.3rd 998, 1006; ***People v. Esparza*** (2023) 95 Cal.App.5th 1084, 1087, 1091, 1092.)

"All relevant factors must be considered in the reasonable suspicion calculus—even those factors that, in a different context, might be entirely innocuous." (***United States v. Fernandez-Castillo*** (9th Cir. 2003) 324 F.3rd 1114, 1124, citing ***United States v. Arvizu***, *supra*, at pp. 277-278. See also ***United States v. Valdes-Vega*** (9th Cir. 2013) 738 F.3rd 1074, 1078-1079.)

> "'This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person. (Citations) It also precludes a "*divide-and-conquer analysis*" because even though each of the suspect's "acts was perhaps innocent in itself . . . taken together, they [may] warrant further investigation."' 'A determination that reasonable suspicion exits . . . need not rule out the possibility of innocent conduct.'" (***United States v. Valdes-Vega***, *supra*.)
>
> But see concurring opinion in **United States *v.* Raygoza-Garcia** (9th Cir. 2018) 902 F.3rd 994, at pp. 1002-1004, criticizing what the justices consider to be putting too much emphasis on otherwise innocent behavior in establishing a reasonable suspicion of criminal activity.

The lawfulness of a detention is determined by balancing the public interest with the individual's right to personal security and the right to be free from arbitrary

interference by law enforcement officers. (***People v. Turner*** (2013) 219 Cal.App.4th 151, 161-162.)

A detention prolonging a lawful traffic stop was held to be lawful where the officer (1) had prior information suggesting that defendant may not have been in compliance with **Penal Code section 290's** registration requirements, (2) was aware that a confidential informant had information suggesting defendant may have been involved in selling drugs and guns, and (3) a civilian ride along had observed defendant making a furtive movement as the stop was being made. (***People v. Espino*** (2016) 247 Cal.App.4th 746, 755-765.)

With police officers who had information from a telephone tipster who fully identified himself, including his phone number and address, and who described current on-going criminal activity (i.e., a trespass), while also indicating some knowledge of other more serious wrongdoing by the person described (i.e., selling drugs in the area), when the area itself was known by the officers to be a "high crime area," it was held that the officers would have been remiss had they not at least checked the parking lot for the described vehicle and suspect. Upon arrival in the area, the described vehicle, with defendant sleeping inside, was exactly as the telephone tipster had indicated. Upon contacting defendant, his immediate actions added to the officers' suspicions; i.e., looking around furtively and attempting to drive away. Upon contacting him, defendant attempted to flee on foot. With all this, the officers were held to have more than enough reasonable suspicion to detain defendant for investigation. (***United States v. Williams*** (9th Cir. 2017) 846 F.3rd 303, 308-310.)

The officer had sufficient reasonable suspicion to stop and detain defendant where (1) the officer arrived within two-minutes of receiving the message from the 911 operator at a location known for criminal activity, (2) the officer saw a relatively short man wearing long sleeves, clothing that stood out from what others were wearing and which most closely matched the 911 caller's description, (3) the officer knew that defendant was a convicted felon who did not live at the apartment complex, and (4) defendant reacted by attempting to evade the officer. While the 911 caller's information did not match exactly with what the officer saw upon arriving, the court noted that reasonable suspicion to justify a ***Terry*** stop does not require "perfection." (***United States v. Adair*** (7th Cir. IL 2019) 925 F.3rd 931.)

In evaluating the presence of a reasonable suspicion, while determining the legality of a detention and a patdown for weapons, a court is not to "focus on what was missing from this encounter, nor can (the court) isolate each component in analyzing a ***Terry*** stop; instead, (the court is to) evaluate the factors that *were* present, as part of the whole picture, to decide whether they gave rise to reasonable suspicion." (Italics in original; ***People v. Esparza*** (2023) 95 Cal.App.5th 1084, 1091, rejecting defendant's attempt to "pick these factors (see below) apart," as the Court rejected the defendant's argument that the court

should consider "his calm conduct and agreeable demeanor during the traffic stop, plus the absence of any contraband in the car immediately visible to the officers."

> In ***Esparza***, the Court found the following factors to be relevant to a determination that there was sufficient reasonable suspicion to justify patting defendant down for weapons: I.e.: Defendant was "identified by a veteran gang detective as an established gang member who was driving a car with (at least) two other gang members. (fn. omitted) At the moment of the traffic stop, he was driving through contested territory claimed by both his gang and a rival group. Each of the gangs were known for violent activity. A ghost gun with a magazine of ammunition had just been found on one of his passengers. (fn. omitted) Given that 'consideration of the modes or patterns of operation of certain kinds of lawbreakers' is a permissible point of reference from which a 'trained officer [can] draw[ ] inferences and make[ ] deductions." (Pgs. 1091-1092.)

Furtive Actions:

In a two-to-one decision, the Ninth Circuit Court of Appeal held that the trial court properly denied defendant's motion to suppress gun evidence where defendant was the target of a police detention. The trial judge expressly found three facts. First, defendant saw police and tried to avoid contact with them by ducking down behind a parked car. Second, during defendant's ducking and crouching, defendant was "toying with his feet." Defendant did not freeze or remain still. Rather than remain motionless, defendant continued doing something with his hands. Defendant kept his hands out of the sight of the approaching officer, as noted on a police video camera. Third, as police at night approached in an obvious way with a "huge light" on him, defendant persisted in his odd crouch position for "far too long a period of time," failing to respond as one might expect him to. The combination of these facts did not establish defendant was in fact engaged in illegal drug activity, but the trial court was right that together the facts justified a reasonable suspicion ant a "***Terry*** stop." (***People v. Flores*** (2021) 60 Cal.App.5th 978, 988-990.)

> The dissent, after noting defendant's apparent Hispanic heritage, and interjecting current racial issues into it's argument, notes that the majority "ignores applicable law and the realities of twenty-first century America . . . (targeting) a person wary of police interaction, . . ." Further along, in criticizing the majority's finding relative to defendant's suspicious acts upon the approach of the officers: "Indeed, some even might instruct their children remaining still is a prudent course of action (and even then, it may not work. #BlackLivesMatter.) To hold otherwise ignores the deep-seated mistrust certain communities feel toward police and how that mistrust manifests in the behavior of people interacting with them." (Parenthesis in the original.) The dissent ends the discussion with the following: "The majority opinion narrows the options for those who want

to be judged 'normal' and hence beyond suspicion. They must stand erect and chat up the officers who approach them. Tell that to Eric Garner.", referencing a person who died at the hands of a New York P.D. patrol officer while being subjected to a chokehold while repeatedly complaining that he couldn't breathe. (***Id.***, 993-994.)

In a footnote (pg. 993, fn. 3), the dissent also makes reference to Ahmaud Marquez Arbery, a black man who was shot and killed by three white citizens as he was confronted while jogging through their neighborhood, but suspected by his assailants of burglarizing a garage as he did so.

Note: The three white defendants have since been convicted of Arbery's murder.

The Officer's Subjective Conclusions: Whether or not an officer has sufficient cause to detain someone will be evaluated by the courts on an "*objective*" basis; or how a reasonable person would evaluate the circumstances. The officer's own "*subjective*" conclusions are irrelevant. (***Whren v. United States*** (1996) 517 U.S. 806 [116 S.Ct. 1769; 135 L.Ed.2nd 89]; ***United States v. Magallon-Lopez*** (9th Cir. 2016) 817 F.3rd 671, 675.)

A Seizure: Although a detention is a "*seizure*" under the **Fourth Amendment** (***Terry v. Ohio***, *supra*, at p. 19, fn. 16 [88 S.Ct. 1868; 20 L.Ed.2nd at pp. 904-905].), it is allowed on less than probable cause because the intrusion is relatively minimal and is done for a valid and necessary investigative purpose.

Probable Cause vs. Reasonable Suspicion: The occasional inarticulate judicial references to the need to prove "*probable cause*" (e.g., see ***United States v. Willis*** (9th Cir. 2005) 431 F.3rd 709, 715, referring to the U.S. Supreme Court's ruling in ***Whren v. United States*** (1996) 517 U.S. 806 [116 S.Ct. 1769; 135 L.Ed.2nd 89].) was not intended to raise the standard of proof from one of needing only a "*reasonable suspicion*." (***United States v. Lopez*** (9th Cir. 2000) 205 F.3rd 1101-1104.)

See ***Ybarra v. Illinois*** (1979) 444 U.S. 85 [100 S.Ct. 338; 62 L.Ed.2nd 238], condemning the detention and patdown of *everyone* at the scene absent individualized evidence connecting each person so detained and patted down with the illegal activity being investigated.

Various Factors which, when taken individually or in combination, help contribute to justifying a detention.

In General: Such factors include, but are not limited to, the following (see above and below):

- Whether the suspect resembles a wanted person.

- The suspect is contacted in a wanted vehicle.
- The suspect appears intoxicated or injured.
- The suspect's suspicious actions.
- The suspect's erratic or evasive driving, or other suspicious actions.
- The officer's prior knowledge of criminal activity by the suspect.
- The suspect's demeanor and/or reaction to seeing the officer.
- The suspect's nervousness, belligerence, etc.
- The suspect's evasive replies to questions.
- The time of day.
- Criminal history of the area. (E.g., a "*high narcotics*" or "*crime area*.")
- The proximity to a recent, or a series of crimes.
- The officer's expertise, training and/or experience for the type of crime suspected.
- The suspect's actions consistent with common patterns for the type of crime suspected.
- Informant information.

A "*High Crime*" or "*High Narcotics*" *Area*:

Although being in a so-called "*high crime*" or "*high narcotics activity*" area is a factor to be considered (see ***People v. Moore*** (2021) 64 Cal.App.5th 291, 301); "(a)n 'officer's assertion that the location lay in a "*high crime*" area does not (by itself) elevate . . . facts into a reasonable suspicion of criminality. The "*high crime area*" factor is not an "*activity*" of an individual. Many citizens of this state are forced to live in areas that have "*high crime*" rates or they come to these areas to shop, work, play, transact business, or visit relatives or friends. The spectrum of legitimate human behavior occurs every day in so-called high crime areas. . . .'" (Italics added; ***People v. Pitts*** (2004) 117 Cal.App.4th 881, 887; quoting ***People v. Loewen*** (1983) 35 Cal.3rd 117, 124; and ***People v. Bower*** (1979) 24 Cal.3rd 638, 546; see also ***People v. Walker*** (2012) 210 Cal.App.4th 1372, 1390-1391.)

> "(T)he time and location of an encounter are insufficient by themselves to cast reasonable suspicion on an individual." (***People v. Medina*** (2003) 110 Cal.App.4th 171, 177; noting that neither the "*nighttime factor*" nor the "*high crime area factor*" are "*activities*" by a person sought to be detained.)

The mere presence in a high-crime area of a Samoan family, celebrating a birthday by barbequing and singing songs, cannot serve as the basis for detaining them, "because it merely 'cast[s] suspicion on entire categories of people without any individualized suspicion of the particular person to be stopped.'" (**Sialoi *v. City of* San Diego** (9th Cir. 2016) 823 F.3rd 1223,

1235; quoting ***United States v. Sigmond-Ballesteros*** (9th Cir. 2001) 285 F.3rd 1117, 1121.)

However, note that the United States Supreme Court has held that a subject's flight on foot from the police when it occurs in a so-called "*high narcotics area*" is sufficient in itself to justify a temporary detention (as well as a patdown for weapons). (***Illinois v. Wardlow*** (2000) 528 U.S. 119 [120 S.Ct. 673; 145 L.Ed.2nd 570]; see "*Flight*" under "*Consensual Encounters*" (Chapter 3), above.)

"Although '[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime,' police can consider the 'relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation'" (***United States v. Williams*** (9th Cir. 2017) 846 F.3rd 303, 309; quoting ***Illinois v. Wardlow***, *supra*, at p. 124.)

It was shown that there was a strong governmental interest (i.e., a "*special need*") in *responding to the sounds of gunfire and preventing violence* in a high crime area where recent shootings and homicides (six shooting and two homicides in that past three months) had occurred, thus constituting an "exigent circumstance." (***United States v. Curry*** (4th Cir. 2019) 937 F.3rd 363.)

Breaking down defendant's door and entering his home when he had refused to invite police in to investigate was *not* justified under the **Fourth Amendment**, even though someone had discharged a firearm outside the home in a high crime neighborhood, overruling the Court's prior decision in ***People v Rubio*** (2019) 37 Cal.App.4th 622, in light of the California Supreme Court decision of **People v. Ovieda** (2019) 7 Cal.5th 1034, 1049.). The *emergency aid exception* does not apply because the police had no reasonable basis to conclude there was anyone inside the apartment who was in danger or distress, and the *exigent circumstances exception* does not apply because police had no reason to believe a shooter was hiding in the apartment or that evidence of criminal conduct would be destroyed before they had a chance to obtain a warrant. (***People v. Rubio*** (2019) 43 Cal.App.5th 342, 348-355.)

"(I)n general '[a]n area's reputation for criminal activity is an appropriate consideration in assessing whether an investigative detention is reasonable under the **Fourth Amendment**.' ((***People v.***) ***Souza*** ((1994) . . . 9 Cal.4th (224,) at p. 240.) But][a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime.' (fn.

omitted)" (***People v. Flores*** (2019) 38 Cal.App.5th 617, 630; quoting ***Illinois v. Wardlow***, *supra*, at p. 124.)

"Unprovoked flight" during an attempted traffic stop in a high crime area, running several stop signs in the process, serves to extend the "mission of the traffic stop" beyond what it would have taken to merely write a citation (for a license plate light violation, in this case). (***United States v. Perry*** (4th Cir. Feb. 6, 2024) __ F.4th __ [2024 U.S.App. LEXIS 2691].)

Ethnicity:

"(I)t is no secret that people of color are disproportionate victims of [law enforcement] scrutiny." (***Utah v. Strieff*** (2016) 579 U.S. 232, 254 [136 S.Ct. 2056, 2060-2064; 195 L.Ed.2nd 400].)

"Courts must be mindful that when officers rely on innocuous factors that may disproportionately apply to Latinos, or other persons of color, we may be making room for racial bias—whether it be explicit or implicit—to play a role." (***United States v. Raygoza-Garcia*** (9th Cir. 2018) 902 F.3rd 994, 1003.)

> "(W)here a large portion of the area's population is Latino, officers cannot rely on an individual's apparent Latino appearance in making a reasonable suspicion determination because one's ethnicity or race is not sufficiently particularized to indicate the criminality of a particular person." (**United States *v. Raygoza-Garcia***, *supra*, citing ***United States v. Manzo-Jurado*** (9th Cir. 2006) 457 F.3rd 928, 935, fn. 6, and ***United States v. Montero-Camargo*** (9th Cir. 2009) 208 F.3rd 1122, 1132, and noting that while there was no direct evidence in this case that the agents took defendant's Latin ethnicity into account, an "officers' inferences must rationally explain how innocuous conduct and factors establish reasonable suspicion as to the particular person being stopped to avoid stops that might be interpreted as premised on race or ethnicity." (pg. 1004).)

See the dissent in ***People v. Flores*** (2021) 60 Cal.App.5th 978, at pages 993-994, which, after noting defendant's apparent Hispanic heritage, and interjecting current racial issues into its argument, notes that the majority decision in this case (which upheld defendant's detention in a "high crime" area) "ignores applicable law and the realities of twenty-first century America . . . (targeting) a person wary of police interaction, . . ." Further along, in criticizing the majority's finding relative to defendant's suspicious acts upon the approach of the officers: "Indeed, some even might instruct their children remaining still is a prudent course of action (and even then, it may not work. #BlackLivesMatter.) To hold otherwise

ignores the deep-seated mistrust certain communities feel toward police and how that mistrust manifests in the behavior of people interacting with them." (Parenthesis in the original.) The dissent ends the discussion with the following: "The majority opinion narrows the options for those who want to be judged 'normal' and hence beyond suspicion. They must stand erect and chat up the officers who approach them. Tell that to Eric Garner.", referencing a person who died at the hands of a New York P.D. patrol officer while being subjected to a chokehold and while repeatedly complaining that he couldn't breathe.

In a footnote (pg. 993, fn. 3), the dissent also makes reference to Ahmaud Marquez Arbery, a black man who was shot and killed by three white citizens as he was confronted while jogging through their neighborhood, but suspected by his assailants of burglarizing a garage as he did so.

Note: The three white defendants have since been convicted of Arbery's murder.

See "*Racial Profiling and Implicit Bias*," above.

Statutory Interpretation*:** The legality of a detention is often based upon an interpretation of a statute which the suspect is suspected of violating. This will necessarily involve an appellate court's employment of the rules of statutory interpretation, considering the meaning of the statute "*de novo*" (i.e., from the beginning, while ignoring the lower court's interpretation). (People v. Campuzano*** (2015) 237 Cal.App.4th Supp. 14, 18; citing **People v. Glaser** (1995) 11 Cal.4th 354, 262.)

The Rules of "*Statutory Interpretation*" are as follows:

(1) Courts look to the Legislature's intent to effectuate a statute's purpose.

(2) Courts give the words of a statute their usual and ordinary meaning.

(3) A statute's plain meaning controls the court's interpretation unless the statutory words are ambiguous.

(4) If the words of a statute do not themselves indicate legislative intent, courts may resolve ambiguities by examining the context and adopting a construction that harmonizes the statute internally and with related statutes.

(5) A literal construction does not prevail if it is contrary to the apparent legislative intent.

(6) If a statute is amenable to two alternative interpretations, courts will follow the one that leads to the more reasonable result.

(7) Courts may consider legislative history, statutory purpose, and public policy to construe an ambiguous statute.

(8) If a statute defining a crime or punishment is susceptible of two reasonable interpretations, courts will ordinarily adopt the interpretation more favorable to the defendant. (**People v. Arias** (2008) 45 Cal.4th 169, 177; ***People v. Campuzano***, *supra*, at pp. 18-19.)

(See also ***People v. Moon*** (2011) 193 Cal.App.4th 1246, 1249-1250; ***Gund v. County of Trinity*** (2020) 10 Cal.5th 503, 511; ***People v. Valencia*** (2017) 3 Cal.5th 347, 357–360; ***People v. Farleigh*** (2017) 13 Cal.App.5th Supp. 12, 14-15; and ***People v. Reyes*** (2020) 56 Cal.App.5th 972, 982.)

A court's "primary mandate is to effectuate the intent of the enacting body." (**People *v.* Osotonu** (2018) 26 Cal.App.5th 973, 977; citing *People v. Gonzales* (2017) 2 Cal.5th 858, 868.)

"Another 'fundamental rule[ ] of statutory construction is that a law should not be applied in a manner producing absurd results, because the Legislature is presumed not to intend such results.' [Citation.]" (***People v. Farleigh***, *supra*, quoting ***San Jose Unified School Dist. v. Santa Clara County*** (2017) 7 Cal App.5th 967, 982.)

In construing the meaning of a statute; "(w)e independently review issues regarding statutory interpretation. In doing so, we begin with the plain language of the statute, then look to the statute's purpose, legislative history, public policy, and statutory scheme to 'select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' (***People v. Barba*** (2012) 211 Cal.App.4th 214, 222 . . . .) The same principles of statutory construction are applied when interpreting a voter initiative. (***People v. Canty*** (2004) 32 Cal.4th 1266, 1276.)" (***People v. Korwin*** (2019) 36 Cal.App.5th 682, 687.)

***Types of Detentions*:**

Traffic Stops:

Rule:

"States have a 'vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles [and] that licensing, registration, and vehicle inspection requirements are being observed.'" (***Kansas v. Glover*** (Apr. 6, 2020) __ U.S. __, __ [140 S.Ct. 1183; 206 L.Ed.2nd 412]; quoting ***Delaware v. Prouse*** (1979) 440 U.S. 648, 658 [99 S.Ct. 1391; 59 L.Ed.2nd 660].)

"(A)n officer may stop and detain a motorist on reasonable suspicion that the driver has violated the law." (***People v. Vera*** (2018) 28 Cal.App.5th 1081, 1085, quoting ***People v. Wells*** (2006) 38 Cal.4th 1078, 1082–1083.)

Under the **Fourth Amendment**, a police officer may stop and detain for investigation a motorist on reasonable suspicion that the driver has violated the law. (***Ornelas v. United States*** (1996) 517 U.S. 690, 693 [116 S.Ct. 1657; 134 L.Ed.2nd 911]; ***People v. Dolly*** (2007) 40 Cal.4th 458, 463.)

Restriction: Driver's License Check:

Veh. Code § 14607.6(b): A peace officer shall *not* stop a vehicle for the sole reason of determining whether the driver is properly licensed.

Restriction: Physician Traveling in Response to Emergency Call:

Veh. Code § 21058: "A physician traveling in response to an emergency call shall be exempt from the provisions of **Sections 22351** and **22352** if the vehicle so used by him displays an insigne approved by the department indicating that the vehicle is owned by a licensed physician. The provisions of this section do not relieve the driver of the vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor protect the driver from the consequences of an arbitrary exercise of the privileges of this section."

Notes: **V.C. § 22351**: Speed Law Violations:

(a) The speed of any vehicle upon a highway not in excess of the limits specified in **Section 22352** or established as authorized in this code is lawful unless clearly proved to be in violation of the basic speed law.

(b) The speed of any vehicle upon a highway in excess of the prima facie speed limits in **Section 22352** or established as authorized in this code is prima facie unlawful unless the defendant establishes by competent evidence that the speed in excess of said limits did not constitute a violation of the basic speed law at the time, place and under the conditions then existing.

V.C. § 22352: Prima Facie Speed Limits: Describes speed limits except where posted otherwise.

Case Law:

A chiropractor is *not* a "licensed physician" entitled to emergency–call automobile insignia. (7 ***Ops. Cal. Atty. Gen.*** 356.)

Restriction: *Traffic Stops Performed Outside the Officer's Jurisdiction and Exception per* ***Pen. Code § 830.1(a)(2)*** & ***(3)***:

The trial court denied defendant's motion for judgment of acquittal and convicted him of failing to stop at a red light (**Veh. Code § 21453(a)**). An officer of the Costa Mesa Police Department testified that defendant's vehicle crossed an intersection against a red light but in an otherwise safe manner and that no vehicles were coming in the cross-direction that were required to decelerate, brake, or stop to avoid the truck as it crossed the intersection. The offense occurred outside the city limits. The Appellate Department of the Superior Court (Orange County) reversed the judgment, holding that the officer acted in excess of his statutory authority because the jurisdictional exceptions for immediate danger or escape under **Pen. Code § 830.1(a)(3)**, did not apply. I.e.: No persons or property were endangered. The exception conferring jurisdiction on an officer in case of an immediate danger of the escape of the perpetrator is limited to those instances where the officer has particularized cause to believe that a motorist is likely to take action to avoid being detained. That was not the situation in the case at bar because defendant immediately and fully complied with the officer's command to pull over. The citation was not proper as a citizen's arrest under **Pen. Code § 837.1**, because defendant was not taken to a magistrate or other peace officer, as required by **Pen. Code § 847(a)**. (***People v. Landis*** (2007) 156 Cal.App.4th Supp. 12.)

Note: The trial Court noted that it had "seen written agreements in other kinds of court cases in which Orange County police agencies consent to cross-jurisdictional activity by officers of other agencies." The trial court also observed that in traffic trials, the court "consistently takes the position that there is no legitimate jurisdictional issue where, as in this case, the Court credits the peace officer's testimony that the violation was observed to have been committed in his or her presence." However, no such agreement was proffered in this case, and the trial court

therefore did not take judicial notice of any such agreements or suggest it gave any evidentiary value to any writing not before the court. (pg. 269.) Later, the Court noted that "(w)hile the trial court may have been correct that cities within Orange County have in place consent agreements for cross-jurisdictional activity, absent evidence of such an agreement in this case, there is no basis on which to find Officer Bao had authority to issue the citation pursuant to **Penal Code section 830.1**, **subdivision (a)(2)**" And then at footnote 3: "If indeed such agreements exist, this problem can be avoided in the future by having the testifying officer present a copy of any such agreement at the hearing and request that the court take judicial notice of its existence and applicability."

Additional Note: Such an agreement referred to above, allowing for a peace officer to cite for offenses outside that officer's jurisdiction when prior approval is given by "the chief of police or chief, director, or chief executive officer of a consolidated municipal public safety agency, or person authorized by that chief, director, or officer to give consent, if the place is within a city, or of the sheriff, or person authorized by the sheriff to give consent, if the place is within a county," is in fact statutorily allowed for by **Pen. Code § 830.1(a)(2)**. It is the understanding of the author that such agreements are in fact in existence, memorialized in writing, and renewed annually.

A county deputy sheriff had the right and duty under **Pen C § 830.1(c)(3)** to stop a driver within city limits, there being reasonable and probable cause to believe a public offense had been committed in his presence, that there was danger to both persons and property from the driver's manner of driving, and that the driver would escape unless then stopped, where the deputy witnessed the driver weaving in sweeping curves on the road *outside* the city and followed him into the city, in which the driver failed to stop for a red light and blocked traffic. (***People v. Tennessee*** (1970), 4 Cal.App.3rd 788; the Court noting at pg. 791 that the words "public offense" include misdemeanors and infractions as well as felonies.)

Standard of Proof:

"(T)he **Fourth Amendment** permits an officer to initiate a brief investigative traffic stop when he has 'a particularized and objective basis for suspecting the particular person stopped of

criminal activity.'" (***Kansas v. Glover*** (Apr. 6, 2020) __ U.S. __, __ [140 S.Ct. 1183; 206 L.Ed.2nd 412].), quoting ***United States v. Cortez*** (1981) 449 U.S. 411, 417-418 [101 S.Ct. 690; 66 L.Ed.2nd 621].)

> "'Although a mere "hunch" does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause.'" (***Kansas v. Glover***, *supra*, quoting ***Navarette v. California*** (2014) 572 U.S. 393, 397 [134 S.Ct. 1683; 188 L.Ed.2nd 680 (quotation altered); and ***United States v. Sokolow*** (1989) 490 U.S. 1, 7 [109 S.Ct. 1581; 104 L.Ed.2nd 1].)
>
> In ***Glover***, the United States Supreme Court held that observing defendant's vehicle, which a records check revealed was owned by someone with a *revoked* license, "*provided more than reasonable suspicion*" to assume that it was defendant who was driving at the time and to initiate a traffic stop, at least absent any other information that it was not the registered owner of the vehicle who was operating the car at the time. (***Kansas v. Glover***, *supra*, at p. __; noting on pg. __ that "the presence of additional facts might dispel reasonable suspicion."
>
> *Note*: In ***Glover***, the officer's records check revealed that defendant's driver's license had been "revoked," which under Kansas law, meant that he had done something serious enough to show a proclivity for having little regard for Kansas' laws. As noted in the concurring opinion, the result might have been different had defendant's license merely been "suspended," which can happened for offenses as minor as failing to pay parking tickets, court fees, or child support. Under such a circumstance, two concurring justices would not have found sufficient reasonable suspicion to believe it was the defendant who was driving his own vehicle. (***Id***, at pp. __-__.)

"A police officer may legally stop a car to conduct a brief investigation if the facts and circumstances known to the officer support a reasonable suspicion that the driver may have violated the **Vehicle Code** or some other law." (***King v. State of California*** (2015) 242 Cal.App.4th 265, 279; citing ***People v. Superior Court* (*Simon*)** (1972) 7 Cal.3rd 186, 200.)

"A traffic stop is a seizure subject to the protections of the **Fourth Amendment** of the United States Constitution." (***People v. Nice*** (2016) 247 Cal.App.4th 928, 937, 940, fn. 3; noting that only a "*reasonable suspicion*," as opposed to "*probable cause*," is needed in order to justify the stop.)

> "(A) lawful traffic stop occurs when the facts and circumstances known to the police officer support at least a reasonable suspicion that the driver has violated the **Vehicle Code** or another law." (***Id***., at pp. 937-938.)

"[A]n officer may stop and briefly detain a suspect for questioning for a limited investigation even if the circumstances fall short of probable cause to arrest." Reasonable suspicion that criminal conduct has occurred "requires that officer to be able to 'point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity.'" (***Brierton v. Department of Motor Vehicles*** (2005) 130 Cal.App.4th 499, 509.)

In that the *traffic stop* itself (i.e., prior to the issuing of a citation), is considered to be no more than a detention, it only requires a "*reasonable suspicion*" that a traffic offense had been committed in order to be a lawful stop. (***United States v. Lopez-Soto*** (9th Cir. 2000) 205 F.3rd 1101, 1104-1105; ***People v. Miranda*** (1993) 17 Cal.App.4th 917, 926; ***Brierton v. Department of Motor Vehicles*** (2005) 130 Cal.App.4th 499, 509-510; ***United States v. Miranda-Guerena*** (9th Cir. 2006) 445 F.3rd 1233; ***United States v. Magallon-Lopez*** (9th Cir. 2016) 817 F.3rd 671, 674; ***People v. Nice*** (2016) 247 Cal.App.4th 928, 937.)

The district court was held to have properly denied defendant's motion to suppress narcotics that Border Patrol agents found in defendant's vehicle because the agents, who had a particularized and objective basis for suspecting defendant was engaged in criminal activity, had sufficieint reasonable suspicion to stop defendant's vehicle. (***United States v. Raygoza-Garcia*** (9th Cir. 2018) 902 F.3rd 994, 999-1001.)

"Border Patrol Agents on roving border patrols may conduct 'brief investigatory stops' without violating the **Fourth Amendment** if the stop is supported by reasonable suspicion to believe that criminal activity may be afoot. (Citing ***United States v. Valdes-Vega*** (9th Cir. 2013) 738 F.3rd 1074, 1078.). 'Reasonable suspicion is defined as a particularized and objective basis for suspecting the

particular person stopped of criminal activity.' ***Id.*** (internal quotations and citation omitted). The standard 'is not a particularly high threshold to reach,' and '[a]lthough . . . a mere hunch is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.' (***Id***.)" (***United States v. Raygoza-Garcia*** (9th Cir. 2018) 902 F.3rd 994, 999-1000.)

But see concurring opinion, at pp. 1002-1004, criticizing what the justices consider to be putting too much emphasis on otherwise innocent behavior in establishing a reasonable suspicion of criminal activity.

A traffic stop is lawful when an officer has a reasonable suspicion to believe that a violation is occurring. Observing a cracked windshield, which the officer believed to be unsafe, was held to be lawful even though it was quickly discovered that the crack did not obscure the driver's view, as required by state (Arkansas) law. Further, detaining the defendant long enough to check his driver's license and registration was lawful even though it had already been discovered that defendant was not in violation of Arkansas law relative to the cracked windshield. (***United States v. Foster*** (8th Cir. Ark. 2021) 15 F.4th 874: A resulting patdown for weapons the lawful product of this traffic stop; an issue not contested.)

Random License Checks:

A random license check on the defendant's vehicle, resulting in information that the owner had an outstanding traffic warrant, justified the stop of that vehicle. (***People v. Williams*** (1995) 33 Cal.App.4th 467.)

It is not a search to randomly check license plates that are otherwise visible to an officer, and to check law enforcement databases for information about that vehicle. Discovering in the process that a vehicle's registered owner has a suspended license, and noting that the observed driver resembles the physical description of the registered owner, stopping the car to check the driver's license status is lawful. (***United States v. Diaz-Castaneda*** (9th Cir. 2007) 494 F.3rd 1146, 1150-1152.)

However, a misreading of a license number by an "automated license plate reader," at least when not verified by a visual check of the license number on the car, has been held *not* to provide a reasonable suspicion as a matter of law that the car is in fact stolen,

it being a question for a civil jury to decide. (***Green v. City & County of San Francisco*** (9th Cir. 2014) 751 F.3rd 1039, 1045-1046.)

Defendant was arrested for a firearm offense after he was pulled over and during the traffic stop, the officer conducted a pat down search, finding a firearm. On appeal, the Eighth Circuit Court of Appeal affirmed the district court's denial of defendant's motion to suppress. The court explained that the officer had reasonable suspicion to make the traffic stop. Upon randomly checking the vehicle's license, the officer determined that there was a color discrepancy between the vehicle's actual color and the color listed on the vehicle registration. The officer also testified that, in his recent experience, several vehicles with mismatched colors came back as stolen. Thus, this gave the officer reasonable suspicion that the vehicle may have been stolen. (***United States v. Brown*** (8th Cir. 2023) 60 F.4th 1179.)

Personal Observation:

Despite local statutes to the contrary, an officer need not, under the **Fourth Amendment**, have personally observed a traffic violation in order to justify making a traffic stop, so long as the necessary "*reasonable suspicion*" to believe a violation (such knowledge coming from another officer in this case) did in fact occur. (***United States v. Miranda-Guerena*** (9th Cir. 2006) 445 F.3rd 1233.)

In establishing the necessary "*reasonable suspicion*," the officer is not required to personally "observe all elements of criminal conduct." He need only "be able to 'point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity.' [Citation]" (***Brierton v. Department of Motor Vehicles*** (2005) 130 Cal.App.4th 499, 509.)

> Then the citation (i.e., the arrest and release) is written based on the "*probable cause*" to believe a traffic infraction had been committed by the person being cited. (***Ibid***.)

Detention vs. Arrest: Although issuing a traffic citation is technically an *arrest and release* on the person's written promise to appear (see ***United States v. Leal-Feliz*** (9th Cir. 2011) 665 F.3rd 1037.), it is treated as a detention only because of the minimal intrusion involved. (***Berkemer v. McCarty*** (1984) 468 U.S. 420, 439 [104 S.Ct. 3138; 82 L.Ed.2nd 317,

334]; ***Arizona v. Johnson*** (2009) 555 U.S. 323, 330-331 [129 S.Ct. 781; 172 L.Ed.2nd 694].)

> "A seizure for a traffic violation justifies a police investigation of that violation. '[A] relatively brief encounter,' a routine traffic stop is 'more analogous to a so-called "***Terry*** stop" . . . than to a formal arrest.' [Citations]" (***Rodriguez v. United States*** (2015) 575 U.S, 348, 354 [135 S.Ct. 1609; 191 L.Ed.2nd 492]; referring to ***Terry v. Ohio*** (1968) 392 U.S. 1 [88 S.Ct. 1868; 20 L.Ed.2nd 889].)
>
> See also ***People v. Suff*** (2014) 58 Cal.4th 1013, 1054, quoting ***People v. Hernandez*** (2006) 146 Cal.App.4th 773; "Traffic stops are treated as investigatory detentions for which the officer must be able to point to specific and articulable facts justifying the suspicion that a crime is being committed."
>
> "When a motorist 'sees a policeman's lights flashing behind him,' he expects 'that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way.'" (***United States v. Gorman*** (9th Cir. 2017) 859 F.3rd 706, 714; as amended at 2017 U.S. App. LEXIS 18610; citing ***Berkemer v. McCarty***, *supra*, at p. 437; and noting that "less than 10 minutes is acceptable," citing *Illinois v. Caballas* (2005) 543 U.S. 405, 406, 410 [125 S.Ct. 834; 160 L.Ed.2nd 842].)
>
> In a trial for resisting, obstructing, or delaying a peace officer, in violation of **P.C. § 148(a)(1)**, the jury was properly instructed that defendant could be found guilty if he refused to identify himself to a ranger who was writing a citation for violating a local ordinance making it an *infraction* to possess open containers of alcoholic beverages in a public place. When a person refuses to identify himself to an officer who is writing a citation to that person for an infraction offense, that refusal can be the basis for a finding that the person resisted, obstructed, or delayed an officer. (***People v. Knoedler*** (2019) 44 Cal.App.5th Supp. 1.)

When No Law Enforcement Involvement:

> A suspect who stops on his own, even if mistakenly believing he was required to stop, but where law enforcement does nothing affirmatively to cause him to stop, has not been detained for purposes of the **Fourth Amendment**. A detention requires a "governmental termination of freedom of movement '*through*

means intentionally applied.'" (***United States v. Nasser*** (9th Cir. 2009) 555 F.3rd 722.)

See ***People v. Linn*** (2015) 241 Cal.App.4th 46, 63-68, where defendant stopped and parked her car prior to being contacted, resulting in no more than a consensual encounter up until when the officer took her driver's license to do a radio check, at which time she was detained.

Moving Violations:

A citizen's report of a vehicle driving erratically, with a specific description of the vehicle (including a personalized license plate, although one digit was wrong), where the officer observed the vehicle shortly thereafter weave outside its lane, was cause to effect a traffic stop. (***People v. Carter*** (2005) 36 Cal.4th 1114, 1139-1142.)

A pedestrian crossing diagonally across an intersection without interfering with any traffic is not a violation of **V.C. § 21954(a)** (Pedestrian's interference with traffic), and therefore does *not* justify a detention. (***People v. Ramirez*** (2006) 140 Cal.App.4th 849.)

Failure to stop a vehicle before the front bumper crosses a crosswalk's limit line at an intersection is a violation of **V.C. § 22450**, justifying a traffic stop. ***People v. Binkowski*** (2007) 157 Cal.App.4th Supp. 1.)

A passenger in a vehicle, where there's evidence that she encouraged the driver to drive faster than is safe, and did so with the knowledge of the likelihood that the vehicle's tires would leave the roadway, resulting in a fatal accident, may herself be guilty of a violation of **V.C. § 21701**. (***Navarrete v. Meyer*** (2015) 237 Cal.App.4th 1276; a civil case.)

> **V.C. § 21701**: "No person shall willfully interfere with the driver of a vehicle or with the mechanism thereof in such manner as to affect the driver's control of the vehicle."

Vehicle Code § 22107 (Failure to signal while turning): Turning without signaling is *not* a violation of this section unless there is another vehicle close enough to be affected by the defendant's failure to signal. (***People v. Carmona*** (2011) 195 Cal.App.4th 1385; the officer's vehicle, being the only other car in the vicinity, was headed towards defendant and some 55 feet away when

defendant turned off onto a side road without signaling; not a violation.)

Vehicle Code § 22108, requiring that a person signal for at least 100 feet before turning, is not a separate offense that may be charged. It takes effect only if, under **section 22107**, the driver was required to signal. (***People v. Carmona***, *supra*., at pp. 1391-1393.)

See also ***In re Jaime P.*** (2006) 40 Cal.4th 128, 131; ***People v. Cartwright*** (1999) 72 Cal.App.4th 1362, 1366; and ***United States v. Mariscal*** (9th Cir. 2002) 285 F.3rd 1127 (interpreting a similar Arizona statute, but where other "traffic," instead of "vehicle," may be affected).

Turning at an intersection without signaling was held *not* to be a violation of **V.C. § 22108** where there was no evidence of another vehicle that was there that "*may be affected by the movement*." (***United States v. Caseres*** (9th Cir. 2008) 533 F.3d 1064, 1068-1069.)

However, when an officer is within 100 feet, traveling in the same direction and at the same speed, the defendant's failure to signal a turn *was* a movement that could have affected the officer's vehicle. Failing to signal while changing lanes where "any other vehicle may be affected by the movement," per **V.C. § 22107**, applies even though the only affected vehicle is a police car. (***People v. Logsdon*** (2008) 164 Cal.App.4th 741, 744; see also ***People v. Suff*** (2014) 58 Cal.4th 1013, 1055-1056.)

V.C. §§ 22107 and **22108** requires a signal when turning right at an intersection, even if the driver doesn't decide to turn until at the intersection, despite the sections' requirement (under **§ 22108**) that a driver do so for 100 feet before making the turn. The Supreme Court ruled that the signaling requirements of **§§ 22107** and **22108** apply whether turning "from a direct course" or "mov(ing) right or left upon a roadway," reflecting a legislative intent "that the signaling requirements apply to lane changes as well as changes of course." (***People v. Suff***, *supra,* at pp. 1054-1056.)

The Court also rejected the defendant's argument that **§ 22107**'s requirement that a driver must signal only "in the event any other vehicle may be affected

by the movement" eliminated the need to signal in this case in that there was no vehicle that could have been affected by his turn, where a motorcycle officer was in fact directly behind defendant when he made his right turn in that had the officer attempted to move around to defendant's right side, as he legally could have done with defendant turning from a center lane, they would have collided. (***Id***., at pp. 1055-1056.)

See also ***People v. Holiman*** (2022) 76 Cal.App.5th 825, 831; "If the detaining officer's justification for a traffic stop is based on a mistake—either factual *or* legal—then the resulting search or seizure is lawful under the **Fourth Amendment** as long as the officer's mistake is *objectively* reasonable. (Citing ***Heien v. North Carolina***, *supra*, at pp. 57, 60–61, 67; for the proposition that a traffic stop may be found lawful where an officer's mistake as to the meaning of a statute is objectively reasonable.

In ***Holiman***, the Court determined that the officer's mistake in her interpretation of **V.C. §§ 22107** & **22108** was not objectively reasonable by assuming that her car being positioned behind defendant's car was affected by defendant's failing to signal for 100 feet before making a turn. Ultimately, the Court ruled that it was not reasonable for the officer to believe that defendant, stopping at a stop sign with a full-sized car (the patrol car) behind him that could not have fit in the limited space to the right of defendant's car, could have been affected by defendant's failure to signal. Thus, the subsequent traffic stop was illegal in that **V.C. §§ 22107/22108** was not violated, and the resulting contraband found in defendant's car should have been suppressed.

Defendant's erratic driving and failing to signal during a right-hand turn. (***People v. Evans*** (2011) 200 Cal.App.4th 735, 743.)

Defendant, having been observed while stopped at the side of the road and texting, was lawfully stopped five minutes later when

observed pulling into traffic while learning forward and looking down, with hand movements consistent with texting, a violation of **V.C. § 23123.5** (texting while driving). (***People v. Corrales*** (2013) 213 Cal.App.4th 696, 669-700.)

But, seeing defendant bent over his phone which he was holding in his right hand *may not* be sufficient cause to effect a traffic stop when there are other uses of a cellphone while driving that are not illegal. (***United States v. Paniagua-Garcia*** (7th Cir. 2016) 813 F.3rd 1013.)

Note: Per ***People v. Spriggs*** (2014) 224 Cal.App.4th 150, 156; some other uses of one's cellphone, such as using the map application while driving, are not prohibited by California law.

Under the basic speed law (**V.C. § 22350**), a police officer may stop and cite a person who is driving at a speed which, although under the posted speed limit and at a speed which is safe for current road and weather conditions, is unsafe when considering the manner in which the person is driving. (***People v. Farleigh*** (2017) 13 Cal.App.5th Supp. 12; driving 45 mph in a posted 50 mph speed zone, but with no hands on the steering wheel because she was holding a cigarette out the window with one hand and her cellphone in the other.

The crime of evading an officer, per **V.C. § 2800.2**, is not part of the **Vehicle Code's** *rules of the road* and is not limited to driving on highways, thus making the section applicable to evading a peace officer while driving on private property. (***People v. Corder*** (2018) 26 Cal.App.5th 554.)

Defendant's actions in attempting to pass on a two-lane road at night, resulting in a head-on collision, were sufficient to support the wanton disregard element of reckless driving under **V.C. § 23103**, because he could not see around the truck he sought to pass and yet pulled into the left lane on a dark, busy road and, driving 70 miles per hour, tried to pass two vehicles at once. Passing is only legal if it is safe. (***People v. Escarcega*** (2019) 32 Cal.App.4th 362, 370-373.)

Estimates of Speed:

A properly trained and experienced police officer's estimate of defendant's speed is sufficient to provide the necessary reasonable

suspicion to justify a traffic stop. (***People v. Nice*** (2016) 247 Cal.App.4th 928, 937-944.)

See also ***People v. Ramirez*** (1997) 59 Cal.App.4th 1548, 1551-1555; and ***United States v. Ludwig*** (10th Cir. 2011) 641 F.3rd 1243, 1247.

But see ***United States v. Sowards*** (4th Cir. 2012) 690 F.3rd 583; 591: "[T]he reasonableness of an officer's visual speed estimate depends, in the first instance, on whether a vehicle's speed is estimated to be in significant excess or slight excess of the legal speed limit. If slight, then additional indicia of reliability are necessary to support the reasonableness of the officer's visual estimate."

Lying to the Suspect as to the Reasons for the Stop:

In that an officer's reasonable suspicion of a violation of the law is enough to justify a stop a vehicle, and the test being an objective one so that the officer's subjective thinking is irrelevant, the fact that the officer lied to the defendant about the reasons for the stop is also irrelevant. (***United States v. Magallon-Lopez*** (9th Cir. 2016) 817 F.3rd 671, 675.)

In Retaliation:

After having stopped plaintiff once for speeding, but issuing a citation for a lesser non-moving offense, after which plaintiff made an obscene single-finger gesture as she drove off, the officer stopping her a second time and rewriting the ticket to the original offense of speeding, the second stop was held to be an unlawful seizure and a **Fourth Amendment** violation. A person has a **First Amendment** constitutional right to express her opinion of law enforcement, even through obscene gestures. (***Cruise-Gulyas v. Minard*** (6th Cir. MI. 2019) 918 F.3rd 484.)

See "*Civil Suits Based Upon an Alleged Retaliation Theory*," under "*Procedural Rules*" (Chapter 2), above.

Avoiding a DUI (*or Immigration*) *Checkpoint*:

The Tenth Circuit Court of Appeal held that a driver's decision to use a rural highway exit after passing drug checkpoint signs may be considered as one factor in an officer's reasonable suspicion determination, but it is not a sufficient basis, by itself, to justify a traffic stop. The court noted that an officer must identify

additional suspicious circumstances or independent evasive behavior to justify stopping a vehicle that uses an exit after driving past ruse drug-checkpoint signs. (***United States v. Neff*** (10th Cir. 2012) 681 F.3rd 1134.)

Purposely avoiding an immigration checkpoint, plus other suspicious circumstances (i.e., the proximity of the checkpoint to the border and the defendants' peculiar attempt to conceal their avoidance of the checkpoint by purchasing containers of peppers at the vegetable stand) was held to be sufficient to justify a stop and detention. (***United States v. Compton*** (2nd Cir. 2016) 830 F.3rd 55.)

Vehicle Code Registration Violations: A police officer may make an investigatory traffic stop anytime the officer has a "*reasonable suspicion*" to believe that the vehicle is in violation of the registration laws. (***People v. Dotson*** (2009) 179 Cal.App.4th 1045, 1049.)

A license plate, although only partially obscured by a trailer hitch, violates **V.C. § 5201** and justifies a traffic stop and citation. (***People v. White*** (2001) 93 Cal.App.4th 1022.)

It has been held that it is reasonable for an officer to assume (without the court deciding whether the officer was actually right) that a license plate holder that obscures the registration tab only is a violation of a state requirement that the plate be "clearly visible." (***United States v. Henry*** (5th Cir. La. 2017) 853 F.3rd 754; a Louisiana state case with a statute similar to California's **V.C. § 5201(a)**; Positioning of License Plates.)

Note: **V.C. § 5201(d)** (to be **subd. (e)** as of 1/1/2019) excuses the obstruction of a rear license plate by a wheelchair lift or carrier if by a disabled person with the applicable disabled person plates or placard, and a decal with the license plate number is clearly visible in the rear window.

Mounting a license plate (the front plate, in this case) upside down is also a violation of **V.C. § 5201**, in that it is not "*clearly legible*" as required by the statute. (***People v. Duncan*** (2008) 160 Cal.App.4th 1014.)

Plates must be positioned "so that the characters are upright and display from left to right, . . ." (**V.C. § 5201(a)**)

A missing front license plate, a violation of **V.C. § 5200**, is legal justification upon which to base a traffic stop. (***People v. Saunders*** (2006) 38 Cal.4th 1129, 1136; ***People v. Vibanco*** (2007) 151 Cal.App.4th 1, 8.)

A traffic stop for the purpose of checking the validity of a red DMV temporary operating permit displayed in a vehicle's window (i.e., the red sticker; see **V.C. § 4156**), when the number on the permit was visible to the officer before the stop and appeared to be current, is a stop based upon no more than a "*hunch*," and is illegal. (***People v. Nabong*** (2004) 115 Cal.App.4th Supp. 1; vehicle with expired registration tab on plate; ***People v. Hernandez*** (2008) 45 Cal.4th 295, vehicle with no license plates.)

> It is irrelevant that the officer believes, in his experience, that such temporary operating permits are often forged or otherwise invalid. (***People v. Hernandez***, *supra*., at p. 299.)
>
> In a case decided by the United States Supreme Court out of California, it was assumed for the sake of argument and without discussing the issue, that stopping a car for the purpose of checking the validity of the temporary operating permit without reason to believe that it was not valid, is illegal. (See ***Brendlin v. California*** (2007) 551 U.S. 249 [127 S.Ct. 2400; 168 L.Ed.2nd 132].)
>
> > On remand, the People conceded that a traffic stop made for the purpose of checking the validity of the temporary red sticker visible in the window, absent cause to believe it was invalid, was an illegal traffic stop. (***People v. Brendlin*** (2008) 45 Cal.4th 262, 268; expired registration tab on plate.)
>
> *But*, a traffic stop *is* legal when the vehicle had only one license plate (the front plate being missing) and the registration tab on the rear plate was expired. (***People v. Saunders*** (2006) 38 Cal.4th 1129: The missing license plate, a violation of **V.C. § 5200**, at the very least constitutes a reasonable suspicion to believe that the red temporary operator's permit, despite a current visible month on the permit, might not be for that vehicle.)
>
> A missing rear license plate and no visible temporary registration displayed in the rear window, even though the temporary registration is later found to be in the front

windshield, but not visible to the officer coming up behind the vehicle, is sufficient reasonable suspicion to justify a traffic stop. (***In re Raymond C.*** (2008) 45 Cal.4th 303.)

> As noted in fn. 2: "A temporary permit is to be placed in the lower rear window. However, if it would be obscured there, it may be placed in the lower right corner of either the windshield or a side window." (***DMV Handbook of Registration Procedures*** (Oct. 2007) ch. 2, § 2.020, p. 7.)

An officer's observation that a vehicle was missing both license plates, absent some other indication that the vehicle was properly or temporarily registered, was enough by itself to establish a reasonable suspicion for the officer to believe that defendant was in violation of **V.C. § 5200**. (***People v. Dotson*** (2009) 179 Cal.App.4th 1045, 1051-1052; rejecting the defendant's argument, and the Attorney General's concession, that the officer had a duty to look for a temporary registration in the vehicle's windows before making the traffic stop.)

Information from DMV that a vehicle's registration has expired, at least in the absence of any other information to the effect that the vehicle is in the process of being re-registered, justifies a traffic stop despite the visible presence of an apparently valid temporary registration sticker in the window. (***People v. Greenwood*** (2010) 189 Cal.App.4th 742.)

Upon observation of a piece of paper in the window of a vehicle without license plates, but not being able to determine whether the piece of paper was a temporary registration, allowed for the stop of the vehicle for the purpose of determining whether the vehicle was registered. (***United States v. Givens*** (8th Cir. 2014) 763 F.3rd 987.)

> As it turned out, the piece of paper was in fact a valid temporary registration sticker. But by then, the officer had smelled the odor of marijuana emanating from the car. The officer was able to testify that in his experience, registration stickers were normally legible from a distance. (***Ibid***.)
>
> The federal Tenth Circuit Court of Appeal has held that once an officer has been assured during a traffic

stop that a temporary tag is valid, the stop having been made because the tag was not visible due to the tint in the rear window, the officer should explain to the driver the reason for the initial stop and then allow the driver to continue on his way without requiring the driver to produce his license and registration. (***Vasquez v. Lewis*** (10th Cir. 2016) 834 F.3rd 1132.)

Similarly, absent a statute authorizing a warrantless, suspicionless administrative inspection of a commercial truck for a permit to drive on a parkway, and without any articulable reasonable suspicion to believe that defendant did not have such a permit, stopping the vehicle to check for a permit is unlawful. (***United States v. Feliciana*** (4th Cir. 2020) 974 F.3rd 519.)

Vehicle Code Equipment Violations:

A cracked windshield (**V.C. § 26710**) justifies a traffic stop. (***People v. Vibanco*** (2007) 151 Cal.App.4th 1; ***United States v. Foster*** (8th Cir. Ark. 2021) 15 F.4th 874.)

In ***Foster,*** a traffic stop was held to be lawful when an officer has a reasonable suspicion to believe that a violation is occurring. Observing a cracked windshield, which the officer believed to be unsafe, was held to be lawful even though it was quickly discovered that the crack did not obscure the driver's view, as required by state (Arkansas) law. Further, detaining the defendant long enough to check his driver's license and registration was lawful even though it had already been discovered that defendant was not in violation of Arkansas law relative to the cracked windshield. A resulting patdown for weapons the lawful product of this traffic stop; an issue not contested.

An inoperable third (rear window) brake light is a **Vehicle Code** violation (**V.C. § 24252(a)**), and justifies a traffic stop and citation. (***In re Justin K.*** (2002) 98 Cal.App.4th 695.)

Seat Belt Violations:

An officer's determination that defendant was not wearing a seat belt, even where it is reasonably uncertain whether the defendant's vehicle was even equipped with a shoulder harness, justified a stop to determine whether California's mandatory seat belt law was being violated. (***Kodani v. Snyder*** (1999) 75 Cal.App.4th 471.)

Police officer had probable cause to arrest a driver for a violation of California's safety belt statute upon observing the driver wearing his seat belt under his left arm and not across his upper torso, barring the driver's **42 U.S.C. § 1983** unlawful arrest claim. The driver was not "properly restrained by a safety belt," as required by **V.C. § 27315(d)(1)**. (***Hupp v. City of Walnut Creek*** (N.D. Cal. 2005) 389 F.Supp.2nd 1229, 1232.)

See also ***Collier v. Montgomery*** (5th Cir. 2009) 569 F.3rd 214, 218; addressing a similar safety belt statute.

The requirement in **V.C. § 27315(d)(1)** that the driver and all passengers 16 years of age and older be "properly restrained" while the vehicle is in operation requires that both the shoulder harness and the lap belt portions of the safety belt assembly be used. (***People v. Overland*** (2011) 193 Cal.App.4th Supp. 9.)

Illegally Tinted Windows (**V.C. § 26708(a)**) justifies a traffic stop. (See ***People v. Carter*** (2010) 182 Cal.App.4th 522; and ***People v. Vera*** (2018) 28 Cal.App.5th 1081.)

But see ***United States v. Caseres*** (9th Cir. 2008) 533 F.3rd 1064, 1069: An officer noting that a person's vehicle windows are tinted, believing that the windows might have been tinted in violation of **V.C. § 26708(a)(1)** (i.e., after-factory), is not reasonable suspicion of a violation absent other evidence tending to support this belief. "Without additional articulable facts suggesting that the tinted glass is illegal, the detention rests upon the type of speculation which may not properly support an investigative stop."

Windshield Obstructions:

An Anchorage, Alaska, Municipal Code ordinance forbidding any item affixed to the windshield (similar to California's **V.C. § 26708(a)(1)**; see ***People v. White*** (2003) 107 Cal.App.4th 636, below.) *was not* violated by an air freshener dangling from the rear view mirror. A traffic stop was found to be illegal. (***United States v. King*** (9th Cir. 2001) 244 F.3rd 736, 740.)

A traffic stop was illegal when based upon a perceived violation of **V.C. § 26708(a)(2)**, for obstructing or reducing the driver's clear view through the windshield, for having an air freshener dangling from the rear view mirror. (***People v. White***, *supra*.)

However, an air freshener hanging from a car's rearview mirror was held to be a violation of **V.C. § 26708(a)(2)** in another case where a more thorough foundation was established through testimony of the officer, citing his personal experience and noting that the object was big enough to block out the view of a pedestrian or a vehicle, and where there was no defense-offered expert testimony relevant to the overall size of the air freshener relative to the size of the window. (***People v. Colbert*** (2007) 157 Cal.App.4th 1068.)

A traffic stop for an equipment violation in a "*high crime*" (i.e., gang) area at night is *not* reasonable suspicion sufficient to justify a detention or patdown for weapons. (***People v. Medina*** (2003) 110 Cal.App.4th 171.)

Observing a vehicle with the front windows illegally tinted in violation of **V.C. § 26708(a)** makes it lawful to stop the vehicle to cite its driver. The arrest of defendant who was a passenger in the vehicle and who resembled the suspect in a robbery just minutes earlier, was lawful. (***People v. Carter*** (2010) 182 Cal.App.4th 522, 529-530; also holding that even if the stop had been illegal, discovery of an arrest warrant for defendant would have attenuated the taint of an illegal traffic stop.)

But see ***United States v. Caseres*** (9th Cir. 2008) 533 F.3rd 1064, 1069: An officer noting that a person's vehicle windows are tinted, believing that the windows might have been tinted in violation of **V.C. § 26708(a)(1)** (i.e., after-factory), is not reasonable suspicion of a violation absent other evidence tending to support this belief. "Without additional articulable facts suggesting that the tinted glass is illegal, the detention rests upon the type of speculation which may not properly support an investigative stop."

Traffic Stops by and Unmarked Police Vehicle:

Defendant was found guilty of possession for sale of marijuana following the denial by the trial court of his motion to suppress evidence of the marijuana and a scale found in the car. The record indicated that two plainclothes police officers on duty and driving an unmarked police car observed the automobile in which defendant was a passenger speeding through a residential area, and that after following it they observed that there was no illumination on the rear license plate. The officers then activated a handheld red light placed in the center of the windshield and attempted to stop

defendant's automobile. Defendant, however, fled. During the pursuit, the officers saw defendant throw three large bricks of marijuana and several baggies of marijuana from the car into the street. After stopping the automobile, one of the officers detained defendant and the driver of the automobile while the other retrieved the marijuana from the street several blocks away. Defendant and his accomplice were arrested. A metal scale was found inside the automobile in a later search. The Court of Appeal affirmed defendant's conviction, upholding the search. The Court held that **Veh. Code § 40800** provides that a traffic officer on duty for the exclusive or main purpose of enforcing traffic laws shall wear a uniform and drive a marked police car. This section does not, however, prohibit the officers from stopping defendant's automobile despite the fact that the officers were neither traffic policemen nor on duty for the exclusive or main purpose of enforcing traffic laws. Furthermore, the court held that **§ 40800** does not prohibit a traffic officer out of uniform and using an unmarked vehicle, or an officer on the street for some other purpose, from detaining and arresting a driver for a speed violation. Finally, the court held that in light of the facts that the officers observed the automobile speeding, and the automobile failed to have illumination on the rear license plate, they were justified in stopping and detaining the automobile, and that thus the evidence was not seized pursuant to an unlawful detention and threat of an illegal search. (***People v. Tuck*** (1977) 75 Cal.App.3rd 639.)

See also ***Whren v. United States*** (1996) 517 U.S. 806 [116 S.Ct. 1769; 135 L.Ed.2nd 89]: Washington D.C. vice officers became suspicious of a vehicle in a "high drug area." When the driver turned without signaling, the officers made a traffic stop. Upon approach, rock cocaine was observed in defendant's lap. Defendant argued the officers used the traffic violation as a ruse to investigate drug activity and that no reasonable vice officer in an unmarked vehicle would be enforcing traffic laws. (The officers, in fact, did not even carry a citation book!) The Supreme Court ruled that an ulterior motive does not invalidate a traffic detention based upon probable cause. Traffic stops made by plainclothes officers in unmarked cars is not an extreme practice.

Weaving Within the Lane:

California Rule:

Erratic driving that does not constitute a traffic violation may justify an officer to stop a vehicle. (***People v. Russell***

(2000) 81 Cal.App.4th 96, 102; "drifting and weaving" in traffic sufficient cause to stop the driver to determine whether he was driving under the influence of alcohol (i.e., "*DUI*").)

Observation of the defendant weaving within his traffic lane for one half of a mile is sufficient cause to stop him to determine whether he is *driving while under the influence* or the vehicle has some unsafe mechanical defect. (***People v. Bracken*** (2000) 83 Cal.App.4th Supp. 1; weaving within his lane for half a mile.)

Weaving within a lane for three quarters of a mile justified a traffic stop for driving while under the influence. (***People v. Perez*** (1985) 175 Cal.App.3rd Supp. 8.)

Weaving within a lane, almost hitting the curb, is sufficient reasonable suspicion for driving while under the influence to justify a traffic stop. (***Arburn v. Department of Motor Vehicles*** (2007) 151 Cal.App.4th 1480.)

> The fact that the weaving was not for a "substantial" or "considerable" distance did not mean that the officer didn't have reasonable suspicion to justify the stop. (***Id***., at p. 1485.)

An officer's detention of the driver was justified where he drove 20 miles under the speed limit and was "weaving abruptly from one side of his lane to the other." (***People v. Perkins*** (1981) 126 Cal.App.3rd Supp. 12, 14.)

Federal Rule: See ***United States v. Colin*** (9th Cir. 2002) 314 F.3rd 439, where the Ninth Circuit Court of Appeal held that weaving from lane line to lane line for 35 to 45 seconds is neither a violation of the lane straddling statute (**V.C. § 21658(a)**) nor reasonable suspicion that the driver may be under the influence; a questionable decision, and one that may probably be ignored by state law enforcement officers in light of ***Bracken*** and ***Perez***.

Weaving Plus: A single pronounced weave within the lane, plus an experienced Highway Patrol officer's observation of the defendant sitting up close to the steering wheel, which the officer recognized as something an impaired driver does, was sufficient to corroborate second-hand information concerning defendant's "*erratic driving*" from Montana Department of Transportation employees, justifying

the stop of the defendant's car. (***United States v. Fernandez-Castillo*** (9th Cir. 2003) 324 F.3rd 1114.)

False Personation During a Traffic Stop:

Pursuant to the "***Williamson** rule*" (***In re Williamson*** (1954) 43 Cal.2nd 651), which prohibits prosecution under a general statute when the conduct at issue also is covered under a more specific statute, prevented defendant from being convicted of the felony offense of false personation, per **P.C. § 529(a)(3)**, by giving a police officer the name of a friend and signing a false or fictitious name on a promise to appear for a traffic citation, in that the misdemeanor offense of **V.C. § 40504(b)** applies. The fact that **section 40504(b)** can be violated in two different ways, one of which does not commonly violate **P.C. § 529(a)(3)** does not by itself render the ***Williamson*** rule inapplicable (***People v. Henry** (2018) 28 Cal.App.5th 786.)*

Vehicle Stops Involving Agricultural Irrigation Supplies; **Veh. Code § 2810.2**:

Subd. (a)(1): A peace officer may stop any vehicle transporting agricultural irrigation supplies that are in plain view for the purpose of inspecting the bills of lading, shipping, or delivery papers, or other evidence, to determine whether the driver is in legal possession of the load, whenever the vehicle is on an unpaved road within the jurisdiction of the Department of Parks and Recreation, the Department of Fish & Game, the Department of Forestry and Fire Protection, the State Lands Commission, a regional park district, the U.S. Forest Service, or the Bureau of Land Management, or is in a timberland production zone.

Subd. (a)(2): If there is a "*reasonable belief*" that the driver of a vehicle is not in legal possession of the load, the peace officer "*shall*" take custody of the load and turn it over to the sheriff for investigation.

Subd. (b): the Sheriff is thereafter responsible for the "care and safekeeping" of the apprehended materials, and for its "legal disposition" and any resulting investigation.

Subd. (c): Any expense incurred by the sheriff is a "legal charge against the county."

Subds. (d) & **(e)**: If the driver is in violation of **V.C. § 12500** (driving without a valid license), the peace officer who makes the

stop shall make a reasonable attempt to identify the registered owner of the vehicle and release the vehicle to him or her. Impoundment of the vehicle is prohibited if the driver's only offense is **V.C. § 12500**.

Subd. (f): "*Agricultural irrigation supplies*" include agricultural irrigation water bladder and one-half inch diameter or greater irrigation line.

Subd. (g): A county board of supervisors must adopt a resolution before this section may be implemented in a particular county.

Note: The stated purpose of the above statute is to assist law enforcement in the combating of illegal marijuana cultivation sites in state parks and other resource lands due to the negative environmental effects of such grows (but not necessarily just because illegal grows are a bad thing). (**Stats 2012**, **ch**. **390**.)

Community Caretaking Function:

Although the "*community caretaking function*" may justify a traffic stop, it will do so only when an officer is acting reasonably in determining that an occupant's safety or welfare is at risk. (***People v. Madrid*** (2008) 168 Cal.App.4th 1050; see also ***Cady v. Dombrowski*** (1973) 413 U.S. 433 [93 S.Ct. 2523; 37 L.Ed.2nd 706].)

Per the ***Madrid*** Court (at pg. 1059, citing ***Wright v. State*** (Tex.Crim.App. 1999) 7 S.W.3rd 148, 151-152; and ***Corbin v. State*** (Tex.Crim.App. 2002) 85 S.W.3rd 272.), four factors are to be considered in determining whether the officer's actions are reasonable, with the most weight going to the first:

- The nature and level of the distress exhibited by the individual;
- The location of the individual;
- Whether or not the individual was alone and/or had access to assistance independent of that offered by the officer; and
- To what extent the individual—if not assisted—presented a danger to himself or others.

Parking Tickets:

> Writing a parking ticket justifies a temporary detention of the vehicle's occupant. The fact that parking tickets are subject to civil penalties only and governed by civil administrative procedures is irrelevant. (***People v. Bennett*** (2011) 197 Cal.App.4th 907; citing ***Whren v. United States*** (1996) 517 U.S. 806 [116 S.Ct. 1769; 135 L.Ed.2nd 89]; and ***United States v. Choudhry*** (9th Cir. 2006) 461 F.3rd 1097.)

Gang-Related Investigations:

> Seeing three vehicles with four Black male occupants each, one of the occupants who is known to be a gang member, driving as if in military formation at 12:30 at night, hours after a prior gang shooting, the vehicles being in one of the warring Black gang's territory, held to be *insufficient* to justify a stop and detention. (***People v. Hester*** (2004) 119 Cal.App.4th 376, 385-392.)

Using a "*Controlled Tire Deflation Device*" ("*CTDD*"):

> The use of a "*controlled tire deflation device*" to stop a vehicle suspected of being used to smuggle controlled substances over the US/Mexico border held to be a detention only (thus requiring only a reasonable suspicion) and not excessive force under the circumstances. (***United States v. Guzman-Padilla*** (9th Cir. 2009) 573 F.3rd 865.)
>
> > *Note*: The "*controlled tire deflation device*," or "*CTDD*," is an accordion-like tray containing small, hollow steel tubes that puncture the tires of a passing vehicle and cause a gradual release of air, bringing the vehicle to a halt within a quarter to half a mile.
> >
> > See "*A Controlled Tire Deflation Device* ('*CTDD*'), under "*New and Developing Law Enforcement Tools and Technology*" (Chapter 14), below.

Checking the Vehicle for a Wanted Suspect:

> To serve a warrant, the officer need only know that the registered owner has an outstanding warrant and may stop the vehicle even without seeing the driver or the vehicle's occupants. (***People v. Dominquez*** (1987) 194 Cal.App.3d 1315, 1317-1318; ***People v. Williams*** (1995) 33 Cal.App.4th 467, 476.)

An Investigative Stop of a Criminal Suspect:

> "Under the **Fourth Amendment**, an officer may conduct a brief investigative stop only where she has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity,' commonly referred to as 'reasonable suspicion.'" (***United States v. Vandergroen*** (9th Cir. 2020) 964 F.3rd 876, 879; involving a reported suspect illegally carrying a concealed firearm, and citing ***Navarette v. California*** (2014) 572 U.S. 393, 396-97 [134 S.Ct. 1683; 188 L.Ed.2nd 680].
>
> In a robbery of a Sprint Wireless Express store, where the clerk slipped in a GPS tracker in with the items taken, officers responded to the intersection from where the GPS indicated, minutes later, that the GPS was responding. Two cars were located at that location, neither of which fit the vehicle description provided by the victim clerk. However, the occupants (two black males, when the robber was described as a black male) of one car paid no attention to the many police vehicles that inundated the area. Also, that vehicle was blue when the suspect vehicle was described as dark green, while the other vehicle was gray. Lastly, the suspect vehicle was described as a Pontiac while the vehicle at the scene was a Ford, but with a similar physical description as a Pontiac. Stopping and detaining (and subsequently arresting as the robbers) the Ford occupants was held to be lawful in that given what was available at that location, and despite the differences, the officers had a *reasonable suspicion* to believe that the Ford occupants were the robbers, justifying the stop. (***United States v. Martin*** (8th Cir. IOWA, 2021) 15 F.4th 878.)
>
> Stopping a vehicle in a school parking lot where it had been observed parked partially outside a parking space, with its driver (defendant) apparently sleeping, with the engine running, and a crossbow visible on the back seat, was held to be lawful. Aside from the above factors, the Court noted that the visible crossbow on the back seat was sufficient "reasonable suspicion" all by itself to justify the stop in order to investigate the defendant having a dangerous weapon on school grounds. (***United States v. Coleman*** (4th Cir. VA 2021) 18 F.4th 131.)

Stopping a Vehicle When Its Owner Has a Revoked License or a Warrant for His Arrest:

> "(T)he **Fourth Amendment** permits an officer to initiate a brief investigative traffic stop when he has 'a particularized and objective basis for suspecting the particular person stopped of

criminal activity.'" (***Kansas v. Glover*** (Apr. 6, 2020) __ U.S. __, __ [140 S.Ct. 1183; 206 L.Ed.2nd 412].), quoting ***United States v. Cortez*** (1981) 449 U.S. 411, 417-418 [101 S.Ct. 690; 66 L.Ed.2nd 621].)

> "'Although a mere "hunch" does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause.'" (***Kansas v. Glover***, *supra*, quoting ***Navarette v. California*** (2014) 572 U.S. 393, 397 [134 S.Ct. 1683; 188 L.Ed.2nd 680 (quotation altered); and ***United States v. Sokolow*** (1989) 490 U.S. 1, 7 [109 S.Ct. 1581; 104 L.Ed.2nd 1].)
>
> In ***Glover***, the United States Supreme Court held that observing defendant's vehicle, which a records check revealed was owned by someone with a *revoked* license, "*provided more than reasonable suspicion*" to assume that it was defendant who was driving at the time and to initiate a traffic stop, at least absent any other information that it was not the registered owner of the vehicle who was operating the car at the time. (***Kansas v. Glover***, *supra*, at p. __; noting on pg. __ that "the presence of additional facts might dispel reasonable suspicion."
>
> *Note*: In ***Glover***, the officer's records check revealed that defendant's driver's license had been "revoked," which under Kansas law, meant that he had done something serious enough to show a proclivity for having little regard for Kansas' laws. As noted in the concurring opinion, the result might have been different had defendant's license merely been "suspended," which can happened for offenses as minor as failing to pay parking tickets, court fees, or child support. Under such a circumstance, two concurring justices would not have found sufficient reasonable suspicion to believe it was the defendant who was driving his own vehicle. (***Id***, at pp. __-__.)

See also ***States v. Yancey*** (7th Cir, 2019) 928 F.3rd 627, where officers stopped a vehicle because they believed the driver had an outstanding warrant. The stop was lawful. And then, after arresting the driver, the officers did not let the passenger drive the vehicle away, instead waiting to determine whether the passenger had a valid license. Without finding reasonable suspicion to continue to hold the passenger, the court held that ensuring the

passenger "could legally drive the car" was part of the stop's mission and justified extending the detention for two additional minutes. (***Id.*** at 631.)

The Ninth Circuit Court of Appeal also extended the rule of ***Glover*** to include with the officer has a reasonable suspicion to believe that the registered owner has an outstanding warrant for her arrest. (***United States v. Nault*** (9th Cir. 2022) 41 F.4th 1073, 1079, and fn. 3.)

To serve a warrant, the officer need only know that the registered owner has an outstanding warrant and may stop the vehicle even without seeing the driver or the vehicle's occupants. (***People v. Dominquez*** (1987) 194 Cal.App.3d 1315, 1317-1318; ***People v. Williams*** (1995) 33 Cal.App.4th 467, 476.)

Mistake of Law vs. Mistake of Fact:

Mistake of Law:

Original Rule:

The long-standing rule has been that an officer making a traffic stop based upon a misapprehension of the *law*, (i.e., a "*mistake of law*"), even if reasonable (but, see ***Heien***, below), is an illegal stop. (***United States v. Lopez-Soto*** (9th Cir. 2000) 205 F.3rd 1101; ***United States v. Morales*** (9th Cir. 2001) 252 F.3rd 1070, 1073, fn. 3.)

As a general rule, a mistake of law, whether reasonable or not, could not be the basis for finding probable cause or a reasonable suspicion. (***People v. Teresinski*** (1982) 30 Cal.3rd 822; involving an officer's mistaken belief that a curfew violation applied. "Courts on strong policy grounds have generally refused to excuse a police officer's mistake of law." (***Id.***, at p. 831.)

See ***People v. White*** (2003) 107 Cal.App.4th 636, 643-644; police officer unaware that Arizona did not require a front license plate; stop illegal.

There is some authority to the contrary. (***People v. Glick*** (1988) 203 Cal.App.3rd 796.) But this is based upon an unusual fact situation; i.e., California

police officer did not know that New Jersey doesn't require registration stickers on their license plates. This is a minority opinion that most courts will not follow.

An officer's mistake of law; i.e., his belief that Baja California, Mexico, required motorists to affix a registration sticker on the car so that it would be visible from the rear of the vehicle (the registration sticker is actually supposed to be affixed to the vehicle's windshield) resulted in a traffic stop made without the necessary reasonable suspicion. The resulting evidence, therefore, should have been suppressed. (***United States v. Lopez-Soto*** (9th Cir. 2000) 205 F.3rd 1101.)

See ***United States v. Twilley*** (9th Cir. 2000) 222 F.3rd 1092; California police officer mistakenly believed that Michigan required two plates.

An officer's misapprehension that a person crossing the street other than in a cross walk was in violation of **V.C. § 21954(a)**, did not justify a detention to cite for that offense when it is later held that the section did not apply. (***People v. Ramirez*** (2006) 140 Cal.App.4th 849.)

An officer's mistaken belief that defendant's vehicle, with no front license plate, violated California law (i.e., **V.C. § 5202**), because it didn't have a front license plate but had a valid rear Florida license plate, when unknown to the officer Florida does not issue two license plates to automobiles, was an inexcusable mistake of law. (***People v. Reyes*** (2011) 196 Cal.App.4th 856.)

New Rule:

Where a mistake of law is based upon a misapprehension of the scope of a statute that has yet to be decided, then such a mistake is "*reasonable*," and *not* a violation of the **Fourth Amendment** when a traffic stop is made based upon that misapprehension. (***Heien v. North Carolina*** (2014) 574 U.S. 54 [135 S.Ct. 530; 190 L.Ed.2nd 475]; unclear under North Carolina statutes

whether a vehicle with one brake light out was a vehicle code violation.)

Note: Although the general rule continues to be that a mistake of law does not excuse an otherwise illegal stop, detention, or arrest, ***Heien*** discredits any of the above cases to the extent that they held that such a mistake of law cannot overcome the fact of an illegal stop, detention, or arrest even though such a mistake is "*objectively reasonable*."

See also ***People v. Holiman*** (2022) 76 Cal.App.5th 825, 831; "If the detaining officer's justification for a traffic stop is based on a mistake—either factual *or* legal—then the resulting search or seizure is lawful under the **Fourth Amendment** as long as the officer's mistake is *objectively* reasonable. (Citing ***Heien v. North Carolina***, *supra*, at pp. 57, 60–61, 67; for the proposition that the a traffic stop may be found lawful where an officer's mistake as to the meaning of a statute is reasonable.

In ***Holiman***, the Court determined that the officer's mistake in her interpretation of **V.C. §§ 22107** & **22108** was not objectively reasonable by assuming that her car being positioned behind defendant's car was affected by defendant's failing to signal for 100 feet before making a turn. Ultimately, the Court ruled that it was not reasonable for the officer to believe that defendant, stopping at a stop sign with a full-sized car (the patrol car) behind him that could not have fit in the limited space to the right of defendant's car, could have been affected by defendant's failure to signal. Thus, the subsequent traffic stop was illegal in that **V.C. §§ 22107/22108** was not violated, and the resulting contraband found in defendant's car should have been suppressed.

Heien cites ***Michigan v. DeFillippo*** (1979) 443 U.S. 31 [99 S.Ct. 2627; 61 L.Ed.2nd 343], where a city ordinance allowing for defendant's arrest was declared, after the fact, to be unconstitutional. The officer's good faith reliance upon the city ordinance was held to be a reasonable mistake of law, justifying the arrest.

Where police officers detained defendant because he was "riding a bicycle in a business district," eventually arresting him for being under the influence of a controlled substance, when the initial detention was based upon a local ordinance prohibiting the operation of a bicycle "upon any sidewalk fronting any commercial business establishment unless official signs are posted authorizing such use" (**San Diego Municipal Code § 84.09(a)**), the detention was held to be illegal. Defendant was stopped in front of a building that was no longer operating as a business and thus, as interpreted by this court, not covered by the ordinance. With no prior guidance, however, the officers' "expansive" interpretation of the statute ("mistake of law") was not unreasonable under the circumstances. Pursuant to the rule of ***Heien v. North Carolina***, *supra*, therefore, the officers' reasonable mistake of law did not negate defendant's detention and subsequent arrest. (***People v. Campuzano*** (2015) 237 Cal.App.4th Supp. 14, 18-21.)

In a securities fraud case, it was alleged that between 2001 and 2007, each of 31 individual investors purchased one or more of 16 different investments from defendant's company. And for each of those investments, it was the prosecution's theory that various material omissions or misstatements were made either through the offering documents or during the sale of the investment. Upon defendant's conviction on all counts, the Appellate Court ruled that the trial court erred by failing to instruct the jury on "mistake of law" on those counts related to defendant's omissions, such omissions being argued by defendant as based on his four attorneys' advice. The error, however, was held to be harmless.

(***People v. Koenig*** (2020) 58 Cal.App.5th 771, 806-811.)

> "(M)istake of law can be a valid defense when the crime requires specific intent if the mistake of law negates the specific intent of the crime." (pg. 806.)

Mistake of Fact: An officer making a traffic stop based upon a "*mistake of fact*," "*held reasonably and in good faith*," will *not* invalidate the stop. (See below.)

> Sheriff's deputies stopping defendants' car based upon a computer check indicating that the vehicle's registration had expired, when in fact the registration had already been renewed. Absent some reason to believe that the computer information was not accurate, the stop was held to be lawful. (***United States v. Miguel*** (9th Cir. 2004) 368 F.3rd 1150.)
>
> A missing rear license plate and no visible temporary registration displayed in the rear window, even though the temporary registration is later found to be in the front windshield, but not visible to the officer coming up behind the vehicle, is sufficient reasonable suspicion to justify a traffic stop. (***In re Raymond C.*** (2008) 45 Cal.4th 303.)
>
> > As noted in fn. 2: "A temporary permit is to be placed in the lower rear window. However, if it would be obscured there, it may be placed in the lower right corner of either the windshield or a side window." (***DMV Handbook of Registration Procedures*** (Oct. 2007) ch. 2, § 2.020, p. 7.)
>
> An officer stopping a vehicle for having illegally tinted windows, when the Plaintiff alleges that the windows were rolled down and not visible to the officer, is, at best, an unreasonable mistake of fact, and does not provide the officer with qualified immunity from civil liability. (***Liberal v. Estrada*** (9th Cir. 2011) 632 F.3rd 1064, 1077-1078.)
>
> However, where a "high risk" stop of a suspected stolen vehicle was made, such stop being precipitated by a misreading of the license plate by an "automated license plate reader" and where the stop was made without first

making a visual verification that the license on the stopped vehicle was as interpreted by the plate reader, the lawfulness of such a stop was held to be a triable issue for a civil jury to decide. (***Green v. City & County of San Francisco*** (9th Cir. 2014) 751 F.3rd 1039, 1045-1046; discounting without discussion the possibility that the stop was based upon a reasonable mistake of fact.)

> *Note*: In a case in which two organizations petitioned for a writ of mandate to compel disclosure of requested automated license plate reader (ALPR) data pursuant to the **California Public Records Act**, the California Supreme Court, reversing a lower court, concluded that the ALPR scan data at issue are *not* subject to **Govt. Code § 6254(f)**'s exemption for records of investigations. The process of ALPR scanning does not produce records of investigations because the scans are not conducted as a part of a targeted inquiry into any particular crime or crimes. Regarding the application of the catchall exemption set forth in **Govt. Code § 6255(a)**, the Supreme Court noted the trial court appeared to have placed significant weight on speculative concerns about possible disclosure of mobile ALPR patrol patterns, without record evidence to support its conclusions. The Court held this to be error. (***American Civil Liberties Union Foundation v. Superior Court*** (2017) 3 Cal.5th 1032.)

A man who went into the backyard of a home, tried unsuccessfully to break in, and was sitting on a bench when police encountered him, might actually have thought, as he claimed, that the house belonged to his cousin, the California Supreme Court held in a unanimous decision, criticizing the Court of Appeal's majority for usurping the function of a jury by factually finding that the account lacked credibility as an unreasonable mistake of fact. The rule is that a defendant's mistaken belief need not be reasonable, just genuinely held, contrary to instructions given by the trial court to the jury. The only question on appeal was whether the instructional error was prejudicial and thus required reversal. (***People v. Hendrix*** (2022) 13 Cal.5th 933; holding that the error was prejudicial.)

Pretext Stops: A "*pretext* (or *pretextual*) *stop*" is one where law enforcement officers stop a vehicle usually for some minor traffic infraction but where the officers' true motivation is actually to investigate some more serious offense for which there is no reasonable suspicion.

Whren v. United States: A prior three-way split of opinion on the legality of such a practice was finally resolved by the U.S. Supreme Court in ***Whren v. United States*** (1996) 517 U.S. 806 [116 S.Ct. 1769; 135 L.Ed.2nd 89], upholding the legality of such a practice. (See also ***People v. Gomez*** (2004) 117 Cal.App.4th 531, 537; and ***People v. Gallardo*** (2005) 130 Cal.App.4th 234.)

A law enforcement officer's actions, so long as *objectively reasonable*, might still result in the admissibility of illegally seized evidence because of the "*good faith*" exception. (***United States v. Leon*** (1984) 468 U.S. 897 [104 S.Ct. 3405; 82 L.Ed.2nd 677]; see also ***People v. Hull*** (1995) 34 Cal.App.4th 1448; ***People v. Suff*** (2014) 58 Cal.4th 1013, 1054.) (See "*Good Faith*," below.)

Per ***Whren***, so long as there is some lawful justification for making the stop, the officers' *subjective motivations* are irrelevant. (***Ibid***; see also ***United States v. Miranda-Guerena*** (9th Cir. 2006) 445 F.3rd 1233.)

Whren is based upon the United States Constitution's **Fourth Amendment**, precluding a state's attempt to impose a stricter standard upon law enforcement, unless the state chooses to employ its own Constitution (under the theory of "*independent state grounds*") (***Arkansas v. Sullivan*** (2001) 532 U.S. 769 [532 S.Ct.769; 149 L.Ed.2nd 994].)

The "*pretext stop*" theory of ***Whren v. United States*** applies to civil parking violations as well as any criminal violation. (***United States v. Choudhry*** (9th Cir. 2006) 461 F.3rd 1097.)

Under ***Whren***, the reasonableness of a traffic stop under the **Fourth Amendment** is based on objective criteria and not the actual or subjective motivations of a law enforcement officer involved. Specifically, "as long as a traffic stop is warranted by objectively reasonable facts, a claim that the officer making the stop was acting in accordance with some hidden agenda will not be grounds a successful **Fourth Amendment** challenge." In this case, the Court held that a

Maine State Trooper had a reasonable basis to believe that defendant had committed a traffic infraction (ignoring a traffic sign commanding drivers to stay to the right except while passing). As a result, the Court held that the trooper was entitled to conduct the traffic stop, regardless of any subjective motivation he possessed. (***United States v. Miles*** (1st Cir. ME 2021) 18 F.4th 76.)

"Pretextual stops are tolerated—so long as the lawful bounds that justify the stop are observed—because the subjective intent of officers is irrelevant in Fourth Amendment analysis." (***People v. Esparza*** (2023) 95 Cal.App.5th 1084, 1094; citing ***Whren v. United States***, *supra*, at p. 814.)

Old California Rule:

Until passage of **Proposition 8**, California Courts were obligated to follows California's stricter rules that in some circumstances may (and lawfully were allowed to) have been stricter than the federal standards. (See ***American Academy of Pediatrics v. Lungren*** (1997) 16 Cal.4th 307, 327-328; ***Raven v. Deukmejian*** (1990) 52 Cal.3rd 336. 353.)

California Courts' ability to use "*Independent State Grounds*" as a basis for imposing stricter rules on law enforcement was eliminated with passage of **Proposition 8** in June, 1982, and its "*Truth in Evidence*" provisions. (***In re Lance W.*** (1985) 37 Cal.3rd 873.)

Since passage of **Proposition 8**, California state courts now determine the reasonableness of a search or seizure by federal constitutional standards, and thus follows ***Whren***. (***People v. Schmitz*** (2012) 55 Cal.4th 909, 916; ***People v. Steele*** (2016) 246 Cal.App.4th 1110, 1114-1115.) (See "*California's Exclusionary Rule*; ***Proposition 8***," under "*Arrests*" (Chapter 5), below.)

Pretext Issues:

Use of the federal material witness statute (**18 U.S.C. 3144**), authorizing the detention of a material witness based upon a reasonable suspicion, may lawfully be used as a pretext to arrest a material witness under certain circumstances, even where shown that there was no real

intent to use the detainee as a witness. (***Ashcroft v. al-Kidd*** (2011) 563 U.S. 731, 741-744 [131 S.Ct. 2074; 179 L.Ed. 2nd 1149].)

Stopping defendant's vehicle upon observing an expired temporary registration sticker upheld despite the officers' real purpose of investigating his involvement in the sale of narcotics. (***United States v. Fowlkes*** (9th Cir. 2015) 804 F.3rd 954, 971.)

In that an officer's reasonable suspicion of a violation of the law is enough to justify a stop a vehicle, and test being an objective one so that the officer's subjective thinking is irrelevant, the fact that the officer lied to the defendant about the reasons for the stop is also irrelevant. (***United States v. Magallon-Lopez*** (9th Cir. 2016) 817 F.3rd 671, 675.)

Officers of the San Jose Police Department were held to have unlawfully prolonged a traffic stop (estimated at 18 minutes, based upon body camera recordings) in violation of defendant's **Fourth Amendment** rights, overruling the trial court on this issue. The record showed the stop was actually part of a preexisting drug investigation and that the officers had used the traffic investigation as a pretext for the stop. One of the officers who stopped defendant openly admitted on a body camera video of the stop that he never intended to issue a citation. The video also showed that a plainclothes officer requested a narcotics dog before conducting any purported sobriety checks. And the dog handler admitted he had been informed that his presence would be required before the stop had even occurred. The fact of the preexisting drug investigation established that the plainclothes officer's testimony about what he observed during the stop was neither reasonable nor credible, and thus did not constitute substantial evidence under the relevant legal standard. (***People v. Ayon*** (2022) 80 Cal.App.5th 926, 937-941.)

> *Note*: This case might be interpreted by some as authority for the argument that a pretext stop is illegal where the officers never intended to write a citation for observed traffic infractions, but rather were intent on investigating defendant's suspected illegal transportation of drugs; a questionable conclusion considering that the U.S. Supreme Court

has clearly held that pretext stops are lawful and that an officer's subjective motivations are irrelevant (see "*Pretext Stops*," above, and ***Whren v. United States*** (1996) 517 U.S. 806 [116 S.Ct. 1769; 135 L.Ed.2nd 89]. In actuality, the Court here merely noted only that the officers' true intention to conduct a narcotics investigation is relevant to *why* the traffic stop was prolonged beyond the time it would have taken to conduct the "mission" of the traffic stop. Aside from this issue, the duration of the stop (18 minutes) clearly exceeded the time limits necessary for completing the mission of the traffic stop; i.e., to write a citation for the observed traffic violation.

"(I)nvestigations conducted by officers not directly related to the initial purpose of the stop 'do not convert the encounter into something other than a lawful seizure, so long as the inquiries do not measurably extend the stop's duration.'" (***People v. Esparza*** (2023) 95 Cal.App.5th 1084, 1094; quoting ***Arizona v. Johnson*** (2009) 555 U.S. 323, 333 [172 L.Ed.2nd 694; 129 S.Ct. 781].)

Exceptions: The theory of ***Whren*** is subject to exceptions:

Rule: Contrary to the general rule, an officer's motivations in conducting a search *do* matter in *three* limited situations; i.e., in "*special needs*" searches, "*administrative searches*," and when conducting a "*knock and talk*" within the curtilage (e.g., front porch) of a home. (***United States v. Lundin*** (9th Cir. 2016) 817 F.3rd 1151, 1159-1160; see also ***United States v. McCarty*** (9th Cir. 2011) 2011 U.S. App. LEXIS 18874 [vacated and remanded]; child pornography observed during a lawful TSA administrative search may lawfully be used to establish probable cause to arrest.)

On remand of ***McCarty***, defendant's motion to suppress was denied at ***United States v. McCarty*** (2011) 835 F.Supp.2nd 938.

In ***Lundin***, the Ninth Circuit quoted the Supreme Court in ***Florida v. Jardines*** (2013) 569 U.S. 1 [133 S.Ct. 1409; 185 L.Ed.2nd 495], noting that: "After ***Jardines***, it is clear that, like the special-needs and administrative-inspection exceptions, the 'knock and talk' exception depends at least in part on an

officer's subjective intent." (***United States v. Lundin***, *supra*, at p. 1160.)

In ***Jardins***, in discussing the legality of entering the front porch area of defendant's home (i.e., the "curtilage") with a drug-sniffing dog, the Supreme Court noted that: "Here, however, the question before the court is precisely *whether* the officer's conduct was an objectively reasonable search. As we have described, that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered. Here, their behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do." (Italics in original; ***Id.,*** 133 S.Ct. 1409, 1416-1417.)

See ***United States v. Orozco*** (9th Cir. 2017) 858 F.3rd 1204, 1210-1212, for a description of the various cases illustrating the exceptions to the rule of ***Whren***.

Administrative Searches:

When the pretext used for making a stop is to conduct an "*administrative search*," such as inspecting the licensing of a taxicab, per local ordinance, or an inventory vehicle search, making a traffic stop is unlawful, and any direct products of that stop are subject to suppression. (***People v. Valenzuela*** (1999) 74 Cal.App.4th 1202; ***Whren v. United States***, *supra*, at pp. 811-812.)

Narcotics detection in the form of a highway check point cannot be justified as a valid administrative purpose. (***City of Indianapolis v. Edmond*** (2000) 531 U.S. 32 [121 S.Ct. 447; 148 L.Ed.2nd 333].)

Use of Nevada's "NAS Level III paperwork inspection" administrative search statutes, which authorize the suspicionless search of a commercial truck under statutes that are intended "to enforce the provisions of state and federal laws and regulations relating to motor carriers, the safety of their vehicles and equipment, and their transportation of hazardous material and other cargo," as a pretext to

search for smuggled drugs, held to be a illegal pretext search. The only purpose of the stop was to investigate criminal activity and that any alleged administrative purpose for the stop was "only a charade to camouflage the real purpose of the stop." (***United States v. Orozco*** (9th Cir, 2017) 858 F.3rd 1204.)

> The Court held in ***Orozco*** that the presence of a criminal investigatory motive, by itself, will not necessarily render an administrative stop and search an illegal pretextual stop or search in all cases. The test is an objective one: A pretextual administrative search will be held to be illegal only in those cases where the officer would not have made the stop or search except for the presence of the invalid purpose. (***Id***. at pp. 1213-1216.)
>
> However, see the concurring opinion in **United States v. Johnson** (9th Cir. 2018) 889 F.3rd 1120, at pp. 1129-1133, where the two concurring justices note that "such decision contradicts earlier Supreme Court precedent and that ***Orozco*** therefore ought to be reconsidered by our court," and that the Supreme Court has explicitly—and unanimously—rejected the approach we adopted in ***Orozco***," citing ***Brigham City v. Stuart*** (2006) 547 U.S. 398 [126 S.Ct. 1943; 164 L.Ed.2nd 650], as authority for this argument.

Vehicle Impound Searches:

> An officer's intent to use the impoundment of a vehicle driven by an unlicensed defendant and an inventory search as a pretext to look for narcotics-related evidence was found *not* to come within the legally recognized grounds for impounding vehicles pursuant to law enforcement's community caretaking function. Inventory searches being an exception to the rule of ***Whren***, the officer's subjective intent in impounding defendant's car was held to be relevant. (***People v. Torres*** (2010) 188

Cal.App.4th 775, 785-793; ***People v. Lee*** (2019) 40 Cal.App.5th 853. 867-869.)

The purpose of an inventory search of an impounded vehicle is to produce an inventory of the items in the car and not to look for incriminating evidence. An administrative search, such as a vehicle inventory search, is an exception to the general rule that an officer's subjective intent in conducting such a search is irrelevant. (***United States v. Johnson*** (9th Cir. 2018) 889 F.3rd 1120, 1125.)

> However, see the concurring opinion at pp. 1129-1133, where the two concurring justices note that "such decision contradicts earlier Supreme Court precedent and that ***Orozco*** therefore ought to be reconsidered by our court," and that the Supreme Court has explicitly—and unanimously—rejected the approach we adopted in ***Orozco***," citing ***Brigham City v. Stuart*** (2006) 547 U.S. 398 [126 S.Ct. 1943; 164 L.Ed.2nd 650], as authority for this argument.

Also see ***United States v. Snoddy*** (6th Cir. 2020) 976 F.3rd 630, where the Sixth Circuit Court of Appeal held that despite the officer's stated intent to impound defendant's vehicle in order to search for drugs (i.e., a "pretextual search"), the impound of his vehicle was lawful, defendant having been arrested on drug warrants and the community caretaking requirements satisfied). The impound and inventory search of defendant's car was therefore lawful.

Special Needs Searches or Seizures:

"(W)hile the traditional **Fourth Amendment** analysis 'is predominantly an objective inquiry,' the 'actual motivations' of officers may be considered when applying the special needs doctrine." (***Scott v. County of San Bernardino*** (9th Cir. 2018) 903 F.3rd 943, 949, citing ***Ashcroft v. al-Kidd*** (2011) 563 U.S. 731, 736 [131 S.Ct. 2074; 179 L.Ed.2nd 1149].)

> "(W)here it is 'clear from the testimony' of the arresting officer that the seizure occurred for an impermissible motive, '[t]his alone is sufficient to conclude that [a] warrantless [arrest] [is] unreasonable' . . . An arrest meant only to 'teach a lesson' and arbitrarily punish perceived disrespect is clearly unreasonable under ***T.L.O.***" *(at p. 950.)* (***Scott v. County of San Bernardino***, *supra*, at p. 950.)

See also ***Gray ex rel. Alexander v. Bostic*** (8th Cir. 2006) 458 F.3rd 1295, 1306, finding the handcuffing of a young student to be unreasonable under ***T.L.O.*** where the arresting officer "candidly admitted" that he did so "to persuade her to get rid of her disrespectful attitude and to impress upon her the serious nature of committing crimes."

When the Use of a Pretext is illegal:

> When a stop or search is *not* a "*run-of-the-mine*" case, such as "cases where 'searches or seizures [were] conducted in an extraordinary manner, usually harmful to an individual's privacy or even physical interests—such as, for example, seizure by means of deadly force, unannounced entry into a home, entry into a home without a warrant, or physical penetration of the body.' (Citing ***Whren v. United States***, *supra*, at p. 818.)" (***United States v. Ibarra*** (9th Cir. 2003) 345 F.3rd 711, 715.)
>
> The theory of ***Whren*** is limited to those circumstances where a police officer is aware of facts that would support an arrest. "(A)lthough ***Whren*** stands for the proposition that a pretextual seizure based on the illegitimate subjective intentions of an officer may be permissible, it does not alter the fact that the pretext itself must be a constitutionally sufficient basis for the seizure and the facts supporting it must be known at the time it is conducted." (***Moreno v. Baca*** (9th Cir. 2005) 431 F.3rd 633, 640; finding that a belatedly discovered arrest warrant and parole search conditions did not justify a detention and search.)

> ***Whren*** requires that there be some legal reason for the officer's actions. This does not allow for officers to bring a drug-sniffing dog into the curtilage of a suspect's home (i.e., the front porch), without a warrant, for the purpose of seeking evidence of the presence of contraband; held to be a search by the United States Supreme Court. (***Florida v. Jardines*** (2013) 569 U.S. 1, 10 [133 S.Ct. 1409; 185 L.Ed.2nd 495].)

Racial Profiling: *Query*: Does ***Whren*** validate a traffic stop when the officer's real motivation is based upon prohibited "*racial profiling*?" The answer has to be: *No*!

> "(D)iscrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice,'" (***Pena-Rodriguez v. Colorado*** (2017) 580 U.S. 206, 223 [137 S.Ct. 855, 859; 197 L.Ed.2nd 107]; criticizing a juror's apparent prejudice towards Mexican males, and quoting ***Rose* v. *Mitchell*** (1979) 443 U.S. 545, 555 [99 S.Ct. 2993; 61 L.Ed.2nd 739].)
>
> Balancing the constitutional principles involved (e.g., **Fourteenth Amendment** and **Calif. Const. Art I, §§ 7, 15**, *equal protection* and *due process*), and the state and federal statutes the officer would be violating (**18 U.S.C. §§ 241, 242**; **42 U.S.C. 1983**; **P.C. §§ 422.6(a)**, **13519.4**; and **C.C. § 52.1**), a court will *not* likely uphold such a stop. (See also ***Baluyut v. Superior Court*** (1996) 12 Cal.4th 826; *equal protection*; and ***Shapiro v. Thompson*** (1969) 394 U.S. 618 [89 S.Ct. 1322; 22 L.Ed.2nd 600]; discrimination may be so arbitrary and injurious as to be deemed a *due process* violation.
>
> > *Note*: The constitutional requirement of "*Equal Protection*" has an interesting history and application: "The United States Constitution as originally written had no provision guaranteeing equal treatment under the law. After the Civil War, discrimination against former slaves led to the enactment of the **Fourteenth Amendment**, which provides: "No State shall … deny to any person within its jurisdiction the equal protection of the laws." (**U.S. Const.**, **14th Amend.**, **§ 1**.) Since its passage, courts have formulated a general analytical framework for analyzing equal protection claims.

(***People v. Lynch*** (2012) 209 Cal.App.4th 353, 358 . . . .) The California Constitution also contains an equal protection clause (**Cal. Const., art. I, § 7**); the federal and state clauses are analyzed in substantially the same manner. (***Lynch***, at p. 358.) (⁋) An analysis of an equal protection claim proceeds as follows: 'We first ask whether the two classes are similarly situated with respect to the purpose of the law in question, but are treated differently. [Citation.] If groups are similarly situated but treated differently, the state must then provide a rational justification for the disparity. [Citation.] However, a law that interferes with a fundamental constitutional right or involves a suspect classification, such as *race or national origin* (italics added), is subject to strict scrutiny requiring a compelling state interest. [Citation.]' (***People v. Lynch***, *supra*, 209 Cal.App.4th at p. 358.) Equal protection claims are reviewed de novo. (***People v. McKee*** (2012) 207 Cal.App.4th 1325, 1338 . . . .)" (***People v. Wolfe*** (2018) 20 Cal.App.5th 673, 686-687; a DUI second degree murder case.)

The Supreme Court itself, in ***Whren***, specifically noted that; "We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race." (***Whren v. United States***, *supra*, at p. 813 [135 L.Ed.2nd at p. 98].)

Discrimination by law enforcement officers based upon a person's race in the providing of both protective and non-protective services is a constitutional equal protection violation. (***Ae Ja Elliot-Park v. Manglona*** (9th Cir. 2010) 592 F.3rd 1003.)

> However, to sustain an "equal protection" argument, a plaintiff must produce evidence sufficient to permit a reasonable trier of fact to find by a preponderance of the evidence that the officer's actions were racially motivated. (***Sandoval v. Las Vegas Metro. Police Dep't.*** (9th Cir. 2014) 756 F.3rd 1154, 1167)
>
> Such "*racial profiling*" would be a **Fourteenth Amendment** "*due process*" violation. (***Ae Ja***

Elliot-Park v. Manglona, *supra*; see also ***United States v. Ibarra*** (9th Cir. 2003) 345 F.3rd 711, 714.)

While a person's race may properly be used as an identification factor when in conjunction with other factors, but standing alone, a person's race is insufficient to justify the detention of a person as the suspect in a crime. (See ***People v. Walker*** (2012) 210 Cal.App.4th 1372, 1388-1389: "(T)here was a sense that the detaining officer relied too heavily on the common general traits of race and age in attempting to justify a stop that had no other circumstances to warrant it."

"(T)he race of an occupant (of a vehicle), without more, does not satisfy the detention standard." (***People v. Bates*** (2013) 222 Cal.App.4th 60, 67; citing ***People v. Bower*** (1979) 24 Cal.3rd 638, 644.)

Note also that California has sought to prevent racial and identity profiling through mandated written guidelines, training, and extensive reporting requirements on the details of all detentions and arrests. (See **Gov't. Code § 12525.5**: "**The Racial and Identity Profiling Act of 2015**."

> See also **P.C. §§ 13012** and **13519.4**. "A peace officer shall not engage in racial or identity profiling." (**P.C. § 13519.4(f)**)

Also, the U.S. Supreme Court has ruled that a defendant's **Sixth Amendment** right to a fair trial takes precedence over a state statute that precludes or restricts inquiry into the validity of a jury's verdict (i.e., the "no impeachment rule") when there is "compelling evidence" that a juror, during deliberations, made a clear statement indicating that he or she relied upon racial stereotypes or animus to convict a defendant. (***Pena-Rodriguez v. Colorado*** (2017) 580 U.S. 206 [137 S.Ct. 855; 197 L.Ed.2nd 107].)

The Supreme Court has also held that a defendant (a black male) in a capital murder case received ineffective assistance of counsel (a Sixth Amendment violation) when his attorney called as an expert witness a psychologist who, as a part of his expert opinion as to the potential future dangerousness of the defendant, testified that black men are statistically more likely to be violent. The Court ruled that

it was inappropriate for a jury to consider race no matter how it was injected into the proceeding, rejecting the argument that it was invited error because defendant's own attorney was the one who called the expert to testify. (***Buck v. Davis*** (2017) 580 U.S. 100 [137 S.Ct. 759; 197 L.Ed.2nd 1].)

See "*Racial Profiling and Implicit Bias*," above.

Motor Vehicle Passengers:

To Arrest a Passenger:

The stop of the defendant's car upon observing a passenger in the car for which there was a known outstanding arrest warrant is lawful. When the stop revealed the defendant/driver was in possession of a billy club, the officer lawfully arrested him as well. (***In re William J.*** (1985) 171 Cal.App.3rd 72.)

"A momentary stop of an automobile by police to investigate a passenger reasonably believed to be involved in a past crime is proper. It creates a minimal inconvenience to the driver of that automobile, when balanced against the government's interest in apprehending criminals." (***Id***., at p. 77.)

To Detain a Passenger: Is a passenger in a vehicle when the driver is stopped and detained also subject to being detained, thus implicating the passenger's privacy rights?

The United States Supreme Court reversed the California Supreme Court on this issue and held that at least in a private motor vehicle (as opposed to a taxi, bus, or other common carrier), the passenger, by virtue of being in a vehicle stopped for a possible traffic infraction, is in fact detained, giving him the right to challenge the legality of the traffic stop. (***Brendlin v. California*** (2007) 551 U.S. 249 [127 S.Ct. 2400; 168 L.Ed.2nd 132].)

The test is whether, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Or, in the case where the person has no desire to leave, "whether 'a reasonable

person would feel free to decline the officers' requests or otherwise terminate the encounter.'" (***Id***., 127 S.Ct., at pp. 2405-2406.)

If the driver is stopped for a traffic-related offense, a "passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place." If the driver is stopped for something unrelated to his driving, a "passenger will reasonably feel subject to suspicion owning to close association" with the driver. (***Id***., 127 S.Ct., at p. 2407.)

This decision is in accord with the majority of prior cases that have considered this issue. (See ***People v. Bell*** (1996) 43 Cal.App.4th 754; see also ***People v. Grant*** (1990) 217 Cal.App.3rd 1451, 1460; ***People v. Hunt*** (1990) 225 Cal.App.3rd 498, 505; ***People v. Lionberger*** (1986) 185 Cal.App.3rd Supp. 1, 5; and ***People v. Lamont*** (2004) 125 Cal.App.4th 404; ***United States v. Twilley*** (9th Cir. 2000) 222 F.3rd 1092, 1095; ***United States v. Eylicio-Montoya*** (10th Cir. 1995) 70 F.3rd 1158, 1164; ***United States v. Kimball*** (1st Cir. 1994) 25 F.3rd 1, 5-6; ***United States v. Roberson*** (5th Cir. 1993) 6 F.3rd 1088, 1091; ***United States v. Rusher*** (4th Cir. 1992) 966 F.2nd 868, 874, fn. 4.)

Note also that even if the passenger is illegally detained, any evidence recovered from the vehicle, if not the product of the illegal detention, will be admissible. (***United States v. Pulliam*** (9th Cir. 2005) 405 F.3rd 782, 787; a vehicle search was done independent of the defendant's detention.)

Although ***Brendlin***, on its face, appears to deal only with the right (i.e., "*standing*") of the passenger to challenge the legality of the traffic stop (***Brendlin v. California***, *supra*., at pp. 256-259.), and arguably was not intended as authority for the continued detention of a passenger who might choose to walk away, the U.S. Supreme Court subsequently ruled quite clearly that "(t)he police need not have, in addition, cause to believe any occupant of the (lawfully stopped) vehicle is involved in criminal activity"

to justify a continued detention for the duration of the traffic stop. (***Arizona v. Johnson*** (2009) 555 U.S. 323 [129 S.Ct. 781; 172 L.Ed.2nd 694].)

> *Also*; "The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop." (***Id***., at p. 325.)
>
> And then: "(A) traffic stop of a car communicates to a reasonable passenger that he or she is not free to terminate the encounter with the police and move about at will." (***Ibid***.)

The California Supreme Court is in apparent agreement with this interpretation, holding that upon ordering the passenger out of the vehicle; "there is a social expectation of unquestioned police command, which is at odds with any notion that a passenger would feel free to leave without advance permission." (***People v. Hoyos*** (2007) 41 Cal.4th 872, 892-894; brief, one-minute detention, necessitated for purposes of officer safety, held to be lawful.)

Should additional justification be required to continue the detention of a passenger, prior case law notes that the detention can be justified by a showing that the passenger is in "*close association*" with persons (e.g., the driver) reasonably suspected of illegal activity. (***People v. Samples*** (1996) 48 Cal.App.4th 1197.)

Otherwise, there must at least be some reason for the officer to believe that his safety will be placed in jeopardy in order to justify a refusal to allow a passenger to walk away from a traffic stop. (See ***People v. Vibanco*** (2007) 151 Cal.App.4th 1; and "*Ordering In*," below.)

Defendant as the passenger in a vehicle where the driver was being arrested on warrants was upheld on the theory that an officer may detain the passengers as well as the driver while a traffic stop is ongoing. (***United States v. Yancey*** (7th Cir. IL 2019) 928 F.3rd 627.)

Ordering Out: The law is clear that upon making a lawful traffic stop, the *driver* may be ordered out of the vehicle without the need for the officer to justify why. (***Pennsylvania v. Mimms*** (1977) 434

U.S. 106, 111 [98 S.Ct. 330; 54 L.Ed.2nd 331, 337]; ***People v. Evans*** (2011) 200 Cal.App.4th 735, 743.)

> The ***Mimms*** majority notes that the justification for ordering the driver out of the car is "officer's safety." But the Court reversed the Pennsylvania Supreme Court's decision (at ***Commonwealth v. Mimms*** (1977) 471 Pa 546.) which held in effect that the **Fourth Amendment** had been violated "because the officer could not point to 'objective observable facts to support a suspicion that criminal activity was afoot or that the occupants of the vehicle posed a threat to police safety.'" (***Id***., at p. 108.)
>
> > *Note*: It appears from this that an officer's general justification of "*officer's safety*," without the need to specifically identify what factors contributed to this conclusion, is sufficient to justify ordering the driver out of his vehicle during a lawful traffic stop. It is suggested, however, to eliminate the issue, an officer, when testifying, note that "officer safety" was the reason (assuming the officer actually felt this) a driver was ordered out of his car, even if the officer cannot point to what it was that caused him or her concern for his or her safety.
>
> Although previously subject to a split of opinion, the U.S. Supreme Court has ruled that the same rules apply to *passengers* other than the driver. If anything, the need to protect the safety of the officers is even greater when he must deal with more than just a lone driver. (***Maryland v. Wilson*** (1997) 519 U.S. 408 [117 S.Ct. 882; 137 L.Ed.2nd 41]; see also ***Ruvalcata v. City of Los Angeles*** (9th Cir. 1995) 64 F.3rd 1323.)
>
> Prior state law was leaning in that direction anyway, allowing drivers and passengers to be ordered out of a vehicle with very little cause:
>
> > To corroborate the driver's identity, and for officer's safety. (***People v. Maxwell*** (1988) 206 Cal.App.3rd 1004, 1009.)
> >
> > Where there is a legitimate need to search the vehicle. (***People v. Webster*** (1991) 54 Cal.3rd 411.)

> Less justification than is needed for a patdown will warrant the ordering of a passenger out of a vehicle. (***People v. Superior Court* [*Simon*]** (1972) 7 Cal.3rd 186, 206, fn. 13.)

Citing ***Mimms*** and ***Wilson***, the California Supreme Court has cited with approval "an officer's authority to order a passenger to exit a vehicle during a traffic stop as a matter of course." (***People v. Saunders*** (2006) 38 Cal.4th 1129, 1134.)

The California Supreme Court has further held that it is also lawful to continue to detain the passenger for "at least as long as reasonably necessary for the officer to complete the activity the (lawful ordering out of the car) contemplates." (***People v. Hoyos*** (2007) 41 Cal.4th 872, 892-893.)

Ordering In: The United States Supreme Court has cited studies to the effect that the safest procedure for a peace officer during a traffic stop is to require the *driver* to remain in his or her vehicle. (***Pennsylvania v. Mimms*** (1977) 434 U.S. 106, 119, fn. 10 [98 S.Ct. 330; 54 L.Ed.2nd 331, 337]; dissenting opinion.)

Under the same rationale, some federal courts have ruled that an officer may order a *passenger* to remain in the vehicle, at least where the passenger has not expressed an intent to simply leave the scene, or when the passenger is interfering with the officer's contact with the driver. (***Rogala v. District of Columbia*** (D.C. Cir. 1998) 161 F.3rd 44; ***United States v. Moorefield*** (3rd Cir. 1997) 111 F.3rd 10, 13.)

The Ninth Circuit is in accord, finding that the officer's safety outweighs the minimal intrusion involved in maintaining the status quo by returning the passenger to where he was in the car. (***United States v. Williams*** (9th Cir. 2005) 419 F.3rd 1029.)

> See also ***Id.***, at p. 1032, fn. 2, for a list of state cases (other than California) that are in accord.

See also ***People v. Castellon*** (1999) 76 Cal.App.4th 1369, upholding the officer's order to a *passenger* to remain in the vehicle: "(W)e will not second-guess (the officer's) reasonable in-the-field call; it was for the officer to decide

whether his personal safety was better preserved by ordering Castellon to stay inside the car or by ordering him out of the vehicle."

But see ***People v. Gonzalez*** (1992) 7 Cal.App.4th 381, where ordering a passenger back into a vehicle was held to be an unlawful detention.

> *Note*: In light of ***Castellon*** and ***Williams***, *supra*, and ***McDaniel***, *infra*, it can be argued that ***Gonzalez*** is a *minority opinion*, and probably no longer a correct statement of the law, if it ever was. (See ***People v. McDaniel***, *infra*, below.)
>
> ***Gonzalez*** was also criticized as no longer good law in ***People v. Vibanco*** (2007) 151 Cal.App.4th 1, at p. 11, where the court specifically held that: "The possibility of a violent encounter is likely to be even greater still when one or more of the passengers in a stopped car attempts to leave while others stay in the car," and that "***Wilson*** can therefore reasonably be interpreted to allow officers as a matter of course to order a passenger or passengers either to get out of the car or to remain in the car during a lawful traffic stop if the officers deem it necessary for officer safety."

The California Supreme Court is also in accord, upholding the constitutionality of requiring a passenger to remain in a vehicle that is lawfully stopped. (***People v. McDaniel*** (2021) 15 Cal.5th 97, 128-131; rejecting defendant's argument that articulable suspicion of criminal activity, over and above merely being the passenger in a lawfully stopped vehicle, is required.)

> After initially ordering defendant to remain in the vehicle, and then upon asking defendant to exit the vehicle, done for the purpose of conducting a pre-impound inventory search of the vehicle, a bulge was noticed in defendant's pocket and a firearm, used in an earlier homicide, was recovered as the result of a lawful patdown for weapons.

And see "*To Detain a Passenger*," above.

Opening the Door and Leaning Inside:

> But the right to order a suspect out of his vehicle under ***Mimms*** does not mean that an officer may open the door and lean into it. Police officers who have reasonable suspicion sufficient to justify a traffic stop—but who lack probable cause or any other particularized justification, such as a reasonable belief that the driver poses a danger—may not open the door to a vehicle and lean inside. Where an officer did so, the Ninth Circuit reversed the district court's denial of a motion to suppress a firearm observed inside the car, vacated his conviction for being a felon in possession of a firearm, and remanded for further proceedings. Because opening the car door and leaning into the car constituted an unlawful search under the **Fourth Amendment**, the Court ruled that the exclusionary rule applied to the loaded handgun found under the driver's seat because the government made no effort to satisfy its burden to show that the gun was not "the fruit of the poisonous tree," did not invoke the attenuation doctrine, and did not argue that the inevitable-discovery doctrine applied. (***United States v. Ngumezi*** (9th Cir. 2020) 980 F.3rd 1285.)

Demanding Identification: The above case law, however, does not answer the question whether an officer may "*demand*" that the passenger identify himself.

> An officer may certainly "*ask*" for identification, so long as he understands that the passenger may refuse. (See ***Kolender v. Lawson*** (1983) 461 U.S. 352 [103 S.Ct. 1855; 75 L.Ed.2nd 903]; ***Brown v. Texas*** (1979) 443 U.S. 47, 52 [99 S.Ct. 2637; 61 L.Ed.2nd 357]; ***United States v. Diaz-Castaneda*** (9th Cir. 2007) 494 F.3rd 1146, 1152-1153.)
>
> But in light of the case law, above, to the effect that the passenger is in fact detained along with the driver (see ***Brendlin v. California*** (2007) 551 U.S. 249 [127 S.Ct. 2400; 168 L.Ed.2nd 132].), there's a viable argument that the officer may also require the passenger to identify himself. (See ***Hiibel v. Sixth Judicial District Court of Nevada*** (2004) 542 U.S. 177 [124 S.Ct. 2451; 159 L.Ed.2nd 292].) However, there's just no case directly on point yet.
>
> > *Query*: Is it not also arguable that a person detained based upon a reasonable suspicion that he is

involved in criminal activity, per ***Terry v. Ohio***, *supra*, is different than a person detained merely by virtue of being a passenger in a stopped motor vehicle, per ***Brendlin v. California***, *supra*? While the former may be required to identify himself, the same rule might not apply to the latter. (See ***Stufflebeam v. Harris*** (8th Cir. 2008) 521 F.3rd 884; finding the arrest of a passenger who refused to identify himself to be illegal; decided after ***Brendlin***, but failing to mention the case.)

The Ninth Circuit has ruled that demanding identification from a passenger in a vehicle during a lawful traffic stop, absent any reasonable suspicion that the passenger himself is engaged in criminal activity, creates an unlawfully prolonged traffic stop and is illegal. (***United States v. Landeros*** (9th Cir. 2019) 913 F.3rd 862.)

See "*Demanding identification*," below.

Flight: While the "*flight*" of the *driver* of a vehicle provides probable cause to arrest for various **Vehicle Code** violations (E.g., **V.C. §§ 2800.1 et seq.**), and a *driver* who is subject to citation may not avoid the citation by fleeing on foot (see **P.C. § 148(a)**), what if *the passenger*, for whom there is no connection with any illegal activity, chooses to exit the vehicle and run?

The long-standing rule has always been that "*flight alone*," without other suspicious circumstances, is not sufficient justification for a detention. (***People v. Souza*** (1994) 9 Cal.4th 224.)

Flight, however, where there is sufficient reasonable suspicion to justify a detention, is a criminal offense, punishable under **P.C. 148(a)(1)**. (***In re T.F.-G.*** (2023) 94 Cal.App.5th 893, 903-904, 908.)

However, the United States Supreme Court lowered the bar a little by holding that flight from a so-called "*high narcotics area*" is sufficient in itself to justify a temporary detention. (***Illinois v. Wardlow*** (2000) 528 U.S. 119 [120 S.Ct. 673; 145 L.Ed.2nd 570].)

Flight of two people is more suspicious than one. Add to this the fact that there appeared to be drug paraphernalia on

a table where the two persons had been sitting, and that the defendant was carrying something in his hand as he fled; the officer had sufficient reasonable suspicion to detain him. (***People v. Britton*** (2001) 91 Cal.App.4th 1112, 1118-1119.)

"Unprovoked flight" during an attempted traffic stop in a high crime area, running several stop signs in the process, serves to extend the "mission of the traffic stop" beyond what it would have taken to merely write a citation (for a license plate light violation, in this case). (***United States v. Perry*** (4th Cir. 2024) 92 F.4th 500.)

Note: A defendant's flight may be used as evidence against him at trial, showing an "awareness of guilt." (See **P.C. § 1127c** and **CALCRIM No. 372**. See also ***People v. Price*** (2017) 8 Cal.App.5th 409, 454-458.)

See "*Ordering In*," above.

See also "*Seriousness of the Offense*," above.

Search Incident to a Citation: Although the issuance of a traffic citation is technically an *arrest and release* on one's promise to appear, it is treated by the courts as a *temporary detention* only. Temporary detentions do not include the power to conduct a search. Therefore, it is not constitutionally permissible to conduct a non-consensual search of a vehicle incident to a citation, even if authorized by statute. (***Knowles v. Iowa*** (1998) 525 U.S. 113 [119 S.Ct. 484; 142 L.Ed.2nd 492]; see also ***People v. Brisendine*** (1975) 13 Cal.3rd 528, 538-552.)

Note: California has no such statute similar to Iowa's.

A "*search incident to arrest*" (see below) requires the *transportation* of the arrestee as a prerequisite to a search, absent *probable cause* to believe there is something illegal to seize. (***United States v. Robinson*** (1973) 414 U.S. 218 [94 S.Ct. 467; 38 L.Ed.2nd 427]; ***People v. Brisendine*** (1975) 13 Cal.3rd 528; ***United States v. Moto*** (9th Cir. 1993) 982 F.2nd 1384.) Writing a person a traffic citation, of course, does not normally involve the transportation of the person who is cited. He is therefore not subject to search based upon the writing of a traffic ticket alone.

A traffic stop for an equipment violation in a "*high crime*" (i.e., gang) area at night is *not* reasonable suspicion sufficient to justify

a detention or patdown for weapons. (***People v. Medina*** (2003) 110 Cal.App.4th 171.)

But see ***People v. McKay*** (2002) 27 Cal.4th 601, 607-619, a violation of **V.C. § 21650.1**, riding a bicycle on the wrong side of the street; and ***People v. Gomez*** (2004) 117 Cal.App.4th 531, 538-539, a seat belt violation: U.S. Supreme Court decisions have held that a mere violation of state statutory restrictions on making a custodial arrest for a minor criminal offense (e.g., mere traffic infraction) does not mean that the **Fourth Amendment** was also violated. (See ***Atwater v. City of Lago Vista*** (2001) 532 U.S. 318 [121 S.Ct. 1536; 149 L.Ed.2nd 549]; ***People v. Gallardo*** (2005) 130 Cal.App.4th 234, 239, fn. 1; ***People v. Bennett*** (2011) 197 Cal.App.4th 907, 918.) Absent a constitutional **Fourth Amendment** violation, evidence that is the product of a state statutory violation is not subject to suppression.

However, "police may not use probable cause for a traffic violation to justify an arrest for an unrelated offense where, under the facts known to police, they have no probable cause supporting the unrelated offense." (***People v. Espino*** (2016) 247 Cal.App.4th 746, 765; ruling that just because officers *could have* arrested defendant for speeding, doesn't mean that that fact justifies an arrest for some other bookable (i.e., a felony) offense for which there was no probable cause. Consent to search obtained without probable cause to justify the arrest for a felony was held to be invalid.)

See "*Search Incident to a Citation*" under "*Other Requirements and Limitations*," under "*Searches of Persons*" (Chapter 11), below.

Detention to Identify a Suspect in a Criminal Offense:

Stopping and detaining a suspect for a felony criminal offense, when balancing law enforcement's interest in identifying criminal suspects with the suspect's interest in personal security from government intrusion, is lawful. (***United States v. Hensley*** (1985) 469 U.S. 221 [105 S.Ct. 675; 83 L.Ed.2nd 604]; a robbery.)

In ***United States v. Jones*** (6th Cir. 2020) 953 F.3rd 433, the Sixth Circuit Court of Appeal, using the balancing test suggested in ***Hensley*** for misdemeanor cases (i.e., turning not on whether the suspect already completed a crime, but rather on the nature of the crime, how long ago the suspect committed it, and the ongoing risk

of the individual to the public safety), held that stopping and detaining defendant (found, upon his detention, to be in illegal possession of a firearm) based upon a reasonable suspicion that he had committed a misdemeanor battery on his ex-girlfriend shortly before, was reasonable. In so ruling, the Court concluded that stopping defendant's vehicle, observed at a nearby intersection shortly after having battered the victim, directly promoted the interest of preventing crime in that the girlfriend credibly claimed that defendant intended to harm her or her home. Lastly, the Court held that the stop promoted public safety, as the girlfriend had told the officers that defendant could get a firearm easily and had attacked her in the past. The court concluded that it was reasonable for the officer to stop defendant to prevent him from committing further acts of violence.

The same may not be true in the case of a misdemeanor, noise violation, not occurring in the officer's presence, at least where there are possible alternative, less intrusive methods of identifying the suspect. Stopping the suspect's vehicle to identify him held to be illegal. (***United States v. Grigg*** (9th Cir. 2007) 498 F.3rd 1070.)

The continuing validity of the ***Grigg*** decision has been questioned and is probably, if it ever was, no longer a valid rule. (See ***United States v. Creek*** (U.S. Dist. Ct, Ariz. 2009) 586 F. Supp.2nd 1099, 1102-1108; upholding the traffic stop of a petty theft (gas drive off) suspect.)

Signaling a car to stop at random, and without sufficient cause to believe it contained a theft suspect that the officers were looking for, held to be illegal. The fact that defendant, a passenger in the car, was later determined to be a probationer subject to search and seizure conditions did not retroactively allow for the stop of the vehicle, nor was it an attenuating factor sufficient to justify the resulting search. (***People v. Bates*** (2013) 222 Cal.App.4th 60, 65-71; see also ***People v. Kidd*** (2019) 36 Cal.App.5th 12, 23.)

Detention of a Person to Determine Citizenship:

Rule: Unlike making illegal entry, the mere unauthorized presence in the United States is not necessarily a crime. Stopping and detaining individuals based solely on their apparent ethnicity to determine whether they are in the country illegally is an illegal detention. (***de Jesus Ortega Melendres v. Arpaio*** (9th Cir. 2012) 695 F.3rd 990, 999-1002; citing ***Martinez-Medina v. Holder*** (9th Cir. 2011) 673 F.3rd 1029, 1036.)

Statutory Limitations:

Gov't. Code §§ 7284-7284.12; *The* "***California Values Act***," limiting law enforcement's ability to participate in enforcing federal immigration law:

Gov't. Code § 7284.6(a)(1): California law enforcement agencies *shall not*: Use agency or department moneys or personnel to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes, including any of the following:

(A) Inquiring into an individual's immigration status.

(B) Detaining an individual on the basis of a hold request.

(C) Providing information regarding a person's release date or responding to requests for notification by providing release dates or other information unless that information is available to the public, or is in response to a notification request from immigration authorities in accordance with **Gov't. Code § 7282.5**. Responses are never required, but are permitted under this subdivision, provided that they do not violate any local law or policy.

(D) Providing personal information, as defined in **Civ. Code § 1798.3**, about an individual, including, but not limited to, the individual's home address or work address unless that information is available to the public.

(E) Making or intentionally participating in arrests based on civil immigration warrants.

(F) Assisting immigration authorities in the activities described in **8 U.S.C. § 1357(a)(3)**.

(G) Performing the functions of an immigration officer, whether pursuant to **8 U.S.C. § 1357(g)** or any other law, regulation, or policy, whether formal or informal.

Pen. Code § 679.015: *Victim and Witnesses' Protection from being Turned over to Immigration Authorities*:

> **(a)** It is the public policy of this state to protect the public from crime and violence by encouraging all persons who are victims of or witnesses to crimes, or who otherwise can give evidence in a criminal investigation, to cooperate with the criminal justice system and not to penalize these persons for being victims or for cooperating with the criminal justice system.
>
> **(b)** Whenever an individual who is a victim of or witness to a crime, or who otherwise can give evidence in a criminal investigation, is not charged with or convicted of committing any crime under state law, a peace officer may not detain the individual exclusively for any actual or suspected immigration violation or turn the individual over to federal immigration authorities absent a judicial warrant.

See also "*Racial Profiling and Implicit Bias*," above.

But see ***Muehler v. Mena*** (2005) 544 U.S. 93 [125 S.Ct. 1465; 161 L.Ed.2nd 299], where the U.S. Supreme Court recently ruled (*rejecting* the Ninth Circuit's unsupported conclusion—see ***Mena v. City of Simi Valley*** (9th Cir. 2003) 332 F.3rd 1255, 1264-1265; cert. granted—to the contrary) that an officer does *not* need a "a *particularized reasonable suspicion* that an individual is not a citizen" in order to ask him or her about the subject's citizenship. Based upon ***Muehler v. Mena***, while a California law enforcement officer may be violating California statutes by questioning a person's citizenship, the officer is *not* also violating the **Fourth Amendment** by doing so.

Detentions in a Residence:

Ordering a person out of his house with only a reasonable suspicion to believe that he might be involved in criminal activity, and to walk backwards as he did so, holding onto him (albeit without handcuffs) with his hands behind his back while asking for his consent to search his person, was held to be illegal. Full probable cause was necessary. (***People v. Lujano*** (2014) 229 Cal.App.4th 175, 185-189: The subsequent consent to search his person and his house was the product of that illegal detention and invalid.)

See also ***Moore v. Pederson*** (11th Cir. 2015) 806 F.3rd 1036; detention in plaintiff's home based upon no more than a reasonable suspicion held to be illegal, absent exigent circumstances. The defendant police officer was held to have qualified immunity, however, in that the issue had yet to be settled.

Detention of Residents (*and Non-Residents*) *During the Execution of a Search Warrant*:

The occupants of a residence may be detained during the execution of a search warrant even though they did not match the description of the suspects (e.g., Caucasian instead of African-American) believed to be living there at the time. (***Los Angeles County v. Rettele*** (2007) 550 U.S. 609 [127 S.Ct. 1989; 167 L.Ed.2nd 974]; the court noting that until the rest of the house is checked for the suspects, other occupants may be detained.)

It was further held that with knowledge that one of the sought-for suspects had a firearm registered to him, the detainees could be held at gunpoint until the rest of the house could be checked, even though the detainees were unclothed at the time. It was not necessary to allow the detainees to cover us until officers' safety could be assured. (***Ibid***.)

See also ***Muehler v. Mena*** (2005) 544 U.S. 93 [125 S.Ct. 1465; 161 L.Ed.2nd 299]; detention of a resident held to be lawful while evidence in a gang shooting case was looked for, at least if not "*prolonged*." (See below)

A non-resident may also be detained when he comes upon the scene during the execution of a search warrant and there is evidence connecting him to the illegal activity at the location of the search. (***United States v. Davis*** (9th Cir. 2008) 530 F.3rd 1069, 1080-1081.)

A probation officer may lawfully "briefly" detain a visitor in a house who is present in the house of a juvenile probationer during a **Fourth** waiver search long enough to determine whether he is an resident of the house or is otherwise connected to illegal activity. (***People v. Rios*** (2011) 193 Cal.App.4th 584, 593-595; ***People v. Matelski*** (2000) 82 Cal.App.4th 837.)

The Court further determined that a probation officer has the legal authority to detain and patdown a non-probationer pursuant to **P.C. § 830.5(a)(4)** (i.e.; enforcing "violations of any penal provisions of law which are discovered while performing the usual or authorized duties of his or her employment.") (***People v. Rios***, *supra*, at p. 600.)

An occupant of a house being subjected to a search pursuant to a *search warrant* may be detained during the search (1) in order to prevent flight, (2) to minimize the risk of harm to the officers, and (3) to facilitate an orderly search through cooperation of the residents. (***Michigan v. Summers*** (1981) 452 U.S. 692, 702-703 [101 S.Ct. 2587; 69 L.Ed.2nd 340, 349-350].)

But see ***Bailey v. United States*** (2013) 568 U.S. 186, 192-202 [133 S.Ct. 1031, 1037-1043; 185 L.Ed.2nd 19], restricting such detentions to occupants who are still in the "immediate vicinity" of the residence being searched. The detention of an occupant who had just left the residence, and was already about a mile away, held to be illegal, at least under the rule of ***Summers***.

Also, the rule of ***Summers*** cannot be used as an excuse for the mass detention and interrogation of suspected illegal aliens at a factory when the ruse used to gain access to the factory and the suspects was a search warrant for employment documents. (***Cruz v. Barr*** (9th Cir. 2019) 926 F.3rd 1128.)

See "*During Execution of a Search or Arrest Warrant, or during a* ***Fourth*** *Waiver Search*," below.

Detention of Residents (*and Non-Residents*) *During the Execution of an Arrest Warrant*:

The Ninth Circuit Court of Appeal has held that the rule allowing for the detention of an occupant of a residence during the execution of a search warrant does not "categorically" apply during the execution of an arrest warrant. (***Sharp v. County of Orange*** (9th Cir. 2017) 871 F.3rd 901, 912-916.) California disagrees. (***People v. Hannah*** (1997) 51 Cal.App.4th 1335.)

See "*During Execution of a Search or Arrest Warrant, or during a* ***Fourth*** *Waiver Search*," below.

Prolonged Detentions: A traffic stop (or any other detention) which is reasonable in its inception may become unreasonable if prolonged beyond that point reasonably necessary for the officer to complete the original purposes of the detention. (***People v. McGaughran*** (1979) 25 Cal.3rd 577.)

During Issuance of a Traffic Citation:

"'Like a ***Terry*** stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission"—to address the traffic violation that warranted the stop, and attend to

related safety concerns.' ***Rodriguez v. United States***, 575 U.S. 348, 354, 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015). '[A] police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures.' ***Id***. at 350. Accordingly, an officer's inquiries during a traffic stop are constitutionally permissible if they are '(1) part of the stop's "mission" or (2) supported by independent reasonable suspicion.' ***United* States v. Landeros**, 913 F.3rd 862, 868 (9th Cir. 2019)." (***United States v. Nault*** (9th Cir. 2022) 41 F.4th 1073, 1077-1078.)

"A seizure for a traffic violation justifies a police investigation of that violation. '[A] relatively brief encounter,' a routine traffic stop is 'more analogous to a so-called "***Terry*** stop" . . . than to a formal arrest.' [Citations]" (***Rodriguez v. United States*** (2015) 575 U.S, 348, 354 [135 S.Ct. 1609; 191 L.Ed.2nd 492]; referring to ***Terry v. Ohio*** (1968) 392 U.S. 1 [88 S.Ct. 1868; 20 L.Ed.2nd 889].)

> "'A seizure for a traffic violation justifies a police investigation of that violation.' (***Rodriguez v. U.S.*** (2015) 575 U.S. 348, 354 [191 L.Ed.2nd 492, 135 S.Ct. 1609] . . . .) A traffic stop begins once the vehicle is pulled over for investigation of the traffic violation. (***People v. McDaniel*** (2021) 12 Cal.5th 97, 130. . . .)" (***People v. Ayon*** (2022) 80 Cal.App.5th 926, 936.)
>
> > "Because the traffic violation is the purpose of the stop, the stop 'may "last no longer than is necessary to effectuate th[at] purpose."'" (***Ibid***.)
> >
> > Eighteen minutes between the traffic stop (for admitted traffic violations) until probable cause was developed (based upon a drug-detection dog alerting on defendant's vehicle) was held to be unlawfully prolonged.

"'A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.' [citation.] '[T]he tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission"—to address the traffic violation that warranted the stop, [citation], and attend to related safety concerns, [citation]. [Citations.] Because addressing the infraction is the purpose of the stop, it may "last no longer than is necessary to effectuate th[at] purpose." [Citations.] Authority for the seizure thus ends when tasks tied to the traffic

infraction are—or reasonably should have been—completed.' [citation] These tasks include those incidental to traffic enforcement, such as validating a license and registration, searching for outstanding warrants, and checking for proof of insurance. [citation]" (***People v. Espino*** (2016) 247 Cal.App.4th 746, 756.)

The "*mission*" of the traffic stop, as referred to above, has been held to include determining whether to issue a traffic ticket, making ordinary inquiries incident to the traffic stop, check the driver's license, determine whether there are outstanding warrants against the driver, inspect the automobile's registration and proof of service, and any activities that serve the purpose of enforcement of the traffic code and the safety precautions that officers may need to take while doing so. (***People v. Vera*** (2018) 28 Cal.App.5th 1081, 1086-1087; citing ***Rodriguez v. United States*** (2015) 575 U.S. 348 [135 S.Ct. 1609; 191 L.Ed.2nd 4927]. See also ***People v. Ayon*** (2022) 80 Cal.App.5th 926, 937-941.)

> "A dog sniff is outside the mission of the traffic stop because it is a measure 'aimed at "detect[ing] evidence of ordinary criminal wrongdoing."'" (**People v. Vera**, supra, at p. 1087, citing ***Rodriguez v. United States***, *supra*, at pp. 355-356.)
>
> > "Because a traffic stop may 'last no longer than is necessary to effectuate' the mission, '[a]uthority for the seizure thus ends' when the mission is completed 'or reasonably should have been' completed. (***Rodriguez***, *supra*, 575 U.S. at p. 354 [135 S.Ct. at p. 1614].) It follows that a seizure of a driver is 'unlawful' when a suspicionless dog sniff prolongs the detention 'beyond' that point. (***Id***. at pp. 354-357 [135 S.Ct. at p. 1616].)" (***People v. Vera***, *supra*.)
>
> "(T)he permissible duration of the stop is not to be measured by the reasonable duration of traffic stops in similar circumstances, but by the amount of time actually necessary to perform the stop expediently." (***People v. Vera***, *supra*, citing (***Rodriguez***, *supra*, at p. 356 [135 S.Ct. at p. 1616]; thus preventing officers from rushing through the writing of a ticket in the belief that the time saved would provide the officer some extra time to ask about other potential issues.)

Note: ***Rodriguez*** involved a 7 to 8 minute delay.

"States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed." (***Delaware v. Prouse*** (1979) 440 U.S. 648, 658 [99 S.Ct. 1391; 59 L.Ed.2nd 660].)

Detaining the defendant for ten minutes, until a radio check came back that the car was stolen, was not excessive, particularly when symptoms of intoxication were noted during the ten minutes. (***People v. Carter*** (2005) 36 Cal.4th 1114, 1139-1142.)

The "mission" necessarily included the time required to write out the citation and obtain the offender's promise to appear. It will also include the time it takes to obtain and examine the offender's driver's license and registration. "(G)ood police practice" might also include the time it takes to discuss the violation with the motorist and listen to any explanation he may wish to offer. And if the vehicles are exposed to danger, the officer may require the driver to proceed to a safer location before the traffic stop is completed. (***People v. Tully*** (2012) 54 Cal.4th 952, 980-981.)

> See ***United States v. Buzzard*** (4th Cir. WV. 2021) 1 F.4th 198; noting that questions related to officer safety are necessarily related to the traffic stop's mission.

Random warrant checks during routine traffic stops are lawful, but the subject must be released when the citation process is completed. (***People v. McGaughran***, *supra*; see also ***United States v. Luckett*** (9th Cir. 1973) 484 F.2nd 89.), or within a reasonable time thereafter. (***People v. Brown*** (1998) 62 Cal.App.4th 493; one minute delay while awaiting the results of a warrant check was *not* unreasonable, even though the officer never wrote the ticket.)

See also ***United States v. Clark*** (1st Cir. ME 2018) 879 F.3rd 1, where the one minute it took to ask a vehicle passenger questions in clarification was held not to have unlawfully prolonged a traffic stop in that the questioning was "one of these negligibly burdensome precautions justified by the unique safety threat posed by traffic stops."

But see ***Rodriguez v. United States*** (2015) 575 U.S, 348 [135 S.Ct. 1609; 191 L.Ed.2nd 4927], above, holding that even a di minimis delay renders the detention illegal.

Rodriguez involved a 7 to 8 minute delay.

However, "(n)on-routine record checks and dog sniffs are paradigm examples of 'unrelated investigations' that may not be performed *if* they prolong a roadside detention absent independent reasonable suspicion." (***United States v. Gorman*** (9th Cir. 2017) 859 F.3rd 706, 715; with "substituted opinion" at 2017 U.S. App. LEXIS 18610].)

> The Court in ***Gorman***, *supra*, cites ***Rodriguez v. United States***, *supra*, at p. 1641, where the High Court notes that its prior cases have concluded that "the **Fourth Amendment** tolerate(s) certain unrelated investigations that (do) not lengthen the roadside detention." (Citing ***Illinois v. Caballes*** (2005) 543 U.S. 405, at pp. 406 & 408 [125 S.Ct. 834; 160 L.Ed.2nd 842], and ***Arizona v. Johnson*** (2009) 555 U.S. 323, at pp. 327-328 [129 S.Ct. 781; 172 L.Ed.2nd 694].
>
> See also ***Muehler* v. *Mena*** (2005) 544 U. S. 93, 101 [125 S. Ct. 1465; 161 L.Ed.2nd 299]; where it is noted that because unrelated inquiries did not "exten[d] the time [petitioner] was detained[,] . . . no additional **Fourth Amendment** justification . . . was required."

Asking defendant for a consent to search, even without any reason to believe there was anything there to search for, is lawful so long as done within the time it would have taken to write the citation which was the original cause of the stop. (***People v. Gallardo*** (2005) 130 Cal.App.4th 234.)

By conducting an ex-felon registration check and a "dog sniff," both of which were unrelated to the traffic violation for which the officer had stopped defendant, the officer prolonged the traffic stop beyond the time reasonably required to complete his traffic mission, and so violated the **Fourth Amendment** absent some independent reasonable suspicion. (***United States v. Evans*** (9th Cir. 2015) 786 F.3rd 779, 784-789.)

> While "vehicle records and warrants checks (are) tasks that are 'ordinary inquiries incident to the traffic stop,'" are lawful, conducting a separate "ex-felon registration check," done for the purpose of verifying that the detainee lives where he was registered, is not part of the traffic stop, and illegal unless supported by independent reasonable

suspicion beyond that of the cause of the traffic stop itself, but is instead "a measure aimed at 'detect[ing] evidence of ordinary criminal wrongdoing.'" (***Id.*** at p. 786.)

Upon remand, no such independent reasonable suspicion was found. (***United States v. Evans*** (Nev. 2015) 122 F.Supp.3rd 1027.)

Note: This rule has been recognized as an exception to the general rule that warrant checks during a traffic stop are allowed, and do not result in an unnecessary prolongation of the traffic stop. (See ***United States v. Hylton*** (9th Cir. 2022) 30 F.4th 842, 847.)

The trial court erroneously denied defendant's motion to suppress evidence obtained as a result of a traffic stop in that the law enforcement officers were not entitled to extend the lawfully initiated vehicle stop just because the passenger (the defendant) refused to identify himself since there was no reasonable suspicion that the passenger had committed a criminal offense. (***United States v. Landeros*** (9th Cir. 2019) 913 F.3rd 862.)

Generally, a police officer may detain a driver once the initial traffic stop ends if, during the stop, "the officer develops an objectively reasonable and articulable suspicion that the driver is engaged in some illegal activity." To determine whether an officer has a reasonable suspicion to continue the detention, a court will "look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis" for suspecting illegal activity. In using these principles, the Tenth Circuit Court of Appeals held that at the conclusion of a traffic stop, specific and articulable facts existed to provide the trooper with reasonable suspicion that defendant was engaged in criminal activity. Specifically, the trooper's suspicion that three vehicles he observed were traveling in tandem to support a drug trafficking operation was supported by the following facts: (1) In his experience it was uncommon to see three vehicles with out-of-state plates traveling in close proximity to each other, east-bound on I-70. (2) The three vehicles were all traveling at approximately ten-miles-per-hour under the speed limit. (3) When the trooper got behind the rear vehicle, a compact car, it continued to travel at approximately ten-miles-per hour under the speed limit while the second vehicle, minivan, and the lead vehicle, a pickup truck, accelerated to the speed limit. (4) The pickup truck accelerated to approximately ten-miles-per hour over the speed limit almost immediately after the minivan committed a traffic violation. From

these facts, the court concluded that it was reasonable for the trooper to infer that the pickup truck was intentionally diverting his attention from the minivan, which he believed to be the "load" vehicle because of its cargo capacity and because the pickup truck was registered to a private individual while the other two were rented. In the trooper's experience, he testified that he rarely saw large amounts of drugs transported in privately owned vehicles. Second, after stopping the minivan (which defendant was driving), the trooper's observations concerning defendant's cargo, in his experience, was not consistent with his claim that he was moving from Las Vegas to Minnesota. Specifically, defendant's minivan was densely packed with at least five large moving boxes for flat panel televisions and twelve full duffel bags and suitcases, which the trooper testified was inconsistent with what he typically sees when people are moving. Consequently, the court held that the trooper had reasonable suspicion to prolong the stop while he waited for another officer to bring a drug-sniffing dog which, when it arrived, alerted on defendant's vehicle. (***United States v. Berg*** (10th Cir. 2020) 947 F.3rd 1313; 471 pounds of marijuana recovered.)

Even though the officer during a lawful traffic stop has already indicated that he is not going to write the driver a traffic citation, the officer may still conduct certain routine tasks related to the traffic violation. Some of these routine tasks include running a computerized check of the vehicle's registration and insurance, running a similar check of the occupants' identification documents and criminal histories, preparing the traffic citation or warning, and asking the occupants about their destination, route, and purpose. (***United States v. Cox*** (8th Cir. 2021) 992 F.3rd 706.)

With two subjects stopped in a lawful traffic stop late at night and in a high crime area, defendants were not the subject of an unlawfully prolonged detention despite the officer asking if they had anything illegal in the vehicle while he waited for backup. The Court held that waiting for backup under those circumstances was reasonable, as was asking about the potential for weapons or contraband in the vehicle while the waited. (***United States v. Buzzard*** (4th Cir. W.V. 2021) 1 F.4th 198; noting that questions related to officer safety are necessarily related to the traffic stop's mission.)

Asking extraneous questions during a traffic stop while issuing a traffic warning, and writing out the warning instead of making a computer-generated warning, does not constitute a prolonged detention. Obtaining a consent search during that time period (10

minutes and 45 seconds) was held to be lawful. (***United States v. Salkil*** (8th Cir. IA, 2021) 10 F.4th 897.)

A traffic officer with 25 years of experience was held to have sufficient reasonable suspicion to continue a traffic stop longer than needed to write a warning when the defendant's responses did not appear to be logical (e.g., why he was there, reasons for traveling between Houston and Chicago, the excessive cost of a rental, and his stated purposes for the trip) and where defendant also appeared to avoid answering certain questions posed by the officer. (***United States v. Gastelum*** (8th Cir. 2021) 11 F.4th 898; cocaine found in the trunk of his car during a consent search that was requested after giving defendant a warning for an unsafe lane change.)

Stopping defendant for a simple traffic violation (i.e., following too close), and while discussing the violation, the officer began to make inquiries into the defendant's travel plans. During these inquires, the officer became suspicious (defendant's nervousness, inconsistent and evasive answers, etc.) as to whether defendant was telling the truth. This eventually led to the use of a drug-sniffing dog and the discovery of methamphetamine and heroin. The Seventh Circuit Court of Appeal ruled that travel-plan questions are routine inquires that reasonably relate to the underlying traffic violation and roadway safety. As such, such questions ordinarily fall within "the mission of a traffic stop." First, the court found that travel-plan questions provide important context for the violation at hand. Also, a driver's travel plans may affect an officer's assessment of roadway safety concerns beyond the immediate violation. Finally, the court cautioned that an officer's travel-plan questions, like the officer's other actions during the stop, must remain reasonable based on the totality of the circumstances surrounding the stop. Applying these principles the Court held that the trooper's travel-plan questions during the initial roadside detention fell within the mission of the traffic stop and did not unlawfully prolong the traffic stop. It was only after defendant provided evasive, confusing, inconsistent, and improbable answers to some of these questions, while appearing nervous, that the trooper asked follow-up questions. Under these circumstances, the court held that the trooper's travel-plan questions were reasonable and not just a "fishing expedition." The Court then held that based upon this, while also being told by dispatch that defendant has three prior drug-transportation convictions, it was less than nine minutes into the stop that the trooper developed a reasonable suspicion that defendant was involved in criminal activity. As a result, the trooper had a lawful basis to prolong the duration of the

stop in order to conduct a dog-sniff of defendant's vehicle. (***United States v. Cole*** (7th Cir. 2021) 21 F.4th 421.)

During a traffic stop for illegally tinted windows, the federal Seventh Circuit held that an officer was not prevented from asking the defendant to sit in the officer's car as a warning was being written, and asking questions unrelated to the traffic stop, so long as it doesn't prolong the duration of the traffic stop beyond what it reasonably takes for the officer to complete the "mission" of the stop. The Court further held that again, so long as the traffic stop is not illegally prolonged, it does not violate the **Fourth Amendment** to have a drug-sniffing dog sniff around the defendant's car. (***United States v. Goodwill*** (7th Cir. 2022) 24 F.4th 612; the dog alerting on cocaine in the car, all accomplished within 10 minutes.)

During a lawful traffic stop, while the citation is being written, it is not unlawful to ask "persistent" questions, even if unrelated to the reason for the traffic stop, as long as doing so does not prolong the duration of the stop. Asking defendant for permission to search his vehicle after the purposes of the stop are completed is not unlawful. In determining the lawfulness of a consent obtained under these circumstances, a court will examine the totality of the circumstances including (but not limited to) the following factors: (1) the person's age, intelligence, and education; (2) whether he was advised of his constitutional rights; (3) how long he was detained before he gave his consent; (4) whether his consent was immediate, or was prompted by repeated requests by the authorities; (5) whether any physical coercion was used; and (6) whether the individual was in police custody when he gave his consent. In this case, defendant's consent, obtained after the citation was written and defendant was released, was held to be voluntary. Discovery of thirteen one-kilogram packages of methamphetamine was held to be lawful. (***United States v. Ambriz-Villa*** (7th Cir. 2022) 28 F.4th 786.)

Officers of the San Jose Police Department were held to have unlawfully prolonged a traffic stop (estimated at 18 minutes, based upon body camera recordings) in violation of defendant's **Fourth Amendment** rights, overruling the trial court on this issue. The record showed the stop was actually part of a preexisting drug investigation and that the officers had used the traffic investigation as a pretext for the stop. One of the officers who stopped defendant openly admitted on a body camera video of the stop that he never intended to issue a citation. The video also showed that a plainclothes officer requested a narcotics dog before conducting

any purported sobriety checks. And the dog handler admitted he had been informed that his presence would be required before the stop had even occurred. The fact of the preexisting drug investigation established that the plainclothes officer's testimony about what he observed during the stop was neither reasonable nor credible, and thus did not constitute substantial evidence under the relevant legal standard. (***People v. Ayon*** (2022) 80 Cal.App.5th 926, 937-941.)

> *Note*: This case might be interpreted by some as authority for the argument that a pretext stop is illegal where the officers never intended to write a citation for observed traffic infractions, but rather were intent on investigating defendant's suspected illegal transportation of drugs; a questionable conclusion considering that the U.S. Supreme Court has clearly held that pretext stops are lawful and that an officer's subjective motivations are irrelevant (see "*Pretext Stops*," above, and ***Whren v. United States*** (1996) 517 U.S. 806 [116 S.Ct. 1769; 135 L.Ed.2nd 89].), an issue clearly conceded by the Court. In actuality, the Court here merely noted only that the officers' true intention to conduct a narcotics investigation is relevant to *why* the traffic stop was prolonged beyond the time it would have taken to conduct the "mission" of the traffic stop. Aside from this issue, the duration of the stop (18 minutes) clearly exceeded the time limits necessary for completing the mission of the traffic stop; i.e., to write a citation for the observed traffic violation.

Defendant argued the district court erred because police officers did not have an objectively reasonable basis to believe he committed a traffic violation and then unconstitutionally expanded the stop while a drug dog sniffed the exterior of the vehicle. The Eighth Circuit disagreed. Given the undisputed facts regarding the length of the stop, the officer had a reasonable suspicion that defendant had committed a traffic offense, making the initial stop lawful. And then, given the detention's short duration, and the reasons given for the time it took to almost complete the purpose of the stop before the narcotics dog alerted to the rear of the driver's side of defendant's vehicle, the district court did not err in concluding that the officer did not unlawfully prolong the stop before the dog alert gave the officers probable cause to arrest Defendant and search the vehicle. Further, the court held that there was no **Fourth Amendment** violation before Defendant made incriminating statements after being given ***Miranda*** warnings. Thus, the district court properly rejected his argument that the

statements should be suppressed as fruit of a poisonous tree. (***United States v. Rutledge*** (8th Cir. 2023) 61 F.4th 597.) [2023

The Ninth Circuit affirmed the district court's denial of a motion to suppress evidence discovered following a traffic stop in a case in which Xzavione Taylor entered a conditional guilty plea to being a felon in possession of a firearm. Ruling that the officers did not unreasonably prolong the traffic stop, the Court held that an officer's asking defendant two questions about weapons early in the counter—once before the officer learned that defendant was on federal supervision for being a felon in possession and once after—was a negligibly burdensome precaution that the officer could reasonably take in the name of safety. Also, the officer did not unlawfully prolong the traffic stop when he asked defendant to exit the vehicle. The officers' subjective motivations are irrelevant because the **Fourth Amendment's** concern with reasonableness allows certain actions to be taking in certain circumstances, whatever the subjective intent. A criminal history check and the officers' other actions while defendant was outside the car were within the lawful scope of the traffic stop. A frisk and criminal history check were not beyond the original mission of the traffic stop, being permissible based on the officers' reasonable suspicion of an independent offense: i.e., defendant's unlawful possession of a gun. As to whether the officers violated the **Fourth Amendment** when they searched defendant's car, the Court held that the district court did not err in finding that defendant unequivocally and specifically consented to a search of the car for firearms when he unambiguously responded: "*It don't matter to me*." (***United States v. Taylor*** (9th Cir. 2023) 60 F.4th 1233; unpublished.)

Defendant's motion to suppress was properly denied as troopers did not illegally delay the traffic stop in order to conduct a drug-dog search as troopers had reasonable suspicion that defendant was involved in drug-related activity before stopping defendant and only 27 minutes passed from the stop until the dog's alert. (***United States v. Rederick*** (8th Cir. 2023) 65 F.4th 961.)

"Most vehicle stops are 'analogous to a so-called "***Terry*** stop."' (***Berkemer v. McCarty*** (1984) 468 U.S. 420, 439 [82 L. Ed. 2d 317, 104 S. Ct. 3138].) When a car is lawfully detained, 'police officers may order the driver to get out of the vehicle without violating the **Fourth Amendment's** proscription of unreasonable searches and seizures.' (***Pennsylvania v. Mimms*** (1977) 434 U.S. 106, 111, fn. 6 [54 L.Ed.2nd 331, 98 S.Ct. 330].) Passengers are seized in traffic stops in the same manner as drivers (***Brendlin v. California*** (2007) 551 U.S. 249, 263 [168 L.Ed.2nd 132, 127 S.Ct.

2400]), and the threat posed to an officer by a passenger is 'every bit as great as that of the driver' such that officers may therefore 'order passengers to get out of the car pending completion of the stop.' (***Maryland v. Wilson*** (1997) 519 U.S. 408, 414–415 [137 L.Ed.2nd 41, 117 S.Ct. 882].)" (***People v. Esparza*** (2023) 95 Cal.App.5th 1084, 1094, differentiating the situation here from those in ***McGaughran***, noting that the lead officer in ***Esparza*** used any delays to insure his and the other officers' safety. Pg. 1098: "In contrast, the total time between the initial detention of Esparza's car and his patdown search was about seven minutes. As discussed above, (Officer) Arreola continued to move the mission of the stop forward in that period while simultaneously attending to legitimate safety considerations. (fn. omitted.)")

> In the omitted footnote, above (fn. 13, pg. 1098), the Court noted that it was irrelevant that defendant was never written a citation, assuming that he would have had he not been arrested.

Taking the time to check a rental agreement to determine if the driver is authorized to drive a rented motor vehicle is a part of an ordinary inquiry incident to a traffic stop, and was thus held by the 10th Circuit Court of Appeal to be part of an officer's mission during a traffic stop, and does not constitute an "unrelated investigation," or an "unlawfully prolonged" detention. (***United States v. Dawson*** (2024) 90 F.4th 1286.)

Asking defendant questions related to the traffic stop for about six minutes, followed up by another five to six minutes of questioning about the purpose of his trip when it was determined that the car did not belong to him. "The circumstances here involved a foreign national driving a car that did not belong to him. It was entirely reasonable, and within the scope of the appropriate inquiries for the traffic stop, for Sergeant Taylor to make further inquiries of the dispatcher regarding the registered owner of the car. It was also reasonable for Sergeant Taylor to take a few minutes to repeat some of his questions to defendant in the presence of the Spanish-speaking officer, who had only just arrived, in order to confirm that he had properly understood defendant's responses." When defendant subsequently consented to the search of the car (resulting in the recovery of some illegal drugs and a firearm), the officer was making valid inquiries about the suspicious nature of defendant's possession of someone else's car. (***People v. Felix*** (Mar. 7, 2024) __ Cal.App.5th __, __ [2024 Cal.App. LEXIS 154].)

While Investigating a Possible DUI Driver:

> Officers conducting a "*criminal history check*" while investigating defendant's possible inebriation when found in his vehicle unconscious with indications that he might have been under the influence of drugs, was held to be lawful. Even though defendant had been detained for some 36 minutes before it was discovered (during criminal history check) that he was a felon (a firearm already having been recovered from his vehicle), his detention was found not to be illegally "prolonged." (***United States v. Hylton*** (9th Cir. 2022) 30 F.4th 842, 847-848; also finding that even if he was illegally detained in a prolonged detention, the firearm would have been inevitably recovered anyway.)

While Executing a Search Warrant:

> The Court rejected defendant's claim that a detention while a search warrant was being executed was too long "simply because of its one-and-a-half to two-hour length" because "the record is devoid of any evidence that the officers engaged in any misconduct or in any way delayed the search." (***People v. Gabriel*** (1986) 188 Cal.App.3rd 1261, 1265.)

Unlawful Extensions of a Detention:

> Statements taken from a detained criminal suspect held for over 16 hours without probable cause to arrest, are subject to suppression as the product of an unlawfully prolonged detention. (***People v Jenkins*** (2004) 122 Cal.App.4th 1160, 1174-1178.)
>
> An otherwise lawful "*knock and talk*," where officers continued to press the defendant for permission to enter his apartment after his denial of any illegal activity, converted the contact into an unlawfully "*extended*" detention, causing the Court to conclude that a later consent-to-search was the product of the illegal detention, and thus invalid. (***United States v. Washington*** (9th Cir. 2004) 387 F.3rd 1060.)
>
> Holding onto a suspect (in handcuffs) for over 4½ hours (and maybe as long as 6½ hours) while narcotics officers drove up to a marijuana grow and searched the area to see if there was any evidence connecting him to the grow, was "*diligent and reasonable*" under the circumstances, and not an illegally prolonged detention. (***People v. Williams*** (2007) 156 Cal.App.4th 949; also finding that the officers had enough to arrest him from the outset had they chosen to do so.)

A sheriff's investigator was held *not* to be protected by qualified immunity when sued for detaining partygoers for as long as 14 hours after a warrant search for evidence of illegal gaming was executed and completed. Interrogating the participants is not part and parcel of executing a warrant. Also, the detentions could not be justified as ***Terry*** stops because individualized suspicion was not established by the partygoers' mere presence in the same large (21,000 sq. ft.) mansion where some limited drug and gaming contraband was discovered, and because detentions as long as 14 hours did not remotely resemble the brief detention authorized by ***Terry v. Ohio***. (***Guillory v. Hill*** (2015) 233 Cal.App.4th 240, 249-256.)

> Referencing ***Terry v. Ohio*** (1968) 392 U.S. 1 [88 S.Ct. 1868; 20 L.Ed.2nd 889].

By conducting an ex-felon registration check and a "dog sniff," both of which were unrelated to the traffic violation for which the officer had stopped defendant, the officer prolonged the traffic stop beyond the time reasonably required to complete his traffic mission, and so violated the **Fourth Amendment** absent some independent reasonable suspicion. (***United States v. Evans*** (9th Cir. 2015) 786 F.3rd 779, 784-789.)

> While "vehicle records and warrants checks (are) tasks that are 'ordinary inquiries incident to the traffic stop,'" are lawful, conducting a separate "ex-felon registration check," done for the purpose of verifying that the detainee lives where he was registered, is not part of the traffic stop, and illegal unless supported by independent reasonable suspicion beyond that of the cause of the traffic stop itself, but is instead "a measure aimed at 'detect[ing] evidence of ordinary criminal wrongdoing.'" (***Id.*** at p. 786.)
>
> > Upon remand, no such independent reasonable suspicion was found. (***United States v. Evans*** (Nev. 2015) 122 F.Supp.3rd 1027.)

In an asset forfeiture proceeding dealing with $167,070 seized from defendant's motorhome, it was held that the search of defendant's vehicle following the second half of a "coordinated traffic stop" (i.e., a first stop which itself lasted nearly half an hour, but didn't reveal any legal cause to search defendant's motorhome, followed by a second traffic stop set up with a drug-sniffing dog available to conduct a sniff around the exterior of the motorhome)

violated the **Fourth Amendment**. Because the dog sniff, which gave the officer in the second stop the necessary probable cause to obtain a search warrant to search defendant's motorhome followed directly in an unbroken chain from the first prolonged traffic stop, the seized currency was held to be the "fruit of the poisonous tree" and was properly suppressed by the trial court. (***United States v. Gorman*** (9th Cir. 2017) 859 F.3rd 706, 714-719; as amended at 2017 U.S. App. LEXIS 18610.)

"When a motorist 'sees a policeman's lights flashing behind him,' he expects 'that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way.'" (***United States v. Gorman***, *supra*, at p. 714; as amended at 2017 U.S. App. LEXIS 18610; citing ***Berkemer v. McCarty*** (1984) 468 U.S. 420, at p. 437 [104 S.Ct. 3138; 82 L.Ed.2nd 317, 334]; and noting that "less than 10 minutes is acceptable," citing ***Illinois v. Caballas*** (2005) 543 U.S. 405, 406, 410 [125 S.Ct. 834; 160 L.Ed.2nd 842].)

Detaining a 75-year old, 4'-11" female plaintiff in a parking lot for up to two hours, knowing that the plaintiff had urinated in her clothes, and after a search warrant had already been executed and a piece of contraband moonrock, which was the target of the instant investigation, had been seized, was arguably unreasonable, subjecting the agent-defendant to potential civil liability. The Court held that the agent was not entitled to qualified immunity under these circumstances in that a civil jury would have to determine whether the detention was unreasonably prolonged. (***Davis v. United States*** (9th Cir. 2017) 854 F.3rd 594, 598-601.)

Detaining defendant for 30 to 50 minutes while officers conducted a **Fourth** waiver search held to be illegal, requiring the suppression of evidence discovered during this prolonged time period. While the initial detention may have been lawful, holding onto defendant after it could no longer be argued that he constituted a threat to the officers or the purposes of the search, was not justified. (***People v. Gutierrez*** (2018) 21 Cal.App.5th 1146, 1153-1161.)

The trial court erroneously denied defendant's motion to suppress evidence obtained as a result of a traffic stop in that the law enforcement officers were not entitled to extend the lawfully initiated vehicle stop just because the passenger (the defendant) refused to identify himself since there was no reasonable suspicion

that the passenger had committed a criminal offense. (***United States v. Landeros*** (9th Cir. 2019) 913 F.3rd 862.)

A police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation. (***Rodriguez v. United States*** (2015) 575 U.S, 348 [135 S.Ct. 1609; 191 L.Ed.2nd 492]; finding a dog-sniff of the exterior of the defendant's car, conducted some seven to eight minutes after completing the purpose of the traffic stop, was illegal.)

> "Beyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.' [Citation]. Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." (***Id***., at p. 355; see also ***People v. Vera*** (2018) 28 Cal.App.5th 1081, 1086-1087; adding that "(t)he mission involves activities that serve the purpose of 'enforcement of the traffic code' . . . and the 'safety precautions' that officers may need to take while doing so." (Citing ***Rodriguez v. United States*** (2015) 575 U.S. 348 [135 S.Ct. 1609, 1615-1616; 191 L.Ed.2nd 4927].)
>
> > "A dog sniff is outside the mission of the traffic stop because it is a measure "aimed at 'detect[ing] evidence of ordinary criminal wrongdoing.'" (**People v. Vera**, supra, at p. 1087, quoting ***Rodriguez v. United States***, *supra*, at p. 355.)
> >
> > "(T)he permissible duration of the stop is not to be measured by the reasonable duration of traffic stops in similar circumstances, but by the amount of time actually necessary to perform the stop expediently." (***People v. Vera***, supra, citing (***Rodriguez***, *supra*, at p. 356.)
> >
> > The Court in ***Vera*** also made the interesting comment (at pg. 1087) that the permissible duration of a traffic stop is not to be measured by the reasonable duration of traffic stops in general, but rather by the amount of time actually necessary to

> perform the stop at issue, in an expeditious manner. (Citing ***Rodriguez**, supra*, 135 S.Ct. at p. 1616].) In other words, a police officer does not earn "bonus time to pursue an unrelated criminal investigation" by writing the ticket as fast as he can, thinking that he can use the time saved to look for other evidence of "criminal wronging." "If an officer can complete traffic-based inquiries expeditiously, then that is the amount of 'time reasonably required to complete [the stop's] mission.'" Thus, the "critical question (in a dog sniff case) . . . is not whether the dog sniff occurs before or after the officer issues a ticket … but whether conducting the sniff 'prolongs'—i.e., adds time to—'the stop'" at issue.

Handcuffing plaintiffs at the scene of an officer-involved shooting of a teenager (one of the plaintiffs), and holding them at the scene while handcuffed for five hours while the shooting was investigated—long after probable cause had dissipated—is a **Fourth Amendment** violation. The fact that the defendant officer (Gutierrez), who was the shooting officer, was pulled aside (per department policy) and monitored during the investigation of the shooting, and no longer had any control over the scene, does not prevent that officer from being liable for the unlawfully prolonged detention. The Court held that an officer need not have been the sole party responsible for a constitutional violation before civil liability may attach. "An officer's liability under (**18 U.S.C.**) **Section 1983** is predicated on his 'integral participation' in the alleged violation. Officers, like other civil defendants, are generally responsible for the 'natural' or 'reasonably foreseeable' consequences. Thus, an officer can be held liable where he is just one participant in a sequence of events that gives rise to a constitutional violation." The trial court's denial of qualified immunity for that officer was upheld. (***Nicholson v. City of Los Angeles*** (9th Cir. 2019) 935 F.3rd 685: The officer's potential civil liability for shooting the one plaintiff was not at issue in this appeal.)

Taking the time to check a rental agreement to determine if the driver is authorized to drive a rented motor vehicle is a part of an ordinary inquiry incident to a traffic stop, and was thus held by the 10th Circuit Court of Appeal to be part of an officer's mission during a traffic stop, and does not constitute an "unrelated investigation," or an "unlawfully prolonged" detention. (***United States v. Dawson*** (2024) 90 F.4th 1286.)

Lawful Extensions of a Detention:

A person may be detained only as long as is reasonably necessary to accomplish the purpose of the original stop, possibly extended by the time needed to investigate any new information justifying a further detention which comes to light during the original detention. (***People v. Russell*** (2000) 81 Cal.App.4th 96, 101.)

A "*reasonable suspicion*" of criminal activity developed during a detention that was initiated for other purposes will justify holding the detainee beyond the time it took to accomplish the original purposes of the stop. (***United States v. Thompson*** (9th Cir. 2002) 282 F.3rd 673; a Coast Guard boat safety check developed cause to believe the subjects were smuggling drugs, justifying a further detention to investigate that possibility; see also ***People v. Espino*** (2016) 247 Cal.App.4th 746, 755-765.)

Where defendant himself (a 16-year-old juvenile), who the officers knew to be on probation, told the officers that he believed there was an outstanding warrant for his arrest, "it was rational for the officers to believe defendant, arrest him, and detain him until they learned otherwise." The Court rejected defendant's argument that his eventual confession was the product of an illegally prolonged detention, finding that taking 84 minutes to learn that there was no outstanding arrest warrant was not unreasonable where there was nothing in the record to show that discovery of the lack of a warrant could have been made sooner. (***People v. Delgado*** (2018) 27 Cal.App.5th 1092, 1102-1104.)

Although defendant, driving a semi with an attached trailer, had initially been detained when a highway patrol officer initiated a traffic stop of his tractor-trailer and he pulled to the side of a freeway, that detention had ended by the time defendant gave his consent to search the tractor-trailer. The officer had returned defendant's documents, told him he was free to leave, and allowed him to walk partway back to his vehicle when the officer asked for consent to search his vehicle. Thus, there was no prolonged detention. (***People v. Arebalos-Cabrera*** (2018) 27 Cal.App.5th 179, 183-190.)

Because the record did not indicate how long it took a police dog to alert to the presence of drugs in defendant's vehicle during a traffic stop and an officer's uncontroverted testimony established that the dog alerted to the trunk of the vehicle while another officer was filling out a citation for an infraction, the dog sniff was not shown to have unconstitutionally prolonged the traffic stop under

Fourth Amendment. The record did not demonstrate that the dog alert came after the time at which the citation reasonably should have been issued had there been no dog sniff because defendant did not show how long it normally took for a police officer to write a citation or that the officer who wrote defendant's citation took more time than usual to write it. (***People v. Vera*** (2018) 28 Cal.App.5th 1081.)

> In ***Vera***, it was held that the discovery of a knife that appeared to possibly be an illegal switchblade knife allowed for the prolonging of the traffic stop for the purpose of investigating whether the knife was in fact illegal. Per the Court: "(A) stop may be prolonged 'if the prolongation itself is supported by independent reasonable suspicion.'" (***Id***., at p. 1088; quoting ***United States v. Evans*** (9th Cir. 2015) 786 F.3rd 779, 788.)

A traffic stop may be extended beyond the point of completing its mission "if an officer develops reasonable suspicion of criminal activity." (***United States v. Wallace*** (2nd Cir. 2019) 937 F.3rd 130; original traffic stop extended when information that the car may have been stolen was developed.

Developing a reasonable suspicion of other criminal activity (e.g., drug smuggling) during the reasonable duration of a traffic stop justified the prolongation of the stop in order to investigate the drug-smuggling suspicions. (***United States v. Davis*** (8th Cir. 2019) 943 F.3rd 1129.)

Where officers stopped a vehicle because they believed the driver had an outstanding warrant, and after arresting the driver, the officers did not let the passenger drive the vehicle away. Instead, they waited to determine whether the passenger had a valid license. Without finding reasonable suspicion to continue to hold the passenger, the court held that ensuring the passenger "could legally drive the car" was part of the stop's mission and justified extending the detention for two additional minutes. (***United States v. Yancy*** (7th Cir. 2019) 928 F.3rd 627.)

> *See also* ***United States v. Gurule*** (10th Cir. 2019) 935 F.3rd 878, 884; "[T]he efforts on the part of law enforcement to help locate a licensed driver cannot be characterized as unconstitutionally extending this traffic stop," and ***United States v. Vargas*** (11th Cir. 2017) 848 F.3rd 971, 974; extending stop to try to identify someone who could lawfully operate the vehicle could be "fairly characterized

> as part of [the officer's] mission. See also ***United States v. Nault*** (9th Cir. 2022) 41 F.4th 1073, below.

Upon observing defendant run a red light and stopping him for this violation, the "collective knowledge doctrine" was held to apply to a traffic stop made by a patrol officer at the request of narcotics officers who were investigating defendant for selling drugs. While stopped, defendant called his brother who then showed up at the scene of the stop and tried to interject himself into the officer's contact with the defendant. The officer therefore waited an extra eleven minutes, waiting for back up to arrive, before he ran his drug-sniffing dog around the vehicle. Waiting for officer safety purposes, the Court held that under these circumstances, the extra eleven minutes was justified. (***United States v. Jordan*** (4th Cir. 2020) 952 F.3rd 160.)

Upon determining that the driver of a vehicle was not the registered owner for whom an arrest warrant was outstanding, and who was found *not* to be in the vehicle, the Ninth Circuit held that continuing to detain the driver for long enough to complete the "mission" of a traffic stop was lawful. This '[t]ypically . . . involve(s) checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." "Such routine checks 'ensur[e] that vehicles on the road are operated safely and responsibly.'" (***United States v. Nault*** (9th Cir. 2022) 41 F.4th 1073, 1078.)

> The Court noted in footnote #2 (pg. 1078), where the "mission" of a traffic stop was not involved; "that other courts have found stops unconstitutional when prolonged by under thirty seconds before officers developed independent suspicion. *See* ***United States v. Clark***, 902 F.3rd 404, 410-11 (3rd Cir. 2018) (twenty seconds of questioning about criminal history); ***United States v. Campbell***, 26 F.4th 860, 885 (11th Cir. 2022) (en banc) (twenty-five seconds of questioning about contraband)."

Upon being subjected to a parole wavier search by one officer, at the direction of that officer's training officer who, as the department gang specialist, was aware of defendant's parole status, the "collective knowledge doctrine" served to support the legality of the search despite the lack of any direct knowledge held by the searching officer. (***United States v. Estrella*** (9th Cir. 2023) 69 F.4th 958, 961, 966, fn. 6.)

The Prolonged "De Minimis" Detention:

Old Rule: A number of appellate court decisions have ruled that a "*de minimis*" extension of the time necessary to "complete the mission" of a traffic stop, even if done for the purpose of conducting a criminal investigation unrelated to the purposes of the stop, is not "constitutionally significant," and will be allowed.

> The Ninth Circuit Court of Appeal has held that a minimally prolonged detention (e.g., about four minutes), at least when motivated by other newly discovered information even though that new information by itself might not constitute a reasonable suspicion, does not make the prolonging of the detention unreasonable. Under such circumstances, a minimally prolonged detention is not unlawful. (***United States v. Turvin et al.*** (9th Cir. 2008) 517 F.3rd 1097.)
>
> Abrogated to the extent that a "brief pause" in writing the defendant a ticket to inquire about defendant's possible (but without reasonable suspicion) drug trafficking was upheld as "*reasonable*," and was inconsistent with ***Rodriguez v. United States*** (2015) 575 U.S, 348 [135 S.Ct. 1609; 191 L.Ed.2nd 4927]. (***United States v. Landeros*** (9th Cir. 2019) 913 F.3rd 862, 866-867; see below.)
>
> > See also the dissenting opinion in ***Turvin***, at p. 1104, and ***United States v. Cornejo*** (E.D. Cal. 2016) 196 F. Supp.3rd 1137, 1151.
> >
> > *Note*: ***Rodriguez*** involved a 7 to 8 minute delay.
>
> See also ***People v. Brown*** (1998) 62 Cal.App.4th 493, where a one minute delay while awaiting the results of a warrant check was held to be reasonable, even though the officer never wrote the ticket.

New Rule: However, the United States Supreme Court, seemingly overruling by inference all "de minimis" traffic cases, has subsequently held that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket or warning for the violation, no matter how minimal that extra time might be.

(***Rodriguez v. United States*** (2015) 575 U.S, 348 [135 S.Ct. 1609; 191 L.Ed.2nd 4927]; finding a dog-sniff of the exterior of the defendant's car, conducted some seven to eight minutes after completing the purpose of the traffic stop, was illegal.)

> See also at 135 S.Ct. at p. 1616, holding that the test is how long it actually takes the officer to handle the traffic offense, proceeding with reasonable diligence, and that rushing the issuance of a ticket, for instance, does not "earn (the officer) bonus time to pursue an unrelated criminal investigation."

Citing ***Rodriguez v. United States***, *supra*, the Ninth Circuit has held that "(a) routine traffic stop is more analogous to a ***Terry*** stop 'than to a formal arrest,' and it 'can become unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a' ticket for the violation. ***Id.*** at 354-55 (cleaned up). '[T]he tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission"—to address the traffic violation that warranted the stop and attend to related safety concerns.' ***Id.*** at 354 (citations omitted). [⁋] The government's interest in officer safety 'stems from the mission of the stop itself' because '[t]raffic stops are especially fraught with danger to police officers, so an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely.' ***Id.*** at 356 (citation and internal quotation marks omitted). In making this observation, the Supreme Court cited favorably to a Tenth Circuit case, ***United States v. Holt***, 264 F.3rd 1215, 1221-22 (10th Cir. 2001) (en banc) (abrogated on other grounds), which it characterized as 'recognizing officer safety justification[s] for criminal record and outstanding warrant checks.' ***Rodriguez***, 575 U.S. at 356." (***United States v. Hylton*** (9th Cir. 2022) 30 F.4th 842, 847; 36-minute detention upheld while investigating defendant's possible DUI-drugs status, and noting that a firearm recovered during that time period would have been inevitably discovered anyway.)

> The Ninth Circuit in ***Hylton*** further held that "criminal history checks are permissible post-***Rodriguez***," citing a number of federal court decisions from other circuits. (***Ibid.*)** The exception to this rule is when a traffic stop is prolonged while officers do "a computer check to see if a person is properly registered as a felon in Nevada per state law . . . (b)ecause such a check is 'unrelated to the traffic violation,'" (See ***United States v. Evans*** (9th Cir. 2015) 786 F.3rd 779, 786.)

See also ***United States v. Nault*** (9th Cir. 2022) 41 F.4th 1073, 1078-1081.)

But see ***United States v. Clark*** (1st Cir. ME 2018) 879 F.3rd 1, where the one minute it took to ask a vehicle passenger questions in clarification was held not to have unlawfully prolonged a traffic stop in that the questioning was "one of these negligibly burdensome precautions justified by the unique safety threat posed by traffic stops." ***Clark***, being decided after ***Rodriguez v. United States***, *supra*, seems to ignore any attempt in ***Rodriguez*** to condemn any delay, matter how minor. ***Rodriguez*** involved a 7 to 8 minute delay.

Extending the duration of a traffic stop in order to question a passenger, unsuccessfully attempting to get the passenger (the defendant) to identify himself when there was no reasonable suspicion that that passenger was engaged in any criminal activity, was unlawful. (***United States v. Landeros*** (9th Cir. 2019) 913 F.3rd 862, 866-870.)

Eighteen minutes between the traffic stop (for admitted traffic violations) until probable cause was developed (based upon a drug-detection dog alerting on defendant's vehicle) was held to be unlawfully prolonged. (***People v. Ayon*** (2022) 80 Cal.App.5th 926, 936-944.)

Despite the above, asking drivers to produce a driver's license at a lawful DUI checkpoint has been held to be a "de minimis" intrusion, and thus lawful. (***Demarest v. City of Vallejo*** (9th Cir. 2022) 44 F.4th 1209, 1223-1224.)

Over-Detention in Jail:

Another form of illegal detention is when a jail fails to release a prisoner when he is due to be released. Such an act potentially constitutes grounds for a federal civil suit, per **42 U.S.C. § 1983**. However, in order to prove such a constitutional violation, the plaintiff/prisoner must be able to prove that the defendant officers personally participated in his over-detention or that the over-detention was the result of a pattern or custom on their part of the defendant law enforcement agency. (***Avalos v. Baca*** (9th Cir. 2010) 596 F.3rd 583, 587.)

Being held in federal custody for some six weeks, during which time defendant made incriminating statements about murdering his wife (an uncharged state offense) to his cellmate who, as an

undercover police agent, pumped him for information, defendant argued that pursuant to **the Bail Reform Act of 1984** (**18 U.S.C. § 3142(f)**), he should have been released on bail and that being detained in custody was a violation of his **Fourth Amendment** rights (i.e., an unlawful seizure), and that anything he said should have been suppressed as the product of this unlawful detention. The California Supreme disagreed, holding that there was no authority for suppressing evidence as a remedy for violating the **Bail Reform Act** (assuming that it was in fact violated in this case). The "exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." (***People v. Fayed*** (2020) 9 Cal.5th 147, 166-167, quoting ***United States v. Leon*** (1984) 468 U.S. 897, 916.)

Enlarging the Scope of the Original Detention:

If the person voluntarily consents to having his vehicle searched after he is free to leave, there is no prolonged detention, at least where a reasonable person should have understood that the purposes of the traffic stop were done. The officer is under no obligation to advise him that he is no longer being detained or that he has a right to refuse to allow the officer to search. (***Robinette v. Ohio*** (1996) 519 U.S. 33 [117 S.Ct. 417; 136 L.Ed.2nd 347].)

The Federal Ninth Circuit Court of Appeal: Up until recently, the Ninth Circuit Court of Appeal has had difficulty accepting the idea that a police officer, during an otherwise lawful detention, and so long as that detention is not unlawfully prolonged (see above), may question the detained person about other possible criminal activity absent some "*particularized suspicion*" relevant to that other criminal activity:

See ***United States v. Chavez-Valenzuela*** (9th Cir. 2001) 268 F.3rd 719, amended at 279 F.3rd 1062, where the Ninth Circuit Court of Appeal found a consent search, obtained after the purposes of the traffic stop had been satisfied, was invalid as a product of an illegally prolonged detention, the extended detention being the result of the officer's unnecessary inquiries made during the traffic stop. ***Robinette*** was not discussed by the Court. The defendant's nervousness was held to be irrelevant to the detention issue, per the Court. (See also ***People v. Lusardi*** (1991) 228 Cal.App.3rd Supp. 1, making a similar argument.)

Note ***United States v. Turvin et al.*** (9th Cir. 2008) 517 F.3rd 1097, discussing the invalidity of the primary holdings of the ***Chavez-Valenzuela*** decision, as it related to the issue of prolonged detentions. However, ***Turvin*** was subsequently

abrogated to the extent that a "brief pause" in writing the defendant a ticket to inquire about defendant's possible (but without reasonable suspicion) drug trafficking was upheld as "*reasonable*," and was inconsistent with ***Rodriguez v. United States*** (2015) 575 U.S, 348 [135 S.Ct. 1609; 191 L.Ed.2nd 4927]. (***United States v. Landeros*** (9th Cir. 2019) 913 F.3rd 862, 866-867; see below.)

See also ***United States v. Murillo*** (9th Cir. 2001) 255 F.3rd 1169, 1174, where the Ninth Circuit Court of Appeal held that an officer must be able to "articulate suspicious factors that are particularized and objective" in order to "broaden the scope of questioning" beyond the purposes of the initial traffic stop.

Note: This is a questionable ruling in light of ***Robinette***.)

And see ***United States v. Mendez*** (9th Cir. 2006) 467 F.3rd 1162, where it was held that questioning a detainee about possible criminal activity not related to the cause of the detention, and without a "*particularized suspicion*" to support a belief that the detainee is involved in that activity, is a **Fourth Amendment** violation. The superseding version of ***Mendez***, at (9th Cir. 2007) 476 F.3rd 1077, however, upheld the legality of such questioning so long as the initial detention wasn't unlawfully prolonged in the process. (***Id***., at pp. 1079-1081.)

The U.S. Supreme Court finally rejected the Ninth Circuit's unsupported conclusion that absent "a *particularized reasonable suspicion* that an individual is not a citizen," it would be a **Fourth Amendment** violation to ask him or her about the subject's citizenship (see ***Mena v. City of Simi Valley*** (9th Cir. 2003) 332 F.3rd 1255, 1264-1265; reversed by the U.S. Supreme Court in ***Muehler v. Mena*** (2005) 544 U.S. 93, 100-101 [125 S.Ct. 1465; 161 L.Ed.2nd 299].)

The Ninth Circuit has since overruled its decisions in ***Chavez-Valenzuela*** and ***Murillo***, finally recognizing the Supreme Court's rulings to the contrary. (***United States v. Mendez*** (9th Cir. 2007) 476 F.3rd 1077, 1079-1081.)

Questioning defendant/truck driver and asking for consent to search the vehicle, when the truck was initially stopped for no more than an administrative check of its paperwork, is not unconstitutional. (***United States v. Delgado*** (9th Cir. 2008) 545 F.3rd 1195, 1205.)

In other cases, the Supreme Court has held: "Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means." (***United States v. Drayton*** (2002) 536 U.S. 194 [122 S.Ct. 2105; 153 L.Ed.2nd 242].); citing ***Florida v. Bostick*** (1991) 501 U.S. 429, 434-435 [111 S.Ct. 2382; 115 L.Ed.2nd 389, 398-399].)

It is a "settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." (***Davis v. Mississippi*** (1969) 394 U.S. 721, 727, fn. 6 [89 S.Ct. 1394; 22 L.Ed.2nd 676].)

More recently, in ***Illinois v. Caballes*** (2005) 543 U.S. 405 [125 S.Ct. 834; 160 L.Ed.2nd 842], the U.S. Supreme Court rejected the argument that allowing a narcotics-sniffing dog to sniff around the outside of a vehicle that was lawfully stopped for a traffic offense "unjustifiably enlarge(s) the scope of a routine traffic stop into a drug investigation." Per the Supreme Court: No expectation of privacy is violated by this procedure, and therefore does not implicate the **Fourth Amendment**.

> However, if the dog-sniff is conducted after the purposes of the traffic stop are completed, and thus during an unlawfully prolonged detention, then it is illegal and the resulting evidence will be suppressed. (***Rodriguez v. United States*** (2015) 575 U.S, 348 [135 S.Ct. 1609; 191 L.Ed.2nd 4927]; the dog's alert to the presence of drugs being seven to eight minutes after the purposes of the traffic stop had been completed.)
>
> > "The seizure remains lawful only 'so long as [unrelated] inquiries do not measurably extend the duration of the stop.'" (***Rodriguez v. United States***, *supra*, at p. 355; quoting ***Arizona v. Johnson*** (2009) 555 U.S. 323, 333 [129 S.Ct. 781; 172 L.Ed.2nd 694].)

Also, the U.S. Supreme Court recently rejected the Ninth Circuit's unsupported conclusion that, absent "a *particularized reasonable suspicion* that an individual is not a citizen," it is a **Fourth Amendment** violation to ask him or her about the subject's citizenship. (See ***Mena v. City of Simi Valley*** (9th Cir. 2003) 332 F.3rd 1255, 1264-1265; reversed by the U.S. Supreme Court in ***Muehler v. Mena*** (2005) 544 U.S. 93 [125 S.Ct. 1465; 161 L.Ed.2nd 299].)

It is not unlawful to ask about a firearm during a detention even if there is otherwise no evidence of the illegal use of a gun, so long as it does not

prolong the detention. (***United States v. Basher*** (9th Cir. 2011) 629 F.3rd 1161, 1166, fn. 3.)

California courts are in accord with these latest Supreme Court pronouncements on the issue: "Questioning during the routine traffic stop on a subject unrelated to the purpose of the stop is not itself a **Fourth Amendment** violation. Mere questioning is neither a search nor a seizure. [Citation.] While the traffic detainee is under no obligation to answer unrelated questions, the Constitution does not prohibit law enforcement officers from asking. [Citation.]" (***People v. Brown*** (1998) 62 Cal.App.4th 493, 499-500; see also ***People v. Bell*** (1996) 43 Cal.App.4th 754, 767; ***People v. Gallardo*** (2005) 130 Cal.App.4th 234, 238; ***People v. Tully*** (2012) 54 Cal.4th 952, 981-982; and ***People v. Gallardo*** (2005) 130 Cal.App.4th 234, 239; asking for consent to search during the time it would have taken to write the citation that was the original cause of the stop is legal, despite the lack of any evidence to believe there was something there to search for.)

"(I)nvestigations conducted by officers not directly related to the initial purpose of the stop 'do not convert the encounter into something other than a lawful seizure, so long as the inquiries do not measurably extend the stop's duration.'" (***People v. Esparza*** (2023) 95 Cal.App.5th 1084, 1094; quoting ***Arizona v. Johnson*** (2009) 555 U.S. 323, 333 [172 L.Ed.2nd 694; 129 S.Ct. 781].)

Other Federal Circuits:

> Other federal circuit courts are in apparent accord: See ***United States v. Cone*** (10th Cir. Okla. 2017) 868 F.3rd 1150, where the Tenth Circuit Court of Appeal recognized that an officer's mission during a stop in not limited to determining whether to issue a ticket. Because traffic stops are potentially dangerous, the Supreme Court has held that officers may run computer checks for warrants and a motorist's criminal history. The court reasoned that if running a computer check of a driver's criminal history is justified, then simply asking the driver about that history is not unreasonable under the **Fourth Amendment**. Here, the court concluded that the information requested by the officer did not exceed the scope of what a computer check would have revealed. The court added that a drivers' answer may not be as reliable as a computer check but the time involved is much shorter.
>
> During a traffic stop for illegally tinted windows, the federal Seventh Circuit held that an officer was not prevented from asking the defendant to sit in the officer's car as a warning was being written, and asking questions unrelated to the traffic stop, so long

as it doesn't prolong the duration of the traffic stop beyond what it reasonably takes for the officer to complete the "mission" of the stop. The Court further held that again, so long as the traffic stop is not illegally prolonged, it does not violate the **Fourth Amendment** to have a drug-sniffing dog sniff around the defendant's car. (***United States v. Goodwill*** (7th Cir. 2022) 24 F.4th 612; the dog alerting on cocaine in the car, all accomplished within 10 minutes.)

Note: Oregon Supreme Court authority to the contrary (i.e., ***State v. Arreola-Botello*** (2019) 365 OR 695), that says that for the purposes of **Article I, section 9** of the **Oregon Constitution**, there are both "*subject-matter and durational limitations*" to the questioning that may occur during a traffic stop, thus making it illegal for Oregon law enforcement officers to question a subject stopped for a traffic violation about any other possible criminal activity whether or not it unlawfully prolongs the traffic stop, is not applicable to federal or California courts, and may (or "should") be ignored.

Despite conceding that he had been lawfully detained (the subject of a citizen's complaint that defendant, in a road rage incident, had threatened to shoot the complainant), defendant argued that the officers violated the **Fourth Amendment** when they continued to detain him after they frisked him and determined that he did not possess a firearm, and then by searching his vehicle. The Eighth Circuit Court of Appeal disagreed. First, the Court held that the officers lawfully continued their investigation after they determined via the patdown search that defendant was not carrying a gun because during the frisk defendant admitted to threatening to shoot the complainant. The court found that the officers had reasonable suspicion that defendant had committed harassment in violation of Iowa law. Consequently, the court concluded that the officer's request for Williams' identification was a reasonable and lawful extension of the initial investigatory stop. (***United States v. Williams*** (8th Cir. 2020) 955 F.3rd 734; defendant's vehicle being subsequently searched based upon the odor of marijuana emanating from the vehicle, resulting in the recovery of the gun and 400 grams of marijuana.)

A traffic stop where an extended records check took 19 minutes to return, during which time a drug-sniffing dog was brought to the scene and alerted on defendant's vehicle, was held to be reasonable under the circumstances. The defendant, being from out-of-state (from Arizona, driving in Utah), a "Triple I" check was made, which took longer than a regular computer check. The court concluded that even if the Triple I check prolonged the duration of the stop, it was reasonable under the circumstances because; (1) the computer in the trooper's patrol car would have provided limited information with respect to out-of-state drivers such

as defendant, (2) the trooper developed concerns for his safety based on defendant's apparent attempt to hide something (stooping over) as the trooper approached his car, and (3) defendant's inability to provide registration or insurance paperwork for the vehicle. Given these circumstances, the court held that the trooper's decision to run a Triple I check through dispatch as opposed to limiting his records check to the computer in his patrol car did not unreasonably prolong the stop, justifying a 19-minutes detention. (***United States v. Mayville*** (10th Cir. 2020) 955 F.3rd 825.)

Taking Fingerprints: So long as there is a reasonable suspicion to detain an individual, it is lawful to also fingerprint the suspect on less than probable cause, at least if done at the scene and without transportation to a police station. (***Davis v. Mississippi*** (1969) 394 U.S. 721 [89 S.Ct. 1394; 22 L.Ed.2nd 676]; ***Hayes v. Florida*** (1985) 470 U.S. 811 [105 S.Ct. 1643; 84 L.Ed.2nd 705]; ***Virgle v. Superior Court*** (2002) 100 Cal.App.4th 572.)

Note: Transporting the subject to the police station for the purposes of taking fingerprints, at least if done without the subject's voluntary consent, will likely convert the contact into an arrest which will be held to be illegal absent full probable cause to arrest him. (See "*Transporting a Detainee*," under "*Detentions vs. Arrests*," above.)

Driving Under the Influence ("*DUI*") (alcohol and/or drugs) *and Other Regulatory Checkpoints*:

Weaving: Observation of the defendant weaving within his traffic lane is sufficient cause to stop him to determine whether he is DUI or the vehicle has some unsafe mechanical defect. (***People v. Bracken*** (2000) 83 Cal.App.4th Supp. 1, weaving within his lane for half a mile; see also ***People v. Perez*** (1985) 175 Cal.App.3rd Supp. 8; weaving within his lane for three quarters of a mile.)

But see ***United States v. Colin*** (9th Cir. 2002) 314 F.3rd 439, where the Ninth Circuit Court of Appeal held that weaving from lane line to lane line for 35 to 45 seconds is neither a violation of the lane straddling statute (**V.C. § 21658(a)**), nor reasonable suspicion that the driver may be under the influence; a questionable decision, and one than may probably be ignored by state law enforcement officers in light of ***Bracken*** and ***Perez***.

A single pronounced weave within the lane, plus an experienced Highway Patrol officer's observation of the defendant sitting up close to the steering wheel, which the officer recognized as something an impaired driver does, was sufficient to corroborate second-hand information concerning defendant's "erratic driving"

from Montana Department of Transportation employees, justifying the stop of the defendant's car. (***United States v. Fernandez-Castillo*** (9th Cir. 2003) 324 F.3rd 1114.)

DUI (and Other Regulatory "*Special Needs*") *Checkpoints*:

General Rule: DUI Checkpoints are lawful if conducted according to specified criteria, and involve a "*special needs*," "*regulatory*" area of the law. (***Ingersoll v. Palmer*** (1987) 43 Cal.3rd 1321; ***Michigan State Police Dept. v. Sitz*** (1990) 496 U.S. 444 [110 S.Ct. 2481; 110 L.Ed.2nd 412].)

Veh. Code § 2814.1(a) also provides statutory authority for DUI checkpoints: A "driver of a motor vehicle shall stop and submit to a sobriety checkpoint inspection conducted by a law enforcement agency when signs and displays are posted requiring that stop."

The section also contains detailed provisions relating to the impoundment of vehicles when the checkpoint reveals that the driver lacks a valid license. (See **Veh. Code § 2814.2(b), (c)**.)

Note: See ***Birchfield v. North Dakota*** (2016) 579 U.S. 438, 444-450 [136 S.Ct. 2160, 2167-2170; 195 L.Ed.2nd 560], for a historical review of the development of DUI statutes and the importance of obtaining a reading of the suspect's "BAC" ("Blood Alcohol Concentration").

Also Note: "*DUI*," is short for "*Driving while Under the Influence*" of alcohol and/or drugs. Similarly, "*DWI*," also commonly used, and used interchangeably, is short for "*Driving While Intoxicated*."

Reasonableness Requirement: Whether or not a "*DUI*" (or other regulatory) roadblock or checkpoint is lawful depends upon whether it meets the federal standard for *reasonableness*.

"*The federal test* for determining whether a detention or seizure is justified balances the public interest served by the seizure, the degree to which the seizure advances the public interest and the severity of the interference with individual liberty. (***Brown v. Texas*** (1979) 443 U.S. 47, 50-51 [99 S.Ct. 2637; 61 L.Ed.2nd 357, 361-362, . . .].)" (*Emphasis added*; ***People v. Banks*** (1994) 6 Cal.4th 926; holding that failure to publicize a DUI roadblock was *not* necessarily fatal to its lawfulness, under ***Brown v. Texas***.)

Factors Determining Predetermined Specified Criteria: While standardless and unconstrained discretion on the part of government officers is prohibited; "stops and inspections for regulatory purposes, although without *'individualized suspicion*,' may be permitted if undertaken pursuant to predetermined specified neutral criteria." (Italics added; ***Ingersoll v. Palmer***, *supra*, at p. 1335.) The factors identified in ***Ingersoll*** (at pp. 1341-1347) are whether:

- The decision to establish a sobriety checkpoint, the selection of the site, and the procedures for the operation of the checkpoint, are made and established by supervisory law enforcement personnel.

- Motorists are stopped according to a neutral formula, such as every third, fifth or tenth driver.

- Adequate safety precautions are taken, such as proper lighting, warning signs, and signals, and whether clearly identifiable official vehicles and personnel are used.

- The location of the checkpoint was determined by a policy-making official, and was reasonable; i.e., on a road having a high incidence of alcohol-related accidents or arrests.

- The time the checkpoint was conducted and its duration reflect "*good judgment*" on the part of law enforcement officials.

- The checkpoint exhibits indicia of its official nature (to reassure the public of the authorized nature of the stop).

- The average length and nature of the detention is minimized.

- The checkpoint is preceded by publicity.

Case Law:

> A DUI checkpoint was upheld where the existence of supervisory control was indicated by documentary evidence that a sobriety checkpoint was planned for that date and by the fact that the checkpoint was staffed by seven police officers. Testimony that an officer was unaware of a neutral formula for stopping vehicles was not affirmative

evidence overcoming the presumption of lawfulness. All 519 vehicles passing through the checkpoint were stopped, thus a neutral mathematical formula of 100 percent applied. The fact that the checkpoint was operated at a different location than given in a media advisory was insufficient to overcome the presumption as to decision making at the supervisory level or reasonable location. (***Arthur v. Department of Motor Vehicles*** (2010) 184 Cal.App.4th 1199.)

A DUI checkpoint was struck down where the People failed to sustain their burden of proof as to (i) the role of supervisory personnel in prescribing the procedures to be used at the checkpoint, (ii) the rationale for selecting the particular location used for the checkpoint, (iii) the length of detentions, and (iv) advance publicity. (***People v. Alvarado*** (2011) 193 Cal.App.4th Supp. 13.)

A vehicle checkpoint, set up for the purpose of checking automobile registrations and compliance with motor vehicle laws in order to ensure the safe and legal operation of motor vehicles on the roadway, was held to be lawful by the Fourth Circuit Court of Appeal in that it was operated by the officers in a reasonable manner. First, it was clearly visible, as flashing blue lights and traffic cones warned motorists of the need to slow to a stop, and the officers manning the checkpoint wore uniforms and reflective vests and hats. Second, and more importantly, the checkpoint was operated pursuant to a "systematic procedure that strictly limited the discretionary authority of the officers and reduced the potential for a motorist to be subjected to arbitrary treatment. Specifically, (1) multiple officers manned the checkpoint, as required by department policy; (2) officers were required to stop every vehicle and were trained to look primarily for violations of motor vehicle laws; (3) the checkpoint was approved and supervised by a commanding officer; and (4) officers did not detain drivers longer than reasonably necessary to accomplish the purpose of checking a license and registration. (***United States v. Moore*** (4th Cir. 2020) 952 F.3rd 186; holding that extending the detention was lawful upon noting evidence that defendant was engaged in criminal activity; i.e., smoking marijuana while driving.)

A city's sobriety checkpoint fit within the limited exception to the **Fourth Amendment** for certain carefully

circumscribed vehicle checkpoints where its primary purpose was to remove intoxicated drivers from the roadway. Any marginal intrusion on liberty associated with adding license checks to the city's DUI checkpoint was minimal and justified by the important interest in road safety served by such inquiries. Plaintiff's **Fourth Amendment** rights were not violated by an officer detaining and ultimately arresting plaintiff when he refused to produce his driver's license. Once plaintiff refused, the officer had probable cause to believe that he was violating **Veh. Code § 12951(b)**. (***Demarest v. City of Vallejo*** (9th Cir. 2022) 44 F.4th 1209, 1220-1226.)

> In determining the lawfulness of a checkpoint, the Ninth Circuit (at p. 1220) used what it referred to as a "two-step analysis." "At the first step, a court must determine . . . whether a checkpoint is 'per se invalid' because its 'primary purpose' is 'to advance the general interest in crime control' with respect to the occupants of the vehicles being stopped. . . . If the answer to that question is no, then the court must 'determine its "reasonableness, hence, its constitutionality, on the basis of the individual circumstances."'"

Issue; *Avoiding a DUI Checkpoint*: Is the observed avoidance of a DUI checkpoint sufficient cause to conduct a traffic stop?

The federal Tenth Circuit Court of Appeal is of the opinion that it *is not*. The Court held that a driver's decision to use a rural highway exit after passing drug checkpoint signs may be considered as one factor in an officer's reasonable suspicion determination, but it is not a sufficient basis, by itself, to justify a traffic stop. The court noted that an officer must identify additional suspicious circumstances or independently evasive behavior to justify stopping a vehicle that uses an exit after driving past ruse drug-checkpoint signs. (***United States v. Neff*** (10th Cir. 2012) 681 F.3rd 1134.)

See also ***United States v. Compton*** (2nd Cir. 2016) 830 F.3rd 55: Purposely avoiding an immigration checkpoint, *plus* other suspicious circumstances (i.e., the proximity of the checkpoint to the border and the defendants' peculiar attempt to conceal their avoidance of the checkpoint by

purchasing containers of peppers at the vegetable stand) was held to be sufficient to justify a detention.

Other Regulatory Checkpoints: Other than for DUI deterrence, roadblocks, checkpoints, and similar "*administrative, special needs*" searches have been approved in the following cases:

- *License and/or registration inspection checkpoints*. (***Delaware v. Prouse*** (1979) 440 U.S. 648 [59 L.Ed.2nd 660]; ***People v. Washburn*** (1968) 265 Cal.App.2nd 665; ***People v. Alvarez*** (1996) 14 Cal.4th 155; ***Merrett v. Moore*** (11th Cir. 1996) 58 F.3rd 1547; ***United States v. McFayden*** (D.C. Cir. 1989) 865 F.2nd 1306; ***United States v. Diaz-Albertini*** (10th Cir. 1985) 772 F.2nd 654; ***United States v. Lopez*** (10th Cir. 1985) 777 F.2nd 543; ***United States v. Obregon*** (10th Cir. 1984) 748 F.2nd 1371; ***United States v. Prichard*** (10th Cir. 1981) 645 F.2nd 854; ***Ashcroft v. al-Kidd*** (2011) 563 U.S. 731, 737 [131 S.Ct. 2074; 179 L.Ed.2nd 1149]; ***United States v. Moore*** (4th Cir. 2020) 952 F.3rd 186; ***Demarest v. City of Vallejo*** (9th Cir. 2022) 44 F.4th 1209.)

- *Border Patrol checkpoint inspections*. (***United States v. Martinez-Fuerte*** (1976) 428 U.S. 543 [96 S.Ct. 3074; 49 L.Ed.2nd 1116.)

- *Airport security searches*. (***People v. Hyde*** (1974) 12 Cal.3rd 158.)

- *To regulate hunting licenses*. (***People v. Perez*** (1996) 51 Cal.App.4th 1168.)

- *Agricultural inspection checkpoints*. (***People v. Dickinson*** (1980) 104 Cal.App.3rd 505.)

- *Vehicle mechanical inspection checkpoints*. (***People v. De La Torre*** (1967) 257 Cal.App.2nd 162.)

- *To check compliance with motor vehicle laws* in order to ensure the safe and legal operation of motor vehicles on the roadway. (***United States v. Moore*** (4th Cir. 2020) 952 F.3rd 186.)

- *Security checkpoints at military bases*. (***United States v. Hawkins*** (9th Cir. 2001) 249 F.3rd 876, Air Force; ***United States v. Hernandez*** (9th Cir. 1984) 739 F.2nd 484, Marines.)

- *Sobriety checkpoints on a federal military base*. (***United States v. Dillon*** (D.Kan. 1997) 983 F.Supp. 1037; ***United States v. Ziegler*** (N.D. Cal. 1993) 831 F.Supp. 771.)

- *A forest service checkpoint* for identification and registration, targeting what in the past has been a "uniquely disruptive event," is not per se illegal. (***Park v. Forest Service*** (8th Cir. 2000) 205 F.3rd 1034, 1040.)

- *Traffic safety checkpoints*. (***United States v. Trevino*** (7th Cir. 1996) 60 F.3rd 333.)

- *Checkpoint at the entrance to a prison parking lot*. (***Cates v. Stroud*** (9th Cir. 2020) 976 F.3rd 972, 983-984; ***Romo v. Champion*** (10th Cir. 1995) 46 F.3rd 1013.)

- *Checkpoint* to "*thwart an imminent terrorist attack* or *to catch a dangerous criminal* who is likely to flee by way of a particular route." (See below; ***City of Indianapolis v. Edmond*** (2000) 531 U.S. 32 [121 S.Ct. 447; 148 L.Ed.2nd 333].)

  See "*Drug Interdiction* (*or* '*Ordinary Criminal Wrongdoing*') *Checkpoints*," below.

- *Checkpoints* set up for the purpose of *collecting information* from the public concerning a prior criminal act (i.e., a fatal "hit and run" in this case), when set up at the location of the prior criminal act, and exactly one week after it occurred. Such a roadblock was differentiated from the attempt to discovery "*ordinary criminal wrongdoing*," as condemned in ***Indianapolis v. Edmond***, *supra.* (***Illinois v. Lidster*** (2004) 540 U.S. 419 [124 S.Ct. 885; 157 L.Ed.2nd 843].)

- An "*information station*" set up to provide park visitors with information concerning the rules of the park and be given a litter bag, where every vehicle was stopped. (***United States v. Faulkner*** (9th Cir. 2006) 450 F.3rd 466.)

- A checkpoint set up for the purpose of *preventing illegal hunting in a national park*, justified by a legitimate concern for preservation of park wildlife, when confined to the park gate where visitors would expect to briefly stop anyway. (***United States v. Fraire*** (9th Cir. 2009) 575 F.3rd 929.)

- Warrantless *searching of luggage* and other packages at selected entrances to New York's subway system, in response to the possibility of terrorists entering the system with explosives. (***MacWade v. Kelly*** (2nd Cir. 2006) 460 F.3rd 260.)

- A *vehicle-inspection exhaust checkpoint*, pursuant to **V.C. § 2814.1(a)**: A County Board of Supervisors is authorized by statute to establish to check for violations of **V.C. §§ 27153** and **27153.5** (exhaust and excessive smoke violations).

    Note: **V.C. § 2814.1(d)**: Motorcycle-only checkpoints are prohibited by statute.

Dual Purpose Checkpoints: Checkpoints may have a *dual-purpose*, such as the *interdiction of drugs* (but see below) and *enforcement of driver's license and registration laws*. (***Merrett v. Moore*** (11th Cir. 1995) 58 F.3rd 1547.)

Multiple Agency Checkpoints: Checkpoints may be attended by *more than one law enforcement agency*, despite the different interests involved. (***United States v. Barajas-Chavez*** (10th Cir. 1999) 162 F.3rd 1285, New Mexico *DUI checkpoint* with Border Patrol present in case the police discovered *illegal aliens*; ***United States v. Galindo-Gonzales*** (10th Cir. 1998) 142 F.3rd 1217, *aliens* found at state *driver's license and vehicle registration roadblock*.)

Drug Interdiction (*or* "*Ordinary Criminal Wrongdoing*") *Checkpoints*:

Rule:

Earlier cases from lower appellate courts upheld the validity of drug interdiction checkpoints upon the same reasoning as above. (See ***Merrett v. Moore*** (11th Cir. 1995) 58 F.3rd 1547; and ***Missouri v. Damask*** (1996) 936 S.W.2nd 565.)

However, the U.S. Supreme Court has since determined that "*drug interdiction*" checkpoints are *not* lawful. The difference is that *drug interdiction checkpoints*, rather than being "*regulatory*," or involving some "*special need*," are set up for the purpose of detecting "*ordinary criminal wrongdoing.*" As such, *drug interdiction checkpoints* require the standard **Fourth Amendment** "*individualized*" or "*particularized*" suspicion to be lawful. (***City of Indianapolis v. Edmond*** (2000) 531 U.S. 32 [121 S.Ct. 447; 148 L.Ed.2nd 333].)

Exceptions:

The Supreme Court in ***Edmond***, *supra*, intimated strongly that roadblocks in unusual circumstances of criminal

wrongdoing might be constitutionally acceptable. "(T)here are circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control." (***Id***., at p. 44.)

For example, as the Seventh Circuit Court of Appeals noted in its reversed decision in ***Edmond*** (see ***Edmond v. Goldsmith*** (7th Cir. 1999) 183 F.3rd 659, 662-663.), "the **Fourth Amendment** would almost certainly permit an appropriately tailored roadblock set up to thwart *an imminent terrorist attack* or *to catch a dangerous criminal* who is likely to flee by way of a particular route." (Italics added; ***City of Indianapolis v. Edmond***, *supra*, at p. 44 (146 L.Ed.2nd at p. 345].)

E.g.: See ***United States v. Paetsch*** (10th Cir. 2015) 782 F.3rd 1162; where barricading an intersection, thus preventing some 20 vehicles and 29 individuals from leaving the area for up to 30 minutes, was held to be lawful when in response to a bank robbery. The minimal intrusion on defendant's right to leave the area was held to be outweighed by the public's interest in apprehending a bank robber.

E.g.: See also ***United States v. Arnold*** (8th Cir. Ark. 2016) 835 F.3rd 833, where a road block, and the suspicionless stop of defendant's vehicle, was upheld where officers had reliable information that implicated co-defendant Johnson in two armed bank robberies, indicating that he was fleeing from the second robbery, and where defendant's vehicle was stopped at the same time at a roadblock. Second, the officers knew the roadblock was likely to be effective because they had a description of Johnson's vehicle and knew the route he was travelling. Third, the public interest advanced by the roadblock outweighed defendant's individual ***Fourth Amendment*** interests. Finally, only five or six minutes elapsed from the time defendant was stopped at the roadblock until the officers identified him as a co-suspect in the second bank robbery, along with Johnson, and discovered the existence of an outstanding warrant for his arrest.

And see ***Illinois v. Lidster*** (2004) 540 U.S. 419 [124 S.Ct. 885; 157 L.Ed.2nd 843], where the U.S. Supreme Court held that a checkpoint set up for the purpose of collecting

information from the public concerning a prior criminal act (i.e., a fatal "hit and run" in this case), when set up at the location of the prior criminal act, and exactly one week after it occurred. Such a roadblock was differentiated from the attempt to discover "*ordinary criminal wrongdoing*," as condemned in ***Indianapolis v. Edmond***, *supra*.

Checkpoints on Indian Land by Indian Authorities:

A roadblock set up on a public right-of-way within tribal territory, lawful under Indian law and established on tribal authority, is permissible only to the extent that the suspicionless stop of non-Indians is limited to the amount of time, and the nature of the inquiry, that can establish whether or not the person stopped is an Indian. (***Bressi v. Ford*** (9th Cir. 2009) 575 F.3rd 891, 896-897.)

Indian law enforcement officers, when also certified to enforce state laws, may set up DUI or other regulatory roadblocks (as opposed to merely checking other Indians pursuant to Tribal law) on Indian land. But such roadblocks must meet the constitutional requirements set by the Supreme Court (see above). (***Id***., at p. 897.)

Field Interviews ("*F.I.*") *of Persons Suspected of Criminal Activity*:

General Rule: Temporarily detaining a person for the purpose of verifying (or negating) the person's possible connection with some criminal activity, based upon an articulable "*reasonable suspicion*" that the person may be involved in criminal activity, is lawful. (***Terry v. Ohio*** (1968) 392 U.S. 1 [88 S.Ct. 1868; 20 L.Ed.2nd 889]; In ***re Tony C.*** (1978) 21 Cal.3rd 888.)

Note: A "*field interview*" (or "*F.I.*") is a standard law enforcement technique used to identify individuals and document their presence at a particular location at a particular time, discourage planned criminal activity, and note companions with whom the person is associating; information which sometimes becomes important and relevant in later investigations or prosecutions. Field interviews may be handled as a *consensual encounter* or, if a reasonable suspicion exists, a *detention*.

Examples:

"(P)olice may . . . use group detentions (assuming the necessary reasonable suspicion is present) or (consensual encounters) encounters (when no reasonable suspicion is present) with

suspected or known gang members in order to do in-field identifications, conduct field interviews, take photographs, or serve gang 'STEP notices.' (fn. 8)" (***People v. Flores*** (2019) 38 Cal.App.5th 617, 635-636.)

> Per Footnote 8: "A STEP notice 'informs the recipient that he is associating with a known gang; that the gang engages in criminal activity; and that, if the recipient commits certain crimes with gang members, he may face increased penalties for his conduct. The issuing officer records the date and time the notice is given, along with other identifying information like descriptions and tattoos, and the identification of the recipient's associates.' (***People v. Sanchez*** (2016) 63 Cal.4th 665, 672 . . . ; see **Pen. Code, § 186.20 et seq**. [**California Street Terrorism Enforcement and Prevention Act**]"

Being in the area of a house for which there is only a speculative belief that it might be involved in drug activity, even when it is known that the person to be detained has a prior drug-related record and that there exists prior untested, unreliable information that the person *might* be involved in the sale of drugs, is *insufficient* cause to detain. (***People v. Pitts*** (2004) 117 Cal.App.4th 881.)

Spotlighting the defendant in a high narcotics area and then walking up to him "briskly" while asking questions held to be a detention under the circumstances. (***People v. Garry*** (2007) 156 Cal.App.4th 1100; ***People v. Rico*** (1979) 97 Cal.App.3rd 124, 128–130.)

> Also, taking into account of the "totality of the circumstances," it was held that defendant was detained when the officer made a U-turn to pull in behind him and then trained the patrol car's spotlights on his car. (***People v. Kidd*** (2019) 36 Cal.App.5th 12, 21-22.)
>
> But see ***People v. Tacardon*** (2022) 14 Cal.5th 235: A deputy sheriff parked 15 to 20 feet behind a lawfully parked car, shined a spotlight into the interior, and approached. When a female suddenly got out, he ordered her to remain at the curb. At about that point the deputy smelled marijuana and observed large marijuana bags on the floorboard. Defendant, in the driver's seat, proved to be on probation. A subsequent search produced additional contraband evidencing drug sales. The Third District Court

of Appeal reversed a superior court ruling that defendant had been unlawfully detained. Disagreeing with ***People v. Kidd*** (2019) 36 Cal.App.5th 12, the court held that while the use of a spotlight might cause someone to feel "scrutiny, such directed scrutiny does not amount to a detention." Although the female who had gotten out of the car was detained, "there is no evidence defendant observed the deputy's interaction with [her] . . . ." By the time the deputy addressed defendant, having smelled marijuana and having seen the large bags of marijuana, defendant was appropriately and lawfully detained. Significantly, the deputy never blocked defendant's egress, he never used emergency lights, and his approach to the car was casual.

And see ***People v. Perez*** (1989) 211 Cal.App.3rd 1492, where a police officer parked his patrol car in front of Perez's vehicle, leaving "plenty of room" for Perez to drive away, and activated both spotlights on the patrol car "to get a better look at the occupants and gauge their reactions." (***Id***. at p. 1494.) The officer then walked over to the car, tapped on the window, and asked the driver to roll down the window. (***Ibid***.) The appellate court concluded: "[T]he conduct of the officer here did *not* manifest police authority to the degree leading a reasonable person to conclude he was not free to leave. While the use of high beams and spotlights might cause a reasonable person to feel himself [or herself] the object of official scrutiny, such directed scrutiny *does not* amount to a detention. [Citations.]" (Italics added; ***Id***. at p. 1496.)

Handcuffing a suspect after he gave an implausible explanation as to why he was in the area of a marijuana grow at 5:30 a.m., and finding clothing in his backpack that smelled like growing marijuana, was a lawful detention even though the detention lasted at least 4½ hours while officers attempted to find physical evidence at the scene connecting him to the marijuana grow. (***People v. Williams*** (2007) 156 Cal.App.4th 949.)

There is no "agreement" that prevents state and local law enforcement from communicating with aliens from another country, nor to "otherwise to cooperate" with federal authorities "regarding the immigration status of any individual." In fact, the cooperation between the police officers and the Border comes within the authority conferred by Congress in **8 U.S.C. § 1357(g)(10)**. Upon determining that defendant was probably in the United States illegally, it was held to be lawful for local law

enforcement to detain him pending the arrival of a Border Patrol agent. (***United States v. Puebla-Zamora*** (8th Cir. 2021) 996 F.3rd 535.)

Gang Membership:

Membership in a street gang (absent evidence that the person has "knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and [that the person] . . . willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang") is not in and of itself a crime. (See **P.C. § 186.22(a)**) The practice of stopping, detaining, questioning, and perhaps photographing a suspected gang member, based solely upon the person's suspected gang membership, is illegal. (***People v. Green*** (1991) 227 Cal.App.3rd 692, 699-700; ***People v. Rodriguez*** (1993) 21 Cal.App.4th 232, 239.)

The ***Rodriguez*** Court noted that; "While this policy (of stopping and questioning all suspected gang members) may serve the laudable purpose of preventing crime, it is prohibited by the **Fourth Amendment**." (***Id.***, at p. 239; citing ***Brown v. Texas*** (1979) 443 U.S. 47, 52 [99 S.Ct. 2637; 61 L.Ed.2nd 357, 363].)

See "*Videotaping, Tape-Recording, and Photographing*," under "*New and Developing Law Enforcement Tools and Technology*" (Chapter 14), below.

*During Execution of a Search or Arrest Warrant, or during a **Fourth** Waiver Search*:

An occupant of a house being subjected to a search pursuant to a *search warrant* may be detained during the search (1) in order to prevent flight, (2) to minimize the risk of harm to the officers, and (3) to facilitate an orderly search through cooperation of the residents. (***Michigan v. Summers*** (1981) 452 U.S. 692, 702-703 [101 S.Ct. 2587; 69 L.Ed.2nd 340, 349-350].)

This includes those who otherwise are not necessarily involved in the suspected criminal activity. (***Bailey v. United States*** (2013) 568 U.S. 186, 192-202 [133 S.Ct. 1031, 1037-1043; 185 L.Ed.2nd 19]; citing ***Muehler v. Mena*** (2005) 544 U.S. 93 [125 S.Ct. 1465; 161 L.Ed.2nd 299].)

In ***Muehler v. Mena***, *supra*, at p. 101, the Supreme Court reversed the Ninth Circuit's conclusion that the officers

should have released Mena as soon as it became clear that she did not constitute an immediate threat, but noted that the detention "can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." (See ***Guillory v. Hill*** (2015) 233 Cal.App.4th 240, 250.)

Note, however, ***Ybarra v. Illinois*** (1979) 444 U.S. 85 [100 S.Ct. 338; 62 L.Ed.2nd 238], condemning the detention and patdown of everyone at the scene absent individualized evidence connecting each person so detained with the illegal activity being investigated.

The time allotted for the detention of the occupants of a residence does not, however, extend beyond the time it takes to execute the search warrant. Questioning the detainees is not part of the detention. Detaining and questioning that takes place beyond the execution of the warrant, therefore, constitutes an unlawfully prolonged detention. (***Guillory v. Hill*** (2015) 233 Cal.App.4th 240, 249-256.)

And, using an otherwise lawful detention during the execution of a search warrant as a tool with which to coerce the employees of a business to submit to interviews, conditioning their release on answering questions, is unlawful and a violation of the **Fourth Amendment**. (***Ganwich v. Knapp*** (9th Cir. 2003) 319 F.3rd 1115.)

Officers acted reasonably by detaining a female occupant of a residence in handcuffs for two to three hours while a search was in progress, even though she was *not* the suspect the officers were looking for, given the fact that the search warrant sought weapons and evidence of gang membership. (***Muehler v. Mena*** (2005) 544 U.S. 93 [125 S.Ct. 1465; 161 L.Ed.2nd 299].)

The justifications for detaining the occupants include:

- Preventing flight in the event that incriminating evidence is found;
- Minimizing the risk of harm to the officers, *and*
- Facilitating the orderly completion of the search while avoiding the use of force.

(***Id***., at p. 98.)

Recognizing the inherent dangerousness in serving narcotics-related search warrants and the common use of weapons, particularly firearms, in such cases, if for no other reason than the officers' safety, anyone present at the scene of the execution of such a warrant who appears to have a

"*close physical and functional association*" with the subjects of the search, may be temporarily detained while the person is identified and that possible association is investigated. (***People v. Samples*** (1996) 48 Cal.App.4th 1197; defendant driving the car listed in the search warrant, in the company of two people listed in the warrant, lawfully detained.)

The same rules apply to detaining occupants of a residence while serving an *arrest warrant*. (***People v. Hannah*** (1997) 51 Cal.App.4th 1335.)

> The Ninth Circuit disagrees with this theory, holding that the "categorical detention" of an occupant of a house while executing an arrest warrant is unconstitutional. (***Sharp v. County of Orange*** (9th Cir. 2017) 871 F.3rd 901, 912-916.)
>
> The Eleventh Circuit agrees with the California rule. (***United States v. Mastin*** (11th Cir. AL. 2020) 972 F.3rd 1230.)

Also, police may lawfully "*briefly*" detain visitors to a probationer's home while executing a "***Fourth** Waiver*" *search* for purposes of identifying the visitors and for the officers' safety. (***People v. Matelski*** (2000) 82 Cal.App.4th 837, suspected felon; ***People v. Rios*** (2011) 193 Cal.App.4th 584, 593-595, suspected gang member.)

Detaining defendant for 30 to 50 minutes while officers conducted a **Fourth** waiver search held to be illegal, requiring the suppression of evidence discovered during this prolonged time period. While the initial detention may have been lawful, holding onto defendant after it could no longer be argued that he constituted a threat to the officers or the purposes of the search, was not justified. (**People *v.* Gutierrez** (2018) 21 Cal.App.5th 1146, 1153-1161.)

However, a person merely approaching a house being searched, at least in the absence of any indication that the person has some connection with the illegal activity occurring in the house, may *not* be detained. (***People v. Gallant*** (1990) 225 Cal.App.3rd 200, 203-204.)

But, a person who approaches a house being searched pursuant to a search warrant under circumstances either indicating some connection with the residence, or when his possible connection cannot be determined without a brief detention, may be detained long enough to investigate his connection with the illegal activity at the house and to ensure police safety during the search. (***People v. Glaser*** (1995) 11 Cal.4th 354, 363-374.)

However, once the subject has left the "immediate vicinity" of the place being searched, he is no longer subject to being detained, at least under the theory of ***Michigan v. Summers*** (1981) 452 U.S. 692 [101 S.Ct. 2587; 69

L.Ed.2nd 340, 349-350] (above). (***Bailey v. United States*** (2013) 568 U.S. 186, 192-202 [133 S.Ct. 1031, 1037-1043; 185 L.Ed.2nd 19]; restricting such detentions to occupants who are still in the "*immediate vicinity*" of the residence being searched. The detention of an occupant who had just left the residence, and was already about a mile away, held to be illegal, at least under the rule of ***Summers***.)

Also, the rule of ***Summers*** cannot be used as an excuse for the mass detention and interrogation of suspected illegal aliens at a factory when the ruse used to gain access to the factory and the suspects was a search warrant for employment documents. (***Cruz v. Barr*** (9th Cir. 2019) 926 F.3rd 1128.)

Pending the Obtaining of a Search Warrant:

Securing a home from the outside, detaining the occupant on his own porch pending the obtaining of a warrant, was upheld by the United States Supreme Court. (***Illinois v. McArthur*** (2001) 531 U.S. 326 [121 S.Ct. 946; 148 L.Ed.2nd 838].)

> Such a "securing" of a house, however, is in fact a **Fourth Amendment** seizure. (***United States v. Shrum*** (10th Cir. KS 2018) 908 F.3rd 1219.)

It is proper for the police to temporarily "*detain a residence*" from the outside, preventing people from entering, when there is a *reasonable suspicion* that contraband or evidence of a crime is inside, at least until the officers can determine through their investigation whether to seek a search warrant. (***People v. Bennett*** (1998) 17 Cal.4th 373.)

Entering and securing a residence pending the obtaining of a search warrant was supported by exigent circumstances when officers received information that the occupant was about to destroy or remove contraband from the residence. (***United States v. Fowlkes*** (9th Cir. 2015) 804 F.3rd 954, 969-971.)

> The fact that it took about an hour to coordinate the officers necessary to make the warrantless entry and securing of defendant's apartment was irrelevant; the exigency still existed. (***Id***., at p. 971.)
>
> See also ***United States v. Dent*** (1st Cir. Me. 2017) 867 F.3rd 37, where the court held that pending the obtaining of a search warrant, the securing of the residence, including doing a protective sweep during which illegal contraband was observed, did not affect the legality of the search warrant where there was no evidence that

either the warrant or the decision to seek the warrant was based on anything the officers discovered during their warrantless entry. The court found that the process of applying for the search warrant had already been initiated based on other independent sources of information and that drugs observed under an air mattress were not included in the search warrant affidavit.

Such a "securing" of a house, however, is in fact a **Fourth Amendment** seizure. (***United States v. Shrum*** (10th Cir. KS 2018) 908 F.3rd 1219.)

It is also lawful to *detain packages* and other containers. (***United States v. Hernandez*** (9th Cir. 2002) 313 F.3rd 1206.) The rules generally parallel the requirements for detaining a person under ***Terry v. Ohio*** (1968) 392 U.S. 1 (See ***United States v. Place*** (1983) 462 U.S. 696 [103 S.Ct. 2637; 77 L.Ed.2nd 110].).

When the container is a package that has been mailed, and the personal intrusion upon the intended recipient is less, the length of time the package may be detained is considerably longer than if taken from the defendant's person. In ***Place***, for instance, the container was the defendant's luggage taken from him at an airport. The Supreme Court held that 90 minutes was *too long*. In contrast, the ***Hernandez*** case, where a 22-hour delay was upheld, cites prior authority where holding onto a mailed package for up to six days was approved.

Seizing and holding defendant's dash-cam pending the obtaining of a search warrant to search the dash-cam (which took three days) for evidence of defendant's reckless driving (causing a traffic collision and serious injury to a motorcyclist), held to be lawful. (***People v. Tran*** **(**2019) 42 Cal.App.5th 1.)

Detentions Away from the Place being Searched:

Reversing the Second Circuit Court of Appeal (See ***United States v. Bailey*** (2nd Cir. 2011) 652 F.3rd 197.), where the defendant wasn't detained until after driving at least a mile from his home, and resolving a split of authority among other circuits, the United States Supreme Court held that ***Michigan v. Summers*** (1981) 452 U.S. 692 [101 S.Ct. 2587; 69 L.Ed.2nd 340, 349-350], does not permit the detention of occupants beyond the immediate vicinity of the premises which is the subject of a search warrant, at least when the sole reason for the detention is that the person's home was about to be searched. If police officers elect to detain an individual after he leaves the immediate vicinity of the premises being searched, that detention must be justified by some other rationale. (***Bailey***

v. United States (2013) 568 U.S. 186, 192-202 [133 S.Ct. 1031; 185 L.Ed.2nd 19].)

Detention Issues, in General:

Information From a Tipster; Reliability: In order for information from a tipster to justify a detention of a suspect, it must first be shown to be reliable.

A bar employee (who later fully identified himself) calling 911 to report that three separate customers observed defendant in possession of a firearm, and then described for the 911 operator the movements of defendant as he fled in a particularly described vehicle, held to be of sufficient reliability to supply the necessary reasonable suspicion justifying the stopping of that vehicle. (***United States v. Vandergroen*** (9th Cir. 2020) 964 F.3rd 876, 879-882.)

The Court noted that; "(w)hile a tip such as the 911 call may generate reasonable suspicion, it can only do so when, under the "totality-of-the-circumstances," it possesses two features. ***United States v. Rowland***, 464 F.3rd 899, 907 (9th Cir. 2006) (citation omitted). *First*, the tip must exhibit sufficient indicia of reliability, and *second*, it must provide information on potential illegal activity serious enough to justify a stop. ***United States v. Edward****s*, 761 F.3rd 977, 983 (9th Cir. 2014). The 911 call here satisfied both requirements." (***Ibid***.)

Factors Identified in ***Vandergroen***:

Whether the tipper is known, rather than anonymous. (***Florida v. J.L.*** (2000) 529 U.S. 266, 270 [120 S.Ct. 1375; 146 L.Ed.2nd 254];

Whether the tipper reveals the basis of his knowledge. (***United States v. Rowland***, *supra*, at p. 908);

Whether the tipper provides detailed predictive information indicating insider knowledge. (***Id.***);

Whether the caller uses a 911 number (allowing the call to be recorded and traced) rather than a non-emergency tip line. (***Foster v. City of Indio*** (9th Cir. 2018) 908 F.3rd 1204, 1214); *and*

Whether the tipster relays fresh, eyewitness knowledge, rather than stale, second-hand knowledge. (***United States v. Terry-Crespo*** (9th Cir. 2004) 356 F.3rd 1170, 1176-1177.)

> Also, "(w)hen evaluating the reliability of a tip such as the 911 call here, in which a caller reports information from a third party regarding possible criminal activity, we consider the reliability of both the caller himself and the third party whose tip he conveys. *See* ***United States v. Brown***, 925 F.3rd 1150, 1153 (9th Cir. 2019) (considering both the fact that the caller was known and that the third-party tipster was anonymous in evaluating the reliability of such a tip)." (*United States v. Vandergroen*, at p. 880.)
>
> The ***Vandergroen*** Court also found the information from the patrons, whose identity was anonymous, to be reliable in that (1) the reports were based on fresh, first-hand knowledge, (2) they reported personally seeing the gun on the defendant shortly before they reported it to the bar employee who called 911, and thus was not "stale," "second-hand" information, (3) the fact that the witnesses to defendant's illegal possession of a firearm were still at the bar when reporting what they saw to the bar employee, thus "narrow(ing) the likely class of informants," making their reports more reliable, and (4) the fact that multiple individuals reported seeing a gun also made the information more reliable. (***Ibid***.)

Information From a Tipster; Illegal Activity: In order for information from a tipster to justify a detention of a suspect, it must describe serious illegal activity.

> Even if a 911 call from a tipster is shown to be reliable, it will only support the necessary showing of a reasonable suspicion if it also "provide[d] information on potential illegal activity." (***United States v. Vandergroen*** (9th Cir. 2020) 964 F.3rd 876, 879, 881; quoting ***Foster v. City of Indio*** (9th Cir. 2018) 908 F.3rd 1204, 1214.)
>
> > The tip must demonstrate that "criminal activity may be afoot." (***Id***.; quoting ***Terry v. Ohio*** (1968) 392 U.S. 1, 30 [88 S.Ct. 1868; 20 L.Ed.2nd 889.)
> >
> > "The 'absence of any presumptively unlawful activity' from a tip will render it inadequate to support reasonable suspicion, (***United States v.) Brown***, 925 F.3d (1150) at 1153. Furthermore, any potential criminal activity identified must be serious enough to justify 'immediate detention of a suspect.' ***United States v. Grigg***, 498 F.3d 1070, 1080-81 (9th Cir. 2007)." (***States v. Vandergroen***, *supra*, at p. 881.)
> >
> > In *Vandergroen*, it was held that a 911 call to the effect that defendant was carrying a gun, which is presumptively illegal in

California (**P.C. § 25400**), provided sufficient information to justify defendant's detention for investigation of whether or not he was in fact in illegal possession of a firearm. Also, the potential crime involved was serious enough, and was an "ongoing" crime, to justify an immediate detention for investigation. (***Id.***, at pp. 879-882.)

Carrying a gun is not presumptively illegal in all states. The Vandergroen case (at p. 881) cites Washington State as one of those states where carrying a gun is presumptively legal. (See ***United States v. Brown*** (9th Cir. 2019) 925 F.3rd 1150, 1154.)

Additional Case Law:

After questioning a person at an airport, a detention was held to be lawful where the name given to police was different than that put on checked luggage, with no documentary proof of identity, while traveling to a faraway city known for receiving narcotics, plus other suspicious circumstances. (***People v. Daugherty*** (1996) 50 Cal.App.4th 275.)

Carrying an ax on a bicycle at 3:00 a.m. is reasonable suspicion of criminal activity justifying a detention for investigation. (***People v. Foranyic*** (1998) 64 Cal.App.4th 186.)

Detaining a person on school grounds for purposes of investigating the lawfulness of his presence there, as an "*administrative search*," is lawful. (***In re Joseph F.*** (2000) 83 Cal.App.4th 501.)

An Anchorage, Alaska, Municipal Code ordinance forbidding any item affixed to the windshield (similar to California's **V.C. § 26708(a)(1)**; see ***People v. White*** (2003) 107 Cal.App.4th 636.) *was not* violated by an air freshener dangling from the rear view mirror. A traffic stop was found to be illegal. (***United States v. King*** (9th Cir. 2001) 244 F.3rd 736, 740.)

A traffic stop for a violation of **V.C. § 26708(a)** was held to be *illegal* in ***People v. White***, *supra*., where insufficient evidence was presented in court of an obstruction of the driver's view caused by an air freshener dangling from the rearview mirror, but *legal* in ***People v. Colbert*** (2007) 157 Cal.App.4th 1068, where the officer was able to testify why he believed the driver's view was obstructed by the same type of object and the defense failed to present any evidence to the contrary.

Observing defendant break traction for about 20 to 25 feet, lasting about 2 seconds, was sufficient cause to suspect a violation of **V.C. § 23109(c)**,

exhibition of speed. (***Brierton v. Department of Motor Vehicles*** (2005) 130 Cal.App.4th 499, 509-510.)

Seeing three vehicles with four Black male occupants each, one of the occupants who is known to be a gang member, driving as if in military formation at 12:30 at night, hours after a prior gang shooting, the vehicles being in one of the warring Black gang's territory, held to be *insufficient* to justify a stop and detention. (***People v. Hester*** (2004) 119 Cal.App.4th 376, 385-392.)

Where the defendant was confronted by six officers, all surrounding him, with five of them in uniform with visible firearms, in an area shielded from public view (an apartment hallway), where his request to shut the door to his room was denied, he was patted down for weapons, he was told three times that he was subject to arrest for failing to register (thus implying a need to cooperate should he wish to avoid the specter of arrest), and where he was never told that he was free to leave, a reasonable person in defendant's position at the time would *not* have believed that he was free to terminate the contact. (***United States v. Washington*** (9th Cir. 2004) 387 F.3rd 1060, 1068-1069; finding that defendant's detention was "*more intrusive than necessary*" and that upon his denial of anything illegal in his room, the detention became illegal.)

A stop and detention based upon stale information concerning a threat, which itself was of questionable veracity, and with little if anything in the way of suspicious circumstances to connect the persons stopped to that threat, is illegal. (***People v. Durazo*** (2004) 124 Cal.App.4th 728; The threat was purportedly from Mexican gang members, and defendant was a Mexican male who (with his passenger) glanced at the victim's apartment as he drove by four days later, where the officer admittedly was acting on his "*gut feeling*" that defendant was involved.)

Stopping the plaintiff, an African-American male, a half mile away while driving a gray car in the direction of a witness's house, 30 minutes after the witness called police to report that he had just been warned by a friend that two African-American males were coming to his house to do him harm and that he had just seen two such males driving by in a gray or black car, was held to be a lawful stop based upon a reasonable suspicion that the plaintiff was possibly one of the suspects. (***Flowers v. Fiore*** (1st Cir. 2004) 359 F.3rd 24.)

Observation of a truck that matched the description of one that had just been stolen in a carjacking, but with a different license plate that appeared to be recently attached, and with two occupants who generally matched the suspects' description, constituted the necessary reasonable suspicion to

justify the defendant's detention. (***United States v. Hartz*** (9th Cir. 2006) 458 F.3rd 1011, 1017-1018.)

A search and seizure condition justifies a detention without a reasonable suspicion of criminal activity. (***People v. Viers*** (1991) 1 Cal.App.4th 990, 993-994; defendant stopped and detained in his vehicle.)

A "*knock and talk*" at the defendant's motel room justified the eventual detention of defendant when (1) the officers had some limited information from an earlier traffic stop that defendant might be involved in the manufacturing of methamphetamine, including the presence of a pressure cooker which the officer knew could be used in the manufacturing of methamphetamine; (2) a roommate took a full two minutes to open the motel room door while the officers could hear noises like people moving things around inside; (3) when defendant was contacted, he acted extremely nervous, contrary to how he had acted during a previous contact by the same officers; and (4) the roommate admitted to being a methamphetamine user and that other people had visited the room the night before. (***United States v. Crapser*** (9th Cir. 2007) 472 F.3rd 1141, 1147-1149.)

Observing defendant sitting in a parked motor vehicle late at night near the exit to a 7-Eleven store parking lot with the engine running, despite prior knowledge of a string of recent robberies at 7-Elevens, held *not* to be sufficient to justify a detention and patdown. (***People v. Perrusquia*** (2007) 150 Cal.App.4th 228.)

Spotlighting the defendant in a high narcotics area and then walking up to him "briskly" while asking questions held to be an unlawful detention under the circumstances. (***People v. Garry*** (2007) 156 Cal.App.4th 1100.)

> See also ***People v. Kidd*** (2019) 36 Cal.App.5th 12, at pp. 21-22, where it was held that taking into account of the "totality of the circumstances," it was held that defendant was detained when the officer made a U-turn to pull in behind him and then trained the patrol car's spotlights on his car.
>
> But see ***People v. Tacardon*** (2020) 53 Cal.App.5th 89 (Petition granted; see ***People v. Tacardon*** (2022) 14 Cal.5th 235: A deputy sheriff parked 15 to 20 feet behind a lawfully parked car, shined a spotlight into the interior, and approached. When a female suddenly got out, he ordered her to remain at the curb. At about that point the deputy smelled marijuana and observed large marijuana bags on the floorboard. Defendant, in the driver's seat, proved to be on probation. A subsequent search produced additional contraband evidencing drug sales. The Third District

Court of Appeal reversed a superior court ruling that defendant had been unlawfully detained. Disagreeing with ***People v. Kidd*** (2019) 36 Cal.App.5th 12, the court held that while the use of a spotlight might cause someone to feel "scrutiny, such directed scrutiny does not amount to a detention." Although the female who had gotten out of the car was detained, "there is no evidence defendant observed the deputy's interaction with [her] . . . ." By the time the deputy addressed defendant, having smelled marijuana and having seen the large bags of marijuana, defendant was appropriately and lawfully detained. Significantly, the deputy never blocked defendant's egress, he never used emergency lights, and his approach to the car was casual.

And see ***People v. Perez*** (1989) 211 Cal.App.3rd 1492, where a police officer parked his patrol car in front of Perez's vehicle, leaving "plenty of room" for Perez to drive away, and activated both spotlights on the patrol car "to get a better look at the occupants and gauge their reactions." (***Id.*** at p. 1494.) The officer then walked over to the car, tapped on the window, and asked the driver to roll down the window. (***Ibid.***) The appellate court concluded: "[T]he conduct of the officer here did *not* manifest police authority to the degree leading a reasonable person to conclude he was not free to leave. While the use of high beams and spotlights might cause a reasonable person to feel himself [or herself] the object of official scrutiny, such directed scrutiny *does not* amount to a detention. [Citations.]" (Italics added; ***Id.*** at p. 1496, and cited with approval in ***People v. Tacardon***, *supra*, at p. 98; petition granted.)

Voluntarily going with the police to the police station, where he was interviewed as a possible witness, and not a suspect, where nothing was ever done or said to indicate otherwise at least up until his arrest, was not an unlawful detention. (***People v. Zamudio*** (2008) 43 Cal.4th 327, 341-346.)

Observation by an officer trained as a "drug recognition expert" of defendant apparently asleep in his vehicle in a drugstore parking lot, at 8:00 p.m., with the parking lights on, knowing that people who are under the influence of drugs tend to fall "asleep quickly, inappropriately, and sometimes uncontrollably," and then noticing that he was breathing faster than usual, and, when awakened, finding defendant to be irritable, aggressive, and overly assertive—all indications of someone under the influence of drugs—held to be sufficient cause to detain him. (***Ramirez v. City of Buena Park*** (9th Cir. 2009) 560 F.3rd 1012, 1016-1018, 1020-1021.)

Observing defendant standing near the open trunk of a car, which he immediately shut upon the approach of the officers and walk away, while appearing nervous, when combined with the officer's plain sight observations of exposed wires in the vehicle where the door panel and the stereo trim had been removed, with tools such as screwdrivers and pliers lying around, was more than enough reasonable suspicion to justify the defendant's detention. (***People v. Osborne*** (2009) 175 Cal.App.4th 1052, 1058.)

With personal knowledge that someone had been illegally shooting a firearm and had an illegal campfire in the area of defendant's campsite, contacting and detaining defendant at the campsite the following morning was lawful. (***United States v. Basher*** (9th Cir. 2011) 629 F.3rd 1161, 1165-1166.)

Where a robbery had just occurred in the vicinity with the suspect and vehicle description, although not perfect, very close, and with defendant having just parked his car "weirdly," not quite at the curb, with a door left open, and defendant apparently attempting to separate himself from his car, the officers had a reasonable suspicion to detain defendant. (***People v. Leath*** (2013) 217 Cal.App.4th 344, 354-355.)

A call made by an identified witness at the behest of an anonymous witness reporting a man with a gun did not support reasonable suspicion because the tip was neither reliable nor indicative of potentially illegal activity. "The tip suffer[ed] from two key infirmities—an unknown, anonymous tipster and the absence of any presumptively unlawful activity." (***United States v. Brown*** (9th Cir. 2019) 925 F.3rd 1150.)

The Ninth Circuit affirmed a criminal judgment in a case in which the district court denied the defendant's motion to suppress evidence, and the defendant entered a conditional guilty plea to being a convicted felon in possession of a firearm. In this case, Police Detectives detained the defendant after observing a bulge under his sweatshirt that likely indicated a concealed firearm, which is presumptively unlawful to carry in California. Defendant was verbally uncooperative, yelling at the detectives. After defendant's companion was found to be in possession of a firearm, defendant was tased and searched, resulting in the recovery of a firearm in a shoulder holster. The Court held that the district court did not clearly err in crediting the detective's testimony that he observed on the defendant a "very large and obvious bulge" that suggested (in the officer's training and experience) a concealed firearm. The Court further held that reasonable suspicion supported the stop, and that the district court therefore properly denied the defendant's motion to suppress evidence found during the search. A dissenting justice argued that, without other corroborating evidence, a sweatshirt bulge alone did not give an

objectively reasonable and particularized suspicion to stop and detain the defendant. (***United States v. Bontemps*** (9th Cir. 2020) 977 F.3rd 909.)

***Anonymous Information*:**

Rule: An *anonymous tip,* absent corroborating circumstances, does *not* constitute a "reasonable suspicion" nor justify a detention. (***Alabama v. White*** (1990) 496 U.S. 325, 331 [110 S.Ct. 2412; 110 L.Ed.2nd 301, 309]; ***In re Cody S.*** (2004) 121 Cal.App.4th 86.)

Patdown for Weapons:

An *anonymous tip* concerning a person carrying a firearm does *not* justify a *patdown* for weapons (nor a *detention* for that purpose). There is no such thing as a "*firearms exception*" to this rule. (***Florida v. J.L.*** (2000) 529 U.S. 266 [120 S.Ct. 1375; 146 L.Ed.2nd 254]; see also ***People v. Jordan*** (2004) 121 Cal.App.4th 544, 562-564.)

> However, being familiar with the tipster's voice, and knowing that he has provided reliable information in the past, *might* be enough. (***People v. Jordan***, *supra*, a pp. 560-661.)

The victim of an assault by a person with a deadly weapon called 911, gave his name (that could not be verified), but claimed to not know the phone number from which he was calling and hesitated to give his location. Under these circumstances, it was held to be sufficient reasonable suspicion to detain and pat defendant down for weapons. The Court held that this was not "*truly anonymous*" in that he gave a name, called 911 concerning a crime that had just occurred, likening it to a "*spontaneous declaration*," and reported a crime about which he had obvious firsthand knowledge, all giving the information the "*indicia of reliability*." (***United States v. Terry-Crespo*** (9th Cir. 2004) 356 F.3rd 1170.)

Sufficient corroboration was found, justifying a patdown for weapons, when the anonymous information came from two separate informants, where the tips were close in time, the informants contacted the officer personally (thus putting their anonymity at risk), and the setting was a crowded throng of celebrants at a New Year's Eve street party, thus increasing the dangerousness of the situation. (***People v. Coulombe*** (2001) 86 Cal.App.4th 52.)

Information from an anonymous tipster who "(1) asserts eyewitness knowledge of the reported event; (2) reports contemporaneously with the event; and (3) uses the 911 emergency system, which permits call tracing" (per ***Navarette v. California*** (2014) 572 U.S. 393 [134 S.Ct. 1683; 188

L.Ed.2nd 680].), is sufficient to establish the necessary reasonable suspicion to justify a temporary detention of the defendant for investigation and patdown of the defendant, where it was reported by the tipster to a police dispatcher that a particularly described individual (the defendant) was seen in possession of a handgun and had just walked into a liquor store. (***United States v. Swinney*** (7th Cir. 2022) 28 F.4th 864.)

Detentions in Highly Dangerous Situations:

Noting the U.S. Supreme Court's reference in ***Florida v. J.L.***, *supra*, to exceptions in highly dangerous situations, California's Fifth District Court of Appeal ruled that officers lawfully stopped defendant on information from an anonymous tipster who reported that defendant was driving to his wife's house for the purpose of shooting her. The lawfulness of the stop was based upon the dangerousness of the situation when combined with some weak corroboration which, by itself, might not have been enough to justify stopping defendant's vehicle. (***People v. Castro*** (2006) 138 Cal.App.4th 486.)

A stop and detention of a suspect based upon an anonymous call was held to be justified where the tipster alleged a dangerous or potentially violent situation, the alleged crime had just occurred, the suspect would have left if not detained, and there is no reason to doubt the tipster's veracity. (***People v. Rodgers*** (2005) 131 Cal.App.4th 1560.)

An anonymous tipster calling in, in an excited state, to report that defendant had just pointed a gun at him, giving detailed information concerning the defendant's description and his location, was held to be sufficient where the call was recorded, he called back a second time to correct the color of the car in which defendant was sitting, gave a first name, and stuck around long enough to insure that defendant was still there. The officers responded within 2 to 3 minutes and found the scene as the tipster described it. Defendant's detention and the warrantless search of the vehicle for the gun was upheld. (***People v. Dolly*** (2007) 40 Cal.4th 458, 463-471; i.e., "[A] firsthand, contemporaneous description of the crime as well as an accurate and complete description of the perpetrator and his location, the details of which were confirmed within minutes by the police when they arrived." ***Id***., at p. 468.)

Anonymous information reporting a dangerous circumstance involving a gun, then occurring, with an accurate description of the suspect and his location which is quickly verified, constitutes sufficient reasonable suspicion to stop, detain, and patdown the suspect. (***People v. Lindsey*** (2007) 148 Cal.App.4th 1390.)

A late night radio call concerning two specifically described males causing a disturbance, with one possibly armed, in a known gang area at an address where a call concerning a daytime shooting days earlier resulted in the recovery of two firearms, and where the described males are found within minutes of the call, is sufficient to justify a detention. (***In re Richard G.*** (2009) 173 Cal.App.4th 1252, 1257-1258.)

An anonymous tip concerning a man who had been shooting at passing vehicles was held to be sufficient to justify a detention when the officers responded within five minutes of the reported incident, observed defendant who closely matched a detailed description of the suspect, and contacted him with guns drawn. Legitimate safety concerns justified the officers' drawing their weapons, ordering defendant to his knees and handcuffing him. Second, the court held the information provided by the anonymous 911 caller was sufficiently reliable to provide the officers reasonable suspicion to conduct a ***Terry*** stop on defendant. Although he was anonymous, the caller reported firsthand information concerning an ongoing emergency while providing a detailed description of the suspect and location of the incident. (***United States v. Edwards*** (9th Cir. 2014) 761 F.3rd 977, 981-982.)

Officers stopping a vehicle in which defendant was found, and then conducting a warrantless search (resulting in the recovery of a firearm from under the center console), based upon an identified person's 911 call to police reporting that three unidentified persons had reported to him having seen defendant in possession of a firearm, was held to be lawful. Denial of defendant's motion to suppress under **Fourth Amendment** was affirmed because the 911 call was sufficiently reliable to support reasonable suspicion where the 911 call conveyed information from three witnesses and the tip provided information on potentially then-occurring illegal activity as the 911 call gave the police sufficieint probable cause to believe defendant was carrying a concealed firearm. (***United States v. Vandergroen*** (9th Cir. 2020) 964 F.3rd 876.)

See also ***United States v. Avilas-Vega*** (1st Cir. 2015) 783 F.3rd 69; where an anonymous tip under circumstances that appeared to be from a concerned citizen reporting a direct observation of a crime concerning two subjects passing around a pistol in a vehicle held to be sufficient reasonable suspicion to justify a traffic stop and a patdown of the subjects.

And see ***People v. Wells*** (2006) 38 Cal.4th 1078, at page 1087 (below), where the California Supreme Court differentiated ***J.L.*** from a DUI case noting that among other factors: "(A) report of a possibly intoxicated highway driver, 'weaving all over the roadway,' poses a far more grave and immediate risk to the public than a report of mere passive gun possession."

An anonymous call concerning a DUI driver weaving all over the road, the tipster correctly providing a detailed description of the vehicle, its location and direction of travel, given the dangerousness of leaving a drunk driver on the street, held to be sufficient "*reasonable suspicion*" to stop the vehicle and check its driver. (***Ibid***., citing ***United States v. Wheat*** (8th Cir. 2001) 278 F.3rd 722, and noting, among other factors (see below), the exigency involved in a DUI case.)

Stopping DUI and Reckless Driving Suspects Based Upon Anonymous Information:

In ***People v. Wells***, *supra*, the California Supreme Court listed four factors to consider, justifying the stop of a DUI suspect based upon anonymous information:

- The exigency of a DUI driver loose on the road, with all the damage they do, justifies an immediate law enforcement response. "(A) report of a possibly intoxicated highway driver, 'weaving all over the roadway,' poses a far more grave and immediate risk to the public than a report of mere passive gun possession (as occurred in ***Florida v. J.L.***)."

- A report from a citizen describing a contemporaneous event of reckless driving, presumably viewed by the caller, adds to the reliability of the information and reduces the likelihood that the caller is merely harassing an enemy.

- The level of intrusion upon one's personal privacy (in a place with a reduced expectation of privacy) and the inconvenience involved in a brief vehicle stop is considerably less than an "embarrassing police search" on a public street (as occurred in ***Florida v. J.L.***).

- Reliability is added by the relatively precise and accurate description given by the tipster regarding the vehicle type, color, location and direction of travel.

A CHP officer stopped defendant shortly after an anonymous 911 caller reported that she had been run off the road by a pickup truck that fit the description of the truck the defendant was driving. He arrested defendant (and his passenger) after smelling marijuana, searched the truck, and found 30 pounds of marijuana in the truck. Defendant filed a motion to suppress the marijuana arguing that the officer who searched his truck lacked reasonable suspicion to conduct a stop. The motion was denied. The U.S. Supreme Court held that the traffic stop complied with the

Fourth Amendment because, under the totality of the circumstances, the officer had a reasonable suspicion that the defendant was intoxicated. The behavior described by the 911 caller, viewed from the standpoint of an objectively reasonable police officer, amounted to a reasonable suspicion of drunk driving. (***Navarette v. California*** (2014) 572 U.S. 393 [134 S.Ct. 1683; 188 L.Ed.2nd 680].)

> With the Court assuming for the sake of argument that the 911 call constituted an anonymous tip: "By reporting that she had been run off the road by a specific vehicle—a silver Ford F-150 pickup, license plate 8D94925—the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability." (***Id.***, 134 S. Ct. at p. 1689.)
>
> "'[An informant's] explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case'" (***Ibid***; citing ***Illinois v. Gates*** (1983) 462 U.S. 213, 234 [103 S.Ct. 2317; 76 L.Ed.2nd 527].)

An anonymous tipster describing defendant's reckless driving, giving a specific location and a detailed description of the car, the driver and the driver's actions, was held to be sufficient to provide the necessary indicia of reliability to justify a traffic stop. (***Lowry v. Gutierrez*** (2005) 129 Cal.App.4th 926.)

> *Note*: The Court, however, also noted that the defendant's potential liability here was no more than a driver's license suspension, as opposed to a criminal prosecution, allowing for a lesser standard of "*reasonable suspicion*." It is unknown whether the Court would have applied the same standards had the consequences been a potential criminal prosecution and conviction instead.

Detentions with Sufficient Corroboration:

Corroboration of an anonymous tip sufficient to justify a detention and/or patdown for weapons can take various forms, such as:

- An accurate prediction of a suspect's future activity (i.e., "*predictive information*;" see above) by the tipster.

- Seemingly innocent activity when the anonymous tip casts the activity in a suspicious light.

- Presence of the person about whom the tip relates in a "*high crime area*."

- Verification of details provided by the tipster through police observation or other sources.

(***People v. Ramirez*** (1996) 41 Cal.App.4th 1608, 1613-1620.)

Potential accountability may help to corroborate an informant's information as well, such "*accountability*" being in the form of:

- The ability of authorities to identify the informant;

- The consequences the informant is likely to experience as a result of providing false information; *and*

- The informant's perception of these factors.

(***People v. Jordan*** (2004) 121 Cal.App.4th 544, 561-562.)

An in-person informant, even though unidentified, supplies the necessary indicia of reliability for two reasons:

- An in-person informant risks losing anonymity and being held accountable for a false tip.

- When a tip is made in-person, an officer can observe the informant's demeanor and determine whether the informant seems credible enough to justify immediate police action without further questioning.

(***United States v. Palos-Marquez*** (9th Cir. 2010) 591 F.3rd 1272; with information corroborated by a Border Patrol Agent's own personal observations and knowledge of the area.)

Predictive Information: The Court in ***J.L.*** also discussed briefly "*predictive information*" which may supply the necessary corroboration, such as being able to correctly describe future actions of the suspect. Also, other unconnected anonymous informants, or anything that would add the element of credibility to the information, might sufficiently corroborate the anonymous informant. (***Florida v. J.L.***, *supra*, at pp. 271 (concurring opinion), 275-276 [146 L.Ed.2nd 260, 263-264].)

> A single pronounced weave within the lane, plus an experienced Highway Patrol officer's observation of the defendant sitting up close to the steering wheel, which the officer recognized as

something an impaired driver does, was sufficient to corroborate second-hand information concerning defendant's "erratic driving" from Montana Department of Transportation employees, justifying the stop of the defendant's car. (***United States v. Fernandez-Castillo*** (9th Cir. 2003) 324 F.3rd 1114.)

An anonymous tip of drug dealing occurring from a particularly described vehicle at a particular location was corroborated by a trained law enforcement officer's observation of what appeared to be a hand-to-hand drug transaction, justifying a detention of the vehicle's occupant. (***People v. Butler*** (2003) 111 Cal.App.4th 150, 159-162.)

Even though the original source of the information that defendant intended to shoot the victim was unknown, the tipster himself was known to the police as was the defendant himself. The information was also corroborated by other information that defendant had threatened a high school coach and that the threats were taken seriously by the coaches who all escorted their families out of the stadium after the game. Further, defendant was seen by the police outside the stadium where he was observed attempting to avoid contact with the police. The totality of the circumstances justified the detention (and even the handcuffing) of the defendant. (***People v. Turner*** (2013) 219 Cal.App.4th 151, 164-170.)

An anonymous tip concerning a man who had been shooting at passing vehicles was held to be sufficient to justify a detention when the officers responded within five minutes of the reported incident, observed defendant who closely matched a detailed description of the suspect, and contacted him with guns drawn. Legitimate safety concerns justified the officers' drawing their weapons, ordering defendant to his knees and handcuffing him. Second, the court held the information provided by the anonymous 911 caller was sufficiently reliable to provide the officers reasonable suspicion to conduct a ***Terry*** stop on defendant. Although he was anonymous, the caller reported firsthand information concerning an ongoing emergency while providing a detailed description of the suspect and location of the incident. (***United States v. Edwards*** (9th Cir. 2014) 761 F.3rd 977, 981-982.)

A bar employee (who later fully identified himself) calling 911 to report that three separate customers observed defendant in possession of a firearm, and then described for the 911 operator the movements of defendant as he fled in a particularly described vehicle, held to be of sufficient reliability to supply the necessary

reasonable suspicion justifying the stopping of that vehicle. (***United States v. Vandergroen*** (9th Cir. 2020) 964 F.3rd 876.)

Illegal Detentions; *Examples*:

An uncorroborated tip concerning contraband in a vehicle without any indication of "*inside personal knowledge*" is insufficient to justify a traffic stop of that vehicle (***United States v. Morales*** (9th Cir. 2001) 252 F.3rd 1070.) or a detention of its driver. (***People v. Saldana*** (2002) 101 Cal.App.4th 170; tip that the driver had a gun and cocaine in the vehicle.)

The fact that the *physical description of a suspect* is very specific, when reported by an anonymous tipster to have a gun in his pocket, but where that physical description would be visible to anyone, does not sufficiently corroborate the tipster's information. Absent at least some suspicious circumstances observed by the responding police officers, finding the person described by the tipster does not create a reasonable suspicion justifying a detention or a patdown for weapons. (***People v. Jordan*** (2004) 121 Cal.App.4th 544, 553-652; the quick confirmation of the physical description of the defendant and his location, by itself, is legally insufficient.)

A tip forwarded by FBI agents to a local law enforcement officer "that he 'might want to pay particular attention to a certain house' in Tucson because there was 'suspicion that there was a possibility that there might be some narcotics' there" did not constitute sufficient reasonable suspicion to justify a stop of a vehicle coming from that house even though the tip had been corroborated by hearing "thumps" from the garage which the officer believed was someone loading something into the vehicle. Neither the source nor the specifics of the FBI's tip were ever identified or explained. (***United States v. Thomas*** (9th Cir. 2000) 211 F.3rd 1186.)

An anonymous tip, even when corroborated by a generally matching (albeit unique) suspect description (i.e., 6'1", 200-pound black male with the same first name), was found to be *not enough* for a finding in civil court that, "*as a matter of law*," there was a "*reasonable belief*" a wanted suspect was both a co-resident and was presently at a particular residence. (***Watts et al. v. County of Sacramento et al.*** (9th Cir. 2001) 256 F.3rd 886.)

An anonymous 911-hangup call, traceable to a particular motel, but without sufficient information to determine which room the call may have come from, did not allow for the non-consensual entry into the defendant's room merely because of the suspicious attempts by the person who answered the door to keep the officers from looking inside, and her apparent lies concerning no one else being there. (***United States v. Deemer*** (9th Cir. 2004) 354 F.3rd 1130.)

Knock and Talks:

The information motivating an officer to conduct a residential "knock and talk" may be from an anonymous tipster. There is no requirement that officers corroborate anonymous information before conducting a knock and talk. (***People v. Rivera*** (2007) 41 Cal.4th 304.)

See "*Knock and Talk*," under "*Miscellaneous Issues*," under "*Searches of Residences and Other Buildings*" (Chapter 13), below.

To Establish Probable Cause:

Anonymous information demonstrating a knowledge of inside information, describing ongoing criminal activity, and sufficiently corroborated, will justify the issuance of a search warrant. (***United States v. Jennen*** (9th Cir. 2010) 596 F.3rd 594, 598-600; where an anonymous tip corroborated by a controlled buy was sufficient to establish probable cause for a search warrant.)

To corroborate the anonymous tip, there must be found to be additional evidence that shows the tip is reliable. For instance:

- The tip must provide a "range of details," *and*

- The future movements of the suspect must be corroborated by independent police observation. (***Id***., at p. 598.)

In ***Illinois v. Gates*** (1983) 462 U.S. 213 [103 S.Ct. 2317; 76 L.Ed.2nd 527], anonymous information reflecting inside, predictive behavior, corroborated in numerous respects through a police follow-up investigation, was determined to constitute *probable cause* (referred to by the Court as a "*fair probability*") when considering the "*totality of the circumstances*," justifying the issuance of a search warrant.

In a search warrant case involving child pornography under **Pen. Code § 311.11**, it was held that the search warrant affidavit was not rendered deficient by the fact that an alleged anonymous tipster provided the information linking defendant to two pornographic images. The police and magistrate had reason to believe that the cyber-tips came from a reliable witness employed by an electronic communication service provider who acted in accord with the provider's federal obligation to report apparent child pornography and that a reliable person at National Center for Missing and Exploited Children (NCMEC) forwarded the two images to the police in accord with NCMEC's legal obligation. That the affidavit did not provide the name of either individual did not, under the totality of the

circumstances, undermine the determination that the tips came from unbiased citizen informants who could be presumed reliable. (***People v. Rowland*** (2022) 82 Cal.App.5th 1099.)

In Prison or Jail:

An anonymous tip that a particular prisoner is in possession of contraband was held to be sufficient cause to do a visual, clothed or unclothed, body cavity search. (***People v. Collins*** (2004) 115 Cal.App.4th 137.)

California Code of Regulations, Title 15, § 3287(b), allows for a visual search of an inmate, clothed or unclothed, whenever there is a "*substantial reason* to believe the inmate may have unauthorized or dangerous items concealed on his or her person." (Italics added) Judicial authorization (i.e., a search warrant), and the use of "medical personnel in a medical setting," is only required in the case of a "*physical* (as opposed to a non-contact *visual*) *body cavity search*." In ***Collins***, a visual inspection of the defendant's rectal area was intended, for which it is generally accepted that the rigorous requirements of the more intrusive "*physical body cavity search*" is not required.

***Detentions Involving Minors*:**

Minors on Campus: The **Fourth Amendment** protects students on a public school campus against unreasonable searches and seizures. (***In re K.J.*** (2018) 18 Cal.App.5th 1123, 1128.)

By School Officials:

School officials have the power to stop a minor/student on campus in order to ask questions or conduct an investigation even in the absence of a reasonable suspicion of criminal activity or a violation of school rules, so long as this authority is not exercised in an arbitrary, capricious, or harassing manner. (***In re Randy G.*** (2001) 26 Cal.4th 556.)

See ***Horton v. Goose Creek Independent School District*** (5th Cir. 1982) 690 F.2nd 470, 480 to 482, for a detailed analysis of the "*The **Fourth Amendment** in the Public Schools*," and why a relaxed search and seizure standard is applied in analyzing the relationship between students and school administrators.

Horton deals with the use of canines to "sniff" students, holding that such an act constitutes a "search" for **Fourth Amendment** purposes, eventually holding that "the type of canine inspection of the student's person involved in this

> case cannot be justified by the need to prevent abuse of drugs and alcohol when there is no individualized suspicion, and we hold it unconstitutional." (Pgs. 482-483.)

California follows the federal rule on this issue, as described in ***New Jersey v. T.L.O.*** (1985) 469 U.S. 325 [105 S.Ct. 733; 83 L.Ed.2nd 720], when applying the protections of the California Constitution. (***In re William G.*** (1985) 40 Cal.3rd 550, 564.)

> ***New Jersey v. T.L.O.***, *supra*, allows for warrantless searches by school officials so long as the search is "*reasonable*." (e.g., a "*reasonable suspicion*?")
>
> ***In re William G.***, *supra*, at p. 564, specifically defines this standard as a "*reasonable suspicion*," holding that searches by school officials are lawful so long as the official has "a reasonable suspicion that the student or students to be searched have engaged, or are engaging, in a proscribed activity (that is, a violation of a school rule or regulation, or a criminal statute)."

The search of a student by a school administrator requires only that there be *a reasonable suspicion of criminal activity or a violation of school rules*. The extent of law enforcement's involvement, evaluating the totality of the circumstances, must be considered when determining whether law enforcement's probable cause standards apply. Finding that; "the police role in the search of appellant was at all times clearly subordinate to the role of the vice-principal, who made the decision to search and conducted the search," a vice principal's search of a student's locker was upheld under the ***T.L.O.*** standard despite the fact that the information came from law enforcement and officers stood by for safety reasons as the vice principal conducted the search. (***In re K.S.*** (2010) 183 Cal.App.4th 72.)

Random metal detector searches of students, without any individualized suspicion, are justified by the "*special needs*" of keeping weapons off campuses. The **Fourth Amendment** is not violated by such searches where the government need is great, the intrusion on the individual is limited, and a more rigorous standard of suspicion is unworkable. (***In re Latasha W.*** (1998) 60 Cal.App.4th 1524.)

Detaining a person on school grounds for purposes of investigating the lawfulness of his presence there, as an "*administrative search*," is lawful. (***In re Joseph F.*** (2000) 83 Cal.App.4th 501.)

See ***In re Cody S.*** (2004) 121 Cal.App.4th 86, holding that upon requiring the minor, pursuant to school rules, to vacate his gym locker when pulled out of gym class at the request of the "school safety officer," the minor lost any expectation of privacy in the gym locker, and that this procedure *did not* constitute a search of that locker. Also, admitting that he had a knife in his backpack supplied the necessary "*reasonable suspicion*" for a warrantless search of his backpack.

The suspicionless search of a student was upheld where it was conducted pursuant to an established policy applying to all students and was consistent with the type of action on the part of a school administrator that fell well within the definition of "*special needs*" of a governmental agency. The search was of a limited nature, being told only to empty out his pockets, as he was not subjected to physical touching of his person nor was he exposed to the intimate process required for a urine sample necessary for drug testing. The purpose of the search was to prevent the introduction of harmful items (weapons and drugs) into the school environment. Given the general application of the policy to all students engaged in a form of rule violation that could easily lend itself to the introduction of drugs or weapons into the school environment (i.e., leaving during the school day without permission and returning later), further individualized suspicion was not required. (***In re Sean A.*** (2010) 191 Cal.App.4th 182, 186-190.)

> But see the dissent (pgs. 191-198) criticizing the decision as a non-particularized, suspicionless search of a student in violation of the principles of ***New Jersey v. T.L.O.*** (1985) 469 U.S. 325 [105 S.Ct. 733; 83 L.Ed.2nd 720], where the Supreme Court held that a reasonable suspicion is required. (See above)

"In practice, a public school student's legitimate expectation of privacy is balanced against the school's obligation to maintain discipline and to provide a safe environment for all students and staff. (Citation.) Accordingly, a school official may detain a student for questioning on campus, without reasonable suspicion, so long as the detention is not arbitrary, capricious, or for the purpose of harassment." (***In re K.J.*** (2018) 18 Cal.App.5th 1123, 1129.)

Rejecting an argument that the fact that an officer assisting a school resource officer was not himself a resource officer necessitated a higher standard of proof. (***Id.***, at pp. 1130-1131.)

Also rejecting the argument that the increased intrusiveness of having "escorted (defendant) out his class by the principal to awaiting police officer[s] who immediately removed his backpack, placed him in handcuffs, and searched his person," dictated that a higher standard of proof was required. (***Id.***, at pp. 1132-1133.)

The Use of Restraints and/or Seclusion as a Disciplinary Measure by School Officials:

See ***A.T. v. Baldo*** (9th Cir. 2019) 2019 U.S. App. LEXIS 38325; (Unpublished.), where it was held that at the very least, teachers and staff were entitled to qualified immunity from an alleged **Fourth Amendment** violation for using "restraints and seclusion" (sometimes referred to as 'containment' or 'isolation') to discipline the plaintiff's child over three years, beginning in the second grade.

"The courts that have addressed this issue have concluded that, while students have a clearly established **Fourth Amendment** right to be free from arbitrary and excessive corporal punishment, the use of physical restraints and seclusion in school settings—particularly in special education classrooms—is not necessarily unlawful. *See* ***C.N. v. Willmar Pub. Schs., Indep. Sch. Dist. No. 347***, 591 F.3rd 624, 633 (8th Cir. 2010) (teacher's allegedly excessive use of restraints and seclusion that were part of developmentally delayed student's IEP (Individualized Education Plan), 'even if overzealous at times and not recommended . . . was not a substantial departure from accepted judgment, practice or standards and was not unreasonable in the constitutional sense'); ***Couture*** (***v. Bd. of Educ. of Albuquerque Pub. Schs***) 535 F.3rd at 1251-52, 1256 (10th Cir. 2008) (repeated use of timeout rooms over a two-month period to address student's disruptive and dangerous behavior was reasonable, particularly in light of the fact that timeouts were prescribed in the student's IEP as a mechanism to teach him behavioral control); ***Alex G. ex rel. Dr. Steven G. v. Bd. of Trs. of Davis Joint Unified Sch. Dist.***, 387 F. Supp. 2nd 1119, 1125 (E.D. Cal. 2005) (use of physical restraints against aggressive and violent autistic student not unlawful despite parents' non-consent, where state law allows such restraints when the student poses an immediate danger to himself or others). ⁋ Even

where restraints and seclusion are used in a manner that exceeds what is authorized in the student's IEP, courts have generally found their use to be constitutionally permissible. *See* ***Payne v. Peninsula Sch. Dist.***, 623 F. App'x 846, 847-48 (9th Cir. 2015) (no violation of clearly established rights where teacher repeatedly placed autistic student in prolonged isolation in a small, dark room as a punishment and had student assist in cleaning up after he defecated in the room, both of which violated student's IEP); ***Miller v. Monroe Sch. Dist.***, 159 F. Supp. 3rd 1**238, 1249 (W.D. Wash. 2016)** (finding no clearly established right against holds and seclusions that were performed for discriminatory reasons, by a teacher without the proper training, for lengths that exceeded the maximum time limit in student's IEP). (***Ibid***.)

In a case where students, including the plaintiff, were directed to stand beneath a covered snack bar forty feet from the classroom, and where the Vice Principal did not allow the plaintiff to leave the area when he sought to do so, the Ninth Circuit held that the school officials were not subject to any civil liability as a result. "We have said that 'a student is required to be on school premises, subject to the direction of school authorities, during the course of the school day.' ***Smith v. McGlothlin,*** 119 F.3d 786, 788 (9th Cir. 1997). In the circumstances of this case, we conclude that directing students to a covered snack bar area for five to ten minutes during an unquestionably legitimate dog sniff of the students' classroom is not a seizure within the meaning of the Fourth Amendment. '[A] degree of supervision and control that could not be exercised over free adults' is permissible in the school context. ***Vernonia*** (***School District 47J v. Acton*** (1995)) 515 U.S. (646) at 655-656 ([132 L.Ed.2nd 564; 115 S.Ct. 1286]).) The district court properly denied (the plaintiff's) motion for summary judgment on the issue whether he suffered a seizure of his person." (***B.C. v. Plumas Unified School District*** (9th Cir. 1999) 192 F.3rd 1260, 1269.)

By School Resource Officers:

A "*school resource officer*," although employed by a municipal police department, need only comply with the relaxed search and seizure standards applicable to school officials, when working on campus helping to enforce school rules as well as Penal Code violations. (***In re William V.*** (2003) 111 Cal.App.4th 1464; see also ***In re Alexander B.*** (1990) 220 Cal.App.3rd 1572, 1577-1578; ***In re K.J.*** (2018) 18 Cal.App.5th 1123, 1129.)

"For purposes of **Fourth Amendment** analysis, 'school officials,' include police officers such as Officer Gulian, who are assigned to

high schools as resource officers (Citation), as well as the backup officers who are called to assist them." (***In re K.J.***, *supra*, at p. 1131.)

Although law enforcement is commonly held to stricter standards, when they are on campus and acting at a school official's request, they adopt the same relaxed standards that apply to those school officials. (***Scott v. County of San Bernardino*** (9th Cir. 2018) 903 F.3rd 943, 949; citing, as examples, ***Doe ex rel. Doe v. Hawaii Department of Education*** (9th Cir. 2003) 334 F.3rd 906, 909-910; and ***C.B. v. City of Sonora*** (9th Cir. 2014) 769 F.3rd 1005, 1034.)

A Los Angeles Police Department officer, assigned to a high school, detaining and patting down minors on the school campus who were unable to satisfactorily identify themselves is lawful despite the lack of even a reasonable suspicion that the minors may be armed. (***In re Jose Y.*** (2006) 141 Cal.App.4th 748.)

No **Fourth Amendment** violation occurred when defendant, a minor, was detained at school by an officer designated as a school resource officer, and a back-up officer. Prior to the detention at issue, the resource officer received a report from a vice principal that a male student had a gun. Having the principal remove defendant from class, and then the officer grabbing defendant's backpack and putting him in handcuffs as a safety measure, was reasonable under the circumstances. A warrantless search of the defendant's person was justified at its inception by an anonymous tip from another student who sent a text to the vice principal, saying that there was "a guy with a loaded gun" on campus, and in response to questions, that a video showed a student sitting in a classroom, displaying a gun and a magazine clip, and that she knew who the suspect was, even though she did not know his name. The vice principal's physical description of him as one of two students, with the tipster identifying defendant as the one with the gun, was sufficient to justify defendant's detention and search. (***In re K.J.*** (2018) 18 Cal.App.5th 1123, 1128-1135.)

> "A search is 'justified at its inception' if under 'ordinary circumstances' the information constituted 'reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.'" (***Id.***, at p. 1133; quoting ***New Jersey v. T.L.O.*** (1985) 469 U.S. 325, 341-341 [105 S.C. 733; 83 L.Ed.2nd 720].)

However, applying the two-part reasonableness test set forth in ***New Jersey v. T.L.O.*** (1985) 469 U.S. 325, 333 [105 S.Ct. 733; 83 L.Ed.2nd 720, it was held that arrests of a group of seventh graders (12 and 13 year-olds) by the school resource officer were unreasonable because they were not justified at their inception nor reasonably related in scope to the circumstances. The Court held that the summary arrest, handcuffing, and police transport to the station of the middle school girls was a disproportionate response to the school's need, which was dissipation of what the school officials characterized as an "ongoing feud" and "continuous argument" between the students. The Court further held that police officers were not entitled to qualified immunity because no reasonable officer could have reasonably believed that the law authorizes the arrest of a group of middle schoolers in order to "teach them a lesson" or to "prove a point." The evidence was insufficient to create probable cause to arrest the students for violating **P.C. § 415(1)** or **W&I § 601(a)**. Plaintiffs were entitled to summary judgment in their favor on their state false arrest claim. (***Scott v. County of San Bernardino*** (9th Cir. 2018) 903 F.3rd 943: "An arrest meant only to 'teach a lesson' and arbitrarily punish perceived disrespect is clearly unreasonable under ***T.L.O.****" (*At p. 950*.)*

By Other Law Enforcement Officers:

It is an open question whether municipal police officers, called onto a school campus at the request of school administrators, are entitled to adopt the relaxed search and seizure standards applicable to school officials. (***C.B. v. City of Sonora*** (9th Cir. 2014) 769 F.3rd 1005, 1023-1024; but see ***In re K.S.*** (2010) 183 Cal.App.4th 72, above.)

As noted in ***City of Sonora***, *supra,* two other federal circuits have held that law enforcement, when called to a school situation, may rely upon the relaxed "*reasonableness*" standard while on the school's campus. (See ***Gray ex rel. Alexander v. Bostic*** (11th Cir. 2006) 458 F.3rd 1295, 1303; and ***Shade v. City of Farmington*** (8th Cir. 2002) 309 F.3rd 1054, 1060-1061.)

Minors Violating Curfew:

Minors violating curfew may be stopped, detained, and transported to a curfew center, the police station, or other facility where the minor can await the arrival of a parent or other responsible adult. A search of the

minor prior to placing him in a curfew center with other children is also reasonable. (***In re Ian C.*** (2001) 87 Cal.App.4th 856.)

But see discussion, below ("*Minors and Curfew*," under "*Arrests*" (Chapter 5), below), referring to the taking of a minor into custody for a curfew violation as an "*arrest*." (***In re Justin B.*** (1999) 69 Cal.App.4th 879; ***In re Charles C.*** (1999) 76 Cal.App.4th 420.)

***Miranda*:**

People who have been temporarily detained for investigation are generally *not* "*in custody*" for purposes of ***Miranda*** (***Miranda v. Arizona*** (1966) 384 U.S. 436 [86 S.Ct. 1602; 16 L.Ed.2nd 694].), at least as a general rule, and do *not* have to be warned of their constitutional rights prior to questioning. (***People v. Manis*** (1969) 268 Cal.App.2nd 653, 669; ***People v. Breault*** (1990) 223 Cal.App.3rd 125, 135; ***People v. Clair*** (1992) 2 Cal.4th 629, 675.)

But see ***People v. Pilster*** (2006) 138 Cal.App.4th 1395, at page 1406, where it was noted that "custody" for purposes of ***Miranda***, under the **Fifth Amendment**, involves a different analysis than "custody" for purposes of a detention or arrest under the **Fourth Amendment**. "In contrast (to **Fourth Amendment**, search and seizure issues), **Fifth Amendment *Miranda*** custody claims do not examine the reasonableness of the officer's conduct, but instead examine whether a reasonable person (in the defendant's position) would conclude the restraints used by police were tantamount to a formal arrest."

Refusal to answer questions during a detention does not, by itself, establish probable cause to arrest, but may be one factor to consider, so long as the refusal to answer questions is not interpreted as a **Fifth Amendment** self-incrimination invocation. (See ***People v. Clair*** (1992) 2 Cal.4th 629, 662.)

Also note that "a ***Miranda*** violation does not alone warrant suppression of the physical fruits of the defendant's inculpatory statements." (***United States v. Mora-Alcaraz*** (9th Cir. 2021) 986 F.3rd 1151, 1153, citing ***United States v. Patane*** (2004) 542 U.S. 630, 635 [124 S.Ct. 2620; 159 L.Ed.2nd 667; remanding the case to the trial court for a determination whether his consent to search the trunk of this car, where a firearm was recovered, was voluntary.)

Note: The not uncommon occurrence on many television shows where an uncooperative witness or victim is threatened by police with being taken to the police station for questioning does not correctly reflect the law. Such a transportation, if unconsented to and absent probable cause, would be illegal as an arrest without probable cause. (See "*Transporting a Detainee*," under "*Detentions vs. Arrests*," above)

***Use of Force*:**

Rule: A peace officer may use that amount of force that is *reasonably necessary* under the circumstances in order to enforce a lawful detention. (***In re Tony C.*** (1978) 21 Cal.3rd 888, 895; ***In re Gregory S.*** (1980) 112 Cal.App.3rd 764, 778. But see **Pen. Code § 835a**, below.)

> "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." (***Tennessee v. Garner*** (1985) 471 U.S. 1, 11 [105 S.Ct. 1694; 85 L.Ed.2nd 1]; see also ***Tabares v. City of Huntington Beach*** (9th Cir. 2021) 998 F.3rd 1119, 1126.)
>
> However, the use of *excessive force* constitutes a **Fourth Amendment** violation. (**Bonivert *v. City of* Clarkston** (9th Cir. 2018) 883 F.3rd 865, 879.)
>
> "'Federal law recognizes that "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.' (***Graham*** ((1989) 490 U.S. 386) at p. 396 ([109 S.Ct. 1865; 104 L.Ed.2nd at p. 455].) The reasonableness of that use of force 'must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.' (***Graham***, at p. 396.) The reasonableness inquiry is an objective one: 'whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.' (***Id.*** at p. 397.) In other words, '[a]n officer's evil intentions will not make a **Fourth Amendment** violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.' (***Ibid***.) The reasonableness test evaluates the totality of the relevant circumstances, which may include 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.' (***Id.*** at p. 396.)" (***People v. Perry*** (2019) 36 Cal.App.5th 444, 465-466.)
>
> A city's use of force policy is a matter a city may reasonably determine is mandated by state law and is not subject to a memorandum of understanding's grievance procedure. A city, therefore, is not precluded from making a policy decision on the permissible use of force. The fact that a police association does not agree with that policy does not make it a matter that is subject to arbitration. (***San Francisco Police Officers' Assn. v. San Francisco Police Commission*** (2018) 27 Cal.App.5th 676.)

Factors:

In determining the reasonableness of using force during a detention, the court must take into consideration the following factors:

- The severity of the suspected crime;
- Whether the suspect poses an immediate threat to the safety of the officers or others;
- Whether the suspect is actively resisting arrest or attempting to evade the officers by flight;
- Whether the detention during a search was unnecessarily painful, degrading or prolonged (***Graham v. Connor*** (1989) 490 U.S. 386, 395-396 [109 S.Ct. 1865; 104 L.Ed.2nd 443, 455-456].);
- Or whether the detention involved an undue invasion of privacy. (***Franklin v. Foxworth*** (9th Cir. 1994) 31 F.3rd 873, 876; see also ***Mendoza v. City of West Covina*** (2012) 206 Cal.App.4th 702, 712; ***Kisela v. Hughes*** (2018) 584 U.S. 100, 103-105, 113 [200 L.Ed.2nd 449; 138 S. Ct. 1148].)

The factors considered under ***Tennessee v. Garner*** (1985) 471 U.S. 1, 9-12 [105 S.Ct. 1694; 85 L.Ed.2nd 1] are:

- The immediacy of the threat;
- Whether force was necessary to safeguard officers or the public; and
- Whether officers administered a warning, assuming it was practicable.

  (See also ***George v. Morris*** (9th Cir. 2013) 736 F.3rd 829, 837.)

Factors to consider when a medical emergency is the cause of a plaintiff's physical resistance (e.g., plaintiff going into diabetic shock): As determined by the federal Sixth Circuit Court of Appeals, in ***Estate of Hill v. Miracle*** (6th Cir. Mich. 2017) 853 F.3rd 306, the following factors apply:

- Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others?

- Was some degree of force reasonably necessary to ameliorate the immediate threat?

- Was the force used more than reasonably necessary under the circumstances? (i.e., was it excessive?)

  Note: A civil defendant (e.g., police officer) is entitled to qualified immunity if the answer to the first two questions above is "*yes*," and to the third is "*no*." (***Ibid***.)

***Refusal to Submit*:**

Refusal to submit to a lawful detention constitutes probable cause to arrest, pursuant to **Penal Code § 148(a)(1)** (Interfering with a peace officer in the performance of his or her duties). (***In re Gregory S.*** (1980) 112 Cal.App.3rd 764, 780.)

> Note, however, that a violation of P.C. § 148(a)(1) is not proven in an attempted detention situation absent sufficient evidence that the defendant, when fleeing, knew, or reasonably should have known, that officers were pursing and attempting to detain him. (***In re Charles G.*** (2017) 14 Cal.App.5th 945.)

In a trial for resisting, obstructing, or delaying a peace officer, in violation of **P.C. § 148(a)(1)**, the jury was properly instructed that defendant could be found guilty if he refused to identify himself to a ranger who was writing a citation for violating a local ordinance making it an *infraction* to possess open containers of alcoholic beverages in a public place. When a person refuses to identify himself to an officer who is writing a citation to that person for an infraction offense, that refusal can be the basis for a finding that the person resisted, obstructed, or delayed an officer. (***People v. Knoedler*** (2019) 44 Cal.App.5th Supp. 1.)

Even when the detention is illegal, every person has a legal duty to submit (***Evans v. City of Bakersfield*** (1994) 22 Cal.App.4th 321.), although declining to do so is *not* a violation of **P.C. § 148** in that a peace officer is *not* acting in the "*performance of his* (*or her*) *duties*" by unlawfully detaining someone.

> "One who flees an officer's lawful attempts to detain violates (**Penal Code**) **section 148**, **subdivision (a)(1)**." (***In re T.F.-G.*** (2023) 94 Cal.App.5th 893, 903-904; citing ***People v. Allen*** (1980) 109 Cal.App.3rd 981, 985–987; and ***People v. Lopez*** (1986) 188 Cal.App.3rd 592, 601–602.)
>
> > In ***In re T.F.-G.***, *supra*, at p. 905, defendant minor was held to have been lawfully arrested when he fled from an attempt to detain him. "The totality of the circumstances persuades us that when

> T.F.-G. fled, 'a reasonable person would have believed that he was not free to leave,' or 'otherwise terminate the encounter.'" (Quoting ***People v. Tacardon*** (2022) 14 Cal.5th 235, at p. 241.)

Whether or not a detention or an arrest is lawful, a suspect is not immunized from prosecution for any new crimes he might commit against the officer in response. A defendant's violent response to an unlawful detention, such as assaulting a police officer, may still be the source of criminal charges. A suspect has a duty to cooperate with law enforcement whether or not an attempt to detain or arrest him is later held to be in violation of the **Fourth Amendment**. (***In re Richard G.*** (2009) 173 Cal.App.4th 1252, 1260-1263.)

> See ***People v. Southard*** (2021) 62 Cal.App.5th 424, 434, fn. 8; also citing ***People v. Cox*** (2008) 168 Cal.App.4th 702.
>
> In ***People v. Southard***, *supra*, the Court held that the rule of ***In re Richard G.*** and ***People v. Cox*** pertain to a "motion to suppress" (pursuant to **P.C. § 1538.5**) only. At trial, the fact of a defendant's commission of an illegal act (such as battery on the arresting officer) subsequent to, or during an officer's illegal act (e.g., use of excessive force or an illegal arrest) is *not* excused by the fact that the officer had acted illegally. (An exception to *this* rule is when the defendant is reasonably acting in self-defense.) Neither case supports the argument that the same rule applies to trial, where the prosecution is obligated to prove beyond a reasonable doubt, each element of a charged offense, and the relevant jury instructions that are to be given to a jury in determining guilt or innocence.

Note that the law relevant to the issue of what needs to be proved in relation to an officer acting in the performance of his duties differs depending upon the circumstances:

> Motion to Suppress, per **P.C. § 1538.5**: See ***People v. Cox*** (2008) 168 Cal.App.4th 702, and ***In re Richard G.*** (2009) 173 Cal.App.4th 1252, 1260-1263.
>
> Civil case: See ***Evans v. City of Bakersfield*** (1994) 22 Cal.App.4th 321.
>
> Criminal Trial: ***People v. Southard*** (2021) 62 Cal.App.5th 424.
>
> Also, an excessive use of force used by the officer *after* the arrest does not itself negate the "in the performance of his (or her) duties" element of **P.C. §§ 148(a)** (or **69**). (**People *v.* Williams** (2018) 26 Cal.App.5th 71.)

Pen. Code § 1538.5 does not require the trial court to hold an evidentiary hearing when the defendant's stated issue to be decided is not relevant to the motion to suppress. **Section 1538.5(c)(1)** requires the trial court to receive evidence on any issue of fact necessary to determine the motion. The lawfulness of the initial contact was not an issue of fact necessary for a determination of the motion in this case. The trial court properly rejected defendant's argument that he was entitled to an evidentiary hearing on any issue. The language of **§ 1538.5** limits the scope of such a hearing. In this case (a violation of **P.C. § 148(a)(1)**); "the lawfulness of the initial [police] contact is irrelevant to the suppression of evidence" because defendant's new criminal behavior broke any causal link to an underlying illegality. (***People v. Chavez*** (2020) 54 Cal.App.5th 477.)

Reasonableness of the Force Used:

Rule:

The force used in effecting a detention or an arrest must be tailored to the circumstances. It must be reasonable under the circumstances. Yanking a person out of his vehicle, pushing him up against his car, and handcuffing him when that person is not attempting to escape nor resisting the officers in anyway other than being "verbally confrontational," may be excessive. (***Liberal v. Estrada*** (9th Cir. 2011) 632 F.3rd 1064, 1078-1079.)

Where plaintiff physically resisted an officer's attempt to effect a detention by using physical force, the trial court was held to have erred by granting judgment as a matter of law in the officer's favor because there was sufficient evidence at trial on which a reasonable jury could have concluded that no probable cause for the arrest existed, based both on evidence that plaintiff did not in fact resist the officer nor did he impede the officer in the exercise of his lawful duties. Also, the trial court's granting of judgment as a matter of law on the lawfulness of the arrest, in conjunction with the court's erroneous instructions on the excessive use of force claim, improperly influenced the jury's consideration of plaintiff's excessive force claim. (**Velazquez *v.* City of Long Beach** (9th Cir. 2015) 793 F.3rd 1010, 1017-1027.)

The use of *firearms*, *handcuffs*, putting a person into a *locked patrol car*, or simply a "*show of force*," may, under the circumstances, cause a court to later find that an attempted detention was in fact *an arrest*, and, if made without "probable cause," excessive and illegal. (***United States v. Ramos-Zaragosa*** (9th Cir. 1975) 516 F.2nd 141, 144; ***New York v. Quarles*** (1984) 467 U.S. 649 [104 S.Ct. 2626; 81 L.Ed.2nd 550]; handcuffs; ***Orozco v. Texas*** (1969) 394 U.S. 324 [89 S.Ct. 1095; 22 L.Ed.2nd 311]; force; ***United States v. Ricardo D.*** (9th Cir. 1990) 912 F.2nd 337, 340; "Detention in a patrol car exceeds permissible ***Terry* (*v. Ohio*** (1968) 392 U.S. 1 [20 L.Ed.2nd 889].) limits absent some reasonable justification."

An officer violates the **Fourth Amendment** if he abruptly resorts to overwhelming physical force rather than continuing verbal negotiations with an individual who poses no immediate threat or flight risk, and who engages in, at most, passive (i.e., verbal) resistance, and whom the officer stopped for a minor traffic violation. (***Hanks v. Rogers*** (5th Cir. Tex. 2017) 853 F.3rd 738: Officer's use of a "half spear" to the plaintiff's back, forcing him against the car and forcing him to his knees, and handcuffing him, after plaintiff questioned the officer's actions instead of complying, where the original violations included driving too slow and not having proof of insurance, held to be excessive force as a matter of law under the circumstances.

While the use of force to subdue a resisting suspect may initially be lawful, once the person has been subdued (i.e., handcuffed and zip-tied, in this case) and he is no longer resisting, an officer's continued use of force (hitting and applying a carotid restraint hold on him, rendering him unconscious) is excessive, and a violation of the **Fourth Amendment**. (***McCoy v. Meyers*** (10th Cir. KS 2018) 887 F.3rd 1034.)

At least in the federal Tenth Circuit, the law is clearly established that the gratuitous use of force against a fully compliant, restrained, non-threatening misdemeanant arrestee violated the **Fourth Amendment**. Therefore, an officer who drives recklessly, knowingly tossing about a suspect in the backseat of a patrol car who is handcuffed but otherwise unrestrained arrestee, is potentially subject to civil liability, as is an officer who deprives an arrestee of medical care. The officer's motion for summary judgement was property denied. (***McClown v. Morales*** (10th Cir. N.M 2019) 945 F.3rd 1276.)

A district court's entry of summary judgment in favor of an officer was affirmed in part and vacated in part. The case was remanded since the officer in making an arrest and breaking the plaintiff's arm was entitled to qualified immunity as to the unlawful arrest claim because plaintiff conceded she was asked to leave a hospital's exam room at least two times by a security guard prior to the arrival of the officer. It was undisputed that the officer was asked to remove plaintiff from the property because she declined to leave. However, as to the **Fourth Amendment** excessive force claim, genuine issues of material fact existed as to the level of force employed by the officer and the level of resistance posed by plaintiff. If the force used by the defendant officers was as plaintiff alleged, clearly established law has held the alleged degree of force was excessive whether plaintiff was passively or minimally resisting. (***Close v. City of Vacaville*** (9th Cir. 2021) 846 F.Appx. 513; unpublished.)

Lesser Degree of Force:

"As for using less intrusive alternatives, the courts have held that given the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation, they are not required to use the least intrusive degree of force possible." (***Lowry v. City of San Diego*** (9th 2017) 858 F.3rd 1248, 1259-1260; rejecting plaintiff's argument that an officer could have kept his service dog on her leash instead of releasing her into a darkened commercial business where the dog found and bit the plaintiff as she slept on a couch.)

> See also the dissent in ***People v. Rubio*** (2019) 43 Cal.App.5th 342, 357, citing ***Ryburn v. Huff*** (2012) 565 U.S. 469, 477 [181 L.Ed.2nd 966; 132 S.Ct. 987], criticizing the second-guessing of officers who must make rapid decisions at the scene of an incident.
>
> The ***Lowry*** Court cited ***Miller v. Clark County*** (9th Cir. 2003) 340 F.3rd 959, at 968, where the Court concluded that the use of an off-leash police dog was reasonable and rejecting the alternative proposal of keeping the dog on-leash, because it could have led the officer into an ambush or pulled him "into a dangerous situation with no opportunity to react safely."

"Another relevant factor (in evaluating the reasonableness of an officer's use of deadly force) is 'the availability of alternative methods of capturing or subduing a suspect.' ***Smith*** (***v. City of Hemet*** (9th Cir. 2005)) 394 F.3rd (689) at 703 (citing ***Chew v. Gates***, 27 F.3rd 1432, 1441 n.5 (9th Cir. 1994)). Police need not employ the least intrusive means available; they need only act within the range of reasonable conduct. ***Glenn*** (***v. Washington Cty.*** (9th Cir. 2011)) 673 F.3rd (864), at 876 (citing ***Scott v. Henrich***, 39 F.3rd 912, 915 (9th Cir. 1994)). 'However, "police are required to consider [w]hat other tactics if any were available," and if there were "clear, reasonable and less intrusive alternatives" to the force employed, that "militate against finding [the] use of force reasonable."' ***Id.*** . . . (quoting ***Bryan v. MacPherson***, 630 F.3rd 805, 831 (9th Cir. 2010)) . . . ." (***Nehad v. Browder*** (9th Cir. 2019) 929 F.3rd 1125, 1138.)

Where an obese shoplifting suspect complained, after being handcuffed, that he was having trouble breathing, and subsequently died from a lack of oxygen in his body, the decedent's parents sued. The Court held that the handcuffs used on the decedent were no tighter than they would have been to restrain an arrestee in similar circumstances. Also, there was no evidence the officers were aware the handcuffs were causing the decedent's breathing trouble. He never complained that the tightness of the handcuffs was restricting his breathing nor was there any evidence to

indicate the handcuffs contributed to his breathing difficulty until the autopsy report was released. In fact, the coroner noted no visible signs of trauma and the autopsy report indicated no lacerations or contusions on the decedent's wrists. Consequently, the court held that the officers were entitled to qualified immunity because the officers did not violate the decedent's right "to be free from an officer's knowing use of handcuffs in a way that would inflict knowing pain or injury." (***Day v. Wooten*** (7th Cir. 2020) 947 F.3rd 453.)

When Force is Used Against a Person Who was Not the Intended Target of the Force:

Accidental or unintended seizures are not violations of the **Fourth Amendment**. (***Brower v. County of Inyo*** (1989) 489 U.S. 593, 596 [109 S.Ct. 1378; 103 L.Ed.2nd 628].)

An innocent bystander struck by a stray bullet from an officer's weapon is not "seized" for purposes of the **Fourth Amendment**. (***United States v. Lockett*** (9th Cir. 1990) 919 F.2nd 585, 590.)

The individual seized has to be the deliberate object of the exertion of force intended to terminate the freedom of movement. The accidental injury of a bystander is not a **Fourth Amendment** seizure if an officer has "no reason, expressed or conjectural, to seek to restrain the bystander." (***Rodriguez v. City of Fresno*** (E.D. Cal. 2011) 819 F.Supp.2nd 937, 946.)

Expert Testimony Re: Excessive Force Issue:

In a trial for an alleged violation of **Penal Code § 69** (resisting an executive officer), where the victim officer is alleged to have struck the defendant repeatedly with a baton after defendant was on the ground, the defendant should have been permitted to introduce testimony from a use-of-force expert who would have testified, among other things, that the officer continued to strike defendant after realizing the strikes were ineffective. In some cases involving a claim of excessive force, expert testimony may be helpful to a jury's understanding of the use of special weapons and tactics, and therefore it was error to exclude the testimony on the basis that it invaded the province of the jury or involved an ultimate issue. However, with evidence that defendant had resisted arrest earlier, exclusion of the expert's testimony was harmless error in this case. (***People v. Reardon*** (2018) 26 Cal.App.5th 727, 734-741.)

Note: "(T)he term 'executive officer' has long been held to include police officers." (***People v. Buice*** (1964) 230 Cal.App.2nd 324, 335, citing ***People* v. *Markham*** (1883) 64 Cal. 157; ***Harris* v.**

Superior Court (1921) 51 Cal.App. 15; and ***People v. Mathews*** (1954) 124 Cal.App.2nd 67.)

Note: A judge, however, being a member of the judicial branch, is *not* an executive officer for purposes of **P.C. § 69** (***People v. Hupp*** (2023) 96 Cal.App.5th 946.)

Narcotics-Related Traffic Stops Using a "*Controlled Tire Deflation Device*" ("*CTDD*"):

The use of a "*controlled tire deflation device*" to stop a vehicle suspected of being used to smuggle controlled substances over the US/Mexico border was held to be a *detention* only (thus requiring only a reasonable suspicion) and not excessive force under the circumstances. (***United States v. Guzman-Padilla*** (9th Cir. 2009) 573 F.3rd 865, 886-889.)

Note: The "*controlled tire deflation device*," or "*CTDD*," is an accordion-like tray containing small, hollow steel tubes that puncture the tires of a passing vehicle and cause a gradual release of air, bringing the vehicle to a halt within a quarter to half a mile.

See "*A Controlled Tire Deflation Device* ('*CTDD*'), under "*New and Developing Law Enforcement Tool and Technology*" (Chapter 14), below.

Use of Deadly Force:

Deadly force (i.e., *force likely to cause death or great bodily injury*) may *not* be used to enforce a detention, unless the officer is attacked and must defend him or herself against the use of deadly force by the suspect. (See ***People v. Ceballos*** (1974) 12 Cal.3rd 470, 478; ***Tennessee v. Garner*** (1985) 471 U.S. 1, 12-15 [105 S.Ct. 1694; 85 L.Ed.2nd 1, 10-12].)

See "*Deadly Force*," under "*Use of Force*" (Chapter 6), below.

***Demanding Identification; A Person's Refusal to Identify Himself*:**

Rule: While it is clear that a person who has been "*consensually encountered*" (see Chapter 3, above) need not identify himself, nor even talk to a police officer (See ***Kolender v. Lawson*** (1983) 461 U.S. 352 [103 S.Ct. 1855; 75 L.Ed.2nd 903]; ***Brown v. Texas*** (1979) 443 U.S. 47, 52 [99 S.Ct. 2637; 61 L.Ed.2nd 357].), there is nothing improper with a peace officer asking, or even "*demanding*," that a detained person properly identify himself. (***United States v. Christian*** (9th Cir. 2004) 356 F.3rd 1103; not discussing whether the officer can enforce the demand.)

See also ***People v. Leath*** (2013) 217 Cal.App.4th 344, 350-353: Merely requesting identification from a suspect, or even retaining it, absent more coercive circumstances, does not by itself convert a consensual encounter into a detention.

A passenger in a lawfully stopped vehicle may be "*asked*" for his identification. (***United States v. Diaz-Castaneda*** (9th Cir. 2007) 494 F.3rd 1146, 1152-1153.)

While it is a crime to falsely identify oneself when lawfully detained, per **P.C. § 148.9**, this section is not violated where (1) the person is unlawfully detained, or (2) where he is the target of a consensual encounter only. (***People v. Walker*** (2012) 210 Cal.App.4th 1372, 1392.)

The **Fourth Amendment** is not implicated by *asking* a detained individual for identification, at least so long as the detention is not unnecessarily prolonged in the process. (***People v. Vibanco*** (2007) 151 Cal.App.4th 1, 13-14.)

The trial court erroneously denied defendant's motion to suppress evidence obtained as a result of a traffic stop in that the law enforcement officers were not entitled to extend the lawfully initiated vehicle stop just because the passenger (the defendant) refused to identify himself since there was no reasonable suspicion that the passenger had committed a criminal offense. (***United States v. Landeros*** (9th Cir. 2019) 913 F.3rd 862; specifically noting that "an officer may not lawfully order a person to identify herself absent particularized suspicion that she has engaged, is engaging, or is about to engage in criminal activity, . . " (at p. 869; citing ***Brown v. Texas*** (1979) 443 U.S. 47, 52 [99 S.Ct. 2637; 61 L.Ed.2nd 357].)

In ***Wheatcroft v. City of Glendale*** (U.S. Dist. AZ, 2022) 2022 U.S. Dist. LEXIS 57006, a federal district court in Arizona ruled that the right to *not* identify oneself in such a detention (traffic stop, as the passenger in the vehicle) situation is not "*clearly established*," and held therefore the officer in plaintiff's civil suit was entitled to qualified immunity, thus entitling him to summary judgment on this issue. In so ruling, the Court provided the following analysis at pages 34-35:

> "Assuming that (plaintiff) Wheatcroft is entitled to a **First Amendment** right to refuse to identify himself during an investigatory stop exists, the right is not clearly established so Officer Schneider is entitled to qualified immunity. 'The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' ***Saucier***, 533 U.S. at 201. Wheatcroft maintains that he 'engaged in

> protected speech' by 'questioning why he needed to provide identification when he did nothing wrong.' (Doc. 260 at 21.) But here, the relevant case law either suggests that the **First Amendment** precedent allows refusal-to-identify arrests during investigatory stops or concludes that the right is not clearly established. *See* ***Abdel-Shafy v. City of San Jose***, No. 17-CV-07323-LHK, 2019 WL 570759, at *10 (N.D. Cal. Feb. 12, 2019) (concluding that Plaintiff did not have a clearly established **First Amendment** right to refuse to identify herself during a *Terry* stop); ***Hiibel v. Sixth Judicial Dist. Ct. of Nevada***, 542 U.S. 177, 187, 124 S. Ct. 2451, 159 L. Ed. 2d 292 (holding that '[t]he principles of *Terry* permit a State to require a suspect to disclose his name in the course of a ***Terry*** stop' in the context of a **Fourth** and **Fifth Amendment** challenge, which likely extends to the **First Amendment**); *see also* ***Koch v. City of Del City***, 660 F.3d 1228, 1244 (10th Cir. 2011) (finding 'no authority recognizing a **First Amendment** right to refuse to answer questions during a ***Terry*** stop'). Accordingly, finding the right is not clearly established, the Court need not proceed to the second prong of the analysis, and summary judgment for Defendant ***Schneider*** is granted as to this claim."

Issue: The only issue left hanging by ***Christian***, ***Vibanco***, and the other above cases, is whether a *detained* suspect *must* properly identify himself, or be subject to arrest for refusing to do so.

Case Law:

> The United States Supreme Court ruled in ***Hiibel v. Sixth Judicial District Court of Nevada*** (2004) 542 U.S. 177 [124 S.Ct. 2451; 159 L.Ed.2nd 292], that a person who is lawfully "*detained*" may be charged with a criminal violation for refusing to identify himself. Such an identification requirement violates neither the **Fourth** nor **Fifth Amendment** (self-incrimination) rights of the detained person.
>
> > Note, however, that the Court, in ***Hiibel***, conceded that "a case may arise where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense," thus implicating the **Fifth Amendment** right against self-incrimination. (***Id.***, at p. 191.)
> >
> > *Also note* that Nevada has a specific statute making it a misdemeanor to refuse to identify oneself when lawfully detained. California does not have such a specific statute. (See ***United States v. Williams*** (9th Cir. 2017) 846 F.3rd 303, 310-312,

> discussing the interplay of Nevada statutes **N.R.S. §§ 171.123** and **199.280**, which, together, make it an arrestable offense for a lawfully detained individual to refuse to identify himself.)

See ***People v. Quiroga*** (1993) 16 Cal.App.4th 961, 971-972, upholding a **P.C. § 148(a)(1)** conviction of an *arrestee* who refused to identify himself *during the booking process* for a felony offense.

> However, in noting that **P.C. § 148(a)(1)** applies only "*when no other punishment is prescribed*," the Court held that; "(a) refusal to disclose personal identification *following arrest* for a misdemeanor or infraction cannot constitute a violation of **Pen. Code, § 148** (resisting a peace officer). By enacting **Pen. Code, § 853.5** (refusal by person arrested for infraction to provide identification), **Pen. Code, § 853.6, subd. (i)(5)** (failure of person arrested for misdemeanor to provide satisfactory evidence of personal identification), **Veh. Code, § 40302** (mandatory appearance before magistrate), and **Veh. Code, § 40305** (failure of nonresident to furnish satisfactory evidence of identity), the Legislature established other ways of dealing with such nondisclosure." (***Id***., at p. 970.)

A **P.C. § 148(a)(1)** conviction was affirmed when the defendant was "belligerent, refused to give his name, refused to keep his hands visible, and refused to submit to a patdown." However, the court made it clear that the defendant's arrest was a "far cry" from a mere "refusal to identify himself." Instead, the lack of cooperation was "coupled with" belligerent conduct that interfered with the officer's patdown search. (***People v. Lopez*** (2004) 119 Cal.App.4th 132.)

However, see ***People v. Knoedler*** (2019) 44 Cal.App.5th Supp. 1: In a trial for resisting, obstructing, or delaying a peace officer, in violation of **P.C. § 148(a)(1)**, the jury was properly instructed that defendant could be found guilty if he refused to identify himself to an officer who intended to write a citation for violating a local ordinance making it an *infraction* to possess an open container of an alcoholic beverage in a public place. When a person refuses to identify himself to an officer who intends to cite the individual for an infraction offense, that refusal can be the basis for a finding that the person resisted, obstructed, or delayed an officer.

> The Court in ***Knoedler*** differentiates this defendant from that in ***People v. Quiroga***, *supra*, by the fact that Knoedler had not yet been "arrested," while Quiroga had been, and refused to identify himself during the booking process. (***People v. Knoedler***, *supra*, at pp. 4-5.)

See also ***In re Gregory S.*** (1980) 112 Cal.App.3rd 764, 776, where the First District Court of Appeal (Div. 1) "assume(d) for the sake of discussion" that a violation of **Penal Code section 148** may *not* be premised on a refusal to answer questions, *including a request for identification*. (Italics added) The issue, however, despite the Court's stated opinion that refusing to identify "*probably*" is not a **P.C. § 148** violation (pg. 779), was neither analyzed nor even discussed in that other valid grounds for upholding a **P.C. § 148** (delaying the officer in the performance of his duties) violation was found by the detainee attempting to walk away. Also, ***Gregory S.*** was decided some 24 years before ***Hiibel***.

Also, decided well before ***Hiibel***, was the case of ***Martinelli v. City of Beaumont*** (9th Cir. 1987) 820 F.2nd 1491, which held that **P.C. § 148** was *not* violated by the defendant's refusal to identify oneself. However, the Court in this case, which cited ***Lawson v. Kolender*** (9th Cir. 1981) 658 F.2nd 1362 (Cert. granted), as its authority for this conclusion, failed to differentiate between a consensual encounter and a detention.

Note: A careful reading of ***Hiibel***, ***Quiroga***, and ***Gregory S.*** indicates that whether or not **P.C. § 148(a)(1)** can be charged in a circumstance where a detainee has refused to identify himself is a question that will depend upon the specific circumstances of the individual case at issue. In those cases where refusing to identify oneself does in fact delay the officer in the performance of his duties (i.e., did it unnecessarily extend the time required to complete the detention or otherwise draw the officer away from completing his other lawful duties?), the answer *should be* "*yes*." If not, then the answer, based upon the available case law, is clearly "*no*."

Note: **Veh. Code § 31** can perhaps be used with the driver of a vehicle makes false statements to a law enforcement officer who is in the performance of this duties during a traffic stop (see ***People v. Morera-Munoz*** (2016) 5 Cal.App.5th 838; enforcing **section 31** does not violate the **First Amendment**.), but when the passenger does the same, it is unlikely that he has also violated this section in that it is limited to when necessary for the proper enforcement of the **Vehicle Code**. Questioning a passenger will generally have nothing to do with enforcing the provisions of the **Vehicle Code**.

Although the act of providing a false name, as a violation of **P.C. § 148.9**, is an arrestable offense (***People v. Christopher*** (2006) 137 Cal.App.4th 418, 428.), refusing to provide any identification at all, even while detained, has been held *not* to violate **P.C. § 148(a)(1)**, delaying or obstructing an officer in the performance of his or her duties, at least until the suspect is arrested and the booking process is initiated. In so ruling, the Court found that the evidence as presented was insufficient to show that a minor (the defendant) resisted, delayed, or obstructed a peace officer

in violation of **Pen. Code § 148(a)(1)** merely by exhorted his cohorts not to cooperate with a police investigation. Per the Court, defendant's verbal protests against the detention of his friends, prearrest, were protected political speech under the **First Amendment**. His prearrest conduct in telling non-suspect minors not to cooperate amounted to nothing more than a lawful protest against an unlawful detention; and that his refusal to identify himself post-arrest, but before being transported to the station, was lawful silence under **Fifth Amendment** to the U.S. Constitution. (***In re* Chase C.** (2015) 243 Cal.App.4th 107, 117-118.)

> Despite the holding in ***Chase***, *supra*, there is still some argument (albeit a weak one) that refusing to identify oneself during a detention is in fact a violation of **P.C. § 148(a)(1)**, at least if such refusal does in fact cause a delay in an officer's investigation:
>
> "[T]he ability to briefly stop [a suspect], ask questions, *or check identification* in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice." (Italics added; ***United States v. Hensley*** (1985) 469 U.S. 211 [105 S.Ct. 675; 83 L.Ed.2nd 604]; see also ***Hayes v. Florida*** (1985) 470 U.S. 811, 816 [105 S.Ct. 1643; 84 L.Ed.2nd 705].)
>
> "The principles of ***Terry*** (***v. Ohio*** (1968) 392 U.S. 1.) permit a State to require a suspect to disclose his name in the course of a ***Terry*** stop." (***Hiibel v. Sixth Judicial District Court of Nevada***, *supra*, at p. 187.)

See ***State v. Aloi*** (2007) 280 Conn. 824, where the Connecticut Supreme Court found that by refusing to identify himself, the lawfully detained defendant was in fact in violation of a state statute that specifically provided: "A person is guilty of interfering with an officer when such person obstructs, resists, hinders or endangers any peace officer or firefighter in the performance of such peace officer's or firefighter's duties . . . ." (**Gen. Statutes (Rev. to 2001) § 53a–167a**; "Because a refusal to provide identification in connection with a ***Terry*** stop may hamper or impede a police investigation into apparent criminal activity, we see no reason why such conduct would be categorically excluded under the expansive language of **§ 53a-167a**." (***Id***., at p. 833.)

The issue of whether a detained person violates **P.C. § 148(a)(1)** by refusing to identify himself when asked to do so by a law enforcement officer, still being an undecided issue, means that an officer who is sued for false arrest for using this section to arrest defendant under such circumstances is entitled to qualified immunity. (***Vanegas v. City of Pasadena*** (9th Cir. 2022) 46 F.4th 1159, 1165-1166.)

The Court noted, however, that "multiple district courts, including the one here, thought Officer Klotz could make the arrest," citing ***Nakamura v. City of Hermosa Beach*** (C.D. Cal. 200) 2009 U.S. Dist. LEXIS 59824; ***Abdel-Shafy v. City of San Jose*** (N.D. Cal. 2019) 2019 U.S. Dist. LEXIS 22921; ***Vanegas v. City of Pasadena*** (C.D. Cal. 2021) 2021 U.S. Dist. LEXIS 76047. The Ninth Circuit, in an unpublished decision, agreed. (See ***Kuhlken v. County of*** **San Diego** (9th Cir.2019) 764 F. App'x 612. (***Id***., at pp. 1166-1167.)

See the back-and-forth debate between justices on the issue of whether refusing to identify oneself, by itself, constitutes (or should constitute) a violation of **P.C. § 148(a)(1)**, at pgs. 1167-1175.)

Also, stopping a suspect in a misdemeanor offense, a noise violation, not occurring in the officer's presence, at least where there are possible alternative, less intrusive methods, of identifying the suspect, has been held to be unlawful. The Court is to balance law enforcement's interest in crime prevention with the detainee's interest in personal security from government intrusion. (See ***United States v. Hensley*** (1985) 469 U.S. 221, 229 [105 S.Ct. 675; 83 L.Ed.2nd 604]; declining to decide whether the seriousness of the offense makes a difference.) In a misdemeanor situation, law enforcement's interest *may* not outweigh the suspect's, depending upon the circumstances. (***United States v. Grigg*** (9th Cir. 2007) 498 F.3rd 1070, 1074-1083.)

The continuing validity of the ***Grigg*** decision has been questioned and is probably, if it ever was, no longer a valid rule. (See ***United States v. Creek*** (U.S. Dist. Ct, Ariz. 2009) 586 F. Supp.2nd 1099, 1102-1108; upholding the traffic stop of a petty theft (gas drive off) suspect. See also ***Stanton v. Sims*** (2013) 571 U.S. 3 [134 S.Ct. 3; 187 L.Ed.2nd 341], calling into question, but not deciding, the Ninth Circuit's sensitivity to apprehending misdemeanor suspects.)

It still follows, however, that a person who is only subject to a "*consensual encounter*" is *not* required to identify himself. (See ***Kolender v. Lawson*** (1983) 461 U.S. 352 [103 S.Ct. 1855; 75 L.Ed.2nd 903].)

Also Note: There is no authority for arresting a mere witness or victim for refusing to identify him or herself, or for refusing to submit to an interview or otherwise provide any information, such as by then "threatening" to take such an uncooperative victim or witness to the stationhouse for questioning. There is no crime (e.g., such as "obstruction

of justice") that covers such a lack of cooperation. And even if there were, it would probably be unconstitutional per ***Kolender v. Lawson***, *supra*.

Where defendant refused to identify himself to the officers who detained him while investigating his possible involvement in a series of cellphone thefts and robberies, the Court held that; "[T]he use of **Section 148** to arrest a person for refusing to identify herself during a lawful ***Terry*** stop violates the **Fourth Amendment's** proscription against unreasonable searches and seizures." (***Belay v. City of Gardena*** (C.D. Cal., 2017) 2017 U.S. Dist. LEXIS 66017; quoting ***Martinelli v. City of Beaumont*** (9th Cir. 1987) 820 F.2nd 1491, at p. 1494.)

Unless lawfully detained, a person is free to refuse to identify himself and may lawfully walk away. (*People v. Thomas* (2018) 29 Cal.App.5th 1107, 1117.)

> Absent a sufficient reasonable suspicion justifying a lawful detention, a person under such circumstances "may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." (***Ibid***, quoting ***Florida v. Royer*** (1983) 460 U.S. 491, 498 [103 S.Ct. 1319; 75 L.Ed.2nd 229, 236]; see also ***Illinois v. Wardlow*** (2000) 528 U.S. 119, 125 [120 S.Ct. 673; 145 L.Ed.2nd 570, 577; 120 S.Ct. 673].)
>
> The Ninth Circuit has ruled that demanding identification from a passenger in a vehicle during a lawful traffic stop, absent any reasonable suspicion that the passenger himself is engaged in criminal activity, creates an unlawfully prolonged traffic stop and is illegal. (***United States v. Landeros*** (9th Cir. 2019) 913 F.3rd 862.)

***Detentions of an Employee in the Workplace*:**

The Problem:

When an employee's supervisors (or a student's principal, a military supervisor, or a law enforcement supervisor) *order* the employee (or student, military subordinate, or police officer) to report to the office or remain in the workplace pending an interview at the request or complicity of law enforcement, is the employee "*detained*" for purposes of the **Fourth Amendment**?

Answer: Not necessarily, but it depends upon the circumstances. (See ***Aguilera v. Baca***, *infra*.)

Case Law:

Where sheriff's deputies were ordered to remain at the station pending an interview by Internal Affairs investigators about an alleged excessive force citizen's complaint when criminal prosecution could result, the deputies were held to be *not* detained for purposes of the **Fourth Amendment** after an evaluation of the following factors:

- The experience level of the subordinate;
- Whether the treatment was consistent with that allowed by department guidelines or general policy;
- The occurrence of physical contact or threats of physical restraint;
- An explicit refusal of permission to depart;
- Isolation of the subordinate officer;
- Permission to use the restroom without accompaniment;
- The subordinate officer's being informed that he was the subject of a criminal investigation;
- Whether the subordinate officer was spoken to "in a menacing or threatening manner;"
- Whether the subordinate officer was under constant surveillance;
- Whether superior officers denied a request to contact an attorney or union representative;
- The subordinate officer's ability to retain law enforcement equipment, including weapons and badges;
- The duration of the detention; *and*
- The subordinate's receipt of overtime pay.

(***Aguilera v. Baca*** (9th Cir. 2007) 510 F.3rd 1161, 1167-1171, citing ***Driebel v. City of Milwaukee*** (7th Cir. 2002) 298 F.3rd 622, 638.)

There is no seizure when an on-duty civilian Air Force employee was ordered to report for an interview with an intelligence officer. (***United States v. Muegge*** (11th Cir. 2000) 225 F.3rd 1267, 1270.)

No seizure when an on-duty Coast Guard officer was ordered to report for an interview with an intelligence officer. (***United States v. Baird*** (D.C. Cir. 1988) 851 F.2nd 376, 380-382.)

***Detention of a Student at School*:**

Rule: Interviews of minor students in a principal's office by social workers and/or law enforcement *may* constitute an unlawful seizure, depending upon the circumstances.

Case Law:

In a parent's **18 U.S.C. § 1983** federal lawsuit alleging violation of constitutional rights when a social worker sent a letter to the family court falsely stating that a decision had been made to remove the children from her custody and that her child's rights were violated when the social worker interviewed the child at her school for five minutes, the **Fourteenth Amendment** claims failed because there was no actual loss of custody. The mere threat of separation or being subjected to an investigation was insufficient to establish a **Fourteenth Amendment** violation. The district court erred in granting judgment as a matter of law on the child's **Fourth Amendment** claim regarding her alleged seizure at school because it impermissibly weighed the evidence and concluded that the child was seized and did not consent thereto although substantial evidence supported the jury's contrary verdict. (***Dees v. County of San Diego*** (9th Cir. 2020) 960 F.3rd 1145.)

Note that ***Greene v. Camreta*** (9th Cir. 2009) 588 F.3rd 1011, where the Ninth Circuit Court of Appeal ruled that interviewing a child victim on a school campus without the parents' consent, as a **Fourth Amendment** seizure, required a search warrant or other court order, or exigent circumstances, was overruled by the United States Supreme Court in ***Camreta v. Greene*** (2011) 563 U.S. 692 [179 L.Ed.2nd 1118]. The Ninth Circuit's decision, however, was merely vacated, leaving the issue undecided.

See **P.C. § 11174.3(a)**, setting out statutory procedures police officers are to use in interviewing child victims of abuse or neglect while at school.

Subsequently, however, the Ninth Circuit ruled that because the theory of ***Camreta***, having been vacated by the U.S Supreme Court, is not clearly established, civil defendants are entitled to qualified immunity where plaintiff's argument is that social workers violated the Constitution by interviewing his children at school without their parent's permission or a court order; a **Fourth Amendment** issue. (***Capp v. County of San Diego*** (9th Cir. 2019) 940 F.3rd 1046, 1059-1060.)

***Statutory Authority for Seizure of Firearms During a Detention*:**

Gov't. Code § 8571.5 provides that a police officer may not seize or confiscate any firearm or ammunition from an individual who is lawfully carrying or possessing the firearm or ammunition. However, the officer may temporarily disarm an individual if the officer reasonably believes it is immediately necessary for the protection of the officer or another individual. An officer who disarms an individual is to return the firearm before discharging the individual unless the

officer arrests the individual or seizes the firearm as evidence of the commission of a crime.

> *Note*: This new section is in the part of the **Government Code** entitled the "***California Emergency Services Act***." This section is intended to prohibit an executive order disarming individuals who are in lawful possession of firearms during a state of emergency or crisis, and will conform California law to a new federal law, **Public Law 109-295**, which prohibits the confiscation of otherwise legal firearms from law-abiding citizens during a state of emergency by any agent of the Federal Government or by anyone receiving federal funds. However, it appears to be written broad enough to affect a police officer's contacts with individuals on the street.

Pen. Code § 833.5, providing a peace officer the authority to detain for investigation anyone who the officer has "*reasonable cause*" to believe illegally has in his or her possession a firearm or other deadly weapon.

Pen. Code § 1524(a)(10) provides authority for the obtaining of a search warrant in the ***Sweig*** situation; i.e., when dealing with a person with mental issues under the **Welfare and Institutions Code** (see **W&I §§ 5150 & 8102(a)**).

> See ***People v. Sweig*** (2008) 167 Cal.App.4th 1145 (petition granted), below, declining to imply authority for the issuance of a search warrant under **W&I Code § 8102**, an issue that was subsequently resolved by the Legislature, adding new **subd. (a)(10)** to **P.C. § 1524**, authorizing the issuance of a search warrant when a person with a mental disorder owns or is in possession of a firearm.

Pen. Code §§ 18100-18500, provides for the seizure and retention of a person's firearms and ammunition via a "*Gun Violence Restraining Order*" (also known as California's "*Red Flag Statutes*") whenever "there is reasonable cause to believe that the person poses an immediate and present danger of causing personal injury to themselves or another person by having custody or control of a firearm." (**P.C. § 18108(c))**

Pen. Code § 25850(b) (formerly **P.C. § 12031(e)**) gives a peace officer the right to inspect a firearm carried by any person on his person or in a vehicle "on any public street in an incorporated city or prohibited area of an unincorporated territory" to determine whether a firearm is loaded in violation of **subd. (a)**. Refusal to allow a peace officer to inspect a firearm is probable cause to arrest the subject for violating **P.C. § 25850(a)** (formerly **P.C. § 12031(a)(1)**); illegally carrying a loaded firearm in the listed public places.

Wel. & Inst. Code § 8102(a) authorizes the "*confiscation*" of firearms or other deadly weapons owned, possessed, or under the control of a detained or

apprehended mental patient. However, it has been held that a search warrant must be used in order to lawfully enter the house and/or to search for weapons in those cases where there are no exigent circumstances and the defendant has not given consent. (***People v. Sweig*** (2008) 167 Cal.App.4th 1145 (petition granted, see below); rejecting the People's argument that a warrantless entry to search for and seize the detainee's firearms was justified under law enforcement's "community caretaking" function.)

A petition to the California Supreme Court on ***People v. Sweig*** was granted, making this case no longer available for citation, with review being dismissed on 10/11/09 when the below amendment to **P.C. § 1524** was enacted as a result.

Merchants, Library Employees Theater Owners and Amusement Park Employees:

Pen. Code § 490.5(f); *Merchant, Library Employee or Theater Owner*: Detention of a shoplift or theft suspect, or a person illegally recording a movie in a theater, by a merchant, library employee or theater owner, respectively, for the purpose of determining whether the suspect did in fact steal property belonging to the victim, or illegally record a movie, is authorized by statute.

Once the purpose of the detention is accomplished, the suspect must either be turned over to and arrested by police, or released.

Only *non-deadly force* may be used. (**P.C. § 190.5(f)(2)**)

See ***People v. Zelinski*** (1979) 24 Cal.3rd 357; and ***In re Christopher H.*** (1991) 227 Cal.App.3rd 1567.)

Pen. Code § 490.6*(a)*; *Amusement Parks*: A person employed by an amusement park may detain a person for a reasonable time for the purpose of conducting an investigation in a reasonable manner whenever the person employed by the amusement park has probable cause to believe the person to be detained is violating lawful amusement park rules**.**

(b): It is a violation of **P.C. § 602.1** (trespass) for a person to refuse a request to either comply with the park's rules of leave the premises.

(c): It is a defense to a civil suit if the park employee had "probable cause" to believe that the person was not following lawful amusement park rules and if the employee acted reasonably under all the circumstances.

However, unless shown as a matter of law, it is a jury issue whether the park employee had probable cause and that he acted reasonably under the

circumstances. (***Eckar v. Raging Waters Group*** (2001) 87 Cal.App.4th 1320.)

***Indefinite Detentions Pursuant to Federal Law*:**

***Pen. Code § 145.5*:** Effective since 1/1/2014, the California Legislature has dictated that California law enforcement will *not* participate in any manner with federal indefinite detentions.

It is the policy of California to refuse to provide material support for, or to participate in any way with, the implementation of any federal law that authorizes the indefinite detention of a person within California without charge or trial.

State agencies, state employees, and the California National Guard are prohibited from knowingly aiding an agency of the United States Armed Forces in an investigation, prosecution, or detention of a person within California pursuant to the indefinite detention provisions of the **National Defense Authorization Act**, the federal law known as the **Authorization for Use of Military Force**, or any other federal law if the state agency, employee, or member of the Guard would violate the U.S. Constitution, the California Constitution, or any California law by providing aid.

A local law enforcement agency, a local government, or an employee of a local agency or government is prohibited from using state funds allocated by the state to a local entity on or after January 1, 2013, to engage in any activity that aids an agency of the United States Armed Forces in the detention of a person within California for purposes of implementing the indefinite detention provisions of the **National Defense Authorization Act** or the federal law known as the **Authorization for Use of Military Force**, if the local agency, local government, or employee would violate the U.S. Constitution, the California Constitution, or any California law by providing aid.

C*hapter 5*:

Arrests:

Legal Definition: The "*taking a person into custody, in a case and in the manner authorized by law*." (**Pen. Code § 834**)

Dictionary Definition*:** A "*seizure*," as in the "act of taking by warrant" or "of laying hold on suddenly"—for example, when an "officer seizes a thief." (2 N. Webster, *An American Dictionary of the English Language 67* (1828) (Webster) (See ***Torres v. Madrid (Mar. 25, 2021) __ U.S. __, __ [141 S.Ct. 989; 209 L.Ed.2nd 190].)

***Case Law Definition*:**

"The **Fourth Amendment** protects against unreasonable seizures. (Citation) An arrest is the 'quintessential seizure of the person.'" (***Williamson v. City of National City*** (9th Cir. Jan. 24, 2022) 23 F.4th 1146, 1151; quoting ***Torres v. Madrid*** (2021) __ U.S. __, __ [141 S.Ct. 989, 995; 209 L.Ed.2nd 190].)

"A person is seized by the police and thus entitled to challenge the government's action under the **Fourth Amendment** when the officer, 'by means of physical force or show of authority,' terminates or restrains his freedom of movement, [citation], 'through means intentionally applied,' [citation]. . . . 'When the actions of the police do not show an unambiguous intent to restrain or when an individual's submission to a show of governmental authority takes the form of passive acquiescence,' the test for determining if a seizure occurred is whether, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," [citation].' The coercive effect of the encounter can be measured by whether 'a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter,' [citations]." (***People v. Kopatz*** (2015) 61 Cal.4th 62, 79; quoting ***Brendlin v. California*** (2007) 551 U.S. 249, 254-255 [127 S.Ct. 2400; 168 L.Ed.2nd 132].)

In the subsequent case of ***Torres v. Madrid*** (Mar. 25, 2021) __ U.S. __, __ [141 S.Ct. 989; 209 L.Ed.2nd 190], the United States Supreme Court expanded upon this theory concerning when a "seizure" occurs, ruling that a seizure occurs with "(t)he application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person."

The ***Madrid*** Court overruled a lower court's holding that a suspect's continued flight after being shot by police negates a **Fourth Amendment** excessive-force claim, given the lack of a "seizure." In other words, for **Fourth Amendment** purposes, the subject was seized when shot despite him having fled the police afterwards, and not being actually physically captured until sometime later. (See ***Torres v. Madrid*** (10th Cir. 2019) 769 Fed.Appx. 654.)

Standard of Proof: For an arrest of a person to be lawful, "*Probable Cause*" must be present.

Rule:

"(A) police officer may arrest without (a) warrant (a person) . . . believed by the officer upon *reasonable* (or "*probable*") *cause* to have been guilty of a felony (or misdemeanor)." (Emphasis added; ***United States v. Watson*** (1976) 423 U.S. 411, 417 [96 S.Ct. 820; 46 L.Ed.2nd 598, 605].)

"*Reasonable*" cause is a synonym for "*probable*" cause (not to be confused with a "*reasonable suspicion*"), and is used interchangeably in some case decisions.

"A warrantless arrest is reasonable under the **Fourth Amendment** 'if the officer has probable cause to believe that the suspect committed a crime in the officer's presence.'" (***Demarest v. City of Vallejo*** (9th Cir. 2022) 44 F.4th 1209, 1224, quoting ***District of Columbia v. Wesby*** (2018) 583 U.S. 48, 56 [138 S.Ct. 577; 199 L.Ed.2nd 453].)

Defined: *Probable* (or *Reasonable*) *Cause to Arrest*:

"Probable cause to arrest exists when there is a 'fair probability or substantial chance of criminal activity' by the arrestee based on the totality of the circumstances known to the officers at the time of arrest." (***Vanegas v. City of Pasadena*** (9th Cir. 2022) 46 F.4th 1159, 1164; quoting ***Lacey v. Maricopa County*** (9th Cir. 2012) 693 F.3rd 896, 918.)

"Reasonable or probable cause is shown if a *man of ordinary care* (or *caution*) *and prudence* (or a *reasonable and prudent person*) would be led to believe and conscientiously entertain *an honest and strong suspicion* that the accused is guilty." (See ***People v. Lewis*** (1980) 109 Cal.App.3rd 599 608-609; ***People v. Campa*** (1984) 36 Cal.3rd 870, 879; ***People v. Price*** (1991) 1 Cal.4th 324, 410.)

Note: The terms "*reasonable*" and "*probable*" cause are used interchangeably in both the codes (see **P.C. § 995(a)(1)(B)**) and case law, but (when properly used) mean the same thing. "*Reasonable cause*" and *"reasonable suspicion*" (i.e., the standard of proof for a detention), on the other hand, *do not* mean the same thing, and are not to be confused.

"(R)easonable cause"—a synonym for "probable cause . . . ." (**Heien *v.* North Carolina** (2014) 574 U.S. 54, 62 [135 S.Ct. 530; 190 L.Ed.2nd 475, 483].)

Note: Probable cause is more than a "*reasonable suspicion*," but less than "*clear and convincing evidence*" or "*proof beyond a reasonable doubt*."

> "'Clear and convincing' evidence requires a finding of high probability. [Citation.] Such a test requires that the evidence be so clear as to leave no substantial doubt; sufficiently strong to command the unhesitating assent of every reasonable mind.' This standard, which 'is less commonly used' [Citation], tends to be seen in civil cases involving 'interests … deemed to be more substantial than mere loss of money.'" (***People v. Mary H.*** (2016) 5 Cal.App.5th 246, 256; quoting ***Lillian F. v. Superior Court*** (1984) 160 Cal.App.3rd 314, 320.)
>
> In "a criminal case, … [in which] the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the **Due Process Clause** that the state prove the guilt of an accused beyond a reasonable doubt." (***People v. Mary H.***, *supra*; quoting ***Addington v. Texas*** (1979) 441 U.S. 418, 423 [99 S.Ct. 1804; 60 L.Ed.2nd 323]; ***Addington v. Texas*** (1979) 441 U.S. 418, 423-424 [60 L. Ed. 2d 323; 99 S. Ct. 1804]; see also **CALCRIM No. 220** ["Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true."].)

"Probable cause to arrest exists if facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that an individual is guilty of a crime." (***People v. Turner*** (2017) 13 Cal.App.5th 397, 404, 405; quoting *People v. Kraft* (2000) 23 Cal.4th 978, 1037; and upholding an arrest for trespass, per P.C. § 602.1.)

"Probable cause to arrest exists where facts known to the arresting officer would be sufficient to persuade a person of 'reasonable caution' that the individual arrested committed a crime. (***People v. Spencer*** (2018) 5 Cal.5th 642, 664; quoting ***People v. Celis*** (2004) 33 Cal.4th 667, 673.)

"To determine whether an officer had probable cause for an arrest, 'we examine the events leading up to the arrest, and then decide "whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to" probable cause.'" (***District of Columbia v. Wesby*** (2018) 583 U.S. 48, 56-57 [138 S.Ct. 577; 199 L.Ed.2nd 453], quoting ***Maryland v. Pringle*** (2003) 540 U.S. 366, 371 [124 S.Ct. 795; 157 L.Ed.2nd 769]; and ***Ornelas v. United States*** (1996) 517 U.S. 690, 696 [116 S.Ct. 1657; 134 L.Ed.2nd 911].)

In a misdemeanor DUI case under **V.C. § 3152(a)**, dismissal was error when based upon the prosecution's failure to offer expert testimony on horizontal gaze nystagmus (HGN) other than from the arresting officers. A police officer can use findings from horizontal gaze nystagmus testing as a basis for an opinion that the defendant was driving while under the influence of alcohol. The prosecution is not required to submit expert testimony to confirm the officer's evaluation of the HGN test. (***People v. Randolph*** (2018) 28 Cal.App.5th 602.)

> ***People v. Williams*** (1992) 3 Cal.App.4th 1326, ruling that a police officer was not qualified to give such testimony (i.e., about horizontal gaze nystagmus), was disapproved to the extent it was inconsistent with this holding.

"'(P)robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.;" (***People v. Moore*** (2021) 64 Cal.App.5th 291, 297, quoting ***Illinois v. Gates*** (1983) 462 U.S. 213, 232 [76 L.Ed.2nd 527, 544; 103 S.Ct. 2317].)

"Probable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [plaintiff] had committed or was committing an offense.'" (***Wheatcroft v. City of Glendale*** (U.S. Dist. AZ, 2022) 2022 U.S. Dist. LEXIS 57006; quoting ***Bailey v. Newland*** (9th Cir. 2001) 263 F.3rd 1022, 1031.)

> "Probable cause must be grounded in 'facts and circumstances known to the officers at the moment of the arrest.' ***United States v. Newman***, 265 F. Supp. 2nd 1100, 1106 (D. Ariz. 2003). But 'where probable cause does exist civil rights are not violated by an arrest even though innocence may subsequently be established.' (**Beauregard *v. Wingard***, 362 F.2nd 901, 903 (9th Cir. 1966)." (***Wheatcroft v. City of Glendale***, *supra*.)
>
> In ***Wheatcroft***, the Court found that plaintiff's arrest, supported by sufficient probable cause, had been lawful, given the fact that

defendant had actively resisted arrest by that point, entitling the officers to summary judgment.

"Probable cause exists where the 'available facts suggest a fair probability that the suspect has committed a crime.'" (***Hill v. City of Fountain Valley*** (9th Cir. 2023) 70 F.4th 507, 515; quoting ***Tatum v. City & County of San Francisco*** (9th Cir. 2006) 441 F.3rd 1090, 1094.)

Notes:

While "*probable cause*" is sufficient to justify an arrest, it cannot be forgotten the legal standard for a prosecutor to convict at trial is the stricter standard of "*proof beyond a reasonable doubt*." (See ***Morrisette v. United States*** (1952 342 U.S. 246 [72 S.Ct. 240; 96 L.Ed.2nd 288]; ***Herrera v. Collins*** (1993) 506 U.S. 390, 398-399 [113 S.Ct. 853; 122 L.Ed.2nd 203.)

And for minors, "*proof beyond a reasonable doubt* supported by evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by (**Welfare and Institutions Code**) **Section 602**, and a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by **Section 300** or **601**." (**W&I Code § 701**)

W&I Code § 601: Persons subject to jurisdiction of court as ward for refusal to obey orders of parents, violation of curfew, or truancy.

W&I Code § 602: Persons subject to jurisdiction of juvenile court and to adjudication as ward for violation of law or ordinance defining crime.

W&I Code § 300: Persons subject to jurisdiction of juvenile court; i.e., child victims.

"Constitutional law requires probable cause for arrests. The essence of probable cause is a reasonable belief of criminal guilt that is particular to the arrested person. This standard is practical rather than technical; it deals with the factual aspects of everyday life on which reasonable and prudent people act. One need not be a legal technician to grasp the concept." (***People v. Diaz*** (2024) 97 Cal.App.5th 1172, 1178, citing ***Maryland v. Pringle*** (2003) 540 U.S. 366, 370–371 [157 L.Ed.2nd 769; 124 S.Ct. 795].)

In ***Diaz***, defendant was convicted of first degree murder, based on evidence that he shot a street vendor to death for selling on someone else's turf. The Court held that police had probable cause to arrest defendant. They had a location connected with the murder, they went to the suspect location as soon as they could get warrants, and, nearly immediately, defendant showed up and police observed his highly distinctive neck tattoo, a blue flower. The confluence of three independent factors (right place plus right time plus a highly distinctive personal feature) vastly increased the probability police had found a guilty man. (pgs. 1178-1180.)

Refusing to Cooperate with the Police:

"'[I]t is well established under California law that even an outright refusal to cooperate with police officers cannot create adequate grounds for police intrusion without more.'" (***Hill v. City of Fountain Valley*** (9th Cir. 2023) 70 F.4th 507, 515; holding that the plaintiff's refusal to provided officers with his son's cellphone number did not establish probable cause to arrest; quoting ***Velazquez v. City of Long Beach*** (9th Cir. 2015) 793 F.3rd 1010, 1023.)

The ***Hill*** Court noted (***Ibid***.) that "California courts have held that passively blocking a door or refusing to open a door after a proper police demand are examples of permissible refusals to cooperate with police;" citing ***People v. Wetzel*** (1974) 11 Cal.3rd 104; and ***People v. Cressey*** (1970) 2 Cal.3rd 836.

Reasonableness of the Seizure: The U.S. Supreme Court has noted "'the general rule that **Fourth Amendment** seizures (including arrests) are "*reasonable*" only if based on probable cause' to believe that the individual has committed a crime. [Citation]. The standard of probable cause, with 'roots that are deep in our history,' [Citation], 'represent[s] the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest "reasonable" under the **Fourth Amendment**.' [Citation]" (***Bailey v. United States*** (2013) 568 U.S. 186, 192-193 [133 S.Ct. 1031, 1037-1043; 185 L.Ed.2nd 19].)

In November, 2014, plaintiff David Sosa was pulled over for a traffic stop during which a warrant from 1992, out of Texas, for "David Sosa" was discovered. Despite plaintiff not matching the wanted Sosa, in that his date of birth, height, and weight—a 40-pound difference—were different, and unlike the wanted Sosa, he had no tattoos. Plaintiff was arrested anyway, but released within three hours after a fingerprint comparison showed that he was the wrong Sosa. Then, three and a half years later, plaintiff was arrested again based upon the same information. This time, however, he was held in custody for three days before a fingerprint

comparison showed that he was the wrong Sosa. Suing the County for the two unlawful seizures, the Eleventh Circuit Court of Appeal held that the officers in the first instance were entitled to qualified immunity, given the reasonableness of their mistake (i.e., plaintiff could have lost 40 pounds in the 22 years between issuance of the warrant, could have removed the tattoo in that time period, and was not otherwise shown to be substantially different in age or race). However, the officers were not entitled to qualified immunity for the second arrest in that it was unreasonable to hold him for three days before his fingerprints were checked, particularly where it was shown that the prints could have been checked within hours as opposed to days. (***Sosa v. Martin County*** (11th Cir. FL. 2021) 13 F.4th 1254.)

Where officers reasonably believed that they were dealing with a possible kidnapping, and also reasonably believed that the plaintiff was protecting the kidnapper who was hiding in the plaintiff's home, arresting the plaintiff, even though there was insufficient probable cause justifying the arrest, was held to entitle the officers to qualified immunity from civil liability in that a reasonable officer might have believed, under the circumstances, that arresting the plaintiff for "obstruction" was lawful. (***Hill v. City of Fountain Valley*** (9th Cir. 2023) 70 F.4th 507, 515-517.)

When Probable Cause Exists: "(*P*)*robable cause*" exists if, under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a *fair probability* that the individual had committed a crime." (Italics added; ***United States v. Hernandez*** (9th Cir. 2002) 314 F.3rd 430, 434; see also ***Dunaway v. New York*** (1979) 442 U.S. 200, 208, fn. 9; [99 S.Ct. 2248; 60 L.Ed.2nd 824]; ***People v. Scott*** (2011) 52 Cal.4th 452, 474.) Various courts have used variations of this same definition to define probable cause:

"Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe an offense has been or is being committed by the person being arrested." ***John v. City of El Monte*** (9th Cir. 2008) 515 F.3rd 936, 940; citing ***Beck v. Ohio*** (1964) 379 U.S. 89, 91 [85 S.Ct. 223; 13 L.Ed.2nd 142]; ***Maxwell v. County of San Diego*** (9th Cir. 2012) 697 F.3rd 941, 951; ***Gravelet-Blondin v. Shelton*** (9th Cir. 2013) 728 F.3rd 1086, 1097-1098.)

"Probable cause arises when an officer has knowledge based on reasonably trustworthy information that the person arrested has committed a criminal offense. (Citation)" (***McSherry v. City of Long Beach*** (9th Cir. 2009) 584 F.3rd 1129, 1135.)

"In California, 'an officer has probable cause for a warrantless arrest "if the facts known to him would lead a [person] of ordinary care and

prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime."'[Citations.]" (***Blakenhorn v. City of Orange*** (9th Cir. 2007) 485 F.3rd 463, 471; see also ***People v. Price*** (1991) 1 Cal.4th 324, 410.)

> Except perhaps for a "*specific intent*" element, "an officer need not have probable cause for every element of the offense." (***Blakenhorn v. City of Orange***, *supra*., at p. 472.)
>
> "(T)his rule (however,) must be applied with an eye to the core probable cause requirement; namely, that 'under the totality of the circumstances, a prudent person would have concluded that there was a fair probability that the suspect had committed a crime.'" (Citation omitted) (***Rodis v. City and County of San Francisco*** (9th Cir. 2007) 499 F.3rd 1094, 1099.)

"*Probable cause*" merely requires that "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [plaintiff] had committed or was committing an offense. . . . Police must only show that, under the totality of the circumstances, . . . a prudent person would have concluded that there was a fair probability that [the suspect] had committed a crime." (***Hart v. Parks*** (9th Cir. 2006) 450 F.3rd 1059, 1065-1066.)

"Probable cause exists when the facts known to the arresting officer would persuade someone of 'reasonable caution' that the person to be arrested has committed a crime. [Citation.] '[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts . . .' [Citation.] It is incapable of precise definition. [Citation.] 'The substance of all the definitions of probable cause is a reasonable ground for belief of guilt,' and that belief must be 'particularized with respect to the person to be . . . seized.' [Citations.] '[S]ufficient probability, not certainty, is the touchstone of reasonableness under the **Fourth Amendment**'" (***Gillan v. City of Marino*** (2007) 147 Cal.App.4th 1033, 1044.)

"'*Reasonable and probable cause*' may exist although there may be some room for doubt." (***Lorenson v. Superior Court*** (1950) 35 Cal.2nd 49, 57.)

"(T)he probable-cause standard is a practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." (Citations and internal quotation marks omitted; ***Maryland v. Pringle*** (2003) 540 U.S. 366, 370 [124 S.Ct. 795; 157 L.Ed.2nd 769]; probable cause for arrest

of all three occupants of a vehicle found where a controlled substance was found within reach of any of them.)

> Officers had probable cause to arrest both the passenger and the driver for possession of a billy club seen resting against the driver's door. (***People v. Vermouth*** (1971) 20 Cal.App.3rd 746, 756.)
>
> Informing two suspects in a vehicle that they would both be arrested for possession of a concealed firearm, prompting a response from defendant that he'd "*take the charge*," was *not* the functional equivalent of an interrogation that required a ***Miranda*** admonishment. (***United States v. Collins*** (6th Cir. 2012) 683 F.3rd 697, 701-703.)

"The substance of all the definitions of probable cause is a reasonable ground for belief of guilt, and that belief must be 'particularized with respect to the person to be . . . seized.'" (***People v. Celis*** (2004) 33 Cal.4th 667, 673; citing ***Maryland v. Pringle***, *supra*.)

"Probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts . . . ." (***Illinois v. Gates*** (1983) 462 U.S. 213, 231-232 [103 S.Ct. 2317; 76 L.Ed.2nd 527, 548]; using the term "*fair probability*" to describe probable cause. See also ***Rodis v. City and County of San Francisco*** (9th Cir. 2007) 499 F.3rd 1094, 1098; and ***District of Columbia v. Wesby*** (2018) 583 U.S. 48, 57 [138 S.Ct. 577; 199 L.Ed.2nd 453].)

Probable cause allows for an officer's *reasonable* mistake. It only means that he or she is "*probably*" right, or in effect, having more evidence for than against. (***Ex Parte Souza*** (1923) 65 Cal.App. 9.)

"[P]robable cause means 'fair probability,' not certainty or even a preponderance of the evidence." (***United States v. Gourde*** (9th Cir. 2006) 440 F.3rd 1065, 1069.)

"Probable cause to arrests exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of caution to believe that an offense has been or is being committed by the person being arrested." (Citations omitted; ***Ewing v. City of Stockton*** (9th Cir. 2009) 588 F.3rd 1218, 1230.)

Under the totality of the circumstances, a reasonable officer could believe that the arrestee possessed cocaine in violation of Washington law. The arrestee's husband and 911 callers told the police that the arrestee was high on drugs. She said in her deposition that, given her comments to the

police officers, it would have been reasonable for them to believe she was on drugs. The police officers also had reasonable cause to take her to the hospital for mental evaluation under Washington's mental health evaluation statute. (***Luchtel v. Hagemann*** (9th Cir. 2010) 623 F.3rd 975.)

Detectives had probable cause to stop and arrest defendant and his cohorts the officers saw four males running from one street toward another. The officer observed defendant carrying an object which could be used as a deadly weapon. The officer also observed specific behavior that caused him to entertain an honest and strong suspicion that a crime was being committed. He observed a brick in defendant's hand, heard a shout of "*he's over there*" which he believed to have come from one of the four males, and witnessed a gesture from one of the group directing the others where to go. Viewed collectively, there were clearly facts to suggest the group intended to use their rudimentary weapons to harm someone. The officer's knowledge that defendant was a member of a street gang that "claimed" that particular area reasonably supported this analysis of the facts. At this point, probable cause existed to arrest defendant for possession of a deadly weapon with intent to commit an assault, per **P.C. § 12024**. (***In re J.G.*** (2010) 188 Cal.App.4th 1501.)

"Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested. (Citation) For information to amount to probable cause, it does not have to be conclusive of guilt, and it does not have to exclude the possibility of innocence. . . . (Citation) . . . (P)olice are not required 'to believe to an absolute certainty, or by clear and convincing evidence, or even by a preponderance of the available evidence' that a suspect has committed a crime. (Citation) All that is required is a 'fair probability,' given the totality of the evidence, that such is the case. (***Garcia v. County of Merced*** (9th Cir. 2011) 639 F.3rd 1206, 1209.)

Probable cause was found to exist with the defendant's statements to his girlfriend about his dream concerning the stabbing of the first victim in a series of crimes, even before the murder was reported in the newspapers. Also, defendant was known to be involved in the martial arts and liked to dress as a ninja which was consistent with the suspect information. Defendant told co-workers that he possessed a semiautomatic pistol similar to the weapon used in some of the crimes. Defendant also matched the physical description of the suspect in the various crimes, being a unique combination of Black and Japanese, with a dark complexion that tended to be lighter than most Blacks. (***People v. Scott*** (2011) 52 Cal.4th 452, 474-476.)

Probable cause existed under Nevada law where the arresting agent knew that defendant (1) admitted to gambling at various casinos under a different name, (2) admitted to using identification not issued by a government entity identifying him by that different name, and (3) possessed and had used a credit card issued in that different name. (***Fayer v. Vaughn*** (9th Cir. 649 F.3rd 1061, 1064-1065.)

Observing defendant on a public sidewalk (i.e., a "public place"), and then seconds later on his own front porch (not a "public place"), and then seeing a semi-automatic pistol in his hand while standing on his porch, provided the necessary probable cause to believe that he had been in violation of **P.C. § 25850(a)** (formerly **§ 12031(a)**), carrying a loaded firearm in public, while on the sidewalk. The fact that he was carrying it around his house, where it would normally be used for self-defense or defense of habitation, also constituted probable cause to believe it was loaded. (***United States v. Nora*** (9th Cir. 2014) 765 F.3rd 1049, 1052-1060; noting that we are only "*deal*(*ing*) *in probabilities, not certainties*." ***Id***., at p. 1053.)

W&I §§ 601(a) and **625(a)** do not allow for taking a minor into custody for a single instance of disobedience. The authority to take a minor into custody, as provided for under **section 625(a)**, requires that the minor be a person described in **section 601**. However, **section 601(a)** requires that the minor "persistently or habitually refuses to obey" his or her parent or custodian, or is "beyond the control of that person." A single instance of disobedience does not qualify as "persistently or habitually," or being "beyond the control." Under these circumstances, the Court found no legal justification for officers to take an 11-year-old minor into physical custody at his school and remove him from the school grounds in handcuffs despite the school's administrators reporting him as being "out of control." (***C.B. v. City of Sonora*** (9th Cir. 2014) 769 F.3rd 1005, 1031.)

A deputy sheriff was not entitled to qualified immunity in a false arrest civil suit brought by a deputy public defender where a court referee ordered the deputy to get the public defender and bring her to court, or to get her supervisor if the public defender refused to come to court. The deputy sheriff had no reasonable basis for believing that he was authorized to arrest the public defender since the referee's order, by its clear terms, did not authorize the deputy to physically seize the public defender. Also, the deputy public defender's comment to the deputy sheriff that he would have to arrest her if he wanted her to come to court immediately could not reasonably have caused the deputy sheriff to believe that she was volunteering to be handcuffed. (***Demuth v. County of Los Angeles*** (9th Cir. 2015) 798 F.3rd 837, 838-840.)

"Probable cause is shown 'when the facts known to the arresting officer would persuade someone of "reasonable caution" that the person to be arrested has committed a crime.'" (***People v. Zaragoza*** (2016) 1 Cal.5th 21, 56-57; quoting ***People v. Celis*** (2004) 33 Cal.4th 667, 673.)

"'Under the **Fourth Amendment**, a warrantless arrest requires probable cause,' which 'exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested.' ***United States v. Lopez*** 482 F.3rd 1067, 1072 (9th Cir. 2007). Whether probable cause exists depends 'on the totality of facts' available to the officers, who 'may not disregard facts tending to dissipate probable cause.' ***Id***. at 1073 (internal quotation marks omitted). 'In some instances there may initially be probable cause justifying an arrest, but additional information obtained at the scene may indicate that there is less than a fair probability that the [individual] has committed or is committing a crime. In such cases, execution of the arrest or continuation of the arrest is illegal.' ***Id.***" (***Sialoi v. City of San Diego*** (9th Cir. 2016) 823 F.3rd 1223, 1232.)

Probable cause may be established by a person's "vagueness and implausibility" of his or her story, leading an officer to reasonably believe that he or she is lying, suggesting a "guilty mind." (***District of Columbia v. Wesby*** (2018) 583 U.S. 48, 59-60 [138 S.Ct. 577; 199 L.Ed.2nd 453], citing ***Devenpeck v. Alford*** **(**2004) 543 U.S. 146, 149 [125 S.Ct. 588; 160 L.Ed.2nd 537], noting that the suspect's "untruthful and evasive" answers to police questioning could support probable cause.)

> The Supreme Court in ***Wesby*** also criticized the lower courts' dissection of the various factors, considering them individually rather than following the "totality of the circumstances" rule, in determining the existence of probable cause. (***District of Columbia v. Wesby***, *supra*, at pp. 60-62.)
>
> > See also ***Hill v. City of Fountain Valley*** (9th Cir. 2023) 70 F.4th 507, 516, fn. 5: "The dissent lasers in on each piece of fact to argue that it alone cannot establish probable cause. But we cannot view each fact in isolation, and instead must analyze all the facts under a totality of the circumstances, which means we must consider the 'whole picture' that develops from the combined effect of all the available facts."" (Citing ***District of Columbia v. Wesby***, *supra*, 138 S. Ct. at p. 588, which cites in turn ***United States v. Cortez*** (1981) 449 U.S. 411, 417 [101 S.Ct. 690; 66 L.Ed.2nd 621].) "Every fact leading up to the arrest should serve as a factor in the totality of the circumstances,

> recognizing that the whole is often greater than the sum of the parts and that even seemingly innocent facts can suggest a crime is afoot." (Citing again ***District of Columbia v. Wesby***, *supra*, 138 S.Ct. at 588.)
>
> The Court further criticized the appellate court's rejection of various factors merely because there might be some "innocent explanation" for them, noting that "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." Per the Court: "(T)he panel majority should have asked whether a reasonable officer could conclude—considering all of the surrounding circumstances, including the plausibility of the explanation itself—that there was a 'substantial chance of criminal activity.'" (***Id***., at p. 61; citing ***Illinois v. Gates*** (1983) 462 U.S. 213, 244, fn. 13 [103 S.Ct. 2317; 76 L.Ed.2nd 527].)

Shouting a profanity (i.e., "*F__k you*") at a police officer is *not* grounds for arresting the defendant for disturbing the peace or disorderly conduct (even though in the presence of women and children). The Court further held that defendant's profane shout was protected speech under the **First Amendment**. In addition, according to the trooper's affidavit, defendant's arrest was motivated in part by the content of the language in his shout at the trooper. Consequently, the court held that arresting him for the content of his speech constituted retaliation and would cause others to refrain from exercising their **First Amendment** rights in the future. The Court further held that the right to be free from retaliation was clearly established at the time of his arrest. Criticism of law enforcement officers, even with profanity, has been found to be protected speech. (***Thurairajah v. City of Fort Smith*** (8th Cir. AR 2019) 925 F.3rd 979.)

> See also ***Wood v. Eubanks*** (6th Cir. 2022) 25 F.4th 414, where is was held that a subject wearing profanity (i.e., "*F__k The Police*") on his t-shirt and verbally using similar profanity against six officers who escorted him from the fairgrounds, was constitutionally (**First Amendment**) protected speech and insufficient to constitute "fighting words" under the state's disturbing the peace statutes (similar to California's **Pen. Code § 415**). Police officers are held to a higher standard than average citizens when confronted by insulting, abusive language.

In a trial for resisting, obstructing, or delaying a peace officer, in violation of **P.C. § 148(a)(1)**, the jury was properly instructed that defendant could be found guilty if he refused to identify himself to a ranger who was writing a citation for violating a local ordinance making it an infraction to possess open containers of alcoholic beverages in a public place. When a

person refuses to identify himself to an officer who is writing a citation to that person for an infraction offense, that refusal can be the basis for a finding that the person resisted, obstructed, or delayed an officer. (***People v. Knoedler*** (2019) 44 Cal.App.5th Supp. 1.)

In a sex sting operation at South Dakota's annual Sturgis Motorcycle Rally, the Eighth Circuit Court of appeal upheld the trial court's determination that defendant was arrested on probable cause to believe that he was attempting to commit various sex trafficking crimes when he responded to an officer's posted advertisement entitled "Who Wants to Be Naughty" on a classified advertising website in its dating section under the category "women seeking men." In the resulting communications between the two, the officer posed as a 15-year-old female. Arrangements were made between the two to meet at a particular location. Defendant responded affirmatively to the officer's demand that defendant pay $200 for one hour of sexual intercourse, bring a condom, and not hurt her. Upon defendant showing up at the designated time and location with condoms and $200, the Court found this sufficient to establish the necessary probable cause to arrest defendant and to search his car incident to the arrest. (***United States v. Slim*** (8th Cir. 2022) 34 F.4th 641.)

Whether officers had probable cause under the **Fourth Amendment** to make an arrest for child endangerment or public intoxication under **Cal. Penal Code §§ 273a** and **647(f)** presented a jury question in a **42 U.S.C.S. § 1983** action. Although the video evidence did not establish the plaintiff was intoxicated, she did have unsealed alcohol containers in a vehicle and, as observed by one of the officers, smelled like alcohol. Although a reasonable jury could find probable cause was lacking, the officers were entitled to summary judgment based on qualified immunity because the law did not clearly establish the lack of probable cause. (***Johnson v. Barr*** (9th Cir. 2023) 73 F.4th 644.)

Determination of Probable Cause by a Grand Jury:

"Generally, probable cause for an arrest 'may be satisfied by an indictment returned by a grand jury.' ***Lacy v. Cty. of Maricopa***, 631 F. Supp. 2d 1183, 1194 (D. Ariz. 2008) (quoting ***Kalina v. Fletcher***, 522 U.S. 118, 129, 118 S.Ct. 502, 139 L.Ed.2nd 471 (1997)); *see also* ***Palato v. Botello***, 2012 U.S. Dist. LEXIS 184513, 2012 WL 7018239, at *2 (C.D. Cal. Nov. 15, 2012), *report and recommendation adopted*, 2013 U.S. Dist. LEXIS 6102, 2013 WL 164197 (C.D. Cal. Jan. 11, 2013) ('The filing of a valid grand jury indictment establishes probable cause for plaintiff's arrest and vitiates his **Fourth Amendment** claims for wrongful arrest and false imprisonment.'). A grand jury indictment is prima facie evidence that the defendant has committed an offense. ***Bryant v. City of Goodyear***, 2014 WL 2048013 (D. Ariz. May 19, 2014). However, '[t]his presumption of

probable cause can be rebutted if officers improperly exerted pressure on the prosecutor, knowingly provided misinformation, concealed exculpatory evidence, "or otherwise engaged in wrongful or bad faith conduct that was actively instrumental in causing the initiation of legal proceedings."' (***Id.***, quoting ***Awabdy v. City of Adelanto***, 368 F.3rd 1062, 1067 (9th Cir. 2004))." (***Wheatcroft v. City of Glendale*** (U.S. Dist. AZ, 2022) 2022 U.S. Dist. LEXIS 57006.)

Finding no undue influence exerted upon the prosecutor in this case, the Court granted the defendant officer's summary judgment on plaintiff's allegations that he was arrested without probable cause. (***Ibid***.)

Judicial Determination of Probable Cause in Misdemeanor Custody Cases:

Pen. Code. § 991:

(a) If the defendant is in custody at the time he appears before the magistrate for arraignment and, if the public offense is a misdemeanor to which the defendant has pleaded not guilty, the magistrate, on motion of counsel for the defendant or the defendant, shall determine whether there is probable cause to believe that a public offense has been committed and that the defendant is guilty thereof.

(b) The determination of probable cause shall be made immediately unless the court grants a continuance for good cause not to exceed three court days.

(c) In determining the existence of probable cause, the magistrate shall consider any warrant of arrest with supporting affidavits, and the sworn complaint together with any documents or reports incorporated by reference thereto, which, if based on information and belief, state the basis for such information, or any other documents of similar reliability.

(d) If, after examining these documents, the court determines that there exists probable cause to believe that the defendant has committed the offense charged in the complaint, it shall set the matter for trial. If the court determines that no such probable cause exists, it shall dismiss the complaint and discharge the defendant.

(e) Within *15 days* of the dismissal of a complaint pursuant to this section the prosecution may refile the complaint. A second dismissal pursuant to this section is a bar to any other prosecution for the same offense.

Case Law:

> On appeal of the dismissal of a misdemeanor complaint under **P.C. § 991**, the reviewing court need not determine whether the evidence is sufficient to convict the defendant. That is not the purpose of a **section 991** hearing. The purpose of **section 991** is only to determine whether there is probable cause to believe that a public offense has been committed by the defendant. (***People v. Scott*** (1993) 20 Cal. App.4th Supp. 5.)
>
> This provision permits the trial court to dismiss individual charges from the complaint. (***People v. McGowan*** (2015) 242 Cal.App.4th 377, as modified at 2015 Cal. App. LEXIS 1095.)
>
> In a case in which defendant moved to dismiss a misdemeanor charge of carrying a dirk or dagger for lack of probable cause under **P.C. § 991**, arguing that the knife was recovered illegally, the appellate court concluded that suppression of illegally obtained evidence cannot be litigated on a motion to dismiss under **§ 991**. The probable cause determination contemplated by **§ 991** does not include a determination that evidence was unlawfully obtained. The sole and exclusive means for a misdemeanor defendant to secure that determination is a noticed motion under **P.C. § 1538.5**. The only question for a trial court to answer on a defendant's **§ 991** motion is whether facts that have not yet been excluded by operation of a noticed motion under **§ 1538.5** exist sufficient to warrant a prudent person in believing that a public offense has been committed and that the defendant is guilty thereof. (***Barajas v. Superior Court*** (2019) 40 Cal.App.5th 944; affirming the Appellate Department of the Superior Court's decision published at (2018) 30 Cal.App.5th Supp. 1.)

COVID-19 Executive Order Enforcement:

> The Ninth Circuit Court of Appeal affirmed the district court's summary judgment in favor of Scottsdale Police Officer Christian Bailey and the City of Scottsdale in a **42 U.S.C. § 1983** action alleging constitutional violations arising from plaintiff's arrest and citation for violating a COVID-19 emergency executive order, which prohibited restaurants from offering on-site dining. Arizona Governor Ducey issued four COVID-19 executive orders between March 19, 2020, and June 29, 2020, that among other things prohibited on-site dining (**EO-2020-09**), included restaurants on a list of essential functions that could remain open during the pandemic (**EO 2020-12**), and required that notice and an opportunity to comply be given prior to any enforcement action (**EO 2020-18**). Plaintiff was the

owner of Sushi Brokers, LLC, which operates a sushi restaurant in Scottsdale, Arizona. On April 11, 2020, officers cited and arrested plaintiff for violating **Arizona Revised Statute** ("**A.R.S.**") **§ 26-317**, which makes it a misdemeanor to violate emergency executive orders. The charges were later dismissed. Plaintiff brought suit alleging, among other things, retaliatory arrest, in violation of the **First Amendment**, and false arrest, in violation of the **Fourth Amendment**. The Court first noted that both retaliatory and false arrest claims require showing the absence of probable cause. Here, given that officers had observed on-site dining at the restaurant and there were prior calls reporting violations, Officer Bailey had probable cause to arrest plaintiff under **A.R.S. § 26-317** for violating an emergency order. The Court next rejected plaintiff's argument that that the warnings he received on March 27 and 28, 2020, did not qualify under **EO 2020-18's** notice requirement because they occurred prior to **EO 2020-18's** enactment. Holding that there was no constitutional violation, the panel noted that plaintiff was arrested for the exact same behavior for which he had received previous warnings. He had sufficient notice and opportunity to comply given the challenges presented by the COVID-19 pandemic. (***Miller v. City of Scottsdale*** (9th Cir. 2023) 88 F.4th 800.)

Circumstances Affecting Probable Cause:

Mistaken Identity:

"In a case of mistaken identity, 'the question is whether the arresting officers had a good faith, reasonable belief that the arrestee was the subject of the warrant.' ***Rivera v. Cty. of Los Angeles*** 745 F.3rd 384, 389 (9th Cir. 2014); accord ***Hill v. California***, 401 U.S. 797, 802, 91 S.Ct. 1106, 28 L.Ed.2nd 484 (1971) ('[W]hen the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest.' (internal quotation marks omitted)). The constitutionality of the arrest thus turns on the reasonableness of the deputies' mistake." (***Sharp v. County of Orange*** (9th Cir. 2017) 871 F.3rd 901, 910; finding plaintiff's arrest to be unreasonable, given the differences in the physical description between him and the man they were looking for, but finding the officers to be entitled to qualified immunity.

Mistaken Belief in the Existence of an Arrest Warrant:

Where defendant himself (a 16-year-old juvenile), who the officers knew to be on probation, told the officers that he believed there was an outstanding warrant for his arrest, "it was rational for the officers to believe defendant, arrest him, and detain him until they learned otherwise." (**People *v.* Delgado** (2018) 27 Cal.App.5th 1092, 1102-1104; finding that taking 84 minutes to learn that there was no outstanding arrest

warrant was not unreasonable where there was nothing in the record to show that discovery of the lack of a warrant could have been made sooner.)

The "*Collective Knowledge*" *Doctrine*:

Probable cause can be established by the "*collective knowledge*" of other officers. The officer making a stop, search or arrest need not personally know all the precise information relied upon by other officers. (***People v. Ramirez*** (1997) 59 Cal.App.4th 1548; ***United States v. Sandoval-Venegas*** (9th Cir. 2002) 292 F.3rd 1101; ***United States v. Butler*** (9th Cir. 1996) 74 F.3rd 916, 921; ***People v. Gomez*** (2004) 117 Cal.App.4th 531, 541; ***United States v. Mayo*** (9th Cir. 2005) 394 F.3rd 1271, 1276, fn. 7.)

> "[W]here law enforcement authorities are cooperating in an investigation . . . , the knowledge of one is presumed shared by all." (***Illinois v. Andreas*** (1983) 463 U.S. 765, 722, fn. 5 [103 S.Ct. 3319; 77 L.Ed.2nd 1003].)
>
> "[W]hen police officers work together to build 'collective knowledge' of probable cause, the important question is not what each officer knew about probable cause, but how valid and reasonable the probable cause was that developed in the officers' collective knowledge." (***People v. Gomez***, *supra*, quoting ***People Ramirez***, *supra*, at p. 1555.)

A law enforcement dispatcher's knowledge of specific facts not passed onto the officers in the field may also be considered as a part of the "*collective knowledge*" needed to substantiate a finding of a "*reasonable suspicion*" justifying a traffic stop. (***United States v. Fernandez-Castillo*** (9th Cir. 2003) 324 F.3rd 1114, 1124.)

Information known to three separate officers, involving informant information from three informants of varying degrees of reliability, held to be sufficient to justify defendant's arrest and the impounding, and searching, of his vehicle even though the arresting officer, himself, did not have enough personal knowledge upon which to justify a finding of probable cause. (***United States v. Jensen*** (9th Cir. 2005) 425 F.3rd 698.)

The collective knowledge doctrine is of two types: (1) When a number of law enforcement officers are all working together with bits and pieces of information spread out among the individual officers, but which when all added altogether, amounts to reasonable suspicion or probable cause. (2) When one or more officers with information amounting to reasonable suspicion or probable cause command a separate officer, who may know nothing about the nature of the investigation, to detain, arrest, and/or

search. There is some difference of opinion as to whether the first category is sufficient unless there is shown to be some communication among the officers involved. The second category is universally accepted as coming within the rule. (***United States v. Ramirez*** (9th Cir. 2007) 473 F.3rd 1026; narcotics officers commanding a patrol officer to make a traffic stop: The stop, detention, arrest and search all upheld.)

The "*collective knowledge doctrine*" does not apply unless (1) the separate law enforcement agents are working together in an investigation even though they may not have explicitly communicated to the other the facts that each has independently learned, or (2) unless one officer, with direct personal knowledge of all the facts necessary to give rise to a reasonable suspicion or probable cause, directs or requests another officer to conduct a stop, search, or arrest. Some cases suggest that for the first rule to apply, there must also have been some communication between the two agents. (***United States v. Villasenor*** (9th Cir. 2010) 608 F.3rd 467, 475-476.)

See, however, ***United States v. Evans*** (Nev. 2015) 122 F.Supp.3rd 1027, at p. 1035, where a federal district court judge rejected the use of the collective knowledge doctrine to justify a prolonged traffic stop, citing no authority for why this theory might apply to the facts of this case (i.e., where a detective was working with a patrol deputy on a drug investigation).

The "collective knowledge doctrine" was held to apply to a traffic stop made by a patrol officer at the request of narcotics officers who were investigating defendant for selling drugs. Because the narcotics officers' knowledge of defendant's drug dealing was imputed to the patrol officer who made the stop, the officer had sufficient reasonable suspicion justifying an extra eleven minutes during the stop while he waited for backup and to run his drug-sniffing dog around the vehicle. (***United States v. Jordan*** (4th Cir. 2020) 952 F.3rd 160.)

However, the collective knowledge doctrine does *not* apply where the prosecution fails to establish that the detaining officer had any information about some specific criminal activity. In ***People v. Chalak*** (2020) 48 Cal.App.5th Supp. 1, the prosecution failed to present any evidence that the detaining officer knew the person he detained, based upon a physical description, was suspected of committing an act of domestic violence. The prosecution failed to elicit from the officer reporting the alleged crime that he conveyed to the detaining officer that he had a reasonable suspicion or probable cause to believe that the person described was involved in criminal activity.

Upon being subjected to a parole wavier search by one officer, at the direction of that officer's training officer who, as the department gang

specialist, was aware of defendant's parole status, the "collective knowledge doctrine" served to support the legality of the search despite the lack of any direct knowledge held by the searching officer. (***United States v. Estrella*** (9th Cir. 2023) 69 F.4th 958, 961, 966, fn. 6.)

Evidence Within Reach of Multiple Suspects: Where evidence (e.g., contraband) is found in a vehicle within reach of more than one of the occupants, but no one admits ownership, who is subject to arrest?

Where a large amount of money is found rolled up in a vehicle's glove compartment, and five plastic glassine baggies of cocaine are found behind the center armrest of the backseat, with the armrest pushed up into the closed position to hide the contraband, such contraband being accessible to all the occupants of the vehicle, the arrest of all three subjects in the vehicle (driver, right front and rear seat passengers) was supported by probable cause. (***Maryland v. Pringle*** (2003) 540 U.S. 366 [124 S.Ct. 795; 157 L.Ed.2nd 769].)

Officers had probable cause to arrest both the passenger and the driver for possession of a billy club seen resting against the driver's door. (***People v. Vermouth*** (1971) 20 Cal. App.3rd 746, 756.)

Informing two suspects in a vehicle that they would both be arrested for possession of a concealed firearm, prompting a response from defendant that he'd "*take the charge*," was *not* the functional equivalent of an interrogation that required a ***Miranda*** admonishment. (***United States v. Collins*** (6th Cir. 2012) 683 F.3rd 697, 701-703.)

Note: However, absent sufficient evidence to connect contraband found in the vehicle to one person or the other "*beyond a reasonable doubt*," the case is unlikely to be filed by a prosecutor.

Dissipation of Probable Cause or Reasonable Suspicion:

After receiving information about an apartment manager's 9-1-1 call regarding two black adult males, officers did not have probable cause to arrest three Samoan teenagers after it was determined almost immediately that a suspected gun was only a toy. At that point, any suspicion that the teenagers were engaged in a crime had dissipated. The officers, having detained numerous family members, many of them through the use of handcuffs, therefore violated the **Fourth Amendment** by continuing the seizure beyond that point, as well as the search of everyone present. They were also not entitled to qualified immunity for the warrantless entry and search of the family's apartment. (***Sialoi v. City of San Diego*** (9th Cir. 2016) 823 F.3rd 1223, 1232-1233.)

"A traffic stop is reasonable at its inception if the detaining officer, at the very least, reasonably suspects the driver has violated the law." However, "[o]nce the purpose of the stop is satisfied and any underlying reasonable suspicion dispelled, the driver's detention generally must end without undue delay unless the officer has an objectively reasonable suspicion that illegal activity unrelated to the stop has occurred or the driver otherwise consents to the encounter." (***Robinson v. City of San Diego*** (S.D. Cal. 2013) 954 F. Supp. 2nd 1010, 1019.)

Where an officer pulled the plaintiff over because he could not read the expiration date on the registration sticker on the back of the car—the expiration date appearing to have been covered in reflective tape—but when the officer approached on foot and saw that the reflective tape was a "new device used by the State of Colorado to prevent alteration of the sticker's expiration date" and that the registration was valid and not expired, there was no longer any justification for holding the driver. Nonetheless, the officer proceeded to question the vehicle occupants and to search the vehicle, ultimately arresting the occupants after finding a gun and what appeared to be crack cocaine in a duffel in the trunk of the vehicle. The court found that the arrest violated the **Fourth Amendment** because "[o]nce [the officer approached the vehicle on foot and observed that the temporary sticker was valid and not expired, the purpose of the stop was satisfied." Thus, the officer's further detention of the vehicle to question its occupants and request the driver's license and registration exceeded the scope of the stop's underlying justification. (***United States v. McSwain*** (10th Cir. 1994) 29 F.3rd 558.)

Use of Hearsay:

Information used to establish probable cause need not be admissible in court: E.g., "*hearsay*," or even "*double hearsay*." (***People v. Superior Court* (*Bingham*)** (1979) 91 Cal.App.3rd 463, 469; see also ***Hart v. Parks*** (9th Cir. 2006) 450 F.3rd 1059, 1066-1067; ***People v. Suarez*** (2020) 10 Cal.5th 116, 153.)

Where a suspect is searched and arrested based solely on hearsay information received from witnesses—while maybe sufficient to stop and detain the suspect—must establish probable cause to believe that the suspect subsequently searched and arrested was doing sometime illegal. E.g.:

> The Ninth Circuit in a split 2-to-1 decision affirmed the district court's order granting defendant's motion to suppress evidence and statements obtained after his arrest, in a case that required the Court to determine whether there was probable cause to arrest defendant for displaying a weapon in a manner that "warrant[ed]

alarm for the safety of other persons," per **Wash. Rev. Code § 9.41.270(1)**. Defendant was arrested after two people separately reported that a man in a truck had displayed a firearm while asking them questions about an alleged kidnapping in the area. Defendant was contacted and immediately arrested based upon these witnesses' statements. A subsequent search of defendant's vehicle and person incident to that arrest resulted in the recovery of illegal firearms and a modified CO2 cartridge. He was charged in federal court with making and possessing a destructive device in violation of the **National Firearms Act**. In finding that the arrest and search was made without probable cause, the Court noted that Washington is an open carry state (*i.e.*, it is presumptively legal to carry a firearm openly) although it is a misdemeanor to carry a concealed pistol without a license. Also, Washington is a "*shall issue state*," meaning that local law enforcement must issue a concealed weapons license if the applicant meets certain qualifications. The bare fact that defendant displayed a weapon, not being illegal and not indicative of the possibility that he might be illegally carrying a concealed firearm, did not supply the necessary probable cause because there is no evidence that defendant was carrying a concealed weapon. While defendant may have legally been detained for further investigation under the facts of this case, the information from the witnesses alone did not justify a conclusion that probable cause existed to believe that defendant was in illegal possession of a concealed firearm. Also, for the trial court to conclude that defendant did not display his firearm in a threatening manner, based upon the information supplied by the witnesses, was not clearly erroneous. (***United States v. Willy*** (9th Cir. 2022) 40 F.4th 1074.)

An Officer's Expertise as an Element of Probable Cause:

The fact that the information available to police officers "gave rise to a variety of 'inferences,' some of which support (the suspect's) innocence," is irrelevant. "(O)fficers may 'draw on their own experiences and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." (***Hart v. Parks*** (9th Cir. 2006) 450 F.3rd 1059, 1067.)

"Police officers 'must be given some latitude in determining when to credit witnesses' denials and when to discount them, and we're not aware of any federal law . . . that indicates precisely where the line must be drawn.' (Citation)" "Probable cause arises when an officer has knowledge based on reasonably trustworthy information that the person arrested has committed a criminal offense. (Citation)" (***McSherry v. City of Long Beach*** (9th Cir. 2009) 584 F.3rd 1129, 1135-1136.)

"(C)onduct meaningless 'to the untrained eye of an appellate judge . . . may have an entirely different significance to an experienced narcotics officer' like Agent Jones." (***United States v. Iwai*** (9th Cir. 2019) 930 F.3rd 1141, 1145, quoting ***United States v. Hicks*** (9th Cir. 1985) 752 F.2nd 379, 384.)

In a case where the deceased son sued an officer for failing to recognize a medical condition, the Court held that to the extent the district court found that the officer's video (bodycam) evidence contradicted anything in the amended complaint, it rejected the son's conclusory allegations regarding whether the officers' conduct met the legal standard of a constitutional violation. In doing so, the district court acted within its discretion. The son's allegations suggested that the moving force behind the alleged constitutional violation against the detainee was not a failure to train, but the officers' failure to heed their training. The son did not show that the alleged unlawfulness of the officers' conduct was clearly established at the time they encountered the detainee. The son's argument concerning the deprivation of life claim had been waived. (***J.K.J. v. City of San Diego*** (9th Cir. 2022) 42 F.4th 990.)

Conflicting Evidence:

The fact that if viewed in isolation, any single fact, independently, might not be enough to establish probable cause is unimportant. Probable cause is a determination made based upon "*cumulative information*" (often referred to as the "*totality of the circumstances*"). (***Hart v. Parks*** (9th Cir. 2006) 450 F.3rd 1059, 1067.)

Probable cause to arrest and prosecute the plaintiff for assault and elder abuse was found where a police officer found an elderly and infirm man bleeding profusely from a head wound admittedly inflicted by the plaintiff who himself was without significant injuries. Also, the victim and his wife both told the officers at the scene that plaintiff had attacked him without provocation. The fact that the reporting officer began a romantic relationship with the plaintiff's wife *after* all of the evidence relating to the altercation had been collected and documented in official reports was irrelevant. His later misconduct does nothing to undermine the existence of probable cause that existed at the time of plaintiff's arrest. (***Yousefian v. City of Glendale*** (9th Cir. 2015) 779 F.3rd 1010, 1014.)

> While exculpatory evidence that could negate probable cause cannot be ignored, or the fact that a criminal jury later determines that there was insufficient evidence to prove the case beyond a reasonable doubt, does not mean that an officer at the scene could

not reasonably have concluded that probable cause to arrest the plaintiff existed at the time. (***Id.***, at pp. 1014-1015.)

Also, the fact that it was the *plaintiff* who originally called the police to the scene of the altercation, and that he himself claimed to have been assaulted by the victim, did not overcome the other evidence establishing probable cause to believe that plaintiff had attacked the elderly victim. "(P)robable cause requires only that those 'facts and circumstances within the officer's knowledge are sufficient to warrant a prudent person to believe "that the suspect has committed . . . an offense."'" (***Ibid.***, citing ***Barry v. Fowler*** (9th Cir. 1990) 902 F.2nd 770, 773; and ***Michigan v. DeFillippo*** (1979) 443 U.S. 31, 37 [99 S.Ct. 2627; 61 L.Ed.2nd 343].)

"(T)o focus on the noises (coming from within defendant's residence) in isolation from all other factors . . . is not a proper 'totality of the circumstances' analysis." (***United States v. Iwai*** (9th Cir. 2019) 930 F.3rd 1141, 1145.)

"(E)ven in situations where 'no one event, considered in isolation, would be sufficient, the "succession of superficially innocent events [can proceed] to the point where a prudent man could say to himself that an innocent course of conduct was substantially less likely than a criminal one."'" (***Id.***, fn. 1; quoting ***United States v. Bernard*** (9th Cir. 1979) 623 F.2nd 551, 560.)

A Suspect's Own Admissions:

The information used to establish probable cause may be from the defendant's own admissions which, without independent evidence of the corpus of the crime, will not be admissible in court. However, the likelihood of conviction is not relevant in establishing probable cause to arrest. (***People v. Rios*** (1956) 46 Cal.2nd 297; defendant's admission that he had injected drugs two weeks earlier sufficient to establish probable cause for the past possession of a controlled substance. Search incident to the arrest was therefore lawful.)

Note: See "*Searches with Probable Cause*," under "*Searches of Persons*" (Chapter 11), below

Border Cases:

Probable cause was found where the defendant was in the presence of a commercial quantity of drugs while in a vehicle coming over the International Border from Mexico, defendant was the sole passenger (other than the driver), there was a strong odor of gasoline in the vehicle

(with the drugs being discovered in the gas tank), hiding drugs in a vehicle's gas tank was known as a common method used by drug smugglers, and the driver lied about his immigration status. (***United States v. Carranza*** (9th Cir. 2002) 289 F.3rd 634.)

Probable cause found where defendant was the backseat passenger in a minivan in which a commercial quantity of marijuana was found, and defendant acted nervously and avoided eye contact with a Customs Inspector. (***United States v. Hernandez*** (9th Cir. 2002) 314 F.3rd 340.)

As the passenger in a vehicle crossing the U.S./Mexican border, ignoring a border inspector until another passenger was asked to move from a spot where contraband was later found to be hidden, at which time defendant attempted to distract the inspector by inviting him to a party, was sufficient to constitute probable cause for arrest as soon as the contraband was found. (***United States v. Juvenile* (RRA-A)** (9th Cir. 2000) 229 F.3rd 737, 743.)

See "*Border Searches*" (Chapter 18), below.

Indian Reservation Cases:

After seeing semiautomatic rifles and drugs in a truck parked on a public right-of-way within the Crow Reservation in the State of Montana, a Native American Tribe's police officer seized all contraband in plain view and took defendant, who was not a member of the Tribe, into custody and to the Reservation Police Department. The Supreme Court held that suppression of the evidence in subsequent federal criminal proceedings was not warranted because the tribal officer had authority to search and detain any person the officer believed might commit or had committed a crime on the Reservation, at least when that conduct threatened or had some direct effect on the health or welfare of the Tribe. The search of the car and detention of the defendant did not subject defendant to Tribal law, but only to state and federal laws that applied whether an individual was outside a reservation or on a state or federal highway within it. (***United States v. Cooley*** (June 1, 2021) __ U.S. __ [141 S.Ct. 1638; 210 L.Ed.2nd 1].)

Because the cross-deputization agreement between the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation and the State of Montana was valid, a Montana state trooper was validly deputized to enforce tribal law, and he had jurisdiction to seize and search defendant's truck. Under that agreement, the state trooper was permitted to enforce tribal law, not just state law. Nothing in the Tribes' dependent status precluded them from entering into such an agreement with the State of Montana, nor did anything in federal law. The cross-deputization agreement was not a

Special Law Enforcement Commission agreement under the **Indian Law Enforcement Reform Act**, **25 U.S.C.S. §§ 2801-2804**. It was a compact between the Tribes and the State, and it neither deputized non-federal officers to enforce federal law nor deputized federal officers to enforce tribal law. (***United States v. Fowler*** (9th Cir. 2022) 48 F.4th 1022.)

Retaliatory Arrests:

Arresting a person in retaliation for the defendant having made certain statements to the officer accusing the officer of being racially motivated, even where the officer had probable cause to make the arrest (but also had the option of releasing him on a citation), is a **First Amendment** violation of the defendant's freedom of speech, subjecting the officer to potential civil liability. (***Ford v. City of Yakima*** (9th Cir. 2013) 706 F.3rd 1188, 1192-1196.)

See "*Arresting/Detaining an Individual for being Verbally Uncooperative*," above,
See also "*Civil Suits Based Upon an Alleged Retaliation Theory*," under "*Procedural Rules*" (Chapter 2), above.
See also "*In Retaliation for Engaging in Protected Speech*," under "*The Bill of Rights Protections*" (Chapter 7), below.

Guilt by Association:

"'Mere propinquity to others independently suspected of criminal activity . . . does not, without more, give rise to probable cause.'" (***United States v. Collins*** (9th Cir. 2005) 427 F.3rd 688, 691; quoting ***Ybarra v. Illinois*** (1979) 444 U.S. 85, 91 [100 S.Ct. 338; 62 L.Ed.2nd 238].)

Arrests in a Courthouse:

Civil Code § 43.54:

(a) A person shall not be subject to civil arrest in a courthouse while attending a court proceeding or having legal business in the courthouse.

(b) This section does not narrow, or in any way lessen, any existing common law privilege.

(c) This section does not apply to arrests made pursuant to a valid judicial warrant.

Note: The Legislative history of this bill (**AB 668**) provides that its purpose is to prevent arrests in courthouses by federal Immigration & Customs Enforcement (ICE) officers.

Code of Civ. Proc. § 177:

A judicial officer has the power "to prohibit activities that threaten access to state courthouses and court proceedings, and to prohibit interruption of judicial administration, including protecting the privilege from civil arrest at courthouses and court proceedings."

Immigration and Customs Enforcement (ICE) Arrests in a State Court House:

Confirming the need for freely and fully functioning state courts, and in order to avoid chaos and intimidation throughout New York's judicial system, a federal district court judge held that an Immigration and Customs Enforcement's (ICE) policy of arresting people in state courthouses is illegal. (***New York v. United States Immigration & Customs Enforcement*** (So. Dist. of N.Y., June 10, 2020) 2020 U.S. Dist. LEXIS 101594.)

Additional Case Law:

Conceding that most other circuits have ruled that the mere passing of a counterfeit note (a $100 bill in this case), when coupled with an identification of the person who passed the note, furnishes probable cause to arrest the individual identified as passing the note (Citations at pg. 970, *infra*.), the Ninth Circuit declined to decide the issue, finding that whether or not the arrest was illegal, the arresting officers were entitled to qualified immunity from civil liability. (***Rodis v. City and County of San Francisco*** (9th Cir. 2009), 558 F.3rd 964; reversing its prior finding (at 499 F.3rd 1094.) that the officers lacked probable cause to make the arrest.)

Probable cause was found where the six-year-old victim, on two occasions, positively identified defendant as her attacker, and then a third time in court under oath. She also identified the defendant's father's car as the vehicle used. A crime lab analysis of semen taken from the victim could not eliminate defendant (pre-DNA). Also, defendant's modus operandi known to police from prior similar assaults matched. The fact that the victim's initial description of the assailant varied from how defendant actually appeared did not mean that the officer did not have probable cause to arrest defendant. (***McSherry v. City of Long Beach*** (9th Cir. 2009) 584 F.3rd 1129, 1135.)

Issue*: *Has a Person Been Arrested*?** Whether or not a person has been "*arrested*," (i.e., "*seized*,"), under the **Fourth Amendment**, is determined by considering whether, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave and/or was about to go to jail. (See ***In re James D. (1987) 43 Cal.3rd 903, 913.)

> "The standard for determining whether a person is under arrest is not simply whether a person believes that he is free to leave, *see* ***United States v. Mendenhall***, 446 U.S. 544, 554, 64 L.Ed.2nd 497, 100 S. Ct. 1870 (1980), but rather whether a reasonable person would believe that he or she is being subjected to more than 'temporary detention occasioned by border-crossing formalities.' ***United States v. Butler***, 249 F.3rd 1094, 1100 (9th Cir. 2001)." (***United States v. Hernandez*** (9th Cir. 2002) 314 F.3rd 430, 436; a border arrest and search case.)
>
> There was no arrest where Federal Bureau of Investigations (FBI) agents did not tell defendant that he had the right to refuse to accompany them to the FBI office, but neither did they tell him that he had to go. The agents used no tools of coercion to force defendant to go with them; i.e., they asked him if he would come in to talk because they were investigating cases, and he agreed to do so. Defendant was not in custody during the questioning until he confessed to the sexual assault and murder. In the time leading to the confession, a reasonable person in defendant's shoes would have thought that he or she could get up and go if declining to take part in further investigative questioning. (***United States v. Redlightning*** (9th Cir. 2010) 624 F.3rd 1090.)

Consequences of an Unlawful Arrest:

> *General Rule*: An arrest, if done *without probable cause*, is a violation of the **Fourth Amendment** as an unlawful "*seizure*," and therefore unconstitutional. Any evidence seized as a direct product of an unlawful arrest is subject to possible suppression. (See below).
>
> *Suppression of Resulting Evidence*:
>
> > Any evidence recovered as a direct product of such an unlawful arrest will be subject to suppression. (See ***Smith v. Ohio*** (1990) 494 U.S. 541 [110 S.Ct. 1288; 108 L.Ed.2nd 464].)
> >
> > Confession obtained as the product of an illegal arrest is subject to suppression, absent attenuating circumstances. (***Brown v. Illinois*** (1975) 422 U.S. 590, 603 [95 S.Ct. 2254; 45 L.Ed.2nd 416, 427]; ***Kaupp v. Texas*** (2003) 538 U.S. 626 [123 S.Ct. 1843; 155 L.Ed.2nd 814].)
> >
> > An unlawful arrest subjects the arresting officers to potential civil liability. (See "*Civil Liability*," under "*Procedural Rules*" (Chapter 2), above.

Effect of a Later Exoneration of an Arrestee Where Probable Cause to Arrest Existed:

> When probable cause exists, but the defendant is later exonerated, there is no basis for the officers' civil liability for an illegal arrest. "Probable cause arises when an officer has knowledge based on reasonably trustworthy information that the person arrested has committed a criminal offense. . . . 'Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part.'" (***McSherry v. City of Long Beach*** (2009) 584 F.3rd 1129, quoting, at p. 1135, ***Gausvik v. Perez*** (9th Cir. 2003) 345 F.3rd 813, 818.)
>
> An accusation of stalking that resulted in a warrantless arrest, where it turned out to be a false accusation, does not support a later civil claim of malicious prosecution alleged against the person making the accusation, even though the district attorney's office ultimately declines to prosecute. A cause of action for malicious prosecution cannot be premised on an arrest that does not result in formal charges, at least when the arrest is not pursuant to a warrant. (***Van Audenhove v. Perry*** (2017) 11 Cal.App.5th 915.)

Effect of Conflicting Evidence on a Determination as to the Legality of an Arrest:

> The fact that it was the plaintiff who originally called the police to the scene of the altercation, and that he himself claimed to have been assaulted by the victim, did not overcome the other evidence establishing probable cause to believe that plaintiff had attacked the elderly victim. "(P)robable cause requires only that those 'facts and circumstances within the officer's knowledge are sufficient to warrant a prudent person to believe "that the suspect has committed . . . an offense."'" (***Yousefian v. City of Glendale*** (9th Cir. 2015) 779 F.3rd 1010, 1014: citing **Barry v. Fowler** (9th Cir. 1990) 902 F.2nd 770, 773; and ***Michigan v. DeFillippo*** (1979) 443 U.S. 31, 37 [99 S.Ct. 2627; 61 L.Ed.2nd 343].)
>
> > "The absence of probable cause is a necessary element of (a **42 U.S.C.) § 1983** false arrest and malicious prosecution claims." (**Yousefian *v.* City of Glendale**, *supra*; citing ***Barry v. Fowler***, *supra*; and ***Awabdy v. City of Adelanto*** (9th Cir.2004) 368 F.3rd 1062, 1066.)
>
> Also, while exculpatory evidence that could negate probable cause cannot be ignored, or the fact that a criminal jury later determines that there was insufficient evidence to prove the case beyond a reasonable doubt, does not mean that an officer at the scene could not reasonably have concluded

that probable cause to arrest the plaintiff existed at the time. (***Yousefian v. City of Glendale***, *supra*, at pp. 1014-1015.)

An officer is entitled to qualified immunity from a civil allegation of unlawful arrest so long as at the time of the arrest (1) there was probable cause for the arrest, *or* (2) "it is *reasonably arguable* that there was probable cause for arrest—that is, whether reasonable officers could disagree as to the legality of the arrest such that the arresting officer is entitled to qualified immunity." (***Rosenbaum v. Washoe County*** (9th Cir. 2011) 663 F.3rd 1071, 1076; finding that because no Nevada statute applied to the plaintiff's "scalping" of tickets to a fair, his arrest was unlawful and because no reasonable officer would have believed so, the officer was not entitled to qualified immunity.)

Exceptions to the Rule:

Abduction From Abroad:

"'The right to demand and obtain extradition of an accused criminal is created by treaty.' ***United States v. Van Cauwenberghe***, 827 F.2nd 424, 428 (9th Cir. 1987) (quoting ***Quinn v. Robinson***, 783 F.2nd 776, 782 (9th Cir. 1986)) . . . . The Treaty, effective January 25, 1980, imposes two requirements relevant to defendants' motions. ⁋ First, **Article 17** of the Treaty incorporates the 'rule of specialty,' which precludes the requesting country from prosecuting a defendant for any offense other than that for which the surrendering country consented to extradite, unless surrendering country approves. *See* ***United States v. Iribe***, 564 F.3rd 1155, 1158 (9th Cir. 2009). **Article 17** states: 'A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted nor be extradited by that Party to a third State,' absent certain exceptions not relevant here. ⁋ Second, **Article 2** incorporates the principle of 'dual criminality,' that 'an accused person can be extradited only if the conduct complained of is considered criminal by the jurisprudence or under the laws of both the requesting and requested nations.' ***Quinn***, 783 F.2nd at 783. **Article 2(1)** provides that '[e]xtradition shall take place, subject to this Treaty, for willful acts which fall within any of the clauses of the Appendix and are punishable in accordance with the laws of both Contracting Parties by deprivation of liberty the maximum of which shall not be less than one year.' The Appendix to the Treaty lists 31 categories of offenses, including murder and robbery. **Article 2(3)** provides that '[e]xtradition shall also be granted for willful acts which, although not being included in the Appendix, are punishable, in accordance

with the federal laws of both Contracting Parties, by a deprivation of liberty the maximum of which shall not be less than one year.' ¶ We 'defer to a surrendering sovereign's reasonable determination that the offense in question is extraditable.' ***United States v. Saccoccia***, 58 F.3rd 754, 766 (1st Cir. 1995); *see also* ***Van Cauwenberghe***, 827 F.2nd at 429 (courts should accord 'proper deference' to 'a surrendering country's decision as to whether a particular offense comes within a treaty's extradition provision'). But we review de novo the 'district court's decision that an offense is an extraditable crime.' ***Van Cauwenberghe***, 827 F.2nd at 428. We likewise review de novo the district court's '[i]nterpretation of an extradition treaty, including whether the doctrines of dual criminality and specialty are satisfied.' ***United States v. Anderson***, 472 F.3rd 662, 666 (9th Cir. 2006)." (***United States v. Soto-Barraza*** (9th Cir. 2020) 2020 U.S. App. LEXIS 1742; unpublished]; where it was held that because Mexico elected to extradite defendants on all charges listed in the indictment, the Extradition Treaty between the United Mexican States and the United States of America's principles of specialty and dual criminality were satisfied, and defendants were properly extradited.)

However, it has also been held: "(T)he manner by which a defendant is brought to trial does not affect the government's ability to try him." (***United States v. Matta-Ballesteros*** (9th Cir. 1995) 71 F.3rd 754, 762.)

"(T)he means used to bring a criminal defendant before a court do not deprive that court of personal jurisdiction over the defendant." Prosecution of a defendant is not precluded merely because a defendant is abducted abroad for the purpose of prosecution, even if done in violation of an extradition treaty, such as when U.S. law enforcement agents forcibly abduct a foreign national in Mexico and bring him to the United States for prosecution. (***United States v. Anderson*** (9th Cir. 2006) 472 F.3rd 662, 666; citing ***United States v. Alvarez-Machain*** (1992) 504 U.S. 655, 661-662 [112 S.Ct. 2188; 119 L.Ed.2nd 441; ***Ker v. Illinois*** (1886) 119 U.S. 436 [7 S.Ct; 225; 30 L.Ed.421]; ***Frisbie v. Collins*** (1952) 342 U.S. 519 [72 S.Ct. 509; 96 L.Ed. 541]; see also ***People v. Salcido*** (2008) 44 Cal.4th 93, 119-126.)

> *Exceptions*: Where (1) the transfer of the defendant from a foreign country was done in violation of the terms of an applicable extradition treaty; or (2) the government engaged in misconduct of the most shocking and

outrageous kind to obtain the defendant's presence. (***United States v. Anderson***, *supra*.)

Because defendant had not been extradited, his argument that his removal from Panama to the United States was not in compliance with the **Extradition Treaty, U.S.-Pan., May 25, 1904, 34 Stat. 2851** failed. Moreover, the treaty did not prohibit the use of means besides extradition to obtain a defendant's presence in the United States. The Government had not engaged in shocking and outrageous conduct so as to warrant dismissal of the criminal case against him. The lies that an embassy official told Panamanian officials came after Panama had already decided to cooperate in returning defendant to the United States. Moreover, defendant was deported after his passport was revoked. The trial court properly denied dismissal based on its supervisory powers. There was no evidence that defendant's right to counsel was violated, and he had not developed his argument that international law was violated. Finally, even assuming the indictment process was deficient for its reliance on unlawfully obtained evidence, that deficiency was cured when defendant was convicted by a jury after a trial that excluded all of the suppressed evidence. (***United States v. Struckman*** (9th Cir. 2010) 611 F.3rd 560, 569-575.)

In Violation of a State Statute:

Evidence *will not* be suppressed when an arrest is in violation of a statute only (e.g., misdemeanor arrest not in the officer's presence), not involving a constitutional violation, and where the statute violated does not specifically mandate suppression of the resulting evidence. (***People v. Donaldson*** (1995) 36 Cal.App.4th 532; ***People v. Trapane*** (1991) 1 Cal.App.4th Supp. 10; ***People v. McKay*** (2002) 27 Cal.4th 601, 607-619, a violation of **V.C. § 21650.1** (riding a bicycle in the wrong direction); and ***People v. Gomez*** (2004) 117 Cal.App.4th 531, 538-539, seat belt violation, citing ***Atwater v. City of Lago Vista*** (2001) 532 U.S. 318 [121 S.Ct. 1536; 149 L.Ed.2nd 549] see also ***People v. Gallardo*** (2005) 130 Cal.App.4th 234, 239, fn. 1; ***People v. Bennett*** (2011) 197 Cal.App.4th 907, 918.)

A violation by a police officer of a state statute, such statute limiting the officer's right to make a custodial arrest or a search, so long as not also in violation of the **Fourth Amendment**, does not result in the suppression of the resulting evidence unless mandated by the terms of the statute. While a state is empowered to enact more restrictive search and seizure rules, violation of those rules that are not also a **Fourth Amendment** violation, does not invoke

the **Fourth Amendment's** exclusionary rule. (***Virginia v. Moore*** (2008) 553 U.S. 164 [128 S.Ct. 1598; 170 L.Ed.2nd 559]; ***People v. Xinos*** (2011) 192 Cal.App.4th 637, 653.)

However, "police may not use probable cause for a traffic violation to justify an arrest for an unrelated offense where, under the facts known to police, they have no probable cause supporting the unrelated offense." (***People v. Espino*** (2016) 247 Cal.App.4th 746, 765; ruling that just because officers *could have* arrested defendant for speeding, doesn't mean that that fact justifies an arrest for some other bookable (i.e., a felony) offense for which there was no probable cause. Consent to search obtained without probable cause to justify the arrest for a felony was held to be invalid.)

Prosecutions in Federal Court:

While a state may impose stricter standards on law enforcement in interpreting its own state constitution (i.e., "*independent state grounds*"), a prosecution in federal court is guided by the federal interpretation of the **Fourth Amendment** and is not required to use the state's stricter standards. (***United States v. Brobst*** (9th Cir. 2009) 558 F.3rd 982, 989-991, 997.)

California's Exclusionary Rule; ***Proposition 8***:

Cal. Const., Art I, § 28(d) (subsequently redesignated as **section 28(f)(2)**), the "*Truth in Evidence*" provisions of **Proposition 8** (passed in *June, 1982*), abrogated California's "*independent state grounds*" theory of exclusion, leaving the **United States Constitution** and its amendments as the sole basis for imposing an "*Exclusionary Rule*" on the admissibility of evidence. (***In re Lance W.*** (1985) 37 Cal.3rd 873; ***People v. Gutierrez*** (1984) 163 Cal.App.3rd 332, 334.)

Until passage of **Proposition 8**, California Courts were obligated to follows California's rules that in some circumstances may (and lawfully were allowed to) have been stricter than the federal standards. (See ***American Academy of Pediatrics v. Lungren*** (1997) 16 Cal.4th 307, 327-328; ***Raven v. Deukmejian*** (1990) 52 Cal.3rd 336. 353.)

Since passage of **Proposition 8**, California state courts now determine the reasonableness of a search or seizure by federal constitutional standards. (***People v. Schmitz*** (2012) 55 Cal.4th 909, 916; ***People v. Steele*** (2016) 246 Cal.App.4th 1110, 1114-1115.)

It is "*doubtful*," however, whether **Proposition 8's** "truth-in-evidence provision applies where the requested remedy is not suppression of evidence, but dismissal of all charges based on the state's violation of a defendant's (**Sixth Amendment**, speedy trial, delay in filing charges) due process rights." (***People v. Lazarus*** (2015) 238 Cal.App. 4th 734, 756.)

Statutory Elements of an Arrest:

Pen. Code § 834: The arrested person must be taken into custody in a case and in the manner authorized by law.

Pen. Code § 835: The arrest may be made by actual restraint of the person or the arrested person's submission to authority.

"A seizure occurs when there is '*either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority.'" (Italics in original; ***Hill v. City of Fountain Valley*** (9th Cir. 2023) 70 F.4th 507, 514; quoting ***California v. Hodari D.*** (1991) 499 U.S. 621, 626 [111 S.Ct. 1547; 113 L.Ed.2nd 690].)

"(T)he officer's show of authority must cause the plaintiff's submission." (***Ibid.***; citing ***California v. Hodari D.***, *supra*, at p. 596, which in turn cites ***Brower v. Inyo County*** (1989) 489 U.S. 593, 596 [109 S.Ct. 1378; 103 L.Ed.2nd 628].)

In ***Hill***, plaintiffs were not arrested in that they were never taken into custody and never submitted to the officers' authority. (Pgs. 514-515.)

Pen. Code § 835a: Reasonable force may be used to affect an arrest, prevent escape or overcome resistance. (See below)

Pen. Code §§ 834, **836**, **837**: An arrest may be made by a peace officer or a private person. (See below)

Wel. & Insti. Code § 625: Taking a minor "*into temporary custody*," as authorized by **W&I § 625**, is the functional equivalent of an *arrest*. (***In re Charles C.*** (1999) 76 Cal.App.4th 420, 425; see also ***In re Thierry S.*** (1977) 19 Cal.3rd 727, 734, fn. 6.)

***Legal Authority for Making an Arrests*:**

Peace Officer:

Pen. Code § 830: *Peace Officer Defined*: "Any person who comes within the provisions of this chapter and who otherwise meets all standards imposed by law on a peace officer is a peace officer, and notwithstanding any other provision of law, no person other than those designated in this chapter is a peace officer."

Pen. Code § 830.1: *Peace Officer Authority*:

(a) Any sheriff, undersheriff, or deputy sheriff, employed in that capacity, of a county, any chief of police of a city or chief, director, or chief executive officer of a consolidated municipal public safety agency that performs police functions, any police officer, employed in that capacity and appointed by the chief of police or chief, director, or chief executive of a public safety agency, of a city, any chief of police, or police officer of a district, including police officers of the San Diego Unified Port District Harbor Police, authorized by statute to maintain a police department, any marshal or deputy marshal of a superior court or county, any port warden or port police officer of the Harbor Department of the City of Los Angeles, or any inspector or investigator employed in that capacity in the office of a district attorney, is a peace officer. The authority of these peace officers extends to any place in the state, as follows:

(1) As to any public offense committed or which there is probable cause to believe has been committed within the political subdivision that employs the peace officer or in which the peace officer serves.

(2) Where the peace officer has the prior consent of the chief of police or chief, director, or chief executive officer of a consolidated municipal public safety agency, or person authorized by him or her to give consent, if the place is within a city, or of the sheriff, or person authorized by him or her to give consent, if the place is within a county.

(3) As to any public offense committed or which there is probable cause to believe has been committed in the peace officer's presence, and with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of the offense.

(b) The Attorney General and special agents and investigators of the Department of Justice are peace officers, and those assistant chiefs, deputy chiefs, chiefs, deputy directors, and division directors designated as peace officers by the Attorney General are peace officers. The authority of these peace officers extends to any place in the state where a public offense has been committed or where there is probable cause to believe one has been committed.

(c) A deputy sheriff of the County of Los Angeles, and a deputy sheriff of the Counties of Butte, Calaveras, Colusa, Del Norte, Glenn, Humboldt, Imperial, Inyo, Kern, Kings, Lake, Lassen, Madera, Mariposa, Mendocino, Merced, Mono, Plumas, Riverside, San Benito, San Diego, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Shasta, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehama, Trinity, Tulare, Tuolumne, and Yuba who is employed to perform duties exclusively or initially relating to custodial assignments with responsibilities for maintaining the operations of county custodial facilities, including the custody, care, supervision, security, movement, and transportation of inmates, is a peace officer whose authority extends to any place in the state only while engaged in the performance of the duties of the officer's respective employment and for the purpose of carrying out the primary function of employment relating to the officer's custodial assignments, or when performing other law enforcement duties directed by the officer's employing agency during a local state of emergency.

Case Law:

> Because the cross-deputization agreement between the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation and the State of Montana was valid, a Montana state trooper was validly deputized to enforce tribal law, and he had jurisdiction to seize and search defendant's truck. Under that agreement, the state trooper was permitted to enforce tribal law, not just state law. Nothing in the Tribes' dependent status precluded them from entering into such an agreement with the State of Montana, nor did anything in federal law. The cross-deputization agreement was not a Special Law Enforcement Commission agreement under the **Indian Law Enforcement Reform Act**, **25 U.S.C.S. §§ 2801-2804**. It was a compact between the Tribes and the State, and it neither deputized non-federal officers to enforce federal law nor deputized federal officers to enforce tribal law. (***United States v. Fowler*** (9th Cir. 2022) 48 F.4th 1022.)

As a matter of law based on undisputed evidence, the victim of an assault was working as a peace officer at the time of the incident because he was employed as a deputy sheriff by San Bernardino County. The Legislature added a new category of custodial deputy sheriff with limited powers to the definition of a peace officer when it enacted **subd. (c)** of **Pen. Code § 830.1**, but it did not intend to subtract from the category of peace officers previously defined in **subd. (a)**. (***People v. Orosco*** (2022) 82 Cal.App.5th 348, 355-357.)

Pen. Code § 830.2: *Listed California Peace Officers*: The following persons are peace officers whose authority extends to any place in the state:

(a) Any member of the Department of the California Highway Patrol including those members designated under **subdivision (a)** of **Section 2250.1** of the **Vehicle Code**, provided that the primary duty of the peace officer is the enforcement of any law relating to the use or operation of vehicles upon the highways, or laws pertaining to the provision of police services for the protection of state officers, state properties, and the occupants of state properties, or both, as set forth in the **Vehicle Code** and **Government Code**.

(b) A member of the University of California Police Department appointed pursuant to **Section 92600** of the **Education Code**, provided that the primary duty of the peace officer shall be the enforcement of the law within the area specified in **Section 92600** of the **Education Code**.

(c) A member of the California State University Police Departments appointed pursuant to **Section 89560** of the **Education Code**, provided that the primary duty of the peace officer shall be the enforcement of the law within the area specified in **Section 89560** of the **Education Code**.

(d)

(1) Any member of the Office of Correctional Safety of the Department of Corrections and Rehabilitation, provided that the primary duties of the peace officer shall be the investigation or apprehension of inmates, wards, parolees, parole violators, or escapees from state institutions, the transportation of those persons, the investigation of any violation of criminal law discovered while performing the usual and authorized duties of employment, and the

coordination of those activities with other criminal justice agencies.

(2) Any member of the Office of Internal Affairs of the Department of Corrections and Rehabilitation, provided that the primary duties shall be criminal investigations of Department of Corrections and Rehabilitation personnel and the coordination of those activities with other criminal justice agencies. For purposes of this subdivision, the member of the Office of Internal Affairs shall possess certification from the Commission on Peace Officer Standards and Training for investigators, or have completed training pursuant to **Section 6126.1**.

(e) Employees of the Department of Fish and Game designated by the director, provided that the primary duty of those peace officers shall be the enforcement of the law as set forth in **Section 856** of the **Fish and Game Code**.

(f) Employees of the Department of Parks and Recreation designated by the director pursuant to **Section 5008** of the **Public Resources Code**, provided that the primary duty of the peace officer shall be the enforcement of the law as set forth in **Section 5008** of the **Public Resources Code**.

(g) The Director of Forestry and Fire Protection and employees or classes of employees of the Department of Forestry and Fire Protection designated by the director pursuant to **Section 4156** of the **Public Resources Code**, provided that the primary duty of the peace officer shall be the enforcement of the law as that duty is set forth in **Section 4156** of the **Public Resources Code**.

(h) Persons employed by the Department of Alcoholic Beverage Control for the enforcement of **Division 9** (commencing with **Section 23000**) of the **Business and Professions Code** and designated by the Director of Alcoholic Beverage Control, provided that the primary duty of any of these peace officers shall be the enforcement of the laws relating to alcoholic beverages, as that duty is set forth in **Section 25755** of the **Business and Professions Code**.

(i) Marshals and police appointed by the Board of Directors of the California Exposition and State Fair pursuant to **Section 3332** of the **Food and Agricultural Code**, provided that the primary duty of the peace officers shall be the enforcement of the law as prescribed in that section.

(j) Persons employed by the Bureau of Cannabis Control for the enforcement of **Division 10** (commencing with **Section 26000**) of the **Business and Professions Code** and designated by the Director of Consumer of Affairs, provided that the primary duty of any of these peace officers shall be the enforcement of the laws as that duty is set forth in **Section 26015** of the **Business and Professions Code**.

Pen. Code § 830.3: *Listed California Peace Officers*: The following persons are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty or when making an arrest pursuant to **P.C. § 836** as to any public offense with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of that offense, or pursuant to **Gov't. Code §§ 8597** or **8598**. These peace officers may carry firearms only if authorized and under those terms and conditions as specified by their employing agencies:

(a) Persons employed by the Division of Investigation of the Department of Consumer Affairs and investigators of the Dental Board of California, who are designated by the Director of Consumer Affairs, provided that the primary duty of these peace officers shall be the enforcement of the law as that duty is set forth in **B&P § 160**.

(b) Voluntary fire wardens designated by the Director of Forestry and Fire Protection pursuant to **Pub. Res. Code § 4156**, provided that the primary duty of these peace officers shall be the enforcement of the law as that duty is set forth in **Section 4156** of that code.

(c) Employees of the Department of Motor Vehicles designated in **V.C. § 1655**, provided that the primary duty of these peace officers shall be the enforcement of the law as that duty is set forth in **Section 1655** of that code.

(d) Investigators of the California Horse Racing Board designated by the board, provided that the primary duty of these peace officers shall be the enforcement of **B&P Code §§ 19400 et seq.** (**Div. 8, Chapter 4**) and **B&P Code §§ 330 et seq.** (**Part 2, Title 9, Chapter 10**).

(e) The State Fire Marshal and assistant or deputy state fire marshals appointed pursuant to **H&S Code §§ 13103 et seq.**, provided that the primary duty of these peace officers shall be the

enforcement of the law as that duty is set forth in **Section 13104** of that code.

(f) Inspectors of the food and drug section designated by the chief pursuant to **H&S Code § 106500(a)**, provided that the primary duty of these peace officers shall be the enforcement of the law as that duty is set forth in **Section 106500** of that code.

(g) All investigators of the Division of Labor Standards Enforcement designated by the Labor Commissioner, provided that the primary duty of these peace officers shall be the enforcement of the law as prescribed in **Labor Code § 95**.

(h) All investigators of the State Departments of Health Care Services, Public Health, and Social Services, the Department of Toxic Substances Control, the Office of Statewide Health Planning and Development, and the Public Employees' Retirement System, provided that the primary duty of these peace officers shall be the enforcement of the law relating to the duties of his or her department or office. Notwithstanding any other law, investigators of the Public Employees' Retirement System shall not carry firearms.

(i) Either the Deputy Commissioner, Enforcement Branch of, or the Fraud Division Chief of, the Department of Insurance and those investigators designated by the deputy or the chief, provided that the primary duty of those investigators shall be the enforcement of **P.C. § 550**.

(j) Employees of the Department of Housing and Community Development designated under **H&S Code § 18023**, provided that the primary duty of these peace officers shall be the enforcement of the law as that duty is set forth in **Section 18023** of that code.

(k) Investigators of the office of the Controller, provided that the primary duty of these investigators shall be the enforcement of the law relating to the duties of that office. Notwithstanding any other law, except as authorized by the Controller, the peace officers designated pursuant to this subdivision shall not carry firearms.

(*l*) Investigators of the Department of Business Oversight designated by the Commissioner of Business Oversight, provided that the primary duty of these investigators shall be the enforcement of the provisions of law administered by the Department of Business Oversight. Notwithstanding any other law,

the peace officers designated pursuant to this subdivision shall not carry firearms.

(m) Persons employed by the Contractors' State License Board designated by the Director of Consumer Affairs pursuant to **B&P Code § 7011.5**, provided that the primary duty of these persons shall be the enforcement of the law as that duty is set forth in **B&P Code § 7011.5** and in **B&P Code §§ 7000 et seq.** (**Div. 3**, **Chapter 9**). The Director of Consumer Affairs may designate as peace officers not more than 12 persons who shall at the time of their designation be assigned to the special investigations unit of the board. Notwithstanding any other law, the persons designated pursuant to this subdivision shall not carry firearms.

(n) The Chief and coordinators of the Law Enforcement Branch of the Office of Emergency Services.

(o) Investigators of the office of the Secretary of State designated by the Secretary of State, provided that the primary duty of these peace officers shall be the enforcement of the law as prescribed in **Gov't. Code §§ 8200 et seq.** (**Title 2, Div. 1, Chapter 3**), and **Gov't. Code § 12172.5**. Notwithstanding any other law, the peace officers designated pursuant to this subdivision shall not carry firearms.

(p) The Deputy Director for Security designated by **Gov't. Code § 8880.38**, and all lottery security personnel assigned to the California State Lottery and designated by the director, provided that the primary duty of any of those peace officers shall be the enforcement of the laws related to ensuring the integrity, honesty, and fairness of the operation and administration of the California State Lottery.

(q) Investigators employed by the Investigation Division of the Employment Development Department designated by the director of the department, provided that the primary duty of those peace officers shall be the enforcement of the law as that duty is set forth in **Unemp. Ins. Code § 317**. Notwithstanding any other law, the peace officers designated pursuant to this subdivision shall not carry firearms.

(r) The chief and assistant chief of museum security and safety of the California Science Center, as designated by the executive director pursuant to **Section 4108 of the Food and Agricultural Code**, provided that the primary duty of those peace officers shall

be the enforcement of the law as that duty is set forth in **Fd. & Agri. Code § 4108**.

(s) Employees of the Franchise Tax Board designated by the board, provided that the primary duty of these peace officers shall be the enforcement of the law as set forth in **Rev. & Tax. Code §§ 19701 et seq.** (**Div. 2, Part. 10.2, Chapter 9**).

(t)

(1) Notwithstanding any other provision of this section, a peace officer authorized by this section shall not be authorized to carry firearms by his or her employing agency until that agency has adopted a policy on the use of deadly force by those peace officers, and until those peace officers have been instructed in the employing agency's policy on the use of deadly force.

(2) Every peace officer authorized pursuant to this section to carry firearms by his or her employing agency shall qualify in the use of the firearms at least every six months.

(u) Investigators of the Department of Managed Health Care designated by the Director of the Department of Managed Health Care, provided that the primary duty of these investigators shall be the enforcement of the provisions of laws administered by the Director of the Department of Managed Health Care. Notwithstanding any other law, the peace officers designated pursuant to this subdivision shall not carry firearms.

(v) The Chief, Deputy Chief, supervising investigators, and investigators of the Office of Protective Services of the State Department of Developmental Services, the Office of Protective Services of the State Department of State Hospitals, and the Office of Law Enforcement Support of the California Health and Human Services Agency, provided that the primary duty of each of those persons shall be the enforcement of the law relating to the duties of his or her department or office.

Pen. Code § 830.31: *Listed California Peace Officers*: The following persons are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty or when making an arrest pursuant to **Section 836** as to any public offense with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of that offense, or pursuant to **Gov't. Code §§ 8597 or 8598**.

These peace officers may carry firearms only if authorized, and under the terms and conditions specified, by their employing agency.

(a) A police officer of the County of Los Angeles, if the primary duty of the officer is the enforcement of the law in or about properties owned, operated, or administered by his or her employing agency or when performing necessary duties with respect to patrons, employees, and properties of his or her employing agency.

(b) A person designated by a local agency as a park ranger and regularly employed and paid in that capacity, if the primary duty of the officer is the protection of park and other property of the agency and the preservation of the peace therein.

(c)

(1) A peace officer of the Department of General Services of the City of Los Angeles who was transferred to the Los Angeles Police Department and designated by the Chief of Police of the Los Angeles Police Department, or his or her designee, if the primary duty of the officer is the enforcement of the law in or about properties owned, operated, or administered by the City of Los Angeles or when performing necessary duties with respect to patrons, employees, and properties of the City of Los Angeles. For purposes of this section, "properties" means city offices, city buildings, facilities, parks, yards, and warehouses.

(2) A peace officer designated pursuant to this subdivision, and authorized to carry firearms by the Los Angeles Police Department, shall satisfactorily complete the introductory course of firearm training required by **P.C. § 832** and shall requalify in the use of firearms every six months.

(3) Notwithstanding any other provision of law, a peace officer designated pursuant to this subdivision who is authorized to carry a firearm by his or her employing agency while on duty shall not be authorized to carry a firearm when he or she is not on duty.

(d) A housing authority patrol officer employed by the housing authority of a city, district, county, or city and county or employed by the police department of a city and county, if the primary duty of the officer is the enforcement of the law in or about properties owned, operated, or administered by his or her employing agency

or when performing necessary duties with respect to patrons, employees, and properties of his or her employing agency.

Pen. Code § 830.32: *Listed California Peace Officers*: The following persons are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty or when making an arrest pursuant to **Section 836** as to any public offense with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of that offense, or pursuant to **Gov't. Code §§ 8597 or 8598**. Those peace officers may carry firearms only if authorized and under terms and conditions specified by their employing agency.

(a) Members of a California Community College police department appointed pursuant to **Ed. Code § 72330**, if the primary duty of the police officer is the enforcement of the law as prescribed in **Section 72330** of the **Education Code**.

(b) Persons employed as members of a police department of a school district pursuant to Ed. Code § 38000, if the primary duty of the police officer is the enforcement of the law as prescribed in **Section 38000** of the **Education Code**.

(c) Any peace officer employed by a K-12 public school district or California Community College district who has completed training as prescribed by **P.C. § 832.3(f)** shall be designated a school police officer.

Pen. Code § 830.33: *Listed California Peace Officers*: The following persons are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty or when making an arrest pursuant to **P.C. § 836** as to any public offense with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of that offense, or pursuant to **Gov't. Code §§ 8597 or 8598**. Those peace officers may carry firearms only if authorized and under terms and conditions specified by their employing agency.

(a) A member of the San Francisco Bay Area Rapid Transit District Police Department appointed pursuant to **Pub. Util. Code § 28767.5**, if the primary duty of the peace officer is the enforcement of the law in or about properties owned, operated, or administered by the district or when performing necessary duties with respect to patrons, employees, and properties of the district.

(b) Harbor or port police regularly employed and paid in that capacity by a county, city, or district other than peace officers authorized under **P.C. § 830.1**, if the primary duty of the peace

officer is the enforcement of the law in or about the properties owned, operated, or administered by the harbor or port or when performing necessary duties with respect to patrons, employees, and properties of the harbor or port.

(c) Transit police officers or peace officers of a county, city, transit development board, or district, if the primary duty of the peace officer is the enforcement of the law in or about properties owned, operated, or administered by the employing agency or when performing necessary duties with respect to patrons, employees, and properties of the employing agency.

(d) Any person regularly employed as an airport law enforcement officer by a city, county, or district operating the airport or by a joint powers agency, created pursuant to **Gov't. Code §§ 6500 et seq.** (**Title 1, Div. 7, Chapter 5**), operating the airport, if the primary duty of the peace officer is the enforcement of the law in or about properties owned, operated, and administered by the employing agency or when performing necessary duties with respect to patrons, employees, and properties of the employing agency.

(e)

(1) Any railroad police officer commissioned by the Governor pursuant to **Pub. Util. Code § 8226**, if the primary duty of the peace officer is the enforcement of the law in or about properties owned, operated, or administered by the employing agency or when performing necessary duties with respect to patrons, employees, and properties of the employing agency.

(2) Notwithstanding any other provision of law, a railroad police officer who has met the current requirements of the Commission on Peace Officer Standards and Training necessary for exercising the powers of a peace officer, and who has been commissioned by the Governor as described herein, and the officer's employing agency, may apply for access to information from the California Law Enforcement Telecommunications System (CLETS) through a local law enforcement agency that has been granted direct access to CLETS, provided that, in addition to other review standards and conditions of eligibility applied by the Department of Justice, the CLETS Advisory Committee and the Attorney General, before access is granted the following are satisfied:

(A) The employing agency shall enter into a Release of CLETS Information agreement as provided for in the CLETS policies, practices, and procedures, and the required background check on the peace officer and other pertinent personnel has been completed, together with all required training.

(B) The Release of CLETS Information agreement shall be in substantially the same form as prescribed by the CLETS policies, practices, and procedures for public agencies of law enforcement who subscribe to CLETS services, and shall be subject to the provisions of **Gov't. Code §§ 15150 et seq.** (**Div. 3, Title 2, Chapter 2.5**) and the CLETS policies, practices, and procedures.

(C)

(i) The employing agency shall expressly waive any objections to jurisdiction in the courts of the State of California for any liability arising from use, abuse, or misuse of CLETS access or services or the information derived therefrom, or with respect to any legal actions to enforce provisions of California law relating to CLETS access, services, or information under this subdivision, and provided that this liability shall be in addition to that imposed by **Pub. Util. Code § 8226**.

(ii) The employing agency shall further agree to utilize CLETS access, services, or information only for law enforcement activities by peace officers who have met the current requirements of the Commission on Peace Officer Standards and Training necessary for exercising the powers of a peace officer, and who have been commissioned as described herein who are operating within the State of California, where the activities are directly related to investigations or arrests arising from conduct occurring within the State of California.

(iii) The employing agency shall further agree to pay to the Department of Justice and the providing local law enforcement agency all costs related to the provision of access or services, including, but not limited to, any and all hardware, interface modules, and costs for telephonic communications, as well as administrative costs.

Pen. Code § 830.34: *Listed California Peace Officers*: The following persons are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty or when making an arrest pursuant to **P.C. § 836** as to any public offense with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of that offense, or pursuant to **Gov't. Code §§ 8597 or 8598**. Those peace officers may carry firearms only if authorized and under terms and conditions specified by their employing agency.

(a) Persons designated as a security officer by a municipal utility district pursuant to **Pub. Util. Code § 12820**, if the primary duty of the officer is the protection of the properties of the utility district and the protection of the persons thereon.

(b) Persons designated as a security officer by a county water district pursuant to **Water Code § 30547**, if the primary duty of the officer is the protection of the properties of the county water district and the protection of the persons thereon.

(c) The security director of the public utilities commission of a city and county, if the primary duty of the security director is the protection of the properties of the commission and the protection of the persons thereon.

(d) Persons employed as a park ranger by a municipal water district pursuant to **Water Code § 71342.5,** if the primary duty of the park ranger is the protection of the properties of the municipal water district and the protection of the persons thereon.

Pen. Code § 830.35: *Listed California Peace Officers*: The following persons are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty or when making an arrest pursuant to **P.C. § 836** as to any public offense with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of that offense, or pursuant to **Gov't. Code §§ 8597 or 8598**.

Those peace officers may carry firearms only if authorized and under terms and conditions specified by their employing agency.

> **(a)** A welfare fraud investigator or inspector, regularly employed and paid in that capacity by a county, if the primary duty of the peace officer is the enforcement of the provisions of the **Welfare and Institutions Code**.
>
> **(b)** A child support investigator or inspector, regularly employed and paid in that capacity by a district attorney's office, if the primary duty of the peace officer is the enforcement of the provisions of the **Family Code** and **P.C. § 270**.
>
> **(c)** The coroner and deputy coroners, regularly employed and paid in that capacity, of a county, if the primary duty of the peace officer are those duties set forth in **Gov't. Code §§ 27469** and **27491** to **27491.4**, inclusive.

Pen. Code § 830.36: *Listed California Peace Officers*: The following persons are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty or when making an arrest pursuant to **P.C. § 836** as to any public offense with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of that offense, or pursuant to **Gov't. Code §§ 8597** or **8598**. Those peace officers may carry firearms only if authorized and under terms and conditions specified by their employing agency.

> **(a)** The Sergeant-at-Arms of each house of the Legislature, if the primary duty of the peace officer is the enforcement of the law in or about properties owned, operated, or administered by the employing agency or when performing necessary duties with respect to patrons, employees, and properties of the employing agency.
>
> **(b)** Marshals of the Supreme Court and bailiffs of the courts of appeal, and coordinators of security for the judicial branch, if the primary duty of the peace officer is the enforcement of the law in or about properties owned, operated, or administered by the employing agency or when performing necessary duties with respect to patrons, employees, and properties of the employing agency.
>
> **(c)** Court service officer in a county of the second class and third class, if the primary duty of the peace officer is the enforcement of the law in or about properties owned, operated, or administered by the employing agency or when performing necessary duties with

respect to patrons, employees, and properties of the employing agency.

Pen. Code § 830.37: *Listed California Peace Officers*: The following persons are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty or when making an arrest pursuant to **P.C. § 836** as to any public offense with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of that offense, or pursuant to **Gov't. Code §§ 8597** or **8598**. These peace officers may carry firearms only if authorized and under terms and conditions specified by their employing agency.

(a) Members of an arson-investigating unit, regularly paid and employed in that capacity, of a fire department or fire protection agency of a county, city, city and county, district, or the state, if the primary duty of these peace officers is the detection and apprehension of persons who have violated any fire law or committed insurance fraud.

(b) Members other than members of an arson-investigating unit, regularly paid and employed in that capacity, of a fire department or fire protection agency of a county, city, city and county, district, or the state, if the primary duty of these peace officers, when acting in that capacity, is the enforcement of laws relating to fire prevention or fire suppression.

(c) Voluntary fire wardens as are designated by the Director of Forestry and Fire Protection pursuant to **Pub. Res. Code § 4156**, provided that the primary duty of these peace officers shall be the enforcement of the law as that duty is set forth in **Pub. Res. Code § 4156**.

(d) Firefighter/security guards by the Military Department, if the primary duty of the peace officer is the enforcement of the law in or about properties owned, operated, or administered by the employing agency or when performing necessary duties with respect to patrons, employees, and properties of the employing agency.

Pen. Code § 830.38: *Listed California Peace Officers*:

(a) The officers of a state hospital under the jurisdiction of the State Department of State Hospitals or the State Department of Developmental Services appointed pursuant to **W&I Code §§ 4313** or **4493**, are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty

or when making an arrest pursuant to **P.C. § 836** as to any public offense with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of that offense, or pursuant to **Gov't. Code §§ 8597** or **8598** provided that the primary duty of the peace officers shall be the enforcement of the law as set forth in **W&I Code §§ 4311**, **4313**, **4491**, and **4493**. Those peace officers may carry firearms only if authorized and under terms and conditions specified by their employing agency.

(b) By *July 1, 2015*, the California Health and Human Services Agency shall develop training protocols and policies and procedures for peace officers specified in **subdivision (a)**. When appropriate, training protocols and policies and procedures shall be uniformly implemented in both state hospitals and developmental centers. Additional training protocols and policies and procedures shall be developed to address the unique characteristics of the residents in each type of facility.

(c) In consultation with system stakeholders, the agency shall develop recommendations to further improve the quality and stability of law enforcement and investigative functions at both developmental centers and state hospitals in a meaningful and sustainable manner. These recommendations shall be submitted to the budget committees and relevant policy committees of both houses of the Legislature no later than *January 10, 2015*.

Pen. Code § 830.39: *Listed California Peace Officers*:

(a) Any regularly employed law enforcement officer of the Oregon State Police, the Nevada Department of Motor Vehicles and Public Safety, or the Arizona Department of Public Safety is a peace officer in this state if all of the following conditions are met:

(1) The officer is providing, or attempting to provide, law enforcement services within this state on the state or county highways and areas immediately adjacent thereto, within a distance of up to 50 statute miles of the contiguous border of this state and the state employing the officer.

(2) The officer is providing, or attempting to provide, law enforcement services pursuant to either of the following:

(A) In response to a request for services initiated by a member of the California Highway Patrol.

(B) In response to a reasonable belief that emergency law enforcement services are necessary for the preservation of life, and a request for services by a member of the Department of the California Highway Patrol is impractical to obtain under the circumstances. In those situations, the officer shall obtain authorization as soon as practical.

(3) The officer is providing, or attempting to provide, law enforcement services for the purpose of assisting a member of the California Highway Patrol to provide emergency service in response to misdemeanor or felony criminal activity, pursuant to the authority of a peace officer as provided in **P.C. § 830.2(a)**, or, in the event of highway-related traffic accidents, emergency incidents or other similar public safety problems, whether or not a member of the California Highway Patrol is present at the scene of the event. Nothing in this section shall be construed to confer upon the officer the authority to enforce traffic or motor vehicle infractions.

(4) An agreement pursuant to **V.C. § 2403.5** is in effect between the Department of the California Highway Patrol and the agency of the adjoining state employing the officer, the officer acts in accordance with that agreement, and the agreement specifies that the officer and employing agency of the adjoining state shall be subject to the same civil immunities and liabilities as a peace officer and his or her employing agency in this state.

(5) The officer receives no separate compensation from this state for providing law enforcement services within this state.

(6) The adjoining state employing the officer confers similar rights and authority upon a member of the California Highway Patrol who renders assistance within that state.

(b) Whenever, pursuant to Nevada law, a Nevada correctional officer is working or supervising Nevada inmates who are performing conservation-related projects or fire suppression duties within California, the correctional officer may maintain custody of the inmates in California, and retake any inmate who should escape in California, to the same extent as if the correctional

officer were a peace officer in this state and the inmate had been committed to his or her custody in proceedings under California law.

(c) Notwithstanding any other provision of law, any person who is acting as a peace officer in this state in the manner described in this section shall be deemed to have met the requirements of **Gov't. Code § 1031** and the selection and training standards of the Commission on Peace Officer Standards and Training if the officer has completed the basic training required for peace officers in his or her state.

(d) In no case shall a peace officer of an adjoining state be authorized to provide services within a California jurisdiction during any period in which the regular law enforcement agency of the jurisdiction is involved in a labor dispute.

Pen. Code § 830.4: *Listed California Peace Officers*: The following persons are peace officers whose authority extends to any place in the state for the purpose of performing their duties under the conditions as specified by statute. Those peace officers may carry firearms only if authorized and under terms and conditions specified by their employing agency.

(a) Members of the California National Guard have the powers of peace officers when they are involved in any or all of the following:

(1) Called or ordered into active state service by the Governor pursuant to the provisions of **Section 143** or **146** of the **Military and Veterans Code**.

(2) Serving within the area wherein military assistance is required.

(3) Directly assisting civil authorities in any of the situations specified in **Section 143** or **146** of the **Military and Veterans Code**.

The authority of the peace officer under this subdivision extends to the area wherein military assistance is required as to a public offense committed or which there is reasonable cause to believe has been committed within that area. The requirements of **Section 1031** of the **Government Code** are not applicable under those circumstances.

(b) Security officers of the Department of Justice when performing assigned duties as security officers.

(c) Security officers of the college named in **Section 92200** of the **Education Code**. These officers shall have authority of peace officers only within the City and County of San Francisco. Notwithstanding any other law, the peace officers designated by this subdivision shall not be authorized by this subdivision to carry firearms either on or off duty. Notwithstanding any other law, the act which designated the persons described in this subdivision as peace officers shall serve only to define those persons as peace officers, the extent of their jurisdiction, and the nature and scope of their authority, powers, and duties, and their status shall not change for purposes of retirement, workers' compensation or similar injury or death benefits, or other employee benefits.

Pen. Code § 830.41: *Listed California Peace Officers*:

Notwithstanding any other provision of law, the City of Tulelake, California, is authorized to enter into a mutual aid agreement with the City of Malin, Oregon, for the purpose of permitting their police departments to provide mutual aid to each other when necessary. Before the effective date of the agreement, the agreement shall be reviewed and approved by the Commissioner of the California Highway Patrol.

Pen. Code § 830.5: *Listed California Peace Officers*:

(a) A youth correctional officer employed by the Department of Youth and Community Restoration, having custody of individuals subject to its jurisdiction, a youth correctional counselor series employee of the Department of Youth and Community Restoration, an employee of the Department of Youth and Community Restoration designated by the director, an employee of the Board of Juvenile Hearings designated by the director, and any superintendent, supervisor, or employee having custodial responsibilities in an institution or camp operated by the Department of Youth and Community Restoration is a peace officer whose authority extends to any place in the state while engaged in the performance of the duties of their respective employment and for the purpose of carrying out the primary function of their employment or as required under Sections **8597**, **8598**, and **8617** of the **Government Code.**

(b) A correctional officer or correctional counselor employed by the Department of Youth and Community Restoration or an

employee of the department having custody of wards may carry a firearm while not on duty. This section does not require licensure pursuant to **Section 25400**. The director may deny, suspend, or revoke for good cause a person's right to carry a firearm under this subdivision. That person shall, upon request, receive a hearing, as provided for in the negotiated grievance procedure between the exclusive employee representative and the Department of Youth and Community Restoration or the Board of Juvenile Hearings, to review the director's or chairperson's decision.

(c) The Department of Youth and Community Restoration shall develop and implement a policy for arming peace officers of the department who comprise "high-risk transportation details" or "high-risk escape details" no later than *December 31, 2020*.

(d) The Department of Youth and Community Restoration shall train and arm those peace officers who comprise tactical teams at each facility for use during "*high-risk escape details*."

(e) Persons permitted to carry firearms pursuant to this section, either on or off duty, shall meet the training requirements of **Section 832** and shall qualify with the firearm at least quarterly. It is the responsibility of the individual officer or designee to maintain their eligibility to carry concealable firearms off duty. Failure to maintain quarterly qualifications by an officer or designee with any concealable firearms carried off duty shall constitute good cause to suspend or revoke that person's right to carry firearms off duty.

(f) The director shall promulgate regulations consistent with this section.

(g) "*High-risk transportation details*" and "*high-risk escape details*" as used in this section shall be determined by the Director of the Department of Youth and Community Restoration, or the director's designee. The director, or the director's designee, shall consider at least the protection of the public, protection of officers, flight risk, and violence potential of wards in determining "*high-risk transportation details*" and "*high-risk escape details*."

(h) "*Transportation detail*" as used in this section includes transportation of wards outside of the facility, including, but not limited to, court appearances, medical trips, and interfacility transfers.

(i) This section shall become operative *July 1, 2020*.

Note: Effective *July 1, 2020*, parole officers/agents in the Division of Juvenile Parole Operations and with the Juvenile Parole Board, and correctional officers employed by the Division of Juvenile Justice, are moved from the list of peace officers contained in **P.C. § 830.5** into new **P.C. § 830.53** (see below), with new titles, consistent with other provisions of amended sections **Gov't. C. §§ 12820–12838**; that moved the Division of Juvenile Justice and the Board of Juvenile Hearings from CDCR and re-establishes them as the Department of Youth and Community Restoration under the California Health and Human Services Agency.

Pen. Code § 830.53: Youth Correctional Officers, Correctional Officers, and Correctional Counselors, as Peace Officers:

(a) A youth correctional officer employed by the Department of Youth and Community Restoration, having custody of individuals subject to its jurisdiction, a youth correctional counselor series employee of the Department of Youth and Community Restoration, an employee of the Department of Youth and Community Restoration designated by the director, an employee of the Board of Juvenile Hearings designated by the director, and any superintendent, supervisor, or employee having custodial responsibilities in an institution or camp operated by the Department of Youth and Community Restoration is a peace officer whose authority extends to any place in the state while engaged in the performance of the duties of their respective employment and for the purpose of carrying out the primary function of their employment or as required under **Sections 8597**, **8598**, and **8617** of the **Government Code**.

(b) A correctional officer or correctional counselor employed by the Department of Youth and Community Restoration or an employee of the department having custody of wards may carry a firearm while not on duty. This section does not require licensure pursuant to **Section 25400**. The director may deny, suspend, or revoke for good cause a person's right to carry a firearm under this subdivision. That person shall, upon request, receive a hearing, as provided for in the negotiated grievance procedure between the exclusive employee representative and the Department of Youth and Community Restoration or the Board of Juvenile Hearings, to review the director's or chairperson's decision.

(c) The Department of Youth and Community Restoration shall develop and implement a policy for arming peace officers of the

department who comprise “high-risk transportation details” or “high-risk escape details” no later than *December 31, 2020.*

(d) The Department of Youth and Community Restoration shall train and arm those peace officers who comprise tactical teams at each facility for use during “high-risk escape details.”

(e) Persons permitted to carry firearms pursuant to this section, either on or off duty, shall meet the training requirements of **Section 832** and shall qualify with the firearm at least quarterly. It is the responsibility of the individual officer or designee to maintain their eligibility to carry concealable firearms off duty. Failure to maintain quarterly qualifications by an officer or designee with any concealable firearms carried off duty shall constitute good cause to suspend or revoke that person’s right to carry firearms off duty.

(f) The director shall promulgate regulations consistent with this section.

(g) “*High-risk transportation details*” and “*high-risk escape details*” as used in this section shall be determined by the Director of the Department of Youth and Community Restoration, or the director’s designee. The director, or the director’s designee, shall consider at least the protection of the public, protection of officers, flight risk, and violence potential of wards in determining “*high-risk transportation details*” and “*high-risk escape details*.”

(h) “*Transportation detail*” as used in this section includes transportation of wards outside of the facility, including, but not limited to, court appearances, medical trips, and interfacility transfers.

(i) This section shall become operative *July 1, 2020*.

Pen. Code § 830.55: *Listed California Peace Officers*:

(a)

(1) As used in this section, a correctional officer is a peace officer, employed by a city, county, or city and county that operates a facility described in **P.C. § 2910.5** or **W&I Code § 1753.3** or facilities operated by counties pursuant to **P.C. §§ 6241** or **6242** under contract with the Department of Corrections and Rehabilitation or the Division of Juvenile Justice within the department, who has the

authority and responsibility for maintaining custody of specified state prison inmates or wards, and who performs tasks related to the operation of a detention facility used for the detention of persons who have violated parole or are awaiting parole back into the community or, upon court order, either for their own safekeeping or for the specific purpose of serving a sentence therein.

(2) As used in this section, a correctional officer is also a peace officer, employed by a city, county, or city and county that operates a facility described in **P.C. § 4115.55**, who has the authority and responsibility for maintaining custody of inmates sentenced to or housed in that facility, and who performs tasks related to the operation of that facility.

(b) A correctional officer shall have no right to carry or possess firearms in the performance of his or her prescribed duties, except, under the direction of the superintendent of the facility, while engaged in transporting prisoners, guarding hospitalized prisoners, or suppressing riots, lynchings, escapes, or rescues in or about a detention facility established pursuant **to P.C. §§ 2910.5** or **4115.55** or **W&I Code § 1753.3**.

(c) Each person described in this section as a correctional officer, within 90 days following the date of the initial assignment to that position, shall satisfactorily complete the training course specified in **P.C. § 832**. In addition, each person designated as a correctional officer, within one year following the date of the initial assignment as an officer, shall have satisfactorily met the minimum selection and training standards prescribed by the Board of State and Community Corrections pursuant to **P.C. § 6035**. Persons designated as correctional officers, before the expiration of the 90-day and one-year periods described in this subdivision, who have not yet completed the required training, may perform the duties of a correctional officer only while under the direct supervision of a correctional officer who has completed the training required in this section, and shall not carry or possess firearms in the performance of their prescribed duties.

(d) This section shall not be construed to confer any authority upon a correctional officer except while on duty.

(e) A correctional officer may use reasonable force in establishing and maintaining custody of persons delivered to him or her by a law enforcement officer, may make arrests for misdemeanors and

felonies within the local detention facility pursuant to a duly issued warrant, and may make warrantless arrests pursuant to **Section 836.5** only during the duration of his or her job.

Pen. Code § 830.6: *Listed California Peace Officers*:

(a)

(1) Whenever any qualified person is deputized or appointed by the proper authority as a reserve or auxiliary sheriff or city police officer, a reserve deputy sheriff, a reserve deputy marshal, a reserve police officer of a regional park district or of a transit district, a reserve park ranger, a reserve harbor or port police officer of a county, city, or district as specified in **Har. & Nav. Code § 663.5**, a reserve deputy of the Department of Fish and Game, a reserve special agent of the Department of Justice, a reserve officer of a community service district which is authorized under **Gov't. Code § 61600(h)** to maintain a police department or other police protection, a reserve officer of a school district police department under **Ed. Code § 35021.5**, a reserve officer of a community college police department under **Ed. Code § 72330**, a reserve officer of a police protection district formed under **H&S Code §§ 20000 et seq.** (**Div. 14, Part 1**), or a reserve housing authority patrol officer employed by a housing authority defined in **P.C. § 830.31(d)**, and is assigned specific police functions by that authority, the person is a peace officer, if the person qualifies as set forth in **P.C. § 832.6**. The authority of a person designated as a peace officer pursuant to this paragraph extends only for the duration of the person's specific assignment. A reserve park ranger or a transit, harbor, or port district reserve officer may carry firearms only if authorized by, and under those terms and conditions as are specified by, his or her employing agency.

(2) Whenever any qualified person is deputized or appointed by the proper authority as a reserve or auxiliary sheriff or city police officer, a reserve deputy sheriff, a reserve deputy marshal, a reserve park ranger, a reserve police officer of a regional park district, transit district, community college district, or school district, a reserve harbor or port police officer of a county, city, or district as specified in **Har. & Nav. Code § 663.5**, a reserve officer of a community service district that is authorized under **Gov't. Code § 61600(h)** to maintain a police department or other

police protection, or a reserve officer of a police protection district formed under **H&S Code §§ 20000 et seq.** (**Div. 14, Part 1**), and is so designated by local ordinance or, if the local agency is not authorized to act by ordinance, by resolution, either individually or by class, and is assigned to the prevention and detection of crime and the general enforcement of the laws of this state by that authority, the person is a peace officer, if the person qualifies as set forth in **P.C. § 832.6(a)(1)**. The authority of a person designated as a peace officer pursuant to this paragraph includes the full powers and duties of a peace officer as provided by **P.C. § 830.1**. A transit, harbor, or port district reserve police officer, or a city or county reserve peace officer who is not provided with the powers and duties authorized by **P.C. § 830.1**, has the powers and duties authorized in **P.C. § 830.33**, or in the case of a reserve park ranger, the powers and duties that are authorized in **P.C. § 830.31**, or in the case of a reserve housing authority patrol officer, the powers and duties that are authorized in **P.C. § 830.31(d)**, and a school district reserve police officer or a community college district reserve police officer has the powers and duties authorized in **P.C. § 830.32**.

(b) Whenever any person designated by a Native American tribe recognized by the United States Secretary of the Interior is deputized or appointed by the county sheriff as a reserve or auxiliary sheriff or a reserve deputy sheriff, and is assigned to the prevention and detection of crime and the general enforcement of the laws of this state by the county sheriff, the person is a peace officer, if the person qualifies as set forth in **P.C. § 832.6(a)(1)**. The authority of a peace officer pursuant to this subdivision includes the full powers and duties of a peace officer as provided by **P.C. § 830.1**.

(c) Whenever any person is summoned to the aid of any uniformed peace officer, the summoned person is vested with the powers of a peace officer that are expressly delegated to him or her by the summoning officer or that are otherwise reasonably necessary to properly assist the officer.

Pen. Code § 830.65: *Listed California Peace Officers*:

(a) Any person who is a regularly employed police officer of a city or a regularly employed deputy sheriff of a county, or a reserve peace officer of a city or county and is appointed in the manner

described in **P.C. § 832.6(a)(1)** or **(2)**, may be appointed as a Campaign Against Marijuana Planting emergency appointee by the Attorney General pursuant to **Section 5** of **Chapter 1563** of the **Statutes of 1985** to assist with a specific investigation, tactical operation, or search and rescue operation. When so appointed, the person shall be a peace officer of the Department of Justice, provided that the person's authority shall extend only for the duration of the specific assignment.

(b) Notwithstanding any other provision of law, any person who is appointed as a peace officer in the manner described in this section shall be deemed to have met the requirements **Gov't. Code § 1031** and the selection and training standards of the Commission on Peace Officer Standards and Training.

Pen. Code § 830.7: *Persons Who Are Not California Peace Officers but with Powers of Arrest*:

The following persons are *not* peace officers but *may* exercise the powers of arrest of a peace officer as specified in **Section 836** during the course and within the scope of their employment, if they successfully complete a course in the exercise of those powers pursuant to **Section 832**:

(a) Persons designated by a cemetery authority pursuant to **Section 8325** of the **Health and Safety Code**.

(b) Persons regularly employed as security officers for independent institutions of higher education, recognized under **subdivision (b)** of **Section 66010** of the **Education Code**, if the institution has concluded a memorandum of understanding, permitting the exercise of that authority, with the sheriff or the chief of police within whose jurisdiction the institution lies.

(c) Persons regularly employed as security officers for health facilities, as defined in **Section 1250** of the **Health and Safety Code**, that are owned and operated by cities, counties, and cities and counties, if the facility has concluded a memorandum of understanding, permitting the exercise of that authority, with the sheriff or the chief of police within whose jurisdiction the facility lies.

(d) Employees or classes of employees of the California Department of Forestry and Fire Protection designated by the Director of Forestry and Fire Protection, provided that

the primary duty of the employee shall be the enforcement of the law as that duty is set forth in **Section 4156** of the **Public Resources Code.**

(e) Persons regularly employed as inspectors, supervisors, or security officers for transit districts, as defined in **Section 99213** of the **Public Utilities Code**, if the district has concluded a memorandum of understanding permitting the exercise of that authority, with, as applicable, the sheriff, the chief of police, or the Department of the California Highway Patrol within whose jurisdiction the district lies. For the purposes of this subdivision, the exercise of peace officer authority may include the authority to remove a vehicle from a railroad right-of-way as set forth in **Section 22656** of the **Vehicle Code.**

(f) Nonpeace officers regularly employed as county parole officers pursuant to **Section 3089**.

(g) Persons regularly employed as investigators by the Department of Transportation for the City of Los Angeles and designated by local ordinance as public officers, to the extent necessary to enforce laws related to public transportation, and authorized by a memorandum of understanding with the chief of police, permitting the exercise of that authority. For the purposes of this subdivision, "investigator" means an employee defined in **Section 53075.61** of the **Government Code** authorized by local ordinance to enforce laws related to public transportation. Transportation investigators authorized by this section shall not be deemed "peace officers" for purposes of **Sections 241** and **243**.

(h) Persons regularly employed by any department of the City of Los Angeles who are designated as security officers and authorized by local ordinance to enforce laws related to the preservation of peace in or about the properties owned, controlled, operated, or administered by any department of the City of Los Angeles and authorized by a memorandum of understanding with the Chief of Police of the City of Los Angeles permitting the exercise of that authority. Security officers authorized pursuant to this subdivision shall not be deemed peace officers for purposes of **Sections 241** and **243.**

(i) Illegal dumping enforcement officers or code enforcement officers, to the extent necessary to enforce laws related to illegal waste dumping or littering, and authorized by a memorandum of understanding with, as applicable, the sheriff or chief of police within whose jurisdiction the person is employed, permitting the exercise of that authority. An "illegal dumping enforcement officer or code enforcement officer" is defined, for purposes of this section, as a person employed full time, part time, or as a volunteer after completing training prescribed by law, by a city, county, or city and county, whose duties include illegal dumping enforcement and who is designated by local ordinance as a public officer. An illegal dumping enforcement officer or code enforcement officer may also be a person who is not regularly employed by a city, county, or city and county, but who has met all training requirements and is directly supervised by a regularly employed illegal dumping enforcement officer or code enforcement officer conducting illegal dumping enforcement. This person shall not have the power of arrest or access to summary criminal history information pursuant to this section. No person may be appointed as an illegal dumping enforcement officer or code enforcement officer if that person is disqualified pursuant to the criteria set forth in **Section 1029** of the **Government Code**. Persons regularly employed by a city, county, or city and county designated pursuant to this subdivision may be furnished state summary criminal history information upon a showing of compelling need pursuant to **subdivision (c)** of **Section 11105**.

(j) Until *January 1, 2025*, persons who, pursuant to **Section 4108** of the **Food and Agricultural Code**, were appointed as Museum Security Officers and Supervising Museum Security Officers by the Exposition Park General Manager before *March 1, 2022*, and have not yet completed the regular basic training course prescribed by the Commission on Peace Officer Standards and Training.

Har. & Nav. Code § 663: Peace Officer, Defined:

A "*peace officer*" is defined as "every peace officer of this state or of any city, county, city and county, or other political subdivision of the state . . .", providing such officers authority to "enforce this chapter and any regulations adopted by the department pursuant to this chapter and in the exercise of that duty shall have the authority

to stop and board any vessel subject to this chapter, where the peace officer has probable cause to believe that a violation of state law or regulations or local ordinance exists."

Case Law:

A person who lacks the legislatively set qualifications to be a county sheriff may not run for that office. In disqualifying under **Elec. Code § 13.5** a candidate who lacked the necessary experience to run for county sheriff under **Gov't. Code §§ 24004.3 & 24009(a)**, the county clerk properly declined to consider constitutional arguments because **Cal. Const., art. III, § 3.5(a)**, prohibited administrative declarations of unconstitutionality. A challenge to the Legislature's power to set qualifications lacked merit because **Cal. Const., art. XI, § 1(b)**, expressly conferred upon the Legislature the power to set candidacy requirements for the elected office of county sheriff. A **First Amendment** free speech claim failed because the state had a strong interest in ensuring officeholder qualifications. Also, seeking writ relief after ballots were printed, which showed lack of vigilance under **Civ. Code § 3527**, supported a laches finding. (***Boyer v. County of Ventura*** (2019) 33 Cal.App.5th 49.)

Arrests by a Peace Officer:

Pen. Code §§ 834, 836: When Arrests May be Made: A *peace officer* "*may*" make an arrest under the following circumstances:

- Pursuant to an *arrest warrant*; *or*
- Whenever the officer has *reasonable* (or *probable*) *cause* to believe the suspect has committed a crime; *and*
- Whenever the officer has *reasonable* (or *probable*) *cause* to believe a crime has in fact been committed.

Case Law:

"Warrantless arrests are lawful if there is 'probable cause to believe that the arrestee has committed, or is committing, an offense.'" (***Wheatcroft v. City of Glendale*** (U.S. Dist. AZ, 2022) 2022 U.S. Dist. LEXIS 57006; quoting ***Torres v. City of Los Angeles*** (9th Cir. 2008) 548 F.3rd 1197, 1207, fn. 7.)

Only "*reasonable*" or "*probable*" cause is needed: The fact that the officer may be mistaken as to defendant's guilt, or that a crime even occurred, is irrelevant so long as the

arrest is made with probable cause to believe he is guilty and that a crime occurred. Probable cause allows for an officer's *reasonable* mistake. It only means that he or she is "*probably*" right, or in effect, having more evidence for than against. (***Ex Parte Souza*** (1923) 65 Cal.App. 9.)

The terms "*reasonable*" and "*probable*" cause are used interchangeably in both the codes (See **P.C. § 995(a)(1)(B)**) and case law, but (when properly used) mean the same thing. "(R)easonable cause"—a synonym for "probable cause . . . ." (**Heien *v.* North Carolina** ((2014) 574 U.S. 54, 62 [135 S.Ct. 530; 190 L.Ed.2nd 475, 483].)

The use of the word "*may*" in the statute indicates that the officer is under no obligation to make an arrest. It is a matter of discretion whether or not, despite the existence of "*probable cause*," an arrest will be made. An officer is not generally (absent a command to do so in a particular, applicable statute) required to arrest an individual despite the officer's determination that an arrest could legally be made. (***Michenfelder v. City of Torrance*** (1972) 28 Cal.App.3rd 202, 206-207; ***Tomlinson v. Pierce*** (1960) 178 Cal.app.2nd 112, 116.)

See ***People v. Kenney*** (2023) 88 Cal.App.5th 516, dealing with the arrest of an individual for violating a temporary domestic violence restraining order (DVRO). Per the Court: "**Section 836** authorizes a peace officer to arrest a person who has violated a DVRO where the officer 'has probable cause to believe that the person against whom the order is issued has notice of the order.' (**§ 836, subd. (c)(1)**.) Under **subdivision (c)(2)** of **section 836**, a person who has not been served with a DVRO is nevertheless 'deemed to have notice of the order' if 'informed by a peace office[r] of the contents of the protective order.'" The Court held that when the officers told the defendant through his closed, locked bedroom door, that he had been given the necessary notice of the DVRO, and upon refusing to leave the premises (i.e., his own home), he violated **P.C. § 148(a)**; resisting an officer acting in the performance of this duty. Per the Court: "The obvious purpose of the notice requirement in **section 836** is to afford the restrained person a meaningful opportunity at the scene to conform his or her conduct to law." (Pg. 522.) Defendant here was given that opportunity, but refused to comply, putting him in violation of the terms of the DVRO.

> The Court further noted that there were other requirements imposed on defendant (i.e., a hearing date in 21 days and an order to stay away from his mother's grandson), which "(a)t some point, (he) needed to be informed of . . . . But given the volatile events unfolding at (his mother's home), that could wait." (***Ibid.***)

Note: "*Reasonable cause*" and *"reasonable suspicion*" (i.e., the standard of proof for a detention) *do not* mean the same thing and are *not* to be confused.

Pen. Code § 836: *Arrests by a Peace Officer With or Without Warrants*; *Domestic Violence*; *Noncompliance with Protective Orders*; *Carrying of a Concealed Firearms*:

(a) A peace officer may arrest a person in obedience to a warrant, or, pursuant to the authority granted to him or her by **Chapter 4.5** (commencing with **Section 830**) of **Title 3** of **Part 2**, without a warrant, may arrest a person whenever any of the following circumstances occur:

(1) The officer has probable cause to believe that the person to be arrested has committed a public offense in the officer's presence.

(2) The person arrested has committed a felony, although not in the officer's presence.

(3) The officer has probable cause to believe that the person to be arrested has committed a felony, whether or not a felony, in fact, has been committed.

(b) Any time a peace officer is called out on a domestic violence call, it shall be mandatory that the officer make a good faith effort to inform the victim of his or her right to make a citizen's arrest, unless the peace officer makes an arrest for a violation of **paragraph (1)** of **subdivision (e)** of **Section 243** or **273.5**. This information shall include advising the victim how to safely execute the arrest.

(c)

(1) When a peace officer is responding to a call alleging a violation of a domestic violence protective or restraining order issued under **Section 527.6 of the Code of Civil Procedure**, the **Family Code**, **Section 136.2**, **646.91**, or

paragraph (2) of **subdivision (a)** of **Section 1203.097** of this code, **Section 213.5** or **15657.03** of the **Welfare and Institutions Code**, or of a domestic violence protective or restraining order issued by the court of another state, tribe, or territory and the peace officer has probable cause to believe that the person against whom the order is issued has notice of the order and has committed an act in violation of the order, the officer shall, consistent with **subdivision (b)** of **Section 13701**, make a lawful arrest of the person without a warrant and take that person into custody whether or not the violation occurred in the presence of the arresting officer. The officer shall, as soon as possible after the arrest, confirm with the appropriate authorities or the Domestic Violence Protection Order Registry maintained pursuant to **Section 6380** of the **Family Code** that a true copy of the protective order has been registered, unless the victim provides the officer with a copy of the protective order.

> See ***People v. Kenney*** (2023) 88 Cal.App.5th 516; dealing with the arrest of an individual for violating a temporary domestic violence restraining order (DVRO), where defendant was given notice of the order at the scene, and then arrested when he refused to comply.

(2) The person against whom a protective order has been issued shall be deemed to have notice of the order if the victim presents to the officer proof of service of the order, the officer confirms with the appropriate authorities that a true copy of the proof of service is on file, or the person against whom the protective order was issued was present at the protective order hearing or was informed by a peace officer of the contents of the protective order.

(3) In situations where mutual protective orders have been issued under **Division 10** (commencing with **Section 6200**) of the **Family Code**, liability for arrest under this subdivision applies only to those persons who are reasonably believed to have been the dominant aggressor. In those situations, prior to making an arrest under this subdivision, the peace officer shall make reasonable efforts to identify, and may arrest, the dominant aggressor involved in the incident. The dominant aggressor is the person determined to be the most significant, rather than the first, aggressor. In identifying the dominant aggressor,

an officer shall **consider (A)** the intent of the law to protect victims of domestic violence from continuing abuse, **(B)** the threats creating fear of physical injury, **(C)** the history of domestic violence between the persons involved, and **(D)** whether either person involved acted in self-defense.
(d) Notwithstanding **paragraph (1)** of **subdivision (a)**, if a suspect commits an assault or battery upon a current or former spouse, fiancé, fiancée, a current or former cohabitant as defined in **Section 6209** of the **Family Code**, a person with whom the suspect currently is having or has previously had an engagement or dating relationship, as defined in **paragraph (10)** of **subdivision (f)** of **Section 243**, a person with whom the suspect has parented a child, or is presumed to have parented a child pursuant to the **Uniform Parentage Act** (**Part 3** (commencing with **Section 7600**) of **Division 12** of the **Family Code**), a child of the suspect, a child whose parentage by the suspect is the subject of an action under the **Uniform Parentage Act**, a child of a person in one of the above categories, any other person related to the suspect by consanguinity or affinity within the second degree, or any person who is *65 years of age or older* and who is related to the suspect by blood or legal guardianship, a peace officer may arrest the suspect without a warrant where both of the following circumstances apply:

(1) The peace officer has probable cause to believe that the person to be arrested has committed the assault or battery, whether or not it has in fact been committed.

(2) The peace officer makes the arrest as soon as probable cause arises to believe that the person to be arrested has committed the assault or battery, whether or not it has in fact been committed.

(e) In addition to the authority to make an arrest without a warrant pursuant to **paragraphs (1)** and **(3)** of **subdivision (a)**, a peace officer may, without a warrant, arrest a person for a violation of **Section 25400** when all of the following apply:

(1) The officer has reasonable cause to believe that the person to be arrested has committed the violation of **Section 25400**.

(2) The violation of **Section 25400** occurred within an airport, as defined in **Section 21013** of the **Public Utilities Code**, in an area to which access is controlled by the inspection of persons and property.

(3) The peace officer makes the arrest as soon as reasonable cause arises to believe that the person to be arrested has committed the violation of **Section 25400**.

Pen. Code §§ 150, **1550:** "*Posse Comitatus*" (Repealed; **SB 192**): *Commanding Able-Bodied Individuals to Assist Law Enforcement*:

Note: Both of the above provisions were repealed effective *January 1, 2020*, and are no longer enforceable.

Pen. Code § 150 provided that a uniformed peace officer, or any peace officer described in **P.C. §§ 830.1**, **830.2(a)**, **(b)**, **(c)**, **(d)**, **(e)**, **or (f)**, or **830.33(a)**, had authority to command any "*able-bodied*" individual over the age of 18 to assist in an arrest.

Pen. Code § 1550 said that "(e)very peace officer or other person empowered to make the arrest hereunder shall have the same authority, in arresting the accused, to command assistance therefor as the persons designated in **Section 150**. Failure or refusal to render that assistance is a violation of **Section 150**."

Refusing such a command was an infraction, punishable by a fine of from $50 to $1,000.

In a Domestic Violence Case (see **Pen. Code §§ 6200 et seq.** and **13700 et seq.**), a peace officer should be aware of the following:

- If a peace officer makes an arrest for a violation of **Pen. Code § 243(e)(1)** (domestic violence battery), *it is no longer mandatory* that the officer make a good faith effort to inform the victim of his or her right to make a citizen's arrest. (**Pen. Code §§ 243(e)(5)** & **836(b)**)

- Also, if a peace officer makes an arrest for a violation of **Pen. Code § 273.5(a)** (domestic violence involving corporal injury), *it is no longer mandatory* that the officer make a good faith effort to inform the victim of his or her right to make a citizen's arrest. (**Pen. Code §§ 273.5(j)** & **836(b)**)

- When responding to a situation involving the violation of a domestic violence restraining or protective order (per **Fam. Code §§ 2040 et seq.**, **6200 et seq.**, **or 7700 et seq.**), or of a protective order issued pursuant to **Pen. Code § 136.2** (Victim or Witness Intimidation), the peace officer him or herself *must*, absent exigent circumstances, make the arrest if, under the circumstances, it is lawful to do so. (**Pen. Code §§ 836(c)(1)**, **13701(b)**)

  (See "*Misdemeanor* '*In The Presence*' *Requirement*," below.)

  Note: The defendant need not be physically in the jurisdiction (i.e., California) to violate a domestic violence restraining order (now entitled a "California Restraining and Protective Order"). (See ***Hogue v. Hogue*** (2017) 16 Cal.App.5th 833; respondent (i.e., defendant) sent a faked suicide video from Georgia to plaintiff in California via social media, triggering the legal authority of the court to issue a restraining order pursuant to **Fam. Code §§ 6200 et seq.**)

- Criminal and civil protective orders may coexist, and the issuance of one does not bar the other. Appellant wife, who filed a request for a domestic violence restraining order (DVRO) (now entitled a "*California Restraining and Protective Order*") against her husband under the **Domestic Violence Prevention Act**, per **Fam. Code §§ 6200 et seq**., was correct in her assertion that the existence of a criminal protective order is not a bar to the issuance of a DVRO. The trial court erred by summarily denying the wife's DVRO request on the basis that a criminal protective order was already in place, and if the parties wanted a protective order with different terms, they were required to have the criminal court change its order. (***Lugo v. Corona*** (2019) 35 Cal.App.5th 865.)

  Note: California's **Family** and **Penal Codes** provide two slightly different definitions of "*domestic violence*:"

  Fam. Code § 6211: "*Domestic violence*" is abuse perpetrated against any of the following persons:

  (a) A spouse or former spouse.
  (b) A cohabitant or former cohabitant, as defined in **Section 6209**.
  (c) A person with whom the respondent is having or has had a dating or engagement relationship. (**See Fam. Code § 6210**)

(d) A person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the **Uniform Parentage Act** (**Part 3** (commencing with **Section 7600**) of **Division 12**).
(e) A child of a party or a child who is the subject of an action under the **Uniform Parentage Act**, where the presumption applies that the male parent is the father of the child to be protected.
(f) Any other person related by consanguinity or affinity within the second degree. (See **Fam. Code § 6205**)

Note: "*Abuse*" "*for purposes of this act*" is defined in **Fam. Code § 6203(a)** as:

(1) To intentionally or recklessly cause or attempt to cause bodily injury.
(2) Sexual assault.
(3) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another.
(4) To engage in any behavior that has been or could be enjoined pursuant to **Section 6320**.

Pursuant to **subd. (b)**: Abuse is not limited to the actual infliction of physical injury or assault.

Pen. Code § 13700(b): "*Domestic violence*" means abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. For purposes of this subdivision, "cohabitant" means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) whether the parties hold themselves out as spouses, (5) the continuity of the relationship, and (6) the length of the relationship.

Arrests by a Private Person:

Pen. Code § 490.5(f); *Merchant, Library Employee or Theater Owner*:

See **Pen. Code § 490.5(f)**; *Merchant, Library Employee or Theater Owner*, under "*Detentions*" (Chapter 4), above.

Pen. Code § 490.6(a); *Amusement Park Employees*:

See **Pen. Code § 490.6**(a); "*Amusement Parks*," under "*Detentions*" (Chapter 4), above.

Pen. Code § 837: *Arrests by Private Persons*:

A private person may arrest another:

1. For a public offense committed or attempted in his presence.

2. When the person arrested has committed a felony, although not in his presence.

3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.

Note: Per the above, while a private person may be mistaken as to who committed a particular crime, there is no room for error as to whether a crime actually occurred.

Pen. Code § 839; *Summoning Others to Assist*: Private persons may summon others to assist in an arrest. However, there is no penalty for a person refusing to help.

A citizen in whose presence a misdemeanor has been attempted or committed may effect a citizen's arrest (**Pen. C. § 837**, **subd. 1**), and in so doing *may* both summon the police to his aid (**Pen. C. § 839**), and delegate to police the physical act of taking the offender into custody. (***People v. Johnson*** (1981) 123 Cal.App.3rd 495.)

Pen. Code § 847; *Disposition of Arrestee*: A private person making an arrest must, without unnecessary delay, take the person arrested before a magistrate or deliver him or her to a peace officer.

The provision that a peace officer commits a felony should he or she refuse to take a subject who was arrested by a private citizen,

even when the officer determines that the arrest was made without probable cause (**Pen. Code § 142**), was amended with the addition of **subd. (c)** which states that; "This section shall not apply to arrests made pursuant to **Section 837**;" i.e., a *private person's arrest*.

Law prior to enactment of **subd. (c)**: Although taking a citizen's arrestee when not supported by probable cause, as it was widely believed **Pen. Code § 142** as previously written required, would *not* subject the officer to any civil liability in state court (***Kinney v. County of Contra Costa*** (1970) 8 Cal.App.3rd 761, 767-769; ***Hamburg v. Wal-Mart Stores*** (2004) 116 Cal.App.4th 497, 503-504.), the Ninth Circuit Court of Appeal was of the opinion that the officer in such a situation would be subject to federal civil liability. (***Arpin v. Santa Clara Valley Transportation Agency*** (9th Cir. 2001) 261 F.3rd 912, 924-925.) The addition of **subdivision (c)**, eliminating the requirement that an officer accept a prisoner arrested by a private citizen, avoids the dilemma of incurring federal civil liability while attempting to follow the dictates of a state statute.

But the rule remains that for an officer to allow a private citizen to make a citizen's arrest and then to take the suspect into custody when there is insufficient probable cause to justify the arrest, the officer subjects himself to potential federal civil liability. (***Hopkins v. Bonvicino*** (9th Cir. 2009) 573 F.3rd 752, 774-776.)

> Federal civil liability still existed despite the fact that the officers were exempt from state civil liability in a citizen's arrest situation. (***Ibid***., and see **Pen. Code § 847**.)

The private person may delegate to a peace officer his or her authority to actually perform the arrest for the person. (***People v. Sjosten*** (1968) 262 Cal.App.2nd 539.)

A police dispatcher, being subjected to defendant's numerous harassing telephone calls, may delegate to a police officer the responsibility to arrest the defendant for her. The offense, although over the phone, was held to be in her presence. The arrest was timely in that officers responded immediately to where defendant was calling from and took him into custody. The arrest was held to be a lawful citizen's arrest. (***People v. Bloom*** (2010) 185 Cal.App.4th 1496.)

The Stale Misdemeanor Rule:

> The stale misdemeanor rule applies to private person's arrests as well. (See ***Green v. Department of Motor Vehicles*** (1977) 68 Cal.App.3rd 536; arrest made some 35 to 40 minutes after observation of the crime held to be lawful; see also ***Ogulin v. Jeffries*** (1953) 121 Cal.App.2nd 211; 20 minute delay; arrest lawful.) (See "*Stale Misdemeanor Rule*," below)

The "*In the Presence*" *Requirement*:

> *Rule*: Misdemeanors (and infractions) must have occurred in the private person's (in the case of a private person's arrest) presence. (**P.C. §§ 836(a)(1)**, **837.1**; ***Jackson v. Superior Court*** (1950) 98 Cal.App.2nd 183; see also **Veh. Code § 40300**.)
>
> *Case Law*:
>
> > A police dispatcher, being subjected to defendant's numerous harassing telephone calls, may delegate to a police officer the responsibility to arrest the defendant for her. The offense, over the phone, was held to be in her presence. The arrest was timely (i.e., not stale) in that officers responded immediately to where defendant was calling from and took him into custody. The arrest was held to be a lawful citizen's arrest. (***People v. Bloom*** (2010) 185 Cal.App.4th 1496.)
> >
> > *Note*: See "'*In the Presence*' *Requirement*," under "*Misdemeanors and Infractions*," below.

Out-of-State Officers in "*Fresh Pursuit*:"

> **Pen. Code § 852.2**: "Any peace officer of another State, who enters this State in fresh pursuit, and continues within this State in fresh pursuit, of a person in order to arrest him on the ground that he has committed a felony in the other State, has the same authority to arrest and hold the person in custody, as peace officers of this State have to arrest and hold a person in custody on the ground that he has committed a felony in this State."
>
> **Pen. Code § 852.3**: The arresting officer is then to take the arrestee "*immediately before a magistrate*" of the county in which the arrest is made. The magistrate is to determine whether the person had been lawfully arrested. If so, the arrestee is to be held for extradition. If not, he is to be "discharge(d)."

Federal Officers:

Pen. Code § 830.8:

Subd. (a) Federal criminal investigators and federal law enforcement officers *are not* California peace officers. However, after having been certified by their agency heads as having satisfied the training requirements of **P.C. § 832**, or the equivalent thereof, they may exercise the powers of arrest of a California peace officer under the following circumstances:

- Any circumstance specified in **P.C. § 836** (see above) or **W&I § 5150** (Mental patients who are a danger to themselves, others, or who are gravely disabled).

- When incidental to the performance of their federal law enforcement duties.

- When requested by a California law enforcement agency to be involved in a joint task force or criminal investigation.

- When probable cause exists to believe that a public offense that involves immediate danger to persons or property has just occurred or is being committed.

  See ***United States v. Artis*** (9th Cir. 2019) 919 F.3rd 1123, 1130, where it is noted that federal officers are *not* California peace officers, and thus violate the relevant California code sections requiring that state search warrants be executed by a "peace officer" when a federal officer executes a state warrant. However, it was held *not* to be a **Fourth Amendment** violation, and thus did not require the suppression of any resulting evidence, reversing the prior decision issued by a federal district court, reported at 315 F.Supp.3rd 1142 (U.S. Dist. Ct., ND Cal., 2018).

  > The Ninth Circuit's authority for this conclusion is cited as ***United States v. Green*** (10th Cir. 1999) 178 F.3rd 1099, 1106; ***United States v. Gilbert*** (11th Cir. 1991) 942 F.2nd 1537, 1540-1541); and ***United States v. Freeman*** (8th Cir. 1990) 897 F.2nd 346, 348-349.

  The San Ysidro Port of Entry, in San Diego, is state land and not federal, although the attached facilities belong to the federal government. A federal Immigration and

Naturalization Agent at that location may therefore lawfully make a citizen's arrest for a state criminal violation (e.g., driving while under the influence) and turn him over to state and local law enforcement officers. (***People v. Crusilla*** (1999) 77 Cal.App.4th 141.)

Where a federal officer arrested an obviously intoxicated driver just outside a federal enclave and beyond the officer's territorial jurisdiction after a lawful traffic stop, the **Fourth Amendment** does not require the exclusion of the evidence obtained in a search incident to the arrest because the arrest was supported by probable cause. Therefore, it was not an unreasonable seizure within the meaning of the **Fourth Amendment** despite the lack of any statutory authority for making the arrest. (***United States v. Ryan*** (1st Cir. 2013) 731 F.3rd 66.)

Subd. (b): Duly authorized federal employees who comply with the training requirements set forth in **Section 832** are peace officers when they are engaged in enforcing applicable state or local laws on property owned or possessed by the United States government, or on any street, sidewalk, or property adjacent thereto, with the written consent of the sheriff or the chief of police, respectively, in whose jurisdiction the property is situated."

When arresting pursuant to **Pen. Code § 830.8**, an arrestee must be taken immediately before a magistrate or delivered to a peace officer, as specified in **Pen. Code § 847**.

Federal officers of the Bureau of Land Management and the Forest Service of the Department of Agriculture have no authority to enforce California statutes without the written consent of the sheriff or the chief of police in whose jurisdiction they are assigned.

A police officer with the United States Park Police had acted within the authority set forth in **Pen. Code § 830.8, subd. (b)**, when he detained and arrested defendant on city property. The prosecution established that the search of defendant and his vehicle was reasonable. Upon defendant's failure to provide a valid registration and his provision of false identification of himself, the officer had authority to place defendant under arrest and had authority to search defendant incident to that arrest. (***People v. Redd*** (2010) 48 Cal.4th 691, 703-704, 711-722.)

Subd. (c): National Park Rangers are *not* California peace officers. However, after having been certified by their agency heads as having satisfied the training requirements of **Pen. Code § 832.3**, or the equivalent thereof, they may exercise the powers of a California peace officer under any circumstance specified in **Pen. Code § 836** (see above) or **W&I § 5150** (Mental patients who are a danger to themselves, others, or who are gravely disabled), for violations of state or local laws, but only:

- When incidental to the performance of their federal duties; *or*

- When requested by a California State Park Ranger to assist in preserving the peace and protecting state parks and other property for which California State Park Rangers are responsible.

(See ***People v. Redd***, *supra*.)

Subd. (d): Provides these officers with similar powers during a "state of war emergency or a state of emergency," as defined in **Gov't. Code § 8558**.

Subd. (e): Further provides for limited law enforcement powers for a qualified person who is appointed as a Washoe tribal law enforcement officer.

Pen. Code § 830.85: "Notwithstanding any other law, United States Immigration and Customs Enforcement officers and United States Customs and Border Protection officers *are not* California peace officers."

Supremacy Clause Immunity: There is an argument that federal officers are not necessarily bound by California's laws of arrest, or at least, cannot be held accountable for any more than what the federal law requires.

Rule: Under the federal "*removal statute*" (**28 U.S.C. § 1442**), a federal civil or criminal case against a federal officer can be removed from state to federal court—increasing the likelihood of an outright dismissal—if the federal officer involved shows: (1) that he or she is a federal official; (2) that the prosecution arises out of acts committed by him or her under color of federal law; and, (3) that he or she has a "*colorable*" federal defense.

"*Colorable*" only means that the defense is "*plausible*," not necessarily "*clearly sustainable*." If the defense is plausible, the district court judge should remove the case.

Removal provides the officer with a federal forum for the state trial, meaning the federal court shall decide the question of guilt or innocence and the availability of any defense, like immunity. (See **28 U.S.C. § 1442(a)(1)**; ***Texas v. Kleinhert*** (5th Cir. 2017) 855 F.3rd 305, 311-313.)

Case Law:

In re Neagle (1890) 135 U.S. 1 [10 S.Ct. 658; 34 L.Ed. 55]: Deputy United States Marshal David Neagle, after shooting and killing a person who was assaulting a U.S. Supreme Court Justice, was held to be immune from state prosecution for murder where he was doing no more than performing "an act which he was authorized to do by the law of the United States, which it was his duty to do as a marshal of the United States, and [] in doing that act he did no more than what was necessary and proper for him to do." Under such circumstances, "he cannot be guilty of a crime under the law of the State of California."

Clifton v. Cox (9th Cir. 1977) 549 F.2nd 722: Petitioner federal agent was a member of a task force from various agencies that secured a federal search warrant authorizing a search of a ranch, the alleged location of an illegal drug manufacturing operation. Petitioner, thinking that another agent had been shot, rushed the cabin and kicked in the door. As petitioner entered the front door, the owner started to flee, but petitioner leveled his pistol at the running figure, called halt twice, waited a second or two and then fired, killing the owner. Petitioner was indicted in the state court for second-degree murder and involuntary manslaughter. He subsequently petitioned and was granted a writ of habeas corpus and was released from state custody. On appeal, the court affirmed, holding that a federal agent could not be held on a state criminal charge where the alleged crime arose during the performance of his federal duties under the **Supremacy Clause, U.S. Const. art. VI**. The court concluded that even though petitioner federal agent's acts may have exceeded his express authority, this did not necessarily strip petitioner of his lawful power to act under the scope of authority given to him under the laws of the United States.

In considering a district court's order remanding complaints to state court after defendant energy companies had removed the complaints to federal court on eight

separate grounds, the district court did not err in holding there was no subject-matter jurisdiction under the federal-officer removal statute, **28 U.S.C.S. § 1442(a)(1)**, because the energy companies were not "acting under" a federal officer's directions. In part, in the context of government lease agreements with the energy companies, the willingness to lease federal property or mineral rights to a private entity for the entity's own commercial purposes, without more, could not be characterized as the type of assistance that was required to show that the private entity was "acting under" a federal officer. (***County of San Mateo v. Chevron Corporation*** (9th Cir. 2020) 960 F.3rd 586.)

Bounty Hunters or Bail Enforcement Agents have long exercised a *Common Law* power to locate, arrest, and return to custody persons released from custody on bail provided by a bail-bondsman, when the person fails to make a necessary court appearance. (***Taylor v. Taintor*** (1872) 83 U.S. 366 [21 L.Ed. 287].)

General Rules:

Because state courts have found that a bounty hunter's broad authority comes from the implied terms of a private agreement between the bondsman (i.e., a private citizen) and the defendant, bounty hunters are unburdened by many of the constitutional and statutory restrictions which control the conduct of state law enforcement officers. (***Reese v. United States*** (1969) 76 U.S. 13, 22 [76 S.Ct. 13; 19 L.Ed. 541, 544].)

Generally, "the common-law right of recapture is (only) limited by the reasonable means necessary to affect the arrest." (***Lopez v. Cotter*** (10th Cir. 1989) 875 F.2nd 273, 277.)

Bounty hunters "enjoy extraordinary powers to capture and use force" in tracking down and arresting fugitives. (***Kear v. Hilton*** (4th Cir. 1983) 699 F.2nd 181, 182.)

Not being agents of the state, bounty hunters are not restricted by the usual constitutional constraints that apply to law enforcement. (See ***People v. Johnson*** (1947) 153 Cal.App.2nd 870, 873; ***Landry v. A-Able Bonding, Inc.*** (5th Cir. 1996) 75 F.3rd 200, 203-205; ***United States v. Rhodes*** (9th Cir. 1983) 731 F.2nd 463, 467.)

E.g.: The "*Exclusionary Rule*" does not apply to the actions of a bounty hunter. (***People v. Houle*** (1970) 13 Cal.App.3rd 892, 895.)

California has sought to regulate the licensing and training requirements for bounty hunters. (See **Pen. Code §§ 1299 et seq.** (see below) and **Ins. Code § 1810.7**.)

Other provisions provide for the arrest of a bail jumper by the bounty hunter when the bounty hunter's authority is in writing upon a certified copy of either the undertaking of bail or the certificate of a bail deposited with the court. (**Pen. Code §§ 1300**, **1301**)

> **Pen. Code § 1301** also requires the bondsman or bounty hunter to bring the bail jumper before a magistrate, or deliver him to the custody of a sheriff or police department, within 48 hours after arrest or after being brought into this state, excluding weekends and holidays. It is a misdemeanor to violate this section.

Pen. Code § 847.5 provides that an *out-of-state bounty hunter* must first seek an arrest warrant from a local magistrate, filing with the court an affidavit listing the name and whereabouts of the fugitive, certain particulars of the fugitive's offense, and the circumstances of the fugitive's violation of the terms of his bail. The bounty hunter is also required to bring the fugitive before the magistrate after which a hearing is held. The magistrate may then authorize the bounty hunter to remove the fugitive from the state.

However, a bounty hunter who ignores the requirements of **section 847.5**, because he acts outside California's statutory regulations, is *not* acting "*under color of state law*," and, therefore, is not civilly liable, at least in a **Title 42 U.S.C. § 1983** federal civil rights suit. (***Ouzts v. Maryland National Insurance Co.*** (9th Cir. 1974) 505 F.2nd 547.)

The Bail Fugitive Recovery Persons Act:

Pen. Code § 1299: Designates this article as the "***Bail Fugitive Recovery Persons Act***."

Pen. Code § 1299.01: *Definitions*:

> **(a)** For purposes of this article, the following terms shall have the following meanings:
>
> > **(1)** "*Bail fugitive*" means a defendant in a pending criminal case who has been released from custody

under a financially secured appearance, cash, or other bond and has had that bond declared forfeited, or a defendant in a pending criminal case who has violated a bond condition whereby apprehension and reincarceration are permitted.

(2) "*Bail*" means a bail agent, bail permittee, or bail solicitor licensed by the Department of Insurance pursuant to **Section 1802**, **1802.5**, or **1803** of the **Insurance Code**.

(3) "*Depositor of bail*" means a person who or entity that has deposited money or bonds to secure the release of a person charged with a crime or offense.

(4) "*Bail fugitive recovery agent*" means a person licensed pursuant to **Section 1802.3** of the **Insurance Code** who is provided written authorization pursuant to **Section 1300** or **1301** by the bail or depositor of bail, and is contracted to investigate, surveil, locate, and arrest a bail fugitive for surrender to the appropriate court, jail, or police department, and any person who is employed to assist a bail or depositor of bail to investigate, surveil, locate, and arrest a bail fugitive for surrender to the appropriate court, jail, or police department.

(b) This section shall become operative on *July 1, 2023*.

Pen. Code § 1299.02: *Persons Authorized to Arrest Bail Fugitives*:

(a) No person, other than a certified law enforcement officer, shall be authorized to apprehend, detain, or arrest a bail fugitive unless that person meets one of the following conditions:

(1) Is a bail as defined in **paragraph (2)** of **subdivision (a)** of **Section 1299.01** who is also a bail fugitive recovery agent as defined in **paragraph (4)** of **subdivision (a)** of **Section 1299.01**.

(2) Is a bail fugitive recovery agent as defined in **paragraph (4) of subdivision (a)** of **Section 1299.01**.

(3) Is a licensed private investigator as provided in **Chapter 11.3** (commencing with **Section 7512**) of **Division 3** of the **Business and Professions Code** who is also a bail fugitive recovery agent as defined in **paragraph (4)** of **subdivision (a)** of **Section 1299.01**.

(b) This article shall not prohibit an arrest pursuant to **Sections 837**, **838**, and **839**, provided that no consideration is paid or allowed, directly or indirectly, to any person effecting an arrest pursuant to **Sections 837**, **838**, and **839**.

(c) Individuals who hold a bail license, bail fugitive recovery license, bail enforcer license, bail runner license, or private investigator license issued by another state shall not apprehend, detain, or arrest bail fugitives in California, unless that individual obtains a bail fugitive recovery agent license issued in this state and complies with California law.

(d) This section shall become operative on *July 1, 2023*.

Pen. Code § 1299.04: Qualifications of a Bail Fugitive Recovery Person:

(a) A bail fugitive recovery agent, bail agent, bail permittee, or bail solicitor who contracts their services to another bail agent or surety as a bail fugitive recovery agent for the purposes specified in **paragraph (4)** of **subdivision (a)** of **Section 1299.01**, and any bail agent, bail permittee, or bail solicitor who obtains licensing after **January 1, 2000**, and who engages in the arrest of a defendant pursuant to **Section 1301** shall comply with **Sections 1800** to **1823**, inclusive, of the **Insurance Code**, and any regulations promulgated by the Insurance Commissioner.

(b) This section shall become operative on *July 1, 2023*.

Pen. Code § 1299.05: Bail Fugitive Apprehensions:

> In performing a bail fugitive apprehension, an individual authorized by **P.C. § 1299.01** to apprehend a bail fugitive shall comply with all laws applicable to that apprehension.

Pen. Code § 1299.06: Required Apprehension Documentation:

> An individual authorized by **P.C. § 1299.02** to apprehend a bail fugitive shall have in his or her possession proper documentation of authority to apprehend issued by the bail or depositor of bail as prescribed in **P.C. §§ 1300** and **1301** before making any apprehension. The authority to apprehend document shall include all of the following information:
>
> **(1)** The name of the individual authorized by **P.C. § 1299.02** to apprehend a bail fugitive and any fictitious name, if applicable;
>
> **(2)** The address of the principal office of the individual authorized by **P.C. § 1299.02** to apprehend a bail fugitive; *and*
>
> **(3)** The name and principal business address of the bail agency, surety company, or other party contracting with the individual authorized by **P.C. § 1299.02** to apprehend a bail fugitive.

Pen. Code § 1299.07: Representing Oneself to be a Sworn Law Enforcement Officer:

> **Subd. (a)**: An individual authorized by **P.C. § 1299.02** to apprehend a bail fugitive shall not represent himself or herself in any manner as being a sworn law enforcement officer.
>
> **Subd. (b)**: An individual authorized by **P.C. § 1299.02** to apprehend a bail fugitive shall not wear any uniform that represents himself or herself as belonging to any part or department of a federal, state, or local government. Any uniform shall not display the words United States, Bureau, Task Force, Federal, or other substantially similar words that a reasonable person may mistake for a government agency.

Subd. (c): An individual authorized by **P.C. § 1299.02** to apprehend a bail fugitive shall not wear or otherwise use a badge that represents himself or herself as belonging to any part or department of the federal, state, or local government.

Subd. (d): An individual authorized by **P.C. § 1299.02** to apprehend a bail fugitive shall not use a fictitious name that represents himself or herself as belonging to any federal, state, or local government.

Subd. (e): An individual authorized by **P.C. § 1299.02** to apprehend a bail fugitive may wear a jacket, shirt, or vest with the words "BAIL BOND RECOVERY AGENT," "BAIL ENFORCEMENT," or "BAIL ENFORCEMENT AGENT" displayed in letters at least two inches high across the front or back of the jacket, shirt, or vest and in a contrasting color to that of the jacket, shirt, or vest.

Pen. Code § 1299.08: Procedural Requirements in Making Arrests:

Subd. (a): Except under exigent circumstances, an individual authorized by **P.C. § 1299.02** to apprehend a bail fugitive shall, prior to and no more than six hours before attempting to apprehend the bail fugitive, notify the local police department or sheriff's department of the intent to apprehend a bail fugitive in that jurisdiction by doing all of the following:

(1): Indicating the name of an individual authorized by **P.C. § 1299.02** to apprehend a bail fugitive entering the jurisdiction.

(2): Stating the approximate time an individual authorized by **P.C. § 1299.02** to apprehend a bail fugitive will be entering the jurisdiction and the approximate length of the stay.

(3): Stating the name and approximate location of the bail fugitive.

Subd. (b): If an exigent circumstance does arise and prior notification is not given as provided in **subd. (a)**, an individual authorized by **P.C. § 1299.02** to apprehend a bail fugitive shall notify the local police department or sheriff's

department immediately after the apprehension, and upon request of the local jurisdiction, shall submit a detailed explanation of those exigent circumstances within three working days after the apprehension is made.

Subd. (c): This section shall not preclude an individual authorized by **P.C. § 1299.02** to apprehend a bail fugitive from making or attempting to make a lawful arrest of a bail fugitive on bond pursuant to **P.C. §§ 1300** and **1301**. The fact that a bench warrant is not located or entered into a warrant depository or system shall not affect a lawful arrest of the bail fugitive.

Subd. (d): For the purposes of this section, notice may be provided to a local law enforcement agency by telephone prior to the arrest or, after the arrest has taken place, if exigent circumstances exist. In that case the name or operator number of the employee receiving the notice information shall be obtained and retained by the bail, depositor of bail, or bail fugitive recovery person.

Pen. Code § 1299.09: Forcible Entries:

An individual, authorized by **P.C. § 1299.02** to apprehend a bail fugitive shall not forcibly enter a premises except as provided for in **P.C. § 844** (i.e., the "*knock and notice*" requirements).

Pen. Code § 1299.10: Use of Firearms or Other Weapons:

An individual authorized by **P.C. § 1299.02** to apprehend a bail fugitive shall not carry a firearm or other weapon unless in compliance with the laws of the state.

A bail agent may, upon request of the surety liable for the undertaking, arrest a defendant and transport him to a court, magistrate, sheriff, or police, as directed; although a bail agent has no explicit statutory authority to carry a loaded firearm when performing his duties, like any person who does not have a permit to carry a firearm, he may carry a loaded firearm while engaged in the act of making or attempting to make a lawful arrest of the defendant. (81 ***Op.Cal.Atty.Gen***. 257, 7/29/1998.)

A bail recovery agent was not "attempting to make a lawful arrest" when stopped by police officers, and thus the

California statute providing that a person attempting to make lawful arrest may carry loaded handgun (i.e., formerly **P.C. § 12031(k);** now **P.C. § 26050**) was inapplicable. The officers had probable cause to arrest the agent for carrying loaded firearm when the agent was arrested because he was in his car half block away from fugitive. (***Golt v. City of Signal Hill*** (C.D.Cal. 2001) 132 F.Supp.2nd 1271.)

Pen. Code § 1299.11: Violating the **Bail Fugitive Recovery Persons Act**:

It is a misdemeanor to violate or conspire to violate any provision of the **Bail Fugitive Recovery Persons Act**, or to hire an individual to apprehend a bail fugitive, knowing that the individual is not authorized by **P.C. § 1299.02** to apprehend a bail fugitive.

Punishment: Misdemeanor: Up to one year in county jail and/or a $5,000 fine.

Pen. Code § 1299.12: Licensing Private Investigators:

The above is specifically *not* intended to exempt from licensure persons otherwise required to be licensed as private investigators pursuant to **B&P §§ 7512 et seq.**

***Arrest Options*:** A peace officer has *five options* when he or she makes an arrest pursuant to **Pen. Code § 836** or takes custody of a prisoner from a private person, arrested pursuant to **Pen. Code § 837**:

1. *Release Without Charges*: If, after a subject has been arrested, the officer feels that based upon additional information collected, the arrest is not justified (i.e., there is insufficient probable cause), he or she may unconditionally release the prisoner pursuant to authority described in **Pen. Code § 849(b)(1)**.

   If, when arrested by a private person, the person changes his or her mind about wanting to arrest the subject, the prisoner may simply be released without any further action.

   Otherwise, any such arrest and release must be documented pursuant to **Pen. Code § 851.6**, with a certificate issued to the arrested person by the arresting agency describing such action as a detention only.

The legal status of anyone so released shall be deemed a detention only; not an arrest. (**Pen. Code § 849(c)**)

Pen. Code § 851.91: A detention facility, at the request of an arrestee upon release, is required to supply to him or her the Judicial Council form for sealing the record of an arrest that did not result in a conviction. Also requires a detention facility to post a sign stating that a person who has been arrested but not convicted may petition the court to have the arrest and related records sealed and that the form may be requested at the facility or found on the Internet.

Pen. Code § 849.5 provides that if a person is arrested and released and no accusatory pleading is filed, the arrest shall be deemed a detention *only*. **Subdivision (b)** of **Pen. Code § 851.6** provides that the arresting agency shall issue the arrestee a certificate describing the action as a detention, and **subdivision (d)** provides that the official criminal records shall delete any reference to an arrest and refer to the action as a detention.

> Plaintiff in a class action suit against the CHP asked the court to require it to comply, and won. The Court on appeal affirmed, holding that Plaintiff "is entitled to have his arrest deemed a detention; entitled to a certificate from the CHP describing the action as a detention; and entitled to have his arrest deleted from the records of the CHP and the Department of Justice and have any such record refer to it as a detention." (***Schmidt v. California Highway Patrol*** (2016) 1 Cal.App.5th 1287.)
>
> *Note*: Pursuant to **Pen. Code § 853.6(e)(3)**, a prosecutorial agency has 25 days to decide to file. After that, the prosecutor can only proceed following a new arrest or the issuance of an arrest warrant. It therefore follows that a law enforcement agency has at least 25 days, or until there is a formal and permanent (i.e., not being held for further investigation) reject from the prosecutor (whichever occurs first) before the arresting agency has to worry about complying with the **section 849.5** and **851.6** requirements. Upon the occurrence of one of these events (formal reject or 25 days), it is suggested that **sections 849.5 and 851.6** be complied with "without delay."

Subd. (b)(4) adds as a legal basis for releasing a prisoner prior to booking or without citation when; "(t)he person was arrested for driving under the influence of alcohol or drugs and the person is delivered to a hospital for medical treatment that prohibits immediate delivery before a magistrate."

Subd. (b)(5) adds as a legal basis for releasing a prisoner prior to booking and without a citation when; "(t)he person was arrested and subsequently delivered to a hospital or other urgent care facility, including, but not limited to, a facility for the treatment of co-occurring substance use disorders, for mental health evaluation and treatment, and no further proceedings are desirable.

Note: It is also arguable that a law enforcement officer may choose to release a subject for whom probable cause *does* exist. There is nothing in the case or statutory law that says that **Pen. Code § 849(b)** is the exclusive authority for releasing an arrested prisoner.

Note, however, **Pen. Code § 4011.10(b)** prohibiting law enforcement from releasing a jail inmate for the purpose of allowing the inmate to seek medical care at a hospital, and then immediately re-arresting the same individual upon discharge from the hospital, unless the hospital determines this action would enable it to bill and collect from a third-party payment source.

Subd. (a): "It is the intent of the Legislature in enacting this section to provide county sheriffs, chiefs of police, and directors or administrators of local detention facilities with an incentive to not engage in practices designed to avoid payment of legitimate health care costs for the treatment or examination of persons lawfully in their custody, and to promptly pay those costs as requested by the provider of services. Further, it is the intent of the Legislature to encourage county sheriffs, chiefs of police, and directors or administrators of local detention facilities to bargain in good faith when negotiating a service contract with hospitals providing health care services."

2. *Seek an Arrest Warrant*: (I.e., a "*Notify Warrant*.") Should the peace officer determine that, although probable cause for an arrest exists, the person may not be lawfully arrested (e.g., a misdemeanor *not* in the officer's presence or the private person's presence, or a "*stale misdemeanor*," (see below; "*Legal Requirements of an Arrest*"), or as a discretionary option to taking the subject into custody or writing a misdemeanor citation, an arrest report may be filled out with the appropriate notation made (or box, e.g., "□ notify warrant," checked).

   This is *not* an arrest and requires (after a "*detention for investigation*" during which identification information is collected and a brief investigation is conducted) the immediate release of the subject. The local prosecuting agency to which the reports are forwarded will then notify the subject of when and where to appear in court to answer to any charges

filed in court. Should the person fail to respond to this notification, an arrest warrant will be sought.

Stopping a suspect in a misdemeanor offense situation, a noise violation, not occurring in the officer's presence, at least where there are possible alternative less intrusive methods of identifying the suspect, may be unconstitutional. The Court is to balance law enforcement's interest in crime prevention with the detainee's interest in personal security from government intrusion. (See ***United States v. Hensley*** (1985) 469 U.S. 221 [105 S.Ct. 675; 83 L.Ed.2nd 604]; declining to decide the issue.) In a misdemeanor situation, law enforcement's interest *may* not outweigh the suspect's. (***United States v. Grigg*** (9th Cir. 2007) 498 F.3rd 1070, 1074-1083.)

The continuing validity of the ***Grigg*** decision has been questioned and is probably, if it ever was, no longer a valid rule. (See ***United States v. Creek*** (U.S. Dist. Ct, Ariz. 2009) 586 F. Supp.2nd 1099, 1102-1108; upholding the traffic stop of a petty theft (gas drive off) suspect. See also ***Stanton v. Sims*** (2013) 571 U.S. 3 [134 S.Ct. 3; 187 L.Ed.2nd 341], calling into question, but not deciding, the Ninth Circuit's sensitivity to apprehending misdemeanor suspects.)

3. *Issuance of a Misdemeanor Citation*: A misdemeanor arrest for an offense which *is not* "*stale*" and which *did* occur in the officer's (or a private citizen's) presence, but when booking is either not legal or not appropriate under the circumstances, may result in the subject being cited and released at the scene.

   Misdemeanor citations are in fact an *arrest*, although the subject is released without booking, and must therefore be conducted according to the rules on misdemeanor crimes occurring in the officer's presence, etc. (See below; "*Legal Requirements of an Arrest*.")

   Misdemeanor arrestees are, as a general rule, to be cited and released unless one of the exceptions listed in **Pen. Code § 853.6(i)** applies. (**Pen. Code § 853.6(a)**)

   Note also that all persons released on a misdemeanor citation must be booked and fingerprinted either at the scene or at the arresting agency at some point prior to appearing in court, but that if released prior to doing so, should be so notified of their responsibility to comply. (**Pen. Code § 853.6(g)**)

Note: Booking at the scene requires the officer to use a mobile fingerprint device to take all fingerprints instead of merely a thumbprint.

4. *Book into Jail*: When one or more of the circumstances listed in **Pen. Code § 853.6(i)** does exist, and the subject is otherwise lawfully arrested (e.g., a felony arrest, or a misdemeanor in the officer or private person's presence which is not "stale."), the arrested person may be subjected to a custodial arrest and transported to county jail for booking.

   Pen. Code § 7, **subd. (21)**: To "*book*" signifies the recordation of an arrest in official police records, and the taking by the police of fingerprints and photographs of the person arrested, or any of these acts following an arrest.

   Pen. Code § 853.5 has been held to provide the exclusive grounds for a custodial arrest for an infraction, and that **853.6** applies to misdemeanors only. (***Edgerly v. City and County of San Francisco*** (9th Cir. 2013) 713 F.3rd 976, 981-985; citing ***In re Rottanak K.*** (1995) 37 Cal.App.4th 260, and ***People v. Williams*** (1992) 3 Cal.App.4th 1100.)

   Note that when a subject is to be transported to jail (i.e., a "custodial arrest" as opposed to a cite-and-release), a pre-transportation search of his or her person is lawful; done for the purpose of removing any potential weapons from the subjects release and to prevent the introduction of evidence or contraband into the jail. (***United States v. Johnson*** (9th Cir. 2019) 913 F.3rd 793, 805.)

5. *Take Directly Before a Magistrate*: When court is in session, and a judge is available, a subject may be transported directly to the judge.

   The offense must be a felony, or the conditions for a lawful misdemeanor arrest must be present (i.e., in the presence of the officer or private person making the arrest and not stale).

   See also **Pen. Code § 853.5** and **Veh. Code §§ 40300.5, 40302, 40303, 40304**, and **40305** (below), for conditions under which persons arrested for certain infractions or misdemeanors may be taken immediately before a magistrate.

***Legal Requirements of an Arrest*:**

Felonies: A peace officer may make an arrest for a felony, with or without a warrant, at any time, day or night, at any location, whether or not the felony has occurred in the officer's presence, so long as such arrest is supported by "*probable cause*." (**P.C. § 836(a)(2), (3)**)

Exception: Warrantless arrests in a person's home. (See below)

See also **Veh. Code § 40301**: When probable cause exists to believe that a particular person has violated a **Vehicle Code** felony, the subject "shall be dealt with in like manner as upon arrest for the commission of any other felony," according to the general provisions of the Penal Code on felony arrests. (See ***People v. Superior Court (Simon)*** (1972) 7 Cal.3rd 186, 199.)

Misdemeanors and Infractions:

"*In the Presence*" *Requirement*: Misdemeanors (and infractions) must have occurred in the officer's (or private person's, in the case of a private person's arrest) presence. (**Pen. Code §§ 836(a)(1)**, **837.1**; ***Jackson v. Superior Court*** (1950) 98 Cal.App.2nd 183; see also **Veh Code § 40300**.)

Veh. Code § 40300: "The provisions of this chapter shall govern all peace officers in making arrests for violations of this code without a warrant for offenses *committed in their presence*, but the procedure prescribed herein shall not otherwise be exclusive of any other method prescribed by law for the arrest and prosecution of a person for an offense of like grade." (Italics added)

"*In the Presence*" *Defined*: "*In the presence*" is commonly interpreted to refer to having personal knowledge that the offense in question has been committed, made known to the officer through *any* of the officer's five senses. (See ***People v. Burgess*** (1959) 170 Cal.App.2nd 36, 41.)

The crime of making annoying or harassing telephone calls, per **Pen. Code § 653x**, is done in the listener's presence. (***People v. Bloom*** (2010) 185 Cal.App.4th 1496; harassing phone calls to a police dispatcher.)

Exceptions: A peace officer has statutory authorization to affect a warrantless arrest for misdemeanors which *did not* occur in the officer's presence under limited circumstances:

1. *Juvenile Arrests*: (**W&I Code § 625(a)**; ***In re Samuel V.*** (1990) 225 Cal.App.3rd 511; ***In re Gregory S.*** (1980) 112 Cal.App.3rd 764.)

2. *Driving While Under the Influence of Alcohol and/or Drugs*, when any of the following circumstances exist (**V.C. § 40300.5**):

(a) The person was involved in a traffic accident.

(b) The person is observed in or about a vehicle that is obstructing a roadway.

(c) The person will not be apprehended unless immediately arrested.

(d) The person may cause injury to himself or herself or damage property unless immediately arrested.

(e) The person may destroy or conceal evidence of the crime unless immediately arrested.

(***People v. Schofield*** (2001) 90 Cal.App.4th 968; the metabolic destruction of alcohol in a DUI suspect's body (i.e., the "*burn off*" rate) qualifies as the "*destruction of evidence*" for purposes of this exception.)

See also ***Troppman v. Gourley*** (2005) 126 Cal.App.4th 755, at pp. 760-761, where it was noted that the prior Supreme Court case of ***Mercer v. Department of Motor Vehicles*** (1991) 53 Cal.3rd 753, 768-769, requiring some observation of the vehicle's movement by the arresting officer, was no longer valid case law in light of the amendment to this statute.

Even though the officer did not observe defendant's vehicle moving, where the police officer discovered defendant asleep behind wheel with his foot on the brake, the engine running, and the gear in drive, in the middle of interstate highway, defendant's arrest for driving while under the influence was lawful based upon the circumstantial evidence that defendant had driven there while under the influence. (***Villalobos v. Zolin*** (1995) 35 Cal.App.4th 556.)

The old California rule of requiring a valid arrest, even of an unconscious suspect, prior to the extraction of a blood sample (See ***People v. Superior Court* [*Hawkins*]** (1972) 6 Cal.3rd 757,

762.), was abrogated by passage of **Proposition 8**, in June, 1982. Now, so long as probable cause exists to believe that the defendant was driving while intoxicated, a formal arrest is not a prerequisite to a warrantless seizure of a blood sample. (***People v. Trotman*** (1989) 214 Cal.App.3rd 430, 435; ***People v. Deltoro*** (1989) 214 Cal.App.3rd 1417, 1422, 1425.)

But see ***Missouri v. McNeely*** (2013) 569 U.S. 141 [133 S.Ct. 1552; 185 L.Ed.2nd 696]; requiring a search warrant absent exigent circumstances or consent.

The implied consent provisions under **V.C. § 23612(a)(5)**, where, by statute, blood may be drawn from an unconscious or dead DUI suspect, does not overcome the need for a search warrant without a showing of exigent circumstances. (**People *v.* Arredondo** (2016) 245 Cal.App.4th 186, 193-205; no exigency found, pp. 205-206.)

> Note: Petition for Review was dismissed and the case remanded in light of the decision in ***Mitchell v. Wisconsin*** (June 27, 2019) __ U.S.__, __ [139 S.Ct. 2525; 204 L.Ed.2nd 1040], where the U.S. Supreme Court held that when a DUI arrestee is unconscious, this fact alone will "almost always" constitute an exigency, allowing for a warrantless blood draw.

Veh. Code § 40300.5, allowing for the arrest of someone who had been driving while under the influence under certain circumstances even though not in the officer's presence, does not violate the **Fourth Amendment**. (***People v. Burton*** (2013) 219 Cal.App.4th Supp. 9.)

> "The **Fourth Amendment** supports arrests for misdemeanors when there is objective and reasonable probable cause to justify the arrest, regardless of the 'in the presence' requirement outlined in the **Penal Code.**" (***Id***., at p. 13.)

3. *Battery on School Grounds* during school hours. (**P.C. § 243.5**)

4. *Carrying a Loaded Firearm*, in violation of **P.C. § 25850(a)** (formerly **P.C. § 12031(a)(1)**. (**P.C. § 25850(g)** (formerly **P.C. § 12031(a)(5)(A)**)

5. *Assault or Battery Against the Person of a Firefighter, Emergency Medical Technician, or Paramedic*, per **P.C. §§ 241(b) or 243(b)**. (**P.C. § 836.1**)

6. *Persons Violating a Domestic Violence Protective or Restraining Order* issued under authority of:

- **CCP § 527.6** (*Harassment Orders*);
- **Fam. Code, §§ 6200 et seq.** (*Domestic Violence*);
- **P.C. § 136.2** (*Victim or Witness Intimidation*);
- **P.C. § 646.91** (*Stalking*);
- **P.C. § 1203.097(a)(2)** (*Acts of violence, threats, stalking, sexual abuse, and harassment, in Domestic Violence*);
- **W&I § 213.5** (*During Child Dependency Proceedings*);
- **W&I § 15657.03,** (*Elder or Dependent Adult Abuse*) *or*
- *Similar orders* from another state, tribe, or territory;

. . . where the officer has *probable cause* to believe the suspect has knowledge of the order and has committed an act in violation of the order. (**P.C. § 836(c)(1)**)

Note: This section, and **Pen. Code § 13701(b)**, at least when "*domestic violence*" (per **Fam. Code §§ 2040 et seq.**, **6200 et seq.**, or **7700 et seq.**) is involved, or when *victim or witness intimidation* (per **Pen. Code § 136.2**) is involved, make this arrest *mandatory* upon the officer, absent "*exigent circumstances*" excusing the lack of an arrest.

7. *Assaults or Batteries* upon the suspect's current or former spouse, fiancé, fiancée, a current or former cohabitant (per **Fam. Code, § 6209**), a person with whom the suspect currently is having or has previously had an engagement or dating relationship (per **Pen. Code § 243(f)(10)**), a person with whom the suspect has parented a

child, or is presumed to have parented a child (per the **Uniform Parentage Act**; **Fam. Code, §§ 7600 et seq.**), a child of the suspect, a child whose parentage by the suspect is the subject of an action under the **Uniform Parentage Act**, a child of a person in one of the above categories, or any other person related to the suspect by consanguinity or affinity within the second degree, when the officer has probable cause and the arrest is made as soon as probable cause arises. (**Pen. Code § 836(d)**)

Pen. Code § 13700(b): "*Cohabitant*" is defined in the **Penal Code** as "two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to,

(1) sexual relations between the parties while sharing the same living quarters,
(2) sharing of income or expenses,
(3) joint use or ownership of property,
(4) whether the parties hold themselves out as husband and wife,
(5) the continuity of the relationship, *and*
(6) the length of the relationship."

Fam. Code, § 6209: "*Cohabitant*" is defined in the **Family Code** as a person who regularly resides in the household. "*Former Cohabitant*" is defined as a person who formerly regularly resided in the household.

Pen. Code § 243(f)(10): "*Dating Relationship*" is defined as frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement independent of financial considerations.

Evid. Code § 215: "*Spouse*" is defined to include a "*registered domestic partner*" pursuant to **Fam. Code § 297.5**. (**Fam. Code § 297.5** provides that a registered domestic partner has the same rights, protections, benefits, responsibilities, and duties as are granted to and imposed on spouses.)

8. *Physical Abuse of an Elder*: Assaults or batteries upon any person who is 65 years of age or older and who is related to the suspect by blood or legal guardianship, when the officer has probable cause and the arrest is made as soon as probable cause arises. (**Pen. Code § 836(d)**)

9. *Carrying a Concealed Firearm*, per **Pen. Code § 25400** (formerly **Pen. Code § 12025**), when a peace officer has reasonable (or probable) cause to believe a violation has occurred *within the area of an airport* (as "*airport*" is defined by the **Pub. Utilities Code, § 21013**) to which access is controlled by the inspection of persons and property, and when the arrest is made as soon as reasonable (or probable) cause arises. (**Pen. Code § 836(e)**)

10. *Operating a Vessel or Recreational Vessel, or Manipulation of Water Skis, Aquaplane or Similar Device***,** while under the influence of drugs and/or alcohol, or addicted to the use of drugs. (**Har. & Nav. Code, § 655(b), (c), (d) or (e)**) Upon information from a commissioned, warrant or petty officer of the United States Coast Guard establishing "*reasonable cause*," a peace officer may arrest for a violation of any the above offenses. (**Subd. (g)**)

11. *Operating a Vessel While Under the Influence of Alcohol and/or Drugs*, when the person is involved in an accident on the waters of this state, with "*reasonable cause*," any peace officer may arrest. (**Har. & Nav. Code, § 663.1**)

Vehicle Code *Violations; Exceptions*: The **Vehicle Code** contains limited exceptions, allowing for the option of citing a person for a misdemeanor or infraction even though the offense cited for *did not* occur in the peace officer's presence:

Veh. Code § 16028(c): A peace officer, or a regularly employed and salaried employee of a city or county who has been trained as a traffic collision investigator upon review by a peace officer, at the scene of an accident, may cite any driver involved in the traffic collision who is unable to provide *evidence of financial responsibility*.

Veh. Code § 40600(a): A peace officer who has successfully completed a course or courses of instruction, approved by the Commission on Peace Officer Standards and Training (i.e.,

P.O.S.T.) in the investigation of traffic accidents may cite any person involved in a traffic accident when the officer has probable cause to believe the person violated a provision of the Vehicle Code not declared to be a felony or a local ordinance and when *the offense cited for was a factor in the occurrence of the traffic accident.* **Subd. (d)** provides that the offense need not occur in the officer's presence. However, **subd. (c)** provides that such a citation is *not* considered as an "*arrest*."

Veh. Code § 14602.6(a)(1): This section specifically authorizes the immediate arrest (i.e., or cite) of a person, even though the driving occurred outside the officer's presence, when the defendant is "driving while his or her driving privilege was suspended or revoked,' driving a vehicle while his or her driving privilege is restricted pursuant to **Section 13352** (driving while under the influence or engaging in a speed contest) or **23575** (installation of functioning, certified ignition interlock device) and the vehicle is not equipped with a functioning, certified interlock device, or driving a vehicle without ever having been issued a driver's license." However, no known case has yet to discuss the lawfulness of such an "out of the presence" arrest or citation.

Vehicle Code *Parking Citations*: Parking violations are "*civil infractions*" only, enforceable under a separate civil administrative scheme, and subject to civil penalties. (**Veh. Code §§ 40200 et seq.**) (See ***Tyler v. County of Alameda*** (1995) 34 Cal.App.4th 777; ***United States v. Choudhry*** (9th Cir. 2006) 461 F.3rd 1097, 1101; 82 ***Op.Att'y.Gen.Cal.*** 47 (1999).)

California peace officers are specifically authorized under the **Vehicle Code** to enforce parking infractions. (**Veh. Code §40202(a)**; ***People v. Hart*** (1999) 74 Cal.App.4th 479; ***United States v. Choudhry***, *supra*.)

A parking violation, even though civil in nature, is cause for a police officer to stop and detain a vehicle's driver despite the fact that such a violation is but a "*pretext*" for detaining the driver to investigate some other offense for which the officer does not have a reasonable suspicion, per the rule of ***Whren v. United States*** (1996) 517 U.S. 806 [116 S.Ct. 1769; 135 L.Ed.2nd 89]. (***United States v. Choudhry***, *supra*.)

"*Stale Misdemeanor Rule*:" The arrest for a misdemeanor must occur at the time, or shortly after, the commission of the offense. (***People v. Hampton*** (1985) 164 Cal.App.3rd 27.) If not, it is a "*stale misdemeanor*" for which the defendant may *not* be arrested even if it had occurred in the

officer's presence. (***People v. Craig*** (1907) 152 Cal. 42, 47.) What is and what is not stale depends upon the circumstances:

> "No hard and fast rule can, however, be laid down which will fit every case respecting what constitutes a reasonable time. What may be so in one case under particular circumstances may not be so in another case under different circumstances. All that can be affirmed with safety is that the officer must act promptly in making the arrest, and as soon as possible under the circumstances, and before he transacts other business.' . . . . '(W)e hold that in order to justify an arrest without warrant the arrestor must proceed as soon as may be to make the arrest. And if instead of doing that he goes about other matters unconnected with the arrest, the right to make the arrest without a warrant ceases, and in order to make a valid arrest he must then obtain a warrant therefor (sic)." (***Oleson v. Pincock*** (1926) 68 Utah 507, 515-516 [251 P. 23, 26].)
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> "In order to justify a delay, there should be a continued attempt on the part of the officer or person apprehending the offender to make the arrest; he cannot delay for any purpose which is foreign to the accomplishment of the arrest." (***Jackson v. Superior Court*** (1950) 98 Cal.App.2nd 183, 187; next day, arrest illegal.)
>
> The *stale misdemeanor* rule applies to arrests by private citizens, under authority of **P.C. § 837**, as well. (***Green v. Department of Motor Vehicles*** (1977) 68 Cal.App.3rd 536; arrest made some 35 to 40 minutes after the observation held to be lawful; see also ***Ogulin v. Jeffries*** (1953) 121 Cal.App.2nd 211; 20 minute delay, arrest lawful.)
>
> A police dispatcher, being subjected to defendant's numerous harassing telephone calls, may delegate to a police officer the responsibility to arrest the defendant for her. The offense, over the phone, was held to be in her presence. Also, the arrest was timely in that officers responded immediately to where defendant was calling from and took him into custody. The arrest was held to be a lawful citizen's arrest. (***People v. Bloom*** (2010) 185 Cal.App.4th 1496.)

Sanctions for Violations: A violation by a peace officer of either the "*in the presence*," and, arguably, the "*stale misdemeanor*" rule, or any other statutory (as opposed to constitutional) limitation on taking someone into physical custody, *does not* require the suppression of any evidence, in that these rules are statutory, or non-constitutionally based case law, only, and evidence is suppressed only when it's discovery is the direct product of a *constitutional violation* (or a statute that specifically provides for the

suppression of any resulting evidence). (***Barry v. Fowler*** (9th Cir. 1990) 902 F.2nd 770, 772; ***People v. Donaldson*** (1995) 36 Cal.App.4th 532; ***People v. Trapane*** (1991) 1 Cal.App.4th Supp. 10; see also ***Jackson v. Superior Court*** (1950) 98 Cal.App.2nd 183; and ***People v. McKay*** (2002) 27 Cal.4th 601, 607-619, a violation of **V.C. § 21650.1** (riding a bicycle in the wrong direction); and ***People v. Gomez*** (2004) 117 Cal.App.4th 531, 539, seat belt violation, citing ***Atwater v. City of Lago Vista*** (2001) 532 U.S. 318 [121 S.Ct. 1536; 149 L.Ed.2nd 549]; ***United States v. Miranda-Guerena*** (9th Cir. 2006) 445 F.3rd 1233; ***People v. Bennett*** (2011) 197 Cal.App.4th 907, 918; ***People v. Burton*** (2013) 219 Cal.App.4th Supp. 9, 13.)

> "Under California law, an officer may only make a warrantless arrest for a misdemeanor if he has probable cause to believe that the person committed the offense *in the officer's presence*. **Cal. Penal Code § 836(a)(1)**. So if Vanegas's arrest was based on **§ 415(2)**, then the officers may have violated California law because his conduct was not in Officer Klotz's presence. But that does not change the result. That's because '[t]he requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the **Fourth Amendment**.' ***Barry v. Fowler***, 902 F.2nd 770, 772 (9th Cir. 1990). So to establish a violation of the Fourth Amendment, it does not matter if Officer Klotz was present when Vanegas committed the misdemeanor. Rather, the 'crucial inquiry' is whether Officer Klotz had probable cause to make the arrest. ***Id.*** at 773." (***Vanegas v. City of Pasadena*** (9th Cir. 2022) 46 F.4th 1159, 1165; holding that the officer did in fact have the necessary probable cause to effect an arrest even though the misdemeanor offense did not occur in his presence.)

> "(T)he requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the **Fourth Amendment**." (***Welsh v. Wisconsin*** (1984) 466 U.S. 740, 756 [104 S.Ct. 2091; 80 L.Ed.2nd 732]; opinion of Justice White, citing ***Street v. Surdyka*** (4th Cir. 1974) 492 F.2nd 368, 371-272.)

> *However*, "police may not use probable cause for a traffic violation to justify an arrest for an unrelated offense where, under the facts known to police, they have no probable cause supporting the unrelated offense." (***People v. Espino*** (2016) 247 Cal.App.4th 746, 765; ruling that just because officers *could have* arrested defendant for speeding, doesn't mean that that fact justifies an arrest for some other bookable (i.e., a felony) offense for which there was no

probable cause. Consent to search obtained without probable cause to justify the arrest for a felony was held to be invalid.)

A violation by a police officer of a state statute, such statute limiting the officer's right to make a custodial arrest or a search, so long as not also in violation of the **Fourth Amendment**, does not result in the suppression of the resulting evidence unless mandated by the terms of the statute. While a state is empowered to enact more restrictive search and seizure rules, violation of those rules that are not also a **Fourth Amendment** violation, does not invoke the **Fourth Amendment's** exclusionary rule. (***Virginia v. Moore*** (2008) 553 U.S. 164 [128 S.Ct. 1598; 170 L.Ed.2nd 559]; ***People v. Xinos*** (2011) 192 Cal.App.4th 637, 653.)

Violation of a State Law but not a Constitutional Requirement:

"The violation of a state statute, standing alone, does not form the basis for suppression under the **Fourth Amendment**." (***People v. Hardacre*** (2004) 116 Cal.App.4th 1292, 1301; ***United States v. Miranda-Guerena*** (9th Cir. 2006) 445 F.3rd 1233.)

"It is elemental that the illegality tainting evidence and rendering it inadmissible is illegality flowing from the violation of a defendant's constitutional rights—primarily those involving unlawful searches and seizures in violation of the **Fourth Amendment** to the **United States Constitution** and the essentially identical guarantee of personal privacy set forth in **Article I**, **§ 19**, of the **California Constitution**. [Citations.] Evidence obtained in violation of a statute is not inadmissible per se unless the statutory violation also has a constitutional dimension." (***People v. Brannon*** (1973) 32 Cal.App.3d 971, 975; ***People v. Pifer*** (1989) 216 Cal.App.3rd 956, 962-963.)

See also the same reasoning being used in ***Rodriguez v. Superior Court*** (1988) 199 Cal.App.3rd 1453, 1470; suggesting that because a "*nighttime*" search does not violate any constitutional principles, evidence discovered during a nighttime search without judicial authorization, in violation of the requirements of **P.C. § 1533,** should *not* result in suppression of any evidence.

And see ***People v. Collins*** (2004) 115 Cal.App.4th 137: Violation of the administrative provisions for the searching of prisoners in a prison, absent a constitutional violation, does not require the suppression of any resulting evidence.

The use of a "*Phlebotomist*" to draw blood from a "Driving while Under the Influence" (i.e., "DUI") suspect, as opposed to using one of the medical professionals authorized by **Veh. Code § 23158**, not being a constitutional violation merely due to the violation of the statute, does *not* result in the suppression of any evidence. (***People v. Esayian*** (2003) 112 Cal.App.4th 1031**;** ***People v. McHugh*** (2004) 119 Cal.App.4th 202; ***People v. Mateljan*** (2005) 129 Cal.App.4th 367, 376-377.)

A violation of the "*implied consent law*," forcing a "DUI" (Driving While Under the Influence") suspect to submit to a blood test instead of a breath test, being a violation of state statutory law only, does not expose the officer to any civil liability. (***Ritschel v. City of Fountain Valley*** (2005) 137 Cal.App.4th 107.)

> California's "*implied consent law*" is contained in **Veh. Code § 23612**.
>
> Note ***People v. Ling*** (2017) 15 Cal.App.5th Supp. 1, at page 10, where the Court noted that; "although the actions of the arresting officer failed to comply with the requirements of the implied consent law, no court has held that such a failure rises to the level of a constitutional violation, and we do not so hold now."
>
> *But*, telling a DUI arrestee, who was arrested on federal property (i.e., in a national park) that refusing to submit to a blood test is not a criminal violation in itself, which is the California rule, constitutes a **Fifth Amendment** "due process" violation when the federal rule, which governed the arrest in this case, is that it *is* a criminal violation to refuse a blood test (**16 U.S.C. § 3**), causing a reversal of the defendant's federal conviction. (***United States v. Harrington*** (9th Cir. 2014) 749 F.3rd 825, 828-830.)

While a state may impose stricter standards on law enforcement in interpreting its own state constitution (i.e., "*independent state grounds*"), a prosecution in federal court is guided by the federal interpretation of the **Fourth Amendment** and is not required to use the state's stricter standards. (***United States v. Brobst*** (9th Cir. 2009) 558 F.3rd 982, 989-991, 997.)

> Until passage of **Proposition 8**, California Courts were obligated to follows California's rules that in some circumstances may (and lawfully were allowed to) have been stricter than the federal standards. (See ***American***

Academy of Pediatrics v. Lungren (1997) 16 Cal.4th 307, 327-328; ***Raven v. Deukmejian*** (1990) 52 Cal.3rd 336. 353.)

Since passage of **Proposition 8**, California state courts now determine the reasonableness of a search or seizure by federal constitutional standards. (**People v. Schmitz** (2012) 55 Cal.4th 909, 916; **People *v.* Steele** (2016) 246 Cal.App.4th 1110, 1114-1115.)

Note: See "*California's Exclusionary Rule*; ***Proposition 8***," above.

Mistakenly collecting blood samples for inclusion into California's DNA data base (See **P.C. § 296**), when the defendant did not actually have a qualifying prior conviction, does not require the suppression of the mistakenly collected blood samples, nor is it grounds to suppress the resulting match of the defendant's DNA with that left at a crime scene. (***People v. Robinson*** (2010) 47 Cal.4th 1104, 1116-1129.)

Arrest for an Infraction or Misdemeanor:

Release Requirement: Persons subject to citation for the violation of a crime deemed to be an "*infraction*" *must* be released on a citation, except in limited circumstances. If the person to be cited does not have a driver's license or other satisfactory evidence of identification, the officer *may* (in lieu of a custodial arrest, at the officer's discretion) require the arrestee to place a right thumbprint, or left thumbprint or fingerprint if the person has a missing or disfigured right thumb, on the promise to appear. (**P.C. § 853.5**)

P.C. § 853.5 has been held to provide the exclusive grounds for a custodial arrest for an infraction. (***Edgerly v. City and County of San Francisco*** (9th Cir. 2013) 713 F.3rd 976, 981-985; citing ***In re Rottanak K.*** (1995) 37 Cal.App.4th 260, and ***People v. Williams*** (1992) 3 Cal.App.4th 1100.)

See "*Exceptions*," below.

See also **Public Resources Code § 5786.17**, for the authority for uniformed employees of a Parks and Recreation District to issue misdemeanor and infraction citations for violations of state law, city or county ordinances, or district rules, regulations, or ordinances when the violation is committed within a recreation facility and in the presence of the employee issuing the citation.

Exceptions: The exceptions to the requirement that the subject be released on his written promise to appear when arrested for an infraction, as listed in **Pen. Code § 853.5(a)**, are:

- As specified in **Veh. Code §§ 40302**, **40303**, **40305** and **40305.5** (see below); *or*
- The arrestee refuses to sign a written promise to appear; *or*
- The arrestee has no satisfactory identification *and* refuses to provide an unobstructed view of his or her full face for examination; *or*
- The arrestee, without satisfactory identification, refuses to provide a thumbprint or fingerprint.

  Because the section is written in the "*disjunctive*," it is the opinion of the State Attorney General that if the person does not have satisfactory evidence of identification, the officer has the discretion to take the person into physical custody despite the fact that the person is willing to sign a written promise to appear and to provide a thumbprint. (2005, ***Opn.Cal.Atty.Gen.***, # 05-206)

  Officers were entitled to summary judgment on plaintiff's false arrest claim failed because it was undisputed that plaintiff refused to sign a notice to appear, and **Pen. Code § 835.5(a)** authorized plaintiff's arrest and detention for failing to sign the notice to appear. (***Agha v. Rosengren*** (9th Cir. 2008) 276 Fed.Appx. 579; 2008 U.S.App. LEXIS 9934; an unpublished decision.)

  See ***United States v. Mota*** (9th Cir. 1993) 982 F.2nd 1384, where it was held that a physical arrest of a person committing a business license infraction was a constitutional violation requiring the suppression of evidence: Questionable authority after ***Virginia v. Moore*** (2008) 553 U.S. 164 [128 S.Ct. 1598; 170 L.Ed.2nd 559], holding that booking a suspect for a non-bookable criminal violation is not a **Fourth Amendment** violation. (See "*Sanctions for Violations*," above.)

  Pen. Code § 853.5 has been held to provide the exclusive grounds for a custodial arrest for an infraction. (***Edgerly v. City and County of San Francisco*** (9th Cir. 2013) 713 F.3rd 976, 981-985; citing ***In re Rottanak K.*** (1995) 37 Cal.App.4th 260, and ***People v. Williams*** (1992) 3 Cal.App.4th 1100.)

Veh. Code § 40302: *Mandatory Custodial Arrests*: Persons who would otherwise be cited and released for a **Vehicle Code** infraction or

misdemeanor "*shall*" be arrested and taken immediately before a magistrate when the person:

- Fails to present his driver's license or other satisfactory evidence of his identity for examination *and* refuses to provide an unobstructed view of his or her full face for examination; *or*
- Refuses to give his written promise to appear; *or*
- Demands an immediate appearance before a magistrate; *or*
- Is charged with violating **V.C. § 23152** (i.e., "*driving while under the influence*.").

"*Other Satisfactory Evidence of Identity*:" The arresting officer has the discretion to determine what constitutes "*other satisfactory evidence of identity*," when the subject fails to provide a driver's license as required by the section. (***People v. Monroe*** (1993) 12 Cal.App.4th 1174, 1182; ***People v. McKay*** (2002) 27 Cal.4th 601, 619-625.)

> However, that discretion is not unlimited. Identification documents which are an "*effective equivalent*" are *presumptively* (i.e., in the absence of contrary evidence) sufficient. This would include a California identity card (issued per **Veh. Code § 13000**) or any current written identification which contains at a minimum a photograph and description of the person named on it, a current mailing address, a signature of the person, and a serial or other identifying number. (***People v. Monroe***, *supra*, at p. 1186.)
>
> The officer is not legally obligated to make radio or other inquires in an attempt to verify the person's oral assertions of identity. (***Id***., at p. 1189; ***People v. McKay***, *supra*.)
>
> An officer's refusal to accept oral statements as sufficient evidence of identity will be upheld on appeal. (***People v. McKay***, *supra*; ***People v. Grant*** (1990) 217 Cal.App.3rd 1451, 1455; see also ***People v. Anderson*** (1968) 266 Cal.App.2nd 125, 128.)
>
> An officer's refusal to accept a Social Security card upheld on appeal. (***People v. Farley*** (1971) 20 Cal.App.3rd 1032, 1036, fn. 2.)
>
> See **B&P Code § 25660**, describing what is considered to be **"***bona fide evidence of age*" for purposes of purchasing alcoholic beverages:
>
> (1) A valid vehicle operator's license containing the person's name, date of birth, physical description and picture.

(2) A valid passport issued by the United States or a foreign government.
(3) A valid military identification card that includes a date of birth and picture of the person.

Veh. Code § 40303; *Arrestable Offenses*: This section lists 17 different circumstances in which an arresting officer has the option of either taking a person "*without unnecessary delay*" before a magistrate, or releasing the person with a 10-days' written notice to appear:

- Violation of **Veh. Code §§ 10852** or **10853**, relating to injuring or tampering with a vehicle.
- Violation of **Veh. Code §§ 23103** or **23104**, relating to reckless driving.
- Violation of **Veh. Code § 2800(a)**, relating to failure to stop and submit to an inspection or test of a vehicle's lights per **Veh. Code § 2804**.
- Violation of **Veh. Code § 2800(a)**, relating to failure to stop and submit to a brake test.
- Violation of **Veh. Code § 2800(a)**, relating to failure to stop and submit to a vehicle inspection, measurement, or weighing, per **Veh. Code § 2802**, or a refusal to adjust the load or obtain a permit, per **Veh. Code § 2803**.
- Violation of **Veh. Code § 2800(a)**, relating to continuing to drive after being lawfully ordered not to drive by a member of the California Highway Patrol for violating the driver's hours of service or driver's log regulations, per **Veh. Code § 34501(a)**.
- Violation of **Veh. Code § 2800(b)**, **(c)** or **(d)**, relating to failure or refusal to comply with any lawful out-of-service order.
- Violation of **Veh. Code §§ 20002** or **20003**, relating to duties in the event of an accident.
- Violation of **Veh. Code § 23109**, relating to participating in a speed contest or exhibition of speed.
- Violation of **Veh. Code §§ 14601, 14601.1, 14601.2,** or **14601.5**, relating to driving on a suspended or revoked license.
- When the person arrested has attempted to evade arrest.
- Violation of **Veh. Code § 23332**, relating to persons upon vehicular crossings.
- Violation of **Veh. Code § 2813**, relating to the refusal to stop and submit a vehicle to an inspection of its size, weight, and equipment.
- Violation of **Veh. Code § 21461.5**, relating to being found on a freeway within 24 hours of being cited for same, and refusing to leave when lawfully ordered to do so by a peace officer after having been informed that he is subject to arrest.

- Violation of **Veh. Code § 2800(a)** relating to being found on a bridge or overpass within 24 hours of being cited for same, and refusing to leave when lawfully ordered to do so by a peace officer pursuant to **Veh. Code § 21962**, after having been informed that he is subject to arrest.
- Violation of **Veh. Code § 21200.5**, relating to riding a bicycle while under the influence of alcohol and/or drugs.
- Violation of **Veh. Code § 21221.5**, relating to operating a motorized scooter while under the influence of alcohol and/or drugs.

Veh. Code § 40303.5: "*Fix-It Tickets*:" An arresting officer shall permit a person arrested for any of the following offenses to execute a notice containing a promise to correct the violation in accordance with the provisions of **Veh. Code § 40610** unless the arresting officer finds that any of the disqualifying conditions specified in **V Veh. Code § 40610(b)** exist:

> (a) A registration infraction set forth in **Veh. Code §§ 4000** et seq. (**Division 3**).
>
> (b) A driver's license infraction set forth in **Veh. Code §§ 12500 et seq.** (**Division 6**), **Veh. Code § 12951(a)**, relating to possession of a driver's license.
>
> (c) **Veh. Code § 21201**, relating to bicycle equipment.
>
> (d) **Veh. Code § 21212(a)**. (Bicycle helmet violations)
>
> (e) An infraction involving equipment set forth in **Veh. Code §§ 24000 et seq.** (**Division 12**), **Veh. Code § 29000 et seq.** (**Division 13**), **Veh. Code §§ 34500 et seq.** (**Division 14.8**), **Veh. Code §§ 36000 et seq.** (**Division 16**), **Veh. Code §§ 38000 et seq.** (**Division 16.5**), and **Veh. Code §§ 39000 et seq.** (**Division 16.7**).
>
> (f) **Veh. Code § 2482**, relating to registration decals for vehicles transporting inedible kitchen grease.

Veh. Code § 12801.5(e): *The Unlicensed Driver*: "Notwithstanding (**Veh. Code**) **Section 40300** or any other provision of law, a peace officer may not detain or arrest a person solely on the belief that the person is an *unlicensed driver*, unless the officer has reasonable cause to believe the person is under the age of 16 years."

> See ***Bingham v. City of Manhattan Beach*** (9th Cir. 2003) 341 F.3rd 939, 944; arresting a person for driving with an expired

driver's license, in contravention of this statute, may subject the offending/arresting officer to federal civil liability.

> *Note*: This is questionable authority after ***Virginia v. Moore*** (2008) 553 U.S. 164 [128 S.Ct. 1598; 170 L.Ed.2nd 559], holding that booking a suspect for a non-bookable criminal violation is not a **Fourth Amendment** violation. (See "*Sanctions for Violations*," above; and see ***Harvey v. Coronado*** (9th Cir. 2012) 2012 U.S. Dist. LEXIS 187471; where an arrest for **Veh. Code § 12500** was held to be a lawful arrest.)

The California Supreme Court, in ***People v. Lopez*** (2019) 8 Cal.5th 353, at pages 373-374.), lists the three legal alternatives for dealing with the driver of an automobile who is doing so without a driver's license:

> "When an officer has obtained satisfactory evidence of a detainee's identity, he or she may cite and release the detainee. (**Pen. Code § 853.5, subd. (a)**; **Veh. Code §§ 40303, 40500, 40504**; ***People v. Superior Court*** (***Simon***) (1972) 7 Cal.3rd 186, 199. . . . (fn. omitted) The officer also has discretion to release the suspect with a warning against committing future violations. (**Pen. Code § 849, subd. (b)(1)**; ***People v. McGaughran*** ((1979)) 25 Cal.3rd (577) at p. 584.) And finally, if no other path seems prudent or permissible, the officer can arrest the detainee and take him or her to be booked into jail for the traffic violation. (**Veh. Code, § 40302**; ***Atwater v. Lago Vista*** (2001) 532 U.S. 318, 323 . . . ; ***Knowles*** (***v. Iowa*** (1998)) 525 U.S. (113) at p. 118; (***People v.***) ***McKay*** ((2002)) 27 Cal.4th (601), at pp. 620-625.) In the end, arrest is one option—but it is certainly not the only alternative to a warrantless search. (fn. omitted)"

Veh. Code § 40305: *Non-Residents*: A *nonresident* who is arrested for any violation of the **Vehicle Code** and who fails to provide satisfactory evidence of identity *and* an address within this State at which he can be located *may* be taken immediately before a magistrate.

Veh. Code § 40305.5: *Traffic Arrest Bail Bond Certificate*: Provisions for the arresting officer to receive a guaranteed traffic arrest bail bond certificate (with the requirements for such a certificate listed) when a nonresident driver of a commercial vehicle of 7,000 pounds or more (excluding house cars) is arrested for violating any provision of the

Vehicle Code and fails to provide satisfactory evidence of identification *and* an address within the State at which he can be located.

Pen. Code § 853.6(i): *Misdemeanor Citations*: A person arrested for a *misdemeanor* must also be cited (on a "*misdemeanor citation form*") and released *unless* one of the following statutory *exceptions* applies:

- The person is intoxicated.
- The person requires medical treatment.
- The person was arrested for one or more of the offenses listed in **Veh. Code §§ 40302** or **40303** (see above).
- The person has outstanding warrants.
- The person is unable to provide "*satisfactory evidence of identification*" (see above).
- Prosecution would be jeopardized by immediate release.
- Reasonable likelihood that the offense would continue or that persons or property would be imminently endangered by the release of the person.
- The person demands to be taken before a magistrate or refuses to sign the notice to appear.
- There is reason to believe that the person would not appear on the citation. An arrest warrant or failure to appear that is pending at the time of the current offense shall constitute reason to believe that the person would not appear as specified in the notice.
- The person was subject to **Pen. Code § 1270.1**.

  Pen. Code § 1270.1 prohibits the release of a person arrested for a specified crime on his or her own recognizance, or on bail in an amount that is either more or less than the amount that is contained in the bail schedule for that offense. This includes the following offenses:

  - Serious felonies, per **Pen. Code § 1192.7(c)**.
  - Violent felonies, per **Pen. Code § 667.5(c)**.
  - Domestic violence with corporal injury, per **Pen. Code § 273.5**.
  - Witness intimidation, per **Pen. Code § 136.1(c)**.
  - Spousal rape, per **Pen. Code § 262**.
  - Stalking, per **Pen. Code § 646.9**.
  - Felony criminal threats, per **Pen. Code § 422**.
  - Misdemeanor domestic violence, per **Pen. Code § 243(e)(1)**.
  - Restraining order violations, per **Pen. Code § 273.6**, if the detained person made threats to kill or

harm, engaged in violence against, or went to the residence or workplace of, the protected party.

- The person has one or more failures to appear in court on previous misdemeanor citations that have not been resolved.
- The person has been cited, arrested, or convicted for misdemeanor or felony theft from a store or from a vehicle in the previous six months.
- There is probable cause to believe that the person is guilty of committing organized retail theft, in violation of **Pen. Code § 490.4**.

It is not unconstitutional to make a custodial arrest (i.e., transporting to jail or court) of a person arrested for a minor misdemeanor (***Atwater v. City of Lago Vista*** (2001) 532 U.S. 318 [121 S.Ct. 1536; 149 L.Ed.2nd 549].), or even for a fine-only, infraction. (***People v. McKay*** (2002) 27 Cal.4th 601, 607; see also ***United States v. McFadden*** (2nd Cir. 2001) 238 F.3rd 198, 204.)

California's statutory provisions require the release of misdemeanor arrestees in most circumstances. (e.g., see **P.C. §§ 853.5**, **853.6**, **V.C. §§ 40303**, **40500**) However, violation of these statutory requirements is not a constitutional violation and, therefore, *should not* result in suppression of any evidence recovered as a result of such an arrest. (***People v. McKay***, *supra*, at pp. 607-619, a violation of **V.C. § 21650.1** (riding a bicycle in the wrong direction); ***People v. Gomez*** (2004) 117 Cal.App.4th 531, 539, seat belt violation (**V.C. § 27315(d)(1)**), citing ***Atwater v. City of Lago Vista*** (2001) 532 U.S. 318 [121 S.Ct. 1536; 149 L.Ed.2nd 549]; ***People v. Bennett*** (2011) 197 Cal.App.4th 907, 918.)

The United States Supreme Court has recently affirmed this principle:

> A violation by a police officer of a state statute, such statute limiting the officer's right to make a custodial arrest or a search, so long as not also in violation of the **Fourth Amendment**, does not result in the suppression of the resulting evidence unless mandated by the terms of the statute. While a state is empowered to enact more restrictive search and seizure rules, violation of those rules that are not also a **Fourth Amendment** violation, does not invoke the **Fourth Amendment's** exclusionary rule. (***Virginia v. Moore*** (2008) 553 U.S. 164 [128 S.Ct. 1598; 170 L.Ed.2nd 559].)

An otherwise lawful arrest, done without statutory authority, has been upheld in other circumstances:

> Where a federal officer arrested an obviously intoxicated driver just outside a federal enclave and beyond the officer's territorial jurisdiction after a lawful traffic stop, the **Fourth Amendment** does not require the exclusion of the evidence obtained in a search incident to the arrest because the arrest was supported by probable cause. Therefore, it was not an unreasonable seizure within the meaning of the **Fourth Amendment** despite the lack of any statutory authority for making the arrest. (***United States v. Ryan*** (1st Cir. 2013) 731 F.3rd 66.)

However, "police may not use probable cause for a traffic violation to justify an arrest for an unrelated offense where, under the facts known to police, they have no probable cause supporting the unrelated offense." (***People v. Espino*** (2016) 247 Cal.App.4th 746, 765; ruling that just because officers *could have* arrested defendant for speeding, doesn't mean that that fact justifies an arrest for some other bookable (i.e., a felony) offense for which there was no probable cause. Consent to search obtained without probable cause to justify the arrest for a felony was held to be invalid.)

With an Existing Warrant of Arrest:

Pen. Code § 818: A peace officer serving upon a person a warrant of arrest for a misdemeanor offense under the **Vehicle Code** or under any local ordinance relating to stopping, standing, parking, or operation of a motor vehicle and where no written promise to appear has been filed and the warrant states on its face that a citation may be used in lieu of physical arrest, may, instead of taking the person before a magistrate, prepare a notice to appear and release the person on his or her promise to appear. In such a case, issuing a citation is deemed to be compliance with directions of the warrant. The officer shall endorse on the warrant; "**Section 818**, **Penal Code**, complied with," and return the warrant to the magistrate who issued it.

Pen. Code § 827.1: A person for whom an arrest warrant has been issued for a misdemeanor offense *may* be released upon the issuance of a citation, issued per **Pen. Code §§ 853.6** to **853.8**, in lieu of physical arrest, *unless* one of the following conditions exists:

- The misdemeanor cited in the warrant involves violence.
- The misdemeanor cited in the warrant involves a firearm.
- The misdemeanor cited in the warrant involves resisting arrest.
- The misdemeanor cited in the warrant involves giving false information to a peace officer.
- The person arrested is a danger to himself or herself or others due to intoxication or being under the influence of drugs or narcotics.
- The person requires medical examination or medical care or was otherwise unable to care for his or her own safety.
- The person has other ineligible charged pending against him or her.
- There is reasonable likelihood that the offense or offenses would continue to resume, or that the safety of persons or property would be immediately endangered by the release of the person.
- The person refuses to sign the notice to appear.
- The person cannot provide satisfactory evidence of personal identification.
- The warrant of arrest indicates that the person is not eligible to be released on a citation.

***Arrest Warrants*:**

Defined: A *warrant of arrest* is a written order, signed by a magistrate, and generally directed to a peace officer, commanding the arrest of a named defendant. (**Pen. Code §§ 813**, **814**, **815**, & **819**)

A warrant will issue "*if, and only if*, the magistrate is satisfied from the complaint that the offense complained of has been committed and that there is reasonable ground to believe that the defendant has committed it, . . ." (*Emphasis added*; **Pen. Code § 813(a)**)

"A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions." (***United States v. Leon*** (1984) 468 U. S. 897, 920, fn. 21 [104 S.Ct. 3405; 82 L. Ed.2nd 677].)

Effective *January 1, 2022*, the authority to make a declaration of probable cause in support of a warrant for arrest (as contained in **P.C. § 817(a)(1)**) *when the defendant is a peace officer* has been expanded from a "peace officer" to also include an employee of a public prosecutor's office (e.g., a deputy district attorney, deputy city attorney, or investigator).

The warrant must be supported by a sworn statement made in writing, reflecting the probable cause for the arrest. (**Pen. Code § 817(b)**)

Content: An arrest warrant is directed to "*any peace officer*, or *any public officer or employee authorized to serve process where the warrant is for a violation of a statute or ordinance which such person has the duty to enforce*" (Emphasis added), and states the following (**Pen. Code § 816**):

- The crime, designated in general terms.
- The defendant's name, or, if this is unknown, any name. (E.g., "John Doe.")
- The date and time of issuance.
- Bail.
- The city or county where it is issued.
- The duty of the arresting officer to bring the defendant before the magistrate.
- The judge's signature.
- The court.

Case Law:

An arrest warrant issued solely upon the complainant's "information and belief" cannot stand if the complaint or an accompanying affidavit does not allege underlying facts upon which the magistrate can independently find probable cause to arrest the accused. **Pen. Code §§ 806**, **813**, and **952** do not authorize the issuance of warrants of arrest based solely upon complaints couched in the language of the charged offense and therefore do not violate the **Fourth Amendment**; (See ***People v. Sesslin*** (1968) 68 Cal.2nd 418.)

In a case of mistaken identity, the county did not violate the **Fourth Amendment** by issuing a warrant without including a number corresponding to the true subject's fingerprints in that the warrant satisfied the particularity requirement as it contained both the subject's name and a detailed physical description. Even if the **Fourth Amendment** does require the county to include more detailed information in a warrant, the plaintiff failed to show that the county had a policy or custom of failing to do so. Also, the sheriff's deputies were not unreasonable in believing that the plaintiff was the subject of the warrant at the time of arrest given the name and date of birth on the warrant matched the plaintiff's, and the height and weight descriptors associated with the warrant were within one inch and 10 pounds of the plaintiff's true size. (***Rivera v. County of Los Angeles*** (2014) 745 F.3rd 384, 388-389.)

The ***Rivera*** Court also found that the mistaken incarceration did not violate defendant's **Fourteenth Amendment** due process

rights absent evidence showing that the civil defendants should have known the plaintiff was entitled to release because: (1) the circumstances indicated to the defendants that further investigation was warranted, *or* (2) the defendants denied the plaintiff access to the courts for an extended period of time. Neither circumstance applied in this case. (***Id.***, at pp. 389-392.)

A detention pursuant to a valid warrant but in the face of repeated protests of innocence may, *after the lapse of a certain amount of time*, be held to have deprived the accused of his liberty without due process of law, a **Fifth** or **Fourteenth Amendment** violation. A wrongful detention can ripen into a due process violation, but it is the plaintiff's burden to show that "it was or should have been known [by the defendant] that the [plaintiff] was entitled to release." (***Gant v. County of Los Angeles*** (9th Cir. 2014) 772 F.3rd 608, 619-623.)

And where the circumstances should have prompted verification of an arrestee's identity (e.g., a different middle name and a significant different physical description), a **Fourteenth Amendment** due process violation may be found. (***Garcia v. County of Riverside*** (9th Cir. 2016) 817 F.3rd 635.)

Where officers had an arrest warrant for defendant, their initial entry and protective sweep of defendant's motel room was held to have not violated the **Fourth Amendment**. An arrest warrant, based on probable cause, implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is inside. A person's hotel or motel room is considered a "dwelling" in this context. To enter a hotel or motel room to execute an arrest warrant, a law enforcement officer must have a reasonable belief that: (1) the room is in fact the suspect's and; (2) the suspect is inside. Once inside the room, officers may perform a protective sweep of the premises and they are allowed to seize any contraband in plain view. (***United States v. Ross*** (11th Cir. 2019) 941 F.3rd 1058.)

Under the procedures followed by an Oregon County Circuit Court, the "defendant release assistance officer" had not been delegated authority to make release decisions. Rather, pursuant to **Or. Rev. Stat. § 135.235**, he was authorized only to make recommendations to a judge. Therefore, the officer's action in submitting a bare unsigned warrant for plaintiff's arrest to a judge should have been seen as making a recommendation only that the warrant be signed. Accordingly, the officer was not entitled to absolute immunity in plaintiff's **42 U.S.C. § 1983** lawsuit. (***Patterson v. Van Arsdel*** (9th Cir. 2018) 883 F.3rd 826.)

Types of Arrest Warrants:

Bench Warrant: **Pen. Code § 978.5**: Bench Warrants; When Available:

(a) A bench warrant of arrest may be issued whenever a defendant fails to appear in court as required by law including, but not limited to, the following situations:

(1) If the defendant is ordered by a judge or magistrate to personally appear in court at a specific time and place.

(2) If the defendant is released from custody on bail and is ordered by a judge or magistrate, or other person authorized to accept bail, to personally appear in court at a specific time and place.

(3) If the defendant is released from custody on their own recognizance and promises to personally appear in court at a specific time and place.

(4) If the defendant is released from custody or arrest upon citation by a peace officer or other person authorized to issue citations and the defendant has signed a promise to personally appear in court at a specific time and place.

(5) If a defendant is authorized to appear by counsel and the court or magistrate orders that the defendant personally appear in court at a specific time and place.

(6) If an information or indictment has been filed in the superior court and the court has fixed the date and place for the defendant personally to appear for arraignment.

(b) The bench warrant may be served in any county in the same manner as a warrant of arrest.

(c) This section shall become operative on *July 1, 2026*.

Case Law:

A bench warrant, issued by a neutral and detached magistrate upon a defendant's failure to appear, is legal justification for making entry into a residence in which there is probable cause to believe the subject of the warrant is hiding, despite the fact that such a warrant is issued

without a finding of probable cause. (***United States v. Gooch*** (9th Cir. 2007) 506 F.3rd 1156.)

Pen. Code § 978.5 does not set forth the elements of any crime. Rather, that section simply establishes when a court may issue a bench warrant for a defendant who has failed to appear in court as required by law. The issuing of the bench warrant is not equivalent to a conviction for failure to appear. There is no requirement that the court must have evidence that a defendant would be held liable under all the elements of willful failure to appear before issuing a bench warrant. And even if a bench warrant is issued, a defendant is arrested under that warrant, and the defendant faces trial on that charge, the prosecution will bear the burden to prove that the defendant's absence at the hearing was willful. In satisfying its burden, the prosecution would no doubt have to show that the defendant knew about the hearing (i.e., had actual notice). However, actual notice of a hearing isn't required before issuing a bench warrant under **Penal Code section 978.5**. Here, the defendant appeared at hearings for which he had received notice at prior hearings, but his case was continued due to the COVID pandemic. The trial court sent notice to the last address on file on three occasions, before issuing the warrant even though defense counsel asserted the defendant was couch-surfing and did not have a working cell phone to have had actual notice. The Court of Appeal noted it was not too burdensome to require him to check in with the court or his counsel, the trial court provided notice by mail, and courts do not have the resources to track defendants down and provide them notice of a hearing before merely issuing a warrant. "It cannot be, even in dealing with a pandemic, that this defendant, who has been charged with serious crimes, can avoid answering for those charges simply by claiming a lack of actual notice thereby stripping the court of its discretion to issue a bench warrant." (***Valderas v. Superior Court*** (2021) 72 Cal.App.5th 172.)

Electronic Arrest Warrant; ***Pen. Code § 817(b)***, ***(c)*** & ***(d)*****:**

Effective *January 1, 2019*, the requirement of a telephone conversation between a magistrate and an officer/declarant during the obtaining of an arrest warrant, including an oral oath over the telephone from an officer (declarant), has been eliminated. Now, an arrest warrant may be issued completely electronically by facsimile, email, or computer server.

The procedure requires the officer/declarant to sign under penalty of perjury his or her declaration in support of the arrest warrant, with the signature being a digital or electronic signature if email or computer server are used to obtain the warrant.

The statute continues to permit the magistrate to accept an oral statement made under penalty of perjury that is recorded and transcribed, and continues to provide a magistrate with the discretion to examine under oath the person seeking the warrant and any witness that may be produced. A warrant signed by a magistrate and received by the declarant is deemed to be the original warrant.

See **Pen. Code § 817(f)** for the suggested warrant format.

"***Ramey** Warrant*:" A term of art used to describe an arrest warrant issued prior to the court filing of a criminal case against a specific defendant. (See ***People v. Ramey*** (1976) 16 Cal.3rd 263.)

Note: Ordinarily, a prerequisite to the issuance of an arrest warrant is the filing of a complaint with the magistrate, charging a felony originally triable in the superior court of the county, or where the complaint is presented to a judge in a misdemeanor or infraction case, charging an offense triable in that judge's court.

However, the formal filing of a written complaint is not a condition precedent to issuance of an arrest warrant. (***People v. Case*** (1980) 105 Cal.App.3rd 826, 832.)

Long approved by case law (***People v. Case**, supra*; and ***People v. Bittaker*** (1989) 48 Cal.3rd 1046, 1070-1072.), pre-filing arrest warrants are now authorized by statute. (**Pen. Code § 817(a)**)

Pen. Code § 817 (effective 1/1/22):

(a)

(1) Before issuing an arrest warrant, the magistrate shall examine a declaration of probable cause made by a peace officer or, when the defendant is a peace officer, an employee of a public prosecutor's office of this state, in accordance with **subdivisions (b)**, **(c)**, and **(d)**, as applicable. The magistrate shall issue a warrant of probable cause for the arrest of the defendant only if the magistrate is satisfied after

reviewing the declaration that there exists probable cause that the offense described in the declaration has been committed and that the defendant described therein has committed the offense.

(2) The warrant of probable cause for arrest shall not begin a complaint process pursuant to **Section 740** or **813**. The warrant of probable cause for arrest shall have the same authority for service as set forth in **Section 840** and the same time limitations as that of an arrest warrant issued pursuant to **Section 813**.

(b) The declaration in support of the warrant of probable cause for arrest shall be a sworn statement made in writing. If the declarant transmits the proposed warrant and all affidavits and supporting documents to the magistrate using facsimile transmission equipment, email, or computer server, the conditions in **subdivision (d)** shall apply.

(c) In lieu of the written declaration required in **subdivision (b)**, the magistrate may accept an oral statement made under penalty of perjury and recorded and transcribed. The transcribed statement shall be deemed to be the declaration for the purposes of this section. The recording of the sworn oral statement and the transcribed statement shall be certified by the magistrate receiving it and shall be filed with the clerk of the court. In the alternative, the sworn oral statement may be recorded by a certified court reporter who shall certify the transcript of the statement, after which the magistrate receiving it shall certify the transcript, which shall be filed with the clerk of the court.

(d)

(1) The declarant shall sign under penalty of perjury their declaration in support of the warrant of probable cause for arrest. The declarant's signature shall be in the form of a digital signature or electronic signature if email or computer server is used for transmission to the magistrate. The proposed warrant and all supporting declarations and attachments shall be transmitted to the magistrate utilizing facsimile transmission equipment, email, or computer server.

(2) The magistrate shall verify that all the pages sent have been received, that all the pages are legible, and that the declarant's signature, digital signature, or electronic signature is genuine.

(e) A warrant of probable cause for arrest shall contain the information required pursuant to **Sections 815** and **815a**.

(f) A warrant of probable cause for arrest may be in substantially the following form:

County of ___, State of California.

The people of the State of California to any peace officer of the STATE:

Proof by declaration under penalty of perjury having been made this day to me by (name of declarant),

I find that there is probable cause to believe that the crime(s) of (designate the crime/s) has (have) been committed by the defendant named and described below.

Therefore, you are commanded to arrest (name of defendant) and to bring the defendant before any magistrate in ___ County pursuant to **Sections 821, 825**, **826**, and **848** of the **Penal Code**.

Defendant is admitted to bail in the amount of dollars ($).

Time Issued: (Signature of the Judge)
Dated: Judge of the Court

(g) Before issuing a warrant, the magistrate may examine under oath the person seeking the warrant and any witness the person may produce, take the written declaration of the person or witness, and cause the person or witness to subscribe the declaration. If the magistrate decides to issue the warrant, the magistrate shall do all of the following:

(1) Sign the warrant. The magistrate's signature may be in the form of a digital signature or

electronic signature if email or computer server was used for transmission to the magistrate.

(2) Note on the warrant the date and time of the issuance of the warrant.

(3) Transmit via facsimile transmission equipment, email, or computer server the signed warrant to the declarant. The warrant, signed by the magistrate and received by the declarant, shall be deemed to be the original warrant.

(h) An original warrant of probable cause for arrest or the duplicate original warrant of probable cause for arrest is sufficient for booking a defendant into custody.

(i) After the defendant named in the warrant of probable cause for arrest has been taken into custody, the agency that obtained the warrant shall file a "certificate of service" with the clerk of the issuing court. The certificate of service shall contain all of the following:

(1) The date and time of service.
(2) The name of the defendant arrested.
(3) The location of the arrest.
(4) The location where the defendant was incarcerated.

A "*DNA, John Doe*" *Warrant*:

An arrest warrant must identify the subject of the subject of the warrant with reasonable certainty. Describing the subject of an arrest warrant as merely "*John Doe*" with a description of a particular DNA profile is sufficient to meet this constitutional requirement. (***State of Wisconsin v. Dabney*** (2003) 254 Wis.2nd 43 [663 N.W.2nd 366].)

The California Supreme Court is in agreement, holding that a DNA profile is an accurate, reliable, and valid method of identifying a defendant in an arrest warrant because it is particular in its description. It neither violates the **Fourth Amendment**, California's statutes authorizing arrest warrants (see **P.C. §§ 813**, **815**, **859**, **860**), nor a defendant's due process rights. (***People v. Robinson*** (2010) 47 Cal.4th 1104, 1129-1143.)

Pen. Code § 3455(b): *Post-Release Supervision Warrant*:

> **Subd. (1):** With probable cause to believe that a subject on "*postrelease supervision*" is violating any term or condition of his or her release, a peace officer may arrest, *with or without a warrant*, the person and bring him or her before the supervising county agency established by the county board of supervisors pursuant to **P.C. § 3451(a)**. (See ***People v. Young*** (2016) 247 Cal.App.4th 972, 979-980.)
>
> > Also, an officer employed by the supervising county agency may seek a warrant and a court or its designated hearing officer appointed pursuant to **Gov't. Code § 71622.5** shall have the authority to issue a warrant for that person's arrest.
>
> **Subd. (2):** The court or its designated hearing officer has the authority to issue a warrant for any person who is the subject of a petition filed under this section who has failed to appear for a hearing on the petition or for any reason in the interest of justice, or to remand to custody a person who does appear at a hearing on the petition for any reason in the interest of justice.

A Federal "*Administrative Warrant*:"

> Issued pursuant to **18 U.S.C. § 4213(a)** for the retaking of an alleged parole violator, this type of warrant is *not* subject to the oath or affirmation requirement of the **Fourth Amendment**. (***United States v. Sherman*** (9th Cir. 2007) 502 F.3rd 869; noting that the rule is to the contrary when the warrant is for a supervised release violation, per **18 U.S.C. § 3583(i)**, as held by ***United States v. Vargas-Amaya*** (9th Cir. 2004) 389 F.3rd 901.)

Lowest Priority on Gender-Affirming Care Warrant:

> ***Pen. Code § 819*: *Out of State Arrest Warrant Based on Violating Another State's Law Against Providing, Receiving, or Allowing a Child to Receive Gender-Affirming Health Care or Gender-Affirming Mental Health Care as Lowest Law Enforcement Priority***:
>
> **(a)** It is the public policy of the state that an out-of-state arrest warrant for an individual based on violating another state's law against providing, receiving, or allowing their child to receive gender-affirming health care or gender-affirming mental health care is the lowest law enforcement priority.

(b) California law enforcement agencies shall not knowingly make or participate in the arrest or participate in any extradition of an individual pursuant to an out-of-state arrest warrant for violation of another state's law against providing, receiving, or allowing a child to receive gender-affirming health care and gender-affirming mental health care in this state, if that care is lawful under the laws of this state, to the fullest extent permitted by federal law.

(c) No state or local law enforcement agency shall cooperate with or provide information to any individual or out-of-state agency or department regarding the provision of lawful gender-affirming health care or gender-affirming mental health care performed in this state.

(d) Nothing in this section shall prohibit the investigation of any criminal activity in this state which may involve the performance of gender-affirming health care or gender-affirming mental health care provided that no information relating to any medical procedure performed on a specific individual may be shared with an out-of-state agency or any other individual.

(e) For the purpose of this subdivision, "gender-affirming health care" and "gender-affirming mental health care" shall have the same meaning as provided in **Section 16010.2** of the **Welfare and Institutions Code**.

Notes:

> **Subd. (b)(3)(A)** of **W&I Code § 16010.2** provides the following definition:
>
> > "*Gender affirming health care*" means medically necessary health care that respects the gender identity of the patient, as experienced and defined by the patient, and may include, but is not limited to, the following:
> >
> > > **(i)** Interventions to suppress the development of endogenous secondary sex characteristics.
> > > **(ii)** Interventions to align the patient's appearance or physical body with the patient's gender identity.
> > > **(iii)** Interventions to alleviate symptoms of clinically significant distress resulting from gender dysphoria, as defined in the

Diagnostic and Statistical Manual of Mental Disorders, 5th Edition.

Subd. (b)(3)(B) of **W&I Code § 16010.2** provides the following definition:

> "*Gender affirming mental health care*" means mental health care or behavioral health care that respects the gender identity of the patient, as experienced and defined by the patient, and may include, but is not limited to, developmentally appropriate exploration and integration of identity, reduction of distress, adaptive coping, and strategies to increase family acceptance.

Necessity of an Arrest Warrant:

Warrantless arrests, at least at any location other than within one's private home or other area to which the public does not have ready access (see below), have been held by the United States Supreme Court to be lawful, at least when the offense is a felony (whether or not it occurred in the officer's presence), or for any offense (felony or misdemeanor) which occurs in the officer's presence (see below). (***United States v. Watson*** (1976) 423 U.S. 411 [96 S.Ct. 820; 46 L.Ed.2nd 598].)

Surrounding a barricaded suspect in his home is in effect a warrantless arrest, justified by the exigent circumstances. The passage of time during the ensuing standoff does *not* dissipate that exigency to where officers are expected to seek the authorization of a judge to take the suspect into physical custody. (***Fisher v. City of San Jose*** (9th Cir. 2009) 558 F.3rd 1069; overruling its own prior holding (at 509 F.3rd 952) that failure to obtain an arrest warrant during a 12-hour standoff resulted in an illegal arrest of the barricaded suspect.)

Armed police officers surrounding defendant's home and then ordering him out via a public address system is in effect an arrest within the home, and absent a warrant or exigent circumstances, is illegal. The fact that defendant had just fled into his home, avoiding being arrested on his front porch for a misdemeanor, was held *not* to be an exigent circumstance. (***United States v. Nora*** (9th Cir. 2014) 765 F.3rd 1049, 1052-1060.)

> See ***United States v. Mallory*** (3rd Cir. 2014) 765 F.3rd 373, for the exact opposite conclusion on the lawfulness of entering a residence in hot pursuit under the exact same circumstances, although the firearm should have been suppressed as a product of an unlawful warrantless search after the residence was secured.

With an arrest warrant, no search warrant is needed in order to lawfully enter a house so long as it is a dwelling in which the suspect lives, and when (1) the officers have a reasonable belief that the suspect resides at the place to be entered and (2) reason to believe that the suspect is present when the officers enter. (***United States v. Ford*** (8th Cir. IA 2018) 888 F.3rd 922.)

Service and Return:

Felony arrest warrants may be executed anytime, anywhere, day or night. (**P.C. §§ 836(a)**, **840**)

But see ***Steagald v. United States*** (1981) 451 U.S. 204 [101 S.Ct. 1642; 68 L.Ed.2nd 38], mandating a search warrant to execute an arrest warrant in a *third party's* home.

Misdemeanor arrest warrants may be served anytime, anywhere, day or night, *except* that when the suspect is *not* in public but *not* already in custody (e.g., in his residence), the warrant may not be served between *10:00 p.m. and 6:00 a.m.* unless the warrant is "*endorsed*" for "*night service*" in which case it may be served at any time. (**P.C. § 840(4)**)

"*Night Service*" must be justified in the warrant affidavit, describing the need to make the arrest in other than the daytime. (See ***People v. Kimble*** (1988) 44 Cal.3rd 480, 494; discussing the "*greater intrusiveness*" of a nighttime search and the need for justifying nighttime service for a search warrant.)

Query: If an officer is already lawfully in the house, may a misdemeanor arrest warrant be executed despite the lack of a nighttime endorsement? *Unknown*. **P.C. § 840** itself does not provide for any such exception. But since this limitation on arrests has been held to be statutory only, and not of constitutional origins (***People v. Whitted*** (1976) 60 Cal.App.3rd 569.), no evidence would likely be subject to suppression anyway, making this question moot.

Necessity of Having a Copy of the Arrest Warrant: The law contemplates that when an arrest is made, the officer *should* have a copy of the warrant in his possession. (***People v. Thomas*** (1957) 156 Cal.App.2nd 117, 120.) However, it has been held that there is no constitutional violation even though he does not. (**P.C. § 842**; ***People v. Miller*** (1961) 193 Cal.App.2nd 838, 839.)

However, if requested, the arrestee *shall* be shown a copy of the warrant as soon as it is practicable to do so. (**P.C. § 842**)

Pursuant to **P.C. § 817(g)**: "An original warrant of probable cause for arrest or the duplicate original warrant of probable cause for arrest shall be sufficient for booking a defendant into custody."

Knock and Notice: The search warrant "*knock and notice*" rules (see "*Searches With a Search Warrant*" (Chapter 10), below) apply as well to the execution of an arrest warrant, and for warrantless arrests within a residence. (**P.C. § 844**; see "*Knock and Notice*," below.)

The rule that evidence will not be suppressed as a result of a knock and notice violation, as dictated by ***Hudson v. Michigan*** (2006) 547 U.S. 586 [126 S.Ct. 2159; 165 L.Ed.2nd 56] (a search warrant case), is applicable as well as in a warrantless, yet lawful, arrest case, pursuant to **P.C. § 844**. (***In re Frank S.*** (2006) 142 Cal.App.4th 145.)

However, see ***United States v. Weaver*** (D.C. Cir. 2015) 808 F.3rd 26, where the D.C. Court of Appeal rejected the applicability of ***Hudson v. Michigan***, *supra*, in an arrest warrant service situation, and held that federal agents violated the knock-and-announce rule by failing to announce their purpose before entering defendant's apartment. By knocking but failing to announce their purpose, the agents gave defendant no opportunity to protect the privacy of his home. The exclusionary rule was the appropriate remedy for knock-and-announce violations in the execution of arrest warrants at a person's home.

Officers seeking to execute an arrest warrant observed defendant through his open front door. Upon calling to defendant, he attempted to flee out through the back with the officers in pursuit. The Eighth Circuit Court of Appeals held that the knock-and-announce rule did not apply in this circumstance. When officers enter a home through an open door of a suspect's home in the execution of an arrest warrant, the court reasoned that the rule's underlying purpose (i.e., to avoid violent confrontations) was satisfied. Requiring officers to follow the knock-and-announce rule when facing an open door would "force [officers] to comply with formalistic rules when the circumstances direct otherwise." (***United States v. Sherrod*** (8th Cir. 2020) 966 F.3rd 748; further holding that following defendant's son through the open door, when they believed the boy was leading them to defendant, was reasonable.)

Procedures After Arrest:

Disposition of Prisoner: An officer making an arrest in obedience to a warrant must proceed with the arrestee as commanded by the warrant, or as provided by law. (**P.C. § 848**)

In-County Arrest Warrants: If the offense is for a felony, and the arrest occurs in the county in which the warrant was issued, the officer making the arrest must take the defendant before the magistrate who issued the warrant or some other magistrate of the same county. (**P.C. § 821**)

Note: In reality, an arrestee is typically taken to jail where he or she will await the availability of a magistrate.

Out-of-County Arrest Warrants: If the defendant is arrested in another county on either a felony (**P.C. § 821**) or a misdemeanor (**P.C. § 822**) warrant, the officer must, without unnecessary delay:

- Inform the defendant in writing of his right to be taken before a magistrate in that county; *and*

- Note on the warrant that he has so informed defendant; *and*

- Upon being requested by the defendant, take him before a magistrate in that county.

That magistrate is to admit the defendant to the bail specified on the warrant, if any. (**Pen. Code §§ 821**, **822**) If the offense is a misdemeanor, and no bail is specified on the warrant, the magistrate may set the bail. (**Pen. Code § 822**)

If the defendant does not bail out for any reason, law enforcement officers from the county where the warrant was issued have five (5) days (or five (5) *court days* if the offense is a felony and the law enforcement agency is more than 400 miles from the county where the defendant is being held) to take custody of the defendant. (**Pen. Code §§ 821**, **822**; see 62 ***Op.Cal.Atty.Gen***. 78, 2/16/1979)

Note: There are no similar statutory requirements for an out-of-county arrest made *without* an arrest warrant (i.e., a "probable cause" arrest), except under **Pen. Code § 849(a)**, below.

Arrests without a Warrant; **Pen. Code § 849(a)**: An officer (or private person) making an arrest *without a warrant shall*, without unnecessary delay, take the prisoner not otherwise released before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person shall be laid before such magistrate.

Necessity of Having Probable Cause or Reasonable Suspicion Before Entering a Residence: Until recently, it has been held that before a police officer may enter a residence, absent consent to enter, the officer must have "*probable cause*" to believe the person who is the subject of the arrest warrant is actually inside at that time. (See ***People v. Jacobs*** (1987) 43 Cal.3rd 472; ***United States v. Gorman*** (9th Cir. 2002) 314 F.3rd 1105; ***United States v. Diaz*** (9th Cir. 2007) 491 F.3rd 1074; ***United States v. Phillips*** (9th Cir. 1974) 497 F.2nd 1131; (***United States v. Gooch*** (9th Cir. 2007) 506 F.3rd 1156, 1159, fn. 2; ***Cuevas v. De Roco*** (9th Cir. 2008) 531 F.3rd 726; ***United States v. Mayer*** (9th Cir. 2008) 530 F.3rd 1099, 1103-1104.)

"It is not disputed that until 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, . . ." (***Maryland v. Buie*** (1990) 494 U.S. 325, 330 [110 S.Ct. 1093; 108 L.Ed.2nd 276, 283].)

An arrest warrant constitutes legal authority to enter the suspect's residence and search for him. (***People v. LeBlanc*** (1997) 60 Cal.App.4th 157, 164; entry lawful while executing a misdemeanor arrest warrant.)

"Because an arrest warrant authorizes the police to deprive a person of his liberty, it necessarily also authorizes a limited invasion of that person's privacy interest when it is necessary to arrest him in his home." (***Steagald v. United States*** (1981) 451 U.S. 204, 214-215, fn. 7 [101 S.Ct. 1642; 68 L.Ed.2nd 38, 46].)

"Thus, for **Fourth Amendment** purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is *reason to believe* the suspect is within." (Italics added; ***Payton v.***

New York (1980) 445 U.S. 573, 603 [100 S.Ct. 1371; 63 L.Ed.2nd 639, 661].)

This "*reason to believe*" language, in making reference to the likelihood that the subject is home at the time the arrest warrant is served, has until recently been interpreted by both state and federal authority to require full-blown "*probable cause*" to believe the suspect is there at that time. (See ***People v. Jacobs***, *supra*; ***United States v. Gorman***, *supra*; and ***United States v. Phillips***, *supra*; ***Motley v. Parks*** (9th Cir. 2005) 432 F.3rd 1072, 1070; and see "*Sufficiency of Evidence to Believe the Suspect is Inside*," below.)

Noting that five other federal circuits have ruled that something *less than* probable cause is required, and that the Ninth Circuit is a minority opinion (see ***United States v. Gorman***, *supra*.), the Fourth District Court of Appeal (Div. 2) found instead that an officer executing an arrest warrant *or* conducting a probation or parole search may enter a dwelling if he or she has only a *reasonable belief*, falling short of probable cause to believe, the suspect both lives there and is present at the time. Employing that standard, the entry into defendant's apartment to conduct a probation search was lawful based on all of the information known to the officers. Accordingly, the court upheld the trial court's conclusion that the officers had objectively reasonable grounds to conclude the defendant/probationer lived at the subject apartment, and therefore the officers had the right to enter the apartment to conduct a warrantless probation search. (***People v. Downey*** (2011) 198 Cal.App.4th 652, 657-662.)

> Also noting that the California Supreme Court, in ***People v. Jacobs***, *supra*, when read correctly (see pg. 479, fn. 4), did *not* find that probable cause was required, contrary to the arguments made by some. (***Id***., at p. 662.)
>
> The Ninth Circuit, in subsequent cases dealing with whether the subject of a **Fourth** waiver search in fact lives at the place to be searched, stands by the probable cause standard. (***United States v. Bolivar*** (9th Cir. 2012) 670 F.3rd 1091, 1093-1095; ***United States v. Grandberry*** (9th Cir. 2013) 730 F.3rd 968, 973-980.)

Defendant having an outstanding arrest warrant issued approximately five-weeks earlier and listing the address in question, postal records indicated that defendant received mail at that address, and several public databases connecting defendant with the address, held to be sufficient to give the officers a

"*reasonable belief*" that defendant lived at that address. It was also reasonable for them to believe that he would be home at 6:00 a.m. (***United States v. Hamilton*** (1st Cir. 2016) 819 F.3rd 503.)

See "*Sufficiency of the Evidence to Believe the Suspect is Inside*," below.

The "***Steagald** Warrant*:" If the person is in a *third party's home*, absent consent to enter, a *search warrant* (i.e., commonly referred to as a "***Steagald** warrant*") for the residence must be obtained in addition to the arrest warrant. (***Steagald v. United States*** (1981) 451 U.S. 204, 211-222 [101 S.Ct. 1642; 68 L.Ed.2nd 38]; ***People v. Codinha*** (1982) 138 Cal.App.3rd 167; see **P.C. § 1524(a)(6)**.)

Failure, however, to obtain a search warrant will not benefit the subject with the outstanding arrest warrant, but serves only to protect the homeowner (i.e., the "third party") should evidence of criminal activity be discovered during the entry of his residence. The person with the outstanding arrest warrant will generally be without standing to contest the entry of the warrantless entry of the residence. (***United States v. Bohannon*** (2nd Cir. 2016) 824 F.3rd 242.)

Note: Securing such a search warrant will, of course, require "*probable cause*" to believe that the subject of the arrest warrant is in the place to be searched.

Statute of Limitations: Obtaining an arrest warrant will "*toll*" (i.e., "*stop*") the running of the statute of limitations for the charged offense(s). (**P.C. §§ 803**, **804**; ***People v. Lee*** (2000) 82 Cal.App.4th 1352.)

Duration: There is no statutory requirement that an arrest warrant be executed within any particular time limit. Therefore, arrest warrants do not expire and do not need to be renewed or extended. They will remain in the system until purged, served, or recalled by the court.

*The **All Writs Act***:

28 U.S.C. § 1651: The **All Writs Act** is a United States federal statute, which authorizes the United States federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Case Law:

Affirming two district court orders denying petitions to unseal court records, the Ninth Circuit Court of Appeal held that neither the **First Amendment** nor the common law provides a right of public access to third-party **All Writs Act** technical assistance materials relating to ongoing criminal investigations involving unexecuted arrest warrants. Under the **All Writs Act** ("**AWA**"), federal courts may order private parties to provide technical assistance to law enforcement to aid in the execution of arrest warrants. Here, Forbes Media and Thomas Brewster, a journalist and associate editor at Forbes ("petitioners"), filed petitions in the Northern District of California and the Western District of Washington seeking to unseal past **All Writs Act** orders issued to an online travel-booking technology company related to ongoing criminal investigations in which the United States had obtained arrest warrants but had been thus far unable to make the arrests. The district courts in California and Washington denied petitioners' motions, concluding for similar reasons, that there was no qualified **First Amendment** or common law right of public access to sealed **AWA** technical assistance materials relating to active warrants, and that the government had a compelling interest in non-disclosure while the criminal investigations remained ongoing. The Court further held that neither the **First Amendment** nor the common law rights to public access were so expansive as to encompass the materials sought here—materials that have traditionally been maintained under seal to avoid exposing the government's criminal investigations and compromising its pursuit of fugitives. In determining that the **First Amendment's** right of access did not attach, the panel applied the "experience and logic" test set forth in ***Press-Enter. Co. v. Superior Court*** (1986) 478 U.S. 1, 7 [106 S.Ct. 2735; 92 L.Ed.2nd 1, and concluded that it was aware of no historical tradition of public access to proceedings and materials under the **AWA** to obtain technical assistance from third parties in executing arrest warrants. By all accounts, these proceedings have traditionally taken place *ex parte* and under seal. Logic likewise militated against a qualified right of access under the **First Amendment**. Providing public access to **AWA** technical assistance proceedings in support of unexecuted sealed arrest warrants could easily expose sensitive law-enforcement techniques and endanger active criminal investigations. Addressing whether common law conferred such a right, the Court held that petitioners had not demonstrated an "important public need" justifying disclosure. Given the similarities cross-cutting **AWA** third-party technical assistance proceedings, grand jury proceedings, and pre-indictment search

warrant materials, as a matter of analogical reasoning, the materials petitioners sought here were not within the common law right of access. Finally, and regardless of whether the argument was advanced under the common law, the **First Amendment**, or both, the panel rejected the petitioners' position that the district courts should have analyzed the right of public access question by focusing on the types of documents petitioners sought (motions, orders, etc.) rather than the nature of the **AWA** proceedings of which the documents were a part. (***Forbes Media LLC v. United States*** (9th Cir. 2023) 61 F.4th 1072.)

Detention of Other Occupants of a Home While Executing an Arrest Warrant:

Applying the theory of ***Michigan v. Summers*** (1981) 452 U.S. 692, 702-703 [101 S.Ct. 2587; 69 L.Ed.2nd 340, 349-350], where the detention of occupants of a residence was held to be lawful during the execution of a *search warrant*, California has held that the same rule applies to detaining occupants of a residence while serving an *arrest warrant*. (***People v. Hannah*** (1997) 51 Cal.App.4th 1335.)

The Ninth Circuit disagrees with this theory, holding that the detention of an occupant of a house while executing an arrest warrant is unconstitutional. (***Sharp v. County of Orange*** (9th Cir. 2017) 871 F.3rd 901, 912-913.)

Use of a Motorized Battering Ram: The California Supreme Court has determined in a case that has never been overruled that at least where a "motorized battering ram" is used to force entry into a building, prior judicial authorization in the search or arrest warrant is necessary. Failure to obtain such authorization is both a violation of the **California Constitution** and the **Fourth Amendment**. (***Langford v. Superior Court*** (1987) 43 Cal.3rd 21.)

See "*Use of a Motorized Battering Ram*," under "*Searches With a Search Warrant*," (Chapter 10), below.

*Effect of an existing Arrest Warrant or a **Fourth** waiver on the Exclusion of Evidence after an Illegal Detention or Arrest*:

The fact that the defendant had an outstanding arrest warrant may, depending upon the circumstances, be sufficient of an intervening circumstance to allow for the admissibility of the evidence seized incident to arrest despite the fact that the original detention was illegal. (***People v. Brendlin*** (2008) 45 Cal.4th 262, an illegal traffic stop; and ***Utah v. Strieff*** (2016) 579 U.S. 232, 241-242 [136 S.Ct. 2056; 195 L.Ed.2nd 400], an illegal detention.)

The circumstances to be considered are:

> The temporal proximity of the **Fourth Amendment** violation to the procurement of the challenged evidence;
>
> The presence of intervening circumstances (e.g., an arrest warrant);
>
> The purpose and the flagrancy of the official misconduct.
>
> (***People v. Brendlin***, *supra*, at pp. 269-272; citing ***Brown v. Illinois*** (1975) 422 U.S. 590 [95 S.Ct. 2254; 45 L.Ed.2nd 416]; ***United States v. Garcia*** **(**9th Cir. 2020) 974 F.3rd 1071, 1076.)

Defendant, the passenger in a motor vehicle stopped for illegally tinted windows (**V.C. § 26708(a)**), was arrested on an outstanding arrest warrant. Even had the traffic stop been illegal, the discovery of the arrest warrant was sufficient to attenuate any possible taint of an illegal traffic stop. (***People v. Carter*** (2010) 182 Cal.App.4th 522, 529-530.)

Defendant's incriminatory statements obtained some 36 hours after an illegal search of his residence, and recognizing that what was found during the search would be used in defendant's subsequent interrogation, were held to be inadmissible as a direct product of the illegal search. (***United States v. Shetler*** (9th Cir. 2011) 665 F.3rd 1150, 1156-1160.)

> It was also noted that because the government bore the burden of proving that the defendant's confession was not "fruit of the poisonous tree," the government was required to produce evidence demonstrating that the defendant's answers were not induced or influenced by the illegal search. (***Id.***, at pp. 1157-1161.)

See ***People v. Durant*** (2012) 205 Cal.App.4th 57, finding that a suspect's **Fourth** waiver (subjecting him to warrantless search and seizures) attenuated the taint of an illegal traffic stop.

> But see ***People v. Bates*** (2013) 222 Cal.App.4th 60, 69-71, ruling to the contrary. The ***Bates*** Court both declined to adopt the ***Durant*** Court's reasoning, and differentiated the cases on their respective facts. See also ***People v. Kidd*** (2019) 36 Cal.App.5th 12, 23, agreeing with ***Bates***, but not analyzing the issue.)

The government did not dispute that omissions and distortions in a sheriff office's affidavits for a search warrant were reckless and material, and that the warrant was therefore invalid and that the sheriff's raids that resulted from those reckless and material inaccuracies constituted a **Fourth Amendment** violation. The results of this illegal search, including records suggesting that the business was employing undocumented immigrants, was passed along to Immigration and Customs Enforcement (ICE). ICE subsequently issued a subpoena requiring the business to produce employer verification forms and other records. Based on information turned over in response to the subpoena, ICE charged the business with violations of the Immigration and Nationality Act. Noting that the **Fourth Amendment** violations were egregious, the Court held that it was plain that the evidence ICE obtained was the product of the sheriff's illegal activity. ICE's evidence subsequently obtained was the fruit of the sheriff's unlawful search. The sheriff's conduct easily met the flagrancy standard. The exclusionary rule would serve to deter the sheriff from **Fourth Amendment** violations by the probability that illegally obtained evidence will not be useful to ICE, even in a civil proceeding. (***Frimmel Management, LLC v. United States*** (9th Cir. 2018) 897 F.3rd 1045.)

However, the Ninth Circuit Court of Appeal has held that a mere passage of time, even a significant amount, does not necessarily attenuate the taint of an earlier illegal detention. For instance, after someone at the defendant's address pointed a laser at a police aircraft in flight, officers went to the defendant's home, illegally detained him, interrogated him without ***Miranda*** warnings, and after the defendant confessed, seized the laser. *Eight months later*, an FBI agent approached the defendant outside his home and stated he was there to ask "follow-up" questions about the incident. The defendant repeated his earlier confession. Charged with aiming a laser at an aircraft in violation of **18 U.S.C. § 39A**, defendant moved to suppress the inculpatory statements he made to the FBI agent, arguing that the illegality of the first encounter tainted the second. The government did not dispute that the initial encounter violated at least the **Fourth Amendment**. Agreeing with the defendant, the Ninth Circuit explained that when a confession results from certain types of **Fourth Amendment** violations, the government must go beyond proving that the later confession was voluntary. It must also show a sufficient break in events to undermine the inference that the confession was caused by the **Fourth Amendment** violation. After considering together the relevant factors as set forth in ***Brown v. Illinois*** (1975) 422 U.S.

590 [95 S.Ct. 2254; 45 L.Ed.2nd 416 (1975), the panel was persuaded that the second encounter, introduced as a "follow up" to the first, was directly linked to the original illegalities. Per the Court, although significant time had passed, and the record does not show that the officers' conduct was purposeful or flagrant, the eight-month time period was collapsed by the agent opening the conversation by stating that he was following up on the original investigation. Without other intervening circumstances that act to separate the incidents, the Court concluded that the government failed to carry its burden of proving that the defendant's statements were sufficiently attenuated from the illegal detention and seizure eight months prior. (***United States v. Bocharnikov*** (9th Cir. 2020) 966 F.3rd 1000.)

After chasing a wanted suspect to defendant's home, and arresting him when he tried to escape via a back window, officers entered defendant's home without a warrant and without consent for the stated purposes of checking the welfare of anyone inside (i.e., the "emergency aid exception") and/or as a "protective sweep" for other suspects. While inside, officers contacted defendant, held him at gunpoint, handcuffed him, and took him outside. Once outside, it was discovered that defendant was subject to probationary **Fourth** waiver, and subject to warrantless searches. Officers then reentered his home and conducted a full search, discovering methamphetamine and other incriminating evidence. In a previous appeal, both reasons for entering defendant's home were held to have been in violation of the **Fourth Amendment**, as was defendant's arrest, in an unpublished decision. (See ***United States v. Garcia*** (9th Cir. 2018) 749 F. App'x 516.) Upon returning the case to the trial court for a determination of whether the "attenuation doctrine" applied; i.e., whether the discovery of the suspicionless search condition was an intervening circumstance that broke the causal chain between the initial unlawful entry and the discovery of the evidence supporting defendant's conviction, the trial court held that it did. In a second appeal, the Ninth Circuit disagreed and ruled that the evidence should have been suppressed after finding that all three of the factors as discussed in ***Utah v. Strieff***, supra, favored suppression. (***United States v. Garcia*** **(**9th Cir. 2020) 974 F.3rd 1071.)

> "The attenuation doctrine is an exception to the usual rule of exclusion or suppression of the evidence. It applies when 'the connection between the illegality and the challenged evidence' has become so attenuated 'as to dissipate the taint caused by the illegality.'" (***Id***, at p. 1076; quoting

United States v. Gorman (9th Cir. 2017) 859 F.3rd 706, 718.)

In ***Garcia***, in evaluating the three factors as dictated in ***Utah v. Strieff***, supra (see above), the Court determined the following:

> "The temporal proximity factor weigh(ed) in favor of suppression because only a few minutes passed between the officers' unconstitutional entry into (defendant's) home and those very same officers' reentry into his home to conduct the investigatory search." (pg. 1077.)
>
> The presence of intervening circumstances (e.g., a **Fourth** waiver), also weighed in favor of suppression, noting that "a suspicionless search condition differs from an arrest warrant [as occurred in ***Strieff***] in a significant respect," finding the former to be an optional "exercise of discretionary authority," while the latter is acting on a mandatory court order. (pgs. 1077-1080.)
>
> "The purpose and the flagrancy of the official misconduct" factor was also held to favor suppression in that it was the warrantless entry into a residence and handcuffing defendant before removing him from his own apartment, even if the officers acted in good faith, that was at issue. (pgs. 1080-1082.)

A Recalled or Defective Arrest Warrant:

Arresting a subject with the "*good faith*" belief that there was an outstanding arrest warrant, only to discover after the fact that the arrest warrant had been recalled, does not require the suppression of any resulting evidence where the mistake is the result of negligence only, and was not reckless or deliberate. (***Herring v. United States*** (2009) 555 U.S. 135 [129 S.Ct. 695; 172 L.Ed.2nd 496].)

If officers making an arrest have probable cause to arrest him and the arrest is otherwise lawful (e.g., in public), then it is irrelevant whether the arrest warrant is later declared to be invalid. (***United States v. Jennings*** (9th Cir. 2008) 515 F.3rd 980, 985.)

*Good Faith Reliance on a No Longer Existing **Fourth** Waiver*:

> An officer's good faith reliance on the existence of a subject's waiver of his **Fourth Amendment** search and seizure rights as a condition of his pre-trial release from custody, where that condition is later (after the search) deleted by an appellate court decision, justifies the search. Evidence recovered as a result of that **Fourth** waiver search will not be suppressed. (***People v. Maxwell*** (2020) 58 Cal.App.5th 546, 558-560.)

Statutory Limitations:

> *Daytime and Nighttime Arrests* (**Pen. Code § 840**):
>
> > *Felony Arrests*: An arrest for the commission of a felony may be made:
> >
> > > *Without an Arrest Warrant*: Any time of the day or night, in any public place or while already in custody on another charge, whether or not the offense occurred in the officer's presence. (**Pen. Code § 836(a)(2)**)
> > >
> > > *See **United States v. Watson*** (1976) 423 U.S. 411, 423-424 [96 S.Ct. 820; 46 L.Ed.2nd 598]: "Law enforcement officers may find it wise to seek arrest warrants where practicable to do so, and their judgments about probable cause may be more readily accepted where backed by a warrant issued by a magistrate. See ***United States v. Ventresca***, 380 U.S. 102, 106 (1965); ***Aguilar v. Texas***, 378 U.S. 108, 111 (1964); ***Wong Sun v. United States***, 371 U.S. 471, 479-480 (1963). But we decline to transform this judicial preference into a constitutional rule when the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like." (See also **A Model Code of Pre-arraignment Procedure**, **section 120.1**, and **fn. 11**, pg. 423, in ***Watson***.)
> > >
> > > > "(T)he settled rule that warrantless arrests in public places are valid." (***Payton v. New York*** (1980) 445 U.S 573, 587 [100 S.Ct. 1371; 63 L.Ed.2nd 639].)

Exception: A police officer cannot make a warrantless arrest within the subject's own home (***People v. Ramey*** (1976) 16 Cal.3rd 263, 276; ***Payton v. New York*** (1980) 445 U.S 573 [100 S.Ct. 1371; 63 L.Ed.2nd 639].), or the home of another person (***Steagald v. United States*** (1981) 451 U.S. 204 [101 S.Ct. 1642; 68 L.Ed.2nd 38.]; see below.), absent an exception.

Exceptions to Exception: When the officer is already and/or otherwise lawfully in the home, exigent circumstances exist, or defendant is standing in the threshold. (See examples, below.)

With an Arrest Warrant: Any time of the day or night, in any place, including the subject's own home. (**Pen. Code § 836(a)**):

Exception #1: Cannot make a felony warrant arrest within a third person's home, unless the officer also first obtains a search warrant for the third person's home (See ***Steagald v. United States***, *supra*, and below.) *or* is already and otherwise lawfully in the third person's home.

Exception #2: Private persons may not serve arrest warrants. (**Pen. Code §§ 813**, **816**)

Misdemeanor (and Infraction) Arrests:

Without an Arrest Warrant: Any time of the day or night, in any public place or while already in custody. (**Pen. Code § 836(a)(1)**)

Exception #1: Cannot make a warrantless arrest within the subject's own home (***People v. Ramey***, *supra*: ***Payton v. New York***, *supra*.), or the home of another person (***Steagald v. New York***, *supra*, and below.), absent an exception.

Exception to Exception: Misdemeanor or infraction committed in the officer's presence or the presence of a private citizen (in the case of a private person's arrest), while already and/or otherwise lawfully in the home. (***People v. Graves*** (1968) 263

Cal.App.2nd 719; see also examples, below, under "*Case Law Limitations*," *"**Ramey***.")

Query: If an officer is already lawfully in the house, may a misdemeanor arrest warrant be executed despite the lack of a nighttime endorsement? Unknown. **Pen. Code § 840** itself does not provide for any such exception. But since this limitation on arrests has been held to be statutory only, and not of constitutional origins (***People v. Whitted*** (1976) 60 Cal.App.3rd 569.), no evidence will be suppressed anyway, making this question moot.

Exception #2: Cannot make a warrantless arrest for a misdemeanor or infraction not committed in the officer's presence, or the presence of the private person (in the case of a private person's arrest).

But see exceptions, above.

Exception #3: Cannot make a warrantless arrest for a "*stale misdemeanor* (or *infraction*)." (***Jackson v. Superior Court*** (1950) 98 Cal.App.2nd 183, 187; see above.)

With an Arrest Warrant: Any time of the day or night, in any place, including the subject's own home. (**Pen. Code § 836(a)**)

Exception #1: Cannot make a misdemeanor warrant arrest at night within the subject's home unless the warrant is "*endorsed for night service*" by a judge. (**P.C. § 840(4)**) (See above)

"*Nighttime*" for purposes of an arrest warrant is 10:00 p.m. to 6:00 a.m. (**Pen. Code § 840**.)

The need for a nighttime endorsement must be justified before a judge will approve it; i.e.: Why does this defendant need to be arrested at night? (See ***People v. Kimble*** (1988) 44 Cal.3rd 480, 494; discussing the

need for justifying nighttime service for a search warrant.)

Exception #2: Cannot make a misdemeanor warrant arrest within a third person's home, unless the officer also first obtains a search warrant for the third person's home (See ***Steagald v. United States***, *supra.*) or is already and otherwise lawfully in the third person's home.

Exception #3: Private citizens may not serve arrest warrants. (**Pen. Code §§ 813**, **816**)

Penal Code § 964: *Victim and Witness Confidential Information*: Requires the establishment of procedures to protect the confidentiality of "*confidential personal information*" of victims and witnesses. The section is directed primarily at prosecutors and the courts, but also contains a provision for documents filed by law enforcement with a court in support of search and arrest warrants; i.e., *an affidavit*.

Subd. (b): "*Confidential personal information*" includes, *but is not limited to*, addresses, telephone numbers, driver's license and California identification card numbers, social security numbers, date of birth, place of employment, employee identification numbers, mother's maiden name, demand deposit account numbers, savings or checking account numbers, and credit card numbers.

Live Lineups: An ex parte court order requiring an un-charged criminal suspect to submit to a live lineup, even though there is probable cause to arrest him, is unenforceable. There is no statutory procedure for accomplishing such a procedure. (***Goodwin v. Superior Court*** (2001) 90 Cal.App.4th 215.)

Case Law Limitations:

***People v. Ramey*: ** *Within One's Own Residence*: Warrantless arrests within a private residence are restricted because of the constitutional right to privacy interests a person, even a criminal suspect, has within their own home. (See below)

General Rule: Arrests in one's home for a felony or misdemeanor may only be made with prior judicial authorization in the form of an arrest warrant. (***People v. Ramey*** (1976) 16 Cal.3rd 263, 276; ***Payton v. New York*** (1980) 445 U.S. 573 [100 S.Ct. 1371; 63 L.Ed.2nd 639].)

Police officers need either (1) an arrest warrant or (2) probable cause and exigent circumstances to lawfully enter a person's home to arrest its occupant. (***Kirk v. Louisiana*** (2002) 536 U.S. 635 [122 S.Ct. 2458; 153 L.Ed.2nd 599].)

However, surrounding a barricaded suspect in his home is in effect a warrantless arrest, justified by the exigent circumstances. The passage of time during the ensuing standoff does not dissipate that exigency to where officers are expected to seek the authorization of a judge to take the suspect into physical custody. (***Fisher v. City of San Jose*** (9th Cir. 2009) 558 F.3rd 1069; overruling its prior holding (at 509 F.3rd 952) that failure to obtain an arrest warrant during a 12-hour standoff resulted in an illegal arrest of the barricaded suspect.)

Armed police officers surrounding defendant's home and then ordering him out via a public address system is in effect an arrest within the home, and absent a warrant or exigent circumstances, is illegal. The fact that defendant had just fled into his home, avoiding being arrested on his front porch for a misdemeanor, is not an exigent circumstance. (***United States v. Nora*** (9th Cir. 2014) 765 F.3rd 1049, 1052-1060.)

See ***United States v. Mallory*** (3rd Cir. 2014) 765 F.3rd 373, for the exact opposite conclusion on the lawfulness of entering a residence in hot pursuit under the exact same circumstances, although the firearm should have been suppressed as a product of an unlawful warrantless search after the residence was secured.

Exceptions: There are numerous *exceptions* to this rule:

Consent: When the occupant of a house *consents* to the police officers' entry of his or her home. (***People v. Superior Court* [*Kenner*]** (1977) 73 Cal.App.3rd 65, 68; ***People v. Peterson*** (1978) 85 Cal.App.3rd 163, 171; see also ***People v. Ramey***, *supra*, at p. 275; and ***Payton v. New York***, *supra*, at p. 583 [63 L.Ed.2nd at p. 649]; and ***People v. Newton*** (1980) 107 Cal.App.3rd 568, 578.)

Limitations:

"(A)n alleged consenter must be aware of the purpose of the requested entry and a consent obtained by trickery or subterfuge renders a subsequent search and seizure invalid." (***People v. Superior Court* [*Kenner*]**, *supra*., at p. 69; merely asking for permission to enter "to talk to" the suspect does not justify the warrantless entry and arrest. See also ***In re Johnny V.*** (1978) 85 Cal.App.3rd 120, 132.)

Express or Implied Consent: Permission to enter need not be an express consent. Asking the homeowner for defendant and for permission to "come in and look around" when it was denied that he was present was reasonably interpreted by the police as consent to enter to find defendant for any purpose that they desired, including arrest. (***People v. Newton***, *supra*.)

Authority to Give Consent: For the officers to validly rely upon consent, they must reasonably and in good faith believe that the person giving consent had the authority to consent to their entry into the residence. (***People v. Escudero*** (1979) 23 Cal.3rd 800, 806.)

Undercover Entries: Consent obtained by officers working undercover, for the purpose of continuing an investigation, is valid. It is the "*intrusion into*," not the arrest while inside, which offends the constitutional standards under ***Ramey***. Arresting the defendant after having gained lawful entry is not a ***Ramey*** violation. (***People v. Evans*** (1980) 108 Cal.App.3rd 193, 196.)

"The **Fourth Amendment** does not protect 'a wrongdoer's misplaced belief that a person whom he voluntarily confides his wrongdoing will not reveal it.'" (***Toubus v. Superior Court*** (1981) 114 Cal.App.3rd 378, 383.)

And just because the undercover officer has momentarily left the residence, such action followed immediately by the reentry of the arresting officers, does not violate ***Ramey*** or ***Payton***. (***People v. Cespedes*** (1987) 191 Cal.App.3rd 768.)

> But the reentry must be simultaneous with, or immediately after, the undercover officer's exit. (***People v. Ellers*** (1980) 108 Cal.App.3rd 943; arrest unlawful when after the "*buy*," during an undercover narcotics investigation, the police drove to a parking lot one mile away, spent ten to twenty minutes formulating a plan to arrest the defendant, and then returned and reentered the house to make the arrest.)

Plain View Observations; *Reentry to Seize the Property Observed*: Evidence observed in plain view by officers entering a residence with the suspect's consent and with exigent circumstances, while the officers did a protective sweep and check for victims of a shooting, justified a later warrantless entry to seize and process that evidence so long as the police did not give up control of the premises. (***People v. Superior Court* [*Chapman*]** (2012) 204 Cal.App.4th 1004, 1014-1021; officers left one officer inside to secure the scene and the deceased victim while awaiting investigators, criminologists, and the coroner.)

Exigent circumstances: "'(A) warrantless intrusion may be justified by *hot pursuit* of a fleeing felon, or *imminent destruction* of evidence [citation], or the need to prevent a suspect's *escape*, or the *risk of danger* to the police or to other persons inside or outside the dwelling.' [citations]" (Italics added; ***Minnesota v. Olson*** (1990) 495 U.S. 91, 100 [109 L.Ed.2nd 85, 95].)

> Exigent circumstances is defined as "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence." (***People v. Rubio*** (2019) 43 Cal.App.5th 342, 354, quoting ***People v. Ramey*** (1976) 16 Cal.3rd 263, 276; see also ***People v. Bowen*** (2020) 52 Cal.App.5th 130, 138; quoting ***People v. Panah*** (2005) 35 Cal.4th 395, 465.)
>
> This includes "when an entry or search appears reasonably necessary to render emergency aid, whether or not a crime might be involved." (**People v. Ovieda** (2019) 7 Cal.5th 1034, 1041-1042; ***People v. Rubio***, *supra*.)

And the warrantless pinging of a dangerous suspect's cellphone. (***People v. Bowen***, *supra*, at pp. 136-139.)

"(F)actors that determine 'whether exigent circumstances support the decision to make' a warrantless arrest in a residence include 'whether probable cause is clear' and 'whether the suspect is likely to be found on the premises entered'" (***People v. Rubio***, *supra*, quoting ***People v. Bacigalupo*** (1991) 1 Cal.4th 103, 122.)

"The exigency exception permits warrantless entry where officers 'have both *probable cause* to believe that a crime has been or is being committed and a *reasonable belief* that their entry is necessary to prevent . . . the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.'" (Italics added; **Bonivert *v. City of* Clarkston** (9th Cir. 2018) 883 F.3rd 865, 878-879; quoting ***Hopkins v. Bonvicino*** (9th Cir. 2009) 573 F.3rd 752, 763; ***People v. Rubio***, *supra*.)

"The exigency exception permits warrantless entry where officers 'have both probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is necessary to prevent . . . the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.'" (***Sandoval v. Las Vegas Metro. Police Dep't.*** (9th Cir. 2014) 756 F.3rd 1154, 1161; quoting ***Hopkins v. Bonvicino*** (9th Cir. 2009) 573 F.3rd 752, 763.)

> In ***Sandoval***, it was held that because the officers lacked probable cause to believe that a residential burglary was occurring, there was no exigency allowing for the warrantless entry into the residence. (***Id.***, at pp. 1161-1163.)

A warrantless entry into defendant's residence based upon witness information that defendant, an

armed robber, had entered the home minutes earlier, was lawful. (***Warden, Maryland Penitentiary v. Hayden*** (1967) 387 U.S. 294 [87 S.Ct. 1642; 18 L.Ed.2nd 782].)

Where defendant, the suspect in an ongoing drug transaction, had been standing in the doorway with a brown paper bag in her hand, retreated into the vestibule of her home as police officers pulled up to her house shouting "police," following her into the house was lawful. (***United States v. Santana*** (1976) 427 U.S. 38 [96 S.Ct. 2406; 49 L.Ed.2nd 300].)

"Exigent circumstances include 'the need to prevent the destruction of evidence.'" (***People v. Tran*** **(**2019) 42 Cal.App.5th 1, 11, quoting ***Kentucky v. King*** (2011) 563 U.S. 452, 455 [179 L.Ed.2nd 865; 131 S. Ct. 1849].)

> "(E)exigent circumstances are more generally described as circumstances that would cause a reasonable officer to believe immediate action is necessary to prevent, among other things, the destruction of relevant evidence or some other consequence improperly frustrating legitimate law enforcement efforts," thus excusing the need to obtain a search warrant before seizing a dash-cam recorder from a reckless driving suspect where a motorcyclist was seriously injured. (***People v. Tran***, *supra*, at pp. 12-13, citing ***United States v. Licata*** (9th Cir. 1985) 761 F.2nd 537, 543.)

"The foundation of the exigency is 'a belief that society's interest in the discovery and protection of incriminating evidence from removal or destruction can supersede, at least for a limited period, a person's possessory interest in property, provided that there is probable cause to believe that that property is associated with criminal activity. [Citation.]"' (***People v. Tran***, *supra*, at p. 13, quoting ***Segura v. United States*** (1984) 468 U.S. 796, 808 [104 S.Ct. 3380; 82 L.Ed.2nd 599].)

A reasonable belief in the imminent threat to life or the welfare of a person within the home, with probable cause to believe a missing person was inside, and a reasonable belief that the person inside needed aid, justified a warrantless entry. (***People v. Coddington*** (2000) 23 Cal.4th 529, 580.)

Exigent Circumstances, justifying a warrantless residential arrest, include an evaluation of the following circumstances:

- The gravity of the offense;
- Whether the suspect is reasonably believed to be armed;
- Whether probable cause is clear;
- Whether the suspect is likely to be found on the premises; *and*
- The likelihood that the suspect will escape if not promptly arrested.

(***People v. Williams*** (1989) 48 Cal.3rd 1112, 1138-1139.)

Entering and securing a residence pending the obtaining of a search warrant was supported by exigent circumstances when officers received information that the occupant was about to destroy or remove contraband from the residence. (***United States v. Fowlkes*** (9th Cir. 2015) 804 F.3rd 954, 969-971.)

> The fact that it took about an hour to coordinate the officers necessary to make the warrantless entry and securing of defendant's apartment was irrelevant; the exigency still existed. (***Id***., at p. 971.)
>
> Such a "securing" of a house, however, is in fact a **Fourth Amendment** seizure. (***United States v. Shrum*** (10th Cir. 2018) 908 F.3rd 1219.)

"*Fresh or Hot Pursuit*," or at the end of a "*substantially continuous investigation*:" A continuous investigation from crime to arrest of the subject in his home, within a limited

time period (e.g., within hours), and without an opportunity to stop and obtain an arrest warrant, is "*fresh pursuit*." It is *not* necessary that the suspect be physically in view during the "pursuit." (***People v. Escudero*** (1979) 23 Cal.3rd 800, 809-810; ***In re Lavoyne M.*** (1990) 221 Cal.App.3rd 154; ***People v. Gilbert*** (1965) 63 Cal.2nd 690; ***United States v. Johnson*** (9th Cir. 2000) 207 F.3rd 538.)

> Where there was a two and a half hour investigation between a robbery-murder and the location of the defendant's home, the officers were found to be in "*fresh pursuit*," justifying a warrantless entry to look for the suspect. (***People v. Gilbert*** (1965) 63 Cal.2nd 690, 706.)
>
> When officers contact a rape victim half a block from the crime scene, less than an hour after the rape (***People v. White*** (1986) 183 Cal.App.3rd 1199, 1203-1204.), or immediately across the street minutes after she escaped from the sleeping suspect (***People v. Kilpatrick*** (1980) 105 Cal.App.3rd 401, 409-411.), it is "*fresh pursuit*" when the officers go to the respective suspects' homes, make a warrantless entry, and arrest the suspects. This was found to be necessary to prevent the escape of the suspect and the destruction of evidence.
>
> Tracing an armed robbery suspect by the vehicle description and license number to a particular residence, justifies a warrantless entry. (***People v. Daughhetee*** (1985) 165 Cal.App.3rd 574.)
>
> Exigent circumstances were found where the defendant refused commands to exit his home a short time after he threatened to shoot his neighbor, to light his neighbor's trailer on fire, and to "blow up" the entire trailer park in which the two lived if the neighbor bothered the defendant's family again. Officers were also told that the defendant had also threatened the neighbor with a pistol the day before and had been seen in possession of hand grenades and automatic weapons a few days earlier. However, the Court found the exigency question to be "close." (***United States v. Al-Azzawy*** (9th Cir. 1985) 784 F.2nd 890, 891-893.)

The entry and securing of a home pending the obtaining of a search warrant, immediately following a gang shooting, was justified when it was believed that a second shooter and the firearms used were likely in the house. (***In re Elizabeth G.*** (2001) 88 Cal.App.4th 496.)

> Such a "securing" of a house, however, is in fact a **Fourth Amendment** seizure. (***United States v. Shrum*** (10th Cir. KS 2018) 908 F.3rd 1219.)

Presence of an armed suspect, who had committed a vicious murder who was likely to flee, with the possibility that defendant would dispose of evidence; warrantless entry and arrest was lawful. (***People v. Williams*** (1989) 48 Cal.3rd 1112, 1138-1139.)

A strong reason to believe that defendant was the killer in the murder of two men, that he was probably armed and at a particular apartment, and that he was likely to flee if not immediately arrested, justified the warrantless entry. (***People v. Bacigalupo*** (1991) 1 Cal.4th 103, 122-123.)

Officers may even pursue a person into his home upon attempting to cite him for an infraction where the suspect flees into his home. The defendant's resistance converts the offense into a misdemeanor "resisting arrest" (i.e., **Pen. Code § 148(a)**), and allows for a "hot pursuit" into the suspect's house to arrest him on that charge. (***People v. Lloyd*** (1989) 216 Cal.App.3rd 1425, 1428-1430; citing ***United States v. Santana*** (1976) 427 U.S. 38, 42-43 [96 S.Ct. 2406; 49 L.Ed.2nd 300]; see also ***In re Lavoyne M.*** (1990) 221 Cal.App.3rd 154. 159.)

> But see ***United States v. Johnson*** (9th Cir. 2001) 256 F.3rd 895, 908, fn. 6; where it was held that "*hot pursuit*" does *not* allow for the chasing of a suspect into a private residence except where the underlying offense is a felony, or in other identified "rare circumstances."

However, the Ninth Circuit held in **United States *v.* Lundin** (9th Cir. 2016) 817 F.3rd 1151, that officers going to defendant's home 3½ hours after the victim reported that she had been kidnapped and assaulted by defendant was done so without an exigency. Entering the curtilage of defendant's home (i.e., the front porch) at 4:00 a.m., with the intent to make a warrantless arrest, was therefore unlawful. Any exigency created by such an unlawful act (i.e., defendant attempting to escape from the back of the house) did not justify his warrantless arrest in the backyard or the warrantless entry into the house itself.

In ***Sims v. Stanton*** (9th Cir. 2013) 706 F.3rd 954, the Ninth Circuit Court of Appeal held that entering the curtilage of a home in pursuit of a suspect with the intent to detain him when the subject is ignoring the officer's demands to stop, at worst a misdemeanor violation of **Pen. Code § 148**, is illegal. The warrantless fresh or hot pursuit of a fleeing suspect into a residence (or the curtilage of a residence) is limited to felony suspects only. The United States Supreme Court, however, reversed this decision in ***Stanton v. Sims*** (2013) 571 U.S. 3 [134 S.Ct. 3; 187 L.Ed.2nd 341], without resolving the issue.

> The Ninth Circuit's decision in ***Sims*** was based upon that Court's interpretation of the United States Supreme Court decision in ***Welsh v. Wisconsin*** (1984) 466 U.S. 740 [104 S.Ct. 2091; 80 L.Ed.2nd 732], and conflicts with the California Supreme Court's reasoning in ***People v. Thompson*** (2006) 38 Cal.4th 811 (see "Warrantless entry to arrest a DUI (i.e., "*Driving while Under the Influence*") suspect," above).
>
> However, the United States Supreme Court, in interpreting its own decision on ***Welsh***, noted that they only held there that a warrantless entry into a residence for a minor offense *not involving hot pursuit* was an exception to the normal rule that a warrant is "usually" going to be required.

> Per the Court, there is no rule that residential entries involving hot pursuit are limited to felony cases. In this case, there was a "*hot pursuit*." (***Stanton v. Sims***, *supra*, citing ***Welsh***, at p. 750.)

However, observation of defendant holding onto a handgun while on his own front porch, when he'd been observed moments earlier on the sidewalk in front of his house, constituted probable cause of a misdemeanor violation of carrying a loaded firearm in a public place, per **Pen. Code § 25850(a)** (i.e., the sidewalk). But by ignoring the officers' orders to remain outside, entering the house did *not* constitute an exigent circumstance that allowed for the officers to arrest defendant inside his house. (***United States v. Nora*** (9th Cir. 2014) 765 F.3rd 1049, 1052-1060; suppressing evidence found on his person and as the result of a search warrant obtained for the house after defendant's arrest.)

> The officers used a public address system to order defendant out of the house. This, the Court ruled, was in effect an arrest within his house although the officers did not enter the house. (***Id***., at p. 1054.)
>
> *Note*: The Court made no mention of ***Stanton v. Sims***, *supra*, or of the doctrine of "*hot pursuit*," making the validity of this decision questionable.
>
> See, however, the Third Circuit Court of Appeals decision in ***United States v. Mallory*** (3rd Cir. 2014) 765 F.3rd 373, for the exact opposite conclusion on the lawfulness of entering a residence in hot pursuit under the exact same circumstances as ***Nora***, although the Court also held that the firearm should have been suppressed as a product of an unlawful warrantless search after the residence was secured.

Having used a tracking device to follow defendants with stolen stereo speakers to a particular house, the immediate warrantless entry and search was

justified by the reasonable fear that defendants would disassemble, destroy or hide the speakers, and wash off identifying fluorescent powder if they waited for a warrant. (***People v. Hull*** (1995) 34 Cal.App.4th 1448, 1455.)

Warrantless entry to arrest a misdemeanor DUI (i.e., "*Driving while Under the Influence*") suspect:

> *Illegal*: ***Welsh v. Wisconsin*** (1984) 466 U.S. 740 [104 S.Ct. 2091; 80 L.Ed.2nd 732], where the state treated a person's first DUI offense as a non-criminal offense, subjecting the suspect to civil forfeiture only.
>
> *Legal*: ***People v. Hampton*** (1985) 164 Cal.App.3rd 27, 34, where a warrantless entry was upheld to prevent the destruction of evidence (the blood/alcohol level) and there was reason to believe defendant intended to resume driving.
>
> > *Note*: ***Welsh*** can be distinguished by the simple fact that California treats DUI cases as serious misdemeanors; see below.
>
> *Legal*: Entering a house without consent or a warrant to take a suspected DUI driver into custody and to remove him from the house for identification and arrest by a private citizen who saw defendant's driving, held to be legal. The fact that the defendant's blood/alcohol level might dissipate to some degree pending the obtaining of a telephonic arrest warrant, plus the fact that the suspect might leave and drive again, was sufficient cause to establish an exigent circumstance. (***People v. Thompson*** (2006) 38 Cal.4th 811.)
>
> > *Note*: The Court differentiated on its facts ***Welsh v. Wisconsin*** (1984) 466 U.S. 740 [104 S.Ct. 2091; 80 L.Ed.2nd 732], where it was held that a first time DUI, being no more than

a civil offense with a $200 fine under Wisconsin law, was not aggravated enough to allow for a warrantless entry into a residence to arrest the perpetrator. The cut off between a minor and a serious offense seems to be whether or not the offense is one for which incarceration is a potential punishment. (***People v. Thompson***, *supra*, at pp. 821-824, citing ***Illinois v. McArthur*** (2001) 531 U.S. 326, 336, 337 [121 S.Ct. 946; 148 L.Ed.2nd 838]; and noting (at pp. 821-824) that the Ninth Circuit's opinion on this issue is a minority opinion.)

Illegal: The Ninth Circuit Court of Appeal, arguing the continuing validity of ***Welsh***, held that California's interpretation under ***Thompson*** is wrong, and that a warrantless entry into a home to arrest a misdemeanor driving–while-under-the-influence suspect is a **Fourth Amendment** violation. (***Hopkins v. Bonvicino*** (9th Cir. 2009) 573 F.3rd 752, 768-769; finding that warrantless entries into residences in misdemeanor cases "will seldom, if ever, justify a warrantless entry into the home.")

Note: See ***Birchfield v. North Dakota*** (2016) 579 U.S. 438, 444-450 [136 S.Ct. 2160; 195 L.Ed.2nd 560], for a historical review of the development of DUI statutes and the importance of obtaining a reading of the suspect's "BAC" ("Blood Alcohol Concentration").

Also note the authority authorizing entries into residences to execute misdemeanor arrest warrants from both state (***People v. Leblanc*** (1997) 60 Cal. App.4th 157, 164.) and federal (***United States v. Spencer*** (2nd Cir. 1982) 684 F.2nd 220, 223-224.) courts.

Entering a residence with probable cause to believe only that the non-bookable offense of possession of less than an ounce of marijuana is occurring (**H&S § 11357(b)**), is closer to the ***Welsh*** situation, being a "nonjailable offense," and a violation of the **Fourth Amendment** when entry is made without consent. (***People v. Hua*** (2008) 158 Cal.App.4th 1027; ***People v. Torres et al.*** (2012) 205 Cal.App.4th 989, 993-998; see also ***United States v. Mongold*** (10th Cir. 2013) 528 F.3rd 944.)

The ***Torres*** Court also rejected as "speculation" the People's argument that there being four people in the defendants' hotel room indicted that a "marijuana-smoking party" was occurring, which probably involved a bookable amount of marijuana. (***People v. Torres et al.***, *supra*, at p. 996.)

But see ***People v. Waxler*** (2014) 224 Cal.App.4th 712, 724-725; rejecting the ***Hua*** and ***Torres*** argument when the place being searched is a motor vehicle as opposed to a residence.

The issue of the legality of an officer following defendant into his garage, after defendant failed to yield to the officer's use of his emergency lights while attempting to stop defendant after observing him honking his horn excessively (a violation of **Veh. Code § 27007**), was discussed in ***Lange v. California*** (June 23, 2021) __ U.S.__ [141 S.Ct. 2011; 201 L.Ed.2nd 486]. In ***Lange***, the Supreme Court held that whether or not an officer can make a warrantless entry into a fleeing misdemeanant's home depends upon the circumstances, rejecting the argument that an officer may do so as a "categorical" rule. The People must first show that an exigent circumstance allowed for such an entry. Per the Court: "A great many misdemeanor pursuits involve exigencies allowing warrantless entry. But

whether a given one does so turns on the particular facts of the case." (***Id.***, at p. __.)

See "*Exigent Circumstances*," under "*Warrantless Searches and Seizures*" (Chapter 9), below.

Officers *already lawfully inside* when probable cause develops. (***People v. Ramey***, *supra*; ***People v. Dyke*** (1990) 224 Cal.App.3rd 648, 657-659, 661.)

See also ***United States v. Brobst*** (9th Cir. 2009) 558 F.3rd 982, 997; and ***People v. McCarter*** (1981) 117 Cal.App.3rd 894, 908; both cases with officers inside executing search warrants.

Defendant *standing in the threshold*: Case law has consistently held that an arrest without a warrant, either outside or *even with the suspect standing in the threshold* of his own home, is lawful. For example:

A warrantless arrest at the threshold of defendant's motel room, where defendant opened the door in response to the officers' knock and after having looked outside and seeing the officers standing at the door, is lawful. ***Payton*** draws a "*bright line*" at the threshold. So long as the officers did not misidentify themselves or use coercion to get defendant to open the door, and defendant acquiesced in the procedure, he is subject to a warrantless arrest. The fact that defendant was physically inside the door is also irrelevant so long as the officers are outside at the time the arrest is made. (***United States v. Vaneaton*** (9th Cir. 1995) 49 F.3rd 1423, 1426-1427: Where officers use no force, threats, or subterfuge, a suspect's decision to open the door exposes him to a public place, and the privacy interests protected by ***Payton*** are not violated.)

Without overruling ***Vaneaton*** (leaving the continuing validity of this case "for another case and another day"), the Ninth Circuit noted that its decision here "may be on infirm ground" after deciding ***United States v. Lundin*** (9th Cir. Mar. 22, 2016) (9th Cir. 2016) 817 F.3rd 1151. In ***Lundin***, it was

> held that officers going onto defendant's front porch at 4:00 a.m., without a warrant or exigent circumstances, and for the subjective purpose of arresting him, is illegal, and that any exigent circumstances provoked by that illegal act do not justify the entry of defendant's back yard and the seizure of evidence. However, it was also noted that in ***Vaneaton***, the officers were standing in a "common space" of a motel when they knocked, as opposed to a suspect's front porch.

Defendant, standing in her doorway as officers approached, is in public. Further, she may not defeat an arrest which has been set in motion by attempting to escape into a private place. (***United States v. Santana*** (1976) 427 U.S. 38 [96 S.Ct. 2406; 49 L.Ed.2nd 300].)

When the officer attempted to arrest defendant in the threshold of her apartment door, only to have her pull away and into the apartment, the officer may follow her in to complete the arrest he had set in motion on her doorstep. (***People v. Hampton*** (1985) 164 Cal.App.3rd 27, 35-36.)

However, arresting defendant who was still in bed, even though he could (and did) reach the door and open it from his bed, was held to be a violation of ***Payton***. It is irrelevant that the officer was still outside the residence when he pronounced defendant under arrest in that it is the defendant's location, and not the officer's, that is important. (***United States v. Quaempts*** (9th Cir. 2005) 411 F.3rd 1046.)

Also, telling defendant, who was standing just inside the threshold of his home, that he was under arrest, to which defendant then submitted, was held to be a violation of ***Payton v. New York*** in that when officers engage in actions to coerce an occupant outside of the home, they accomplish the same effect as an actual entry into the home, which triggers the requirements of ***Payton***. (***United States v. Allen*** (2nd Cir. 2016) 813 F.3rd 76.)

A *parolee* (and, therefore, presumably, a *probationer* who is on search and seizure **Fourth Amendment** waiver conditions; e.g., see ***United States v. King*** (9th Cir. 2013) 736 F.3rd 805, 808-810.) may be arrested in his home without the necessity of a warrant. Police are authorized to enter a house without a warrant where the suspect is a parolee (or probationer on search & seizure conditions) who had no legitimate expectation of privacy against warrantless arrests. (***People v. Lewis*** (1999) 74 Cal.App.4th 662, 665-673; ***In re Frank S.*** (2006) 142 Cal.App.4th 145, 151.)

Inviting Defendant Outside: The defendant *may* even be "*invited*" outside, even though the officer's intent to arrest is not disclosed. When the defendant leaves the protection of his home, at least if he does so voluntarily, ***Ramey*** does not apply and the arrest outside is lawful. (***People v. Tillery*** (1979) 99 Cal.App.3rd 975, 979-980; ***People v. Green*** (1983) 146 Cal.App.3rd 369, 377; ***People v. Jackson*** (1986) 187 Cal.App.3rd 499, 505; ***Hart v. Parks*** (9th Cir. 2006) 450 F.3rd 1059, 1065.)

> A suspect may be arrested without a warrant when he is in public. Case law tells us that anywhere, "whether it be the driveway, lawn, or front porch," which is "open to 'common' or 'general use'" by those wishing to contact the resident of a house, are "*public places*." (***People v. Olson*** (1971) 18 Cal.App.3rd 592, 598.)
>
> See ***In re Danny H.*** (2002) 104 Cal.App.4th 92, for a thorough discussion of the law on "*public places*" as it relates to the 24 separate statutes where such is an element.
>
> And while it is illegal for a police officer to use a ruse to make a warrantless entry into a suspect's home, it has been held that it is *not* illegal to trick the suspect out. (***People v. Rand*** (1972) 23 Cal.App.3rd 579, 583.) For example:
>
> > Calling the suspect's house and falsely telling him the police are coming with a warrant, causing defendant, by his own choice, to attempt to flee his residence with

the contraband, is lawful. There is no constitutional violation in arresting him when he comes outside. (***Ibid***.; ***People Porras*** (1979) 99 Cal.App.3rd 874; but note this Court's invitation to the California Supreme Court to review the lawfulness of purposely evading ***Ramey*** in this manner (pp. 879-880) and the Supreme Court's refusal to do so by denying appellant's petition for a hearing.)

These cases, however, are when an officer has probable cause to arrest the suspect. Where there is no pre-existing probable cause, using a ruse to trick people outside during a narcotics investigation at an apartment complex, for the purpose of confronting as many people as they could lure outside (resulting in the defendant's illegal detention when he was surrounded by a team of officers all dressed in raid gear) is illegal. "A deception used to gain entry into a home and a ruse that lures a suspect out of a residence is a distinction without much difference. . . ." (***People v. Reyes*** (2000) 83 Cal.App.4th 7, 12-13.)

But see ***In re R.K.*** (2008) 160 Cal.App.4th 1615, where the Court criticized the police tactic of inviting a drunk suspect out from a non-public location onto the public street and then arresting him for being "drunk in public," ruling that such a tactic is illegal even though he "voluntarily acquiesced" to go to a public place.

Note: It is unknown if this ruling can be applied to a ***Ramey*** situation as well.

However, there is even some authority allowing a police officer to *order* the defendant out of his house, after which he is arrested. Per the Court: ***Ramey*** forbids warrantless entries only, and is not a relevant issue when the defendant is arrested in public no matter how he came to be in public. (***People v. Trudell*** (1985) 173 Cal.App.3rd 1221, 1228-1230.)

Ordering a Person to Come Out: The majority rule appears to be that *ordering* a person to come out of his house is the equivalent of having arrested him while in the house, and is illegal:

> When officers are outside with guns drawn, ordering defendant to come out, he has in effect been seized (i.e., arrested) while in his house. Leaving the house under such coercive circumstances is *not* an exception to ***Ramey***/***Payton***. (***United States v. Al-Azzaway*** (9th Cir. 1985) 784 F.2nd 890, 893-895; ***Fisher v. City of San Jose*** (9th Cir. 2009) 558 F.3rd 1069**,** 1074-1075.)
>
> Also, calling inside the residence through a partially open door, "commanding" any occupants to show themselves, and then ordering defendant to back out of the residence when he did show himself, was held to be an illegal detention effected *inside* the residence in that the warrantless intrusion into the residence was not supported by probable cause. (***People v. Lujano*** (2014) 229 Cal.App.4th 175, 185-189.)
>
> > However, it was also noted that "(i)f (the officer) had *invited* defendant to step outside of his home to talk, and defendant did so voluntarily, then any detention would be treated as if it occurred outside the home, and our analysis would be quite different." (Italics added) (***Id***., at p. 188.)
>
> Armed police officers surrounding defendant's home and then ordering him out via a public address system is in effect an arrest within the home, and absent a warrant or exigent circumstances, is illegal. The fact that defendant had just fled into his home, avoiding being arrested on his front porch for a misdemeanor, is *not* an exigent circumstance, per the Ninth Circuit. (***United States v. Nora*** (9th Cir. 2014) 765 F.3rd 1049, 1052-1060.)
>
> Also, telling defendant, who was standing just inside the threshold of his home, that he was under arrest, to which defendant then submitted, was held

> to be a violation of ***Payton v. New York*** in that when officers engage in actions to coerce an occupant outside of the home, they accomplish the same effect as an actual entry into the home, which triggers the requirements of ***Payton***. (***United States v. Allen*** (2nd Cir. 2016) 813 F.3rd 76; citing the Ninth Circuit's rule on this issue with approval.)

Sufficiency of the Evidence to Believe the Suspect is Inside: The amount of evidence a law enforcement officer must have indicating that a criminal suspect is in fact presently inside his own residence in order to justify a non-consensual entry, with or without an arrest warrant, has been debated over the years:

> The United States Supreme Court, in ***Payton v. New York*** (1980) 445 U.S. 573 [100 S.Ct. 1371; 63 L.Ed.2nd 639], merely states that a police officer must have a "*reason to believe*" the suspect is inside his residence, without defining the phrase.
>
> A California lower appellate court found that the officers needed a "*reasonable belief*," or "*strong reason to believe*," the suspect was home. (***People v. White*** (1986) 183 Cal.App.3rd 1199, 1204-1209; rejecting the defense argument that full "*probable cause*" to believe the subject was inside is required; see also ***United States v. Magluta*** (11th Cir. 1995) 44 F.3rd 1530, 1535, using a "*reasonable belief*" standard.)
>
> Other authority, most notably from the federal Ninth Circuit Court of Appeal, indicates that a full measure of "*probable cause*" is required. (See ***Dorman v. United States*** (D.C. Cir. 1970) 435 F.2nd 385, 393; see also ***United States v. Phillips*** (9th Cir. 1974) 497 F.2nd 1131; a locked commercial establishment, at night; ***United States v. Gorman*** (9th Cir. 2002) 314 F.3rd 1105; defendant in his girlfriend's house with whom he was living; and ***United States v. Diaz*** (9th Cir. 2007) 491 F.3rd 1074; and ***United States v. Gooch*** (9th Cir. 2007) 506 F.3rd 1156, 1159, fn. 2.)
>
> It has been argued that the California Supreme Court, interpreting the language of **P.C. § 844** (i.e., "*reasonable grounds for believing him to be* (*inside*)"), has found that any arrest, with or without an arrest warrant, requires *probable cause* to believe the subject is inside in order to justify a non-consensual entry into a residence. (***People v. Jacobs*** (1987) 43 Cal.3rd 472, 478-479.)
>
> Noting that five other federal circuits have ruled that something less than probable cause is required, and that the Ninth Circuit is a

minority opinion (see ***United States v. Gorman***, *supra*.), the Fourth District Court of Appeal (Div. 2) found instead that an officer executing an arrest warrant or conducting a probation or parole search may enter a dwelling if he or she has only a *reasonable belief*, falling short of probable cause to believe, the suspect lives there and is present at the time. Employing that standard, the entry into defendant's apartment to conduct a probation search was lawful based on all of the information known to the officers. Accordingly, the court upheld the trial court's conclusion that the officers had objectively reasonable grounds to conclude the defendant/probationer lived at the subject apartment and was present at the time, and therefore the officers had the right to enter the apartment to conduct a warrantless probation search. (***People v. Downey*** (2011) 198 Cal.App.4th 652, 657-662.)

> Also noting that the California Supreme Court, in ***People v. Jacobs***, *supra* (pg. 479, fn. 4), did *not* find that probable cause was required, contrary to popular belief. (***Id***., at p. 662.)
>
> The Ninth Circuit, in a case dealing with whether the subject of a **Fourth** waiver search in fact lives at the place to be searched, continues to hold by the probable cause standard. (***United States v. Bolivar*** (9th Cir. 2012) 670 F.3rd 1091, 1093-1095.)

With evidence giving officers "*a reasonable belief*" that the home entered with an arrest warrant was where defendant lived, it was also reasonable for them to believe that he would be home at 6:00 a.m. (***United States v. Hamilton*** (1st Cir. 2016) 819 F.3rd 503.)

Suspect Within a Third Person's Home; the "***Steagald** Warrant*:" Probable cause justifying an arrest warrant for one person does not authorize entry into to a third person's home to look for the subject of the arrest warrant. To do so violates the privacy interests of the third party. Therefore, a *search warrant*, based upon probable cause to believe the wanted subject is in fact in the home of the third party (absent exigent circumstances), is necessary. (***Steagald v. United States*** (1981) 451 U.S. 204 [101 S.Ct. 1642; 68 L.Ed.2nd 38]; ***People v. Codinha*** (1982) 138 Cal.App.3rd 167; sometimes referred to as a "***Steagald** Warrant*." See also **P.C. 1524(a)(6)**; legal authorization for obtaining such a search warrant.)

> The arrestee, if doing no more than merely visiting the lawful resident, probably has no standing to contest the unlawful entry of another's house. (***United States v. Underwood*** (9th Cir. 1983) 717 F.2nd 482.) It is when a police officer obtains evidence against the

third party homeowner, while looking for the subject of the arrest, that ***Steagald*** becomes an issue. The homeowner, in such a case, has standing to contest the warrantless entry of his house in defense at his own prosecution. (***Steagald v. United States***, *supra*, at pp. 212, 216 [101 S.Ct. 1642; 68 L.Ed.2nd at pp. 45, 48].) The person with the outstanding arrest warrant does not. (***United States v. Bohannon*** (2nd Cir. 2016) 824 F.3rd 242.)

But, there is some authority that, as an overnight guest in another's apartment, defendant with an outstanding arrest warrant *does* have standing to contest the entry of the bedroom in which he is staying when done without a search warrant. (***People v. Hamilton*** (1985) 168 Cal.App.3rd 1058.)

A frequent visitor, with free reign of the house despite the fact that he did not stay overnight, might also have standing to contest an allegedly illegal entry of a third person's home. (***People v. Stewart*** (2003) 113 Cal.App.4th 242.)

> ***Hamilton*** and ***Stewart*** have some support in ***Minnesota v. Olson*** (1990) 495 U.S. 91 [109 L.Ed.2nd 85]; and ***People v. Tillery*** (1979) 99 Cal.App.3rd 975, 978-979.

Neither an evicted former tenant, nor her "overnight house guest," have standing to contest the warrantless entry of law enforcement officers who were there checking on a report of trespassers in the vacant apartment. (***Woodward v. City of Tucson*** (9th Cir. 2017) 870 F.3rd 1154, 1159-1161.)

*Consequences of a **Ramey/Payton** Violation*:

A warrantless arrest in the home, in violation of ***Payton v. New York***, *supra*, and ***People v. Ramey***, *supra*, *does not* invalidate a later statement made to police which was not "*an exploitation of the illegal entry*." (***New York v. Harris*** (1990) 495 U.S. 14 [109 L.Ed.2nd 13]; ***People v. Watkins*** (1994) 26 Cal.App.4th 19, 29-31; ***United States v. Manuel*** (9th Cir. 1983) 706 F.2nd 908, 911-912.)

> *Note*: What this means is that should a court rule that ***Ramey/Payton*** has been violated, any oral or physical evidence seized from the defendant *after* removing him from the home will not be suppressed, being the product of a lawful arrest and *not* the product of the illegal entry into the residence.

Tip: In other words, don't question or search the individual until he has been removed from the home in any case where the entry is questionable.

But also note: Earlier case authority has indicated that a ***Ramey*** violation is but one factor for the court to consider in determining whether the defendant's subsequent confession is a product of his free will. (E.g., see ***People v. Trudell*** (1985) 173 Cal.App.3rd 1221, 1231-1232.)

An FBI agent made a warrantless entry into defendant's hotel room in violation of the **Fourth Amendment** and arrested him with probable cause, but then did not question him until he was taken to a law enforcement interrogation room where he waived his ***Miranda*** rights and made incriminating statements. The statements were held to be admissible under the rule of ***New York v. Harris***, *supra*. (***United States v. Slaughter*** (11th Cir. 2013) 708 F.3rd 1208, 1212-1213.)

See also ***People v. Marquez*** (1992) 1 Cal.4th 553, 569, holding that ***New York v. Harris***, *supra*, applies to an arrest made with probable cause but in violation of the California Constitution and ***People v. Ramey***, *supra*.

Even where ***Ramey*** and ***Payton*** are violated, so long as the police have probable cause to make the arrest, only evidence secured in the home is subject to suppression. Defendant's arrest is not suppressed, nor are his statements later (after leaving the house) made to police as a product of that arrest. (***People v. Watkins***, *supra*.)

Similarly, *physical evidence* recovered from the defendant's person upon searching him at the police station, should also be admissible. (***People v. Watkins***, *supra*, at p. 31, fn. 8; citing out-of-state authority.)

This is supported by dicta in ***People v. Marquez***, *supra*, at p. 569, where the Court noted that a ***Ramey*** violation "would require suppression solely of evidence obtained from searching the home at the time of the arrest."

Conducting an illegal parole search within a home where there exists probable cause to arrest the subject (even though he was only detained) will not cause the suppression of a confession

obtained after the subject comes to the law enforcement officer's office where he is interrogated. (***United States v. Crawford*** (9th Cir. 2004) 372 F.3rd 1048, 1054-1059.)

Also, note the potential for civil liability for a ***Ramey*** violation, even if the damages are only "nominal." (***George v. Long Beach*** (9th Cir. 1992) (973 F.2nd 706.)

***Knock and Notice*:**

Statutory Rule: "To make an arrest, a private person, if the offense is a felony, and in all cases a peace officer, may break open the door or window of the home in which the person to be arrested is, or in which they have reasonable grounds for believing the person to be, after having demanded admittance and explained the purpose for which admittance is desired." (**Pen. Code § 844**)

Suppression of Resulting Evidence:

The rule that evidence will *not necessarily* be suppressed as a result of a knock and notice violation, as dictated by ***Hudson v. Michigan*** (2006) 547 U.S. 586 [126 S.Ct. 2159; 165 L.Ed.2nd 56] (a search warrant case.), is applicable as well in a warrantless, yet otherwise lawful, arrest situation, pursuant to **P.C. § 844**. (***In re Frank S.*** (2006) 142 Cal.App.4th 145; defendant, a parolee, was subject to warrantless searches and seizures.)

See "*Knock and Notice*;" under "*Service and Return*" *(of an Arrest Warrant*), above, and "*Searches With a Search Warrant*" (Chapter 10), below.

***Arrest Issues*:**

Arresting for the Wrong Offense:

Rule: The United States Supreme Court has ruled that so long as a police officer has probable cause to arrest for *some* offense, it matters not that, subjectively, the officer erroneously believed that he only had probable cause for another offense. (***Devenpeck v. Alford*** **(**2004) 543 U.S. 146 [125 S.Ct. 588; 160 L.Ed.2nd 537]; rejecting the Ninth Circuit Court of Appeals' opinion (e.g., see ***Alford v. Haner*** (9th Cir. 2003) 333 F.3rd 972; petition for certiorari granted.) that arresting for the wrong offense was only lawful if the two offenses were "*closely* (or '*factually*') *related*," as described in ***Gasho v. United States*** (9th Cir. 1994) 39 F.3rd 1420, 1428.)

The Ninth Circuit was virtually alone on this issue, with other federal circuits following the U.S. Supreme Court's lead. (See ***United States v. Pulvano*** (5th Cir. 1980) 629 F.2nd 1151; ***United***

States v. Saunders (5th Cir. 1973) 476 F.2nd 5; ***Klingler v. United States*** (8th Cir. 1969) 409 F.2nd 299; ***United States ex rel LaBelle v. LaVallee*** (2nd Cir. 1975) 517 F.2nd 750; ***Richardson v. Bonds*** (7th Cir. 1988) 860 F.2nd 1427; ***Knight v. Jacobson*** (11th Cir. 2002) 300 F.3rd 1272.)

Case law:

As long as, when arrested, probable cause to arrest for *some* offense was present, it is *irrelevant* that defendant was arrested for, and/or charged with, the wrong offense. (***People v. Lewis*** (1980) 109 Cal.App.3rd 599, 608-609; ***In re Donald L.*** (1978) 81 Cal.App.3rd 770, 775; see also ***People v. Richardson*** (2008) 43 Cal.4th 959, 988-990; and ***People v. Carmona*** (2011) 195 Cal.App.4th 1385, 1391.) No sanctions will be imposed for having selected the wrong charge.

"Subjective intentions (of the arresting officer) play no role in ordinary, probable-cause **Fourth Amendment** analysis." (***Whren v. United States*** (1996) 517 U.S. 806, 814 [116 S.Ct. 1769; 135 L.Ed.2nd 89, 98]; see also ***United States v. Johnson*** (9th Cir. 2019) 913 F.3rd 793, 799.)

"(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; Stopping defendant for his third (rear window) brake light out despite not knowing the correct legal justification for finding that the inoperable light was in violation of the **Vehicle Code**.)

See also ***People v. Rodriguez*** (1997) 53 Cal.App.4th 1250; defendant arrested for homicide for which there was no probable cause, while the officer did have probable cause to believe defendant had in fact committed another homicide; arrest lawful.

Arresting defendant for "littering" (per **P.C. § 374.4**) for urinating in public was a lawful arrest even though the officer cited the wrong offense. Defendant's actions were in fact a violation of **P.C. §§ 370**, **372**, for having created a public nuisance. (***People v. McDonald*** (2006) 137 Cal.App.4th 521, 530.)

See also ***District of Columbia v. Wesby*** (2018) 583 U.S. 48, 54, fn. 2 [138 S.Ct. 577; 199 L.Ed.2nd 453].) "Because probable cause is an objective standard, an arrest is lawful if the officer had probable cause to arrest for any offense, not just the offense cited at the time of arrest or booking."

"It is well-established that '[i]f the facts support probable cause . . . for one offense,' an arrest may be lawful 'even if the officer invoked, as the basis for the arrest, a different offense' which lacks probable cause." (***Vanegas v. City of Pasadena*** (9th Cir. 2022) 46 F.4th 1159, 1165, quoting ***United States v. Magallon-Lopez*** (9th Cir. 2016) 817 F.3rd 671, 675; and citing ***Edgerly v. City & County. of San Francisco*** (9th Cir. 2010) 599 F.3rd 946, 954; "[P]robable cause supports an arrest so long as the arresting officers had probable cause to arrest the suspect for any criminal offense, regardless of their stated reason for the arrest.").

Exceptions:

An arrest for what the officer believes to be a felony, and which did not occur in the officer's presence, but which is in fact only a misdemeanor, may be an illegal arrest, per **Pen. Code § 836(a)(1)** (i.e., misdemeanor not in the officer's presence.), and/or the "stale misdemeanor" rule (see above).

The Ninth Circuit Court of Appeal also reversed a defendant's conviction when he was *prosecuted* for the wrong offense where **The Immigration and Nationality Act** has three related but separate categories defining the three different ways a noncitizen may make an unlawful entry, ruling that crossing into the country at a non-designated time or place was not a violation of **8 U.S.C. § 1325(a)(2)**, the crime of eluding examination or inspection by immigration officers. This particular crime can be committed only where and when examinations or inspections take place—at open ports of entry. The government's broad reading of the statute disrupted its careful structure, its interpretation ran afoul of the presumption that statutory language was not superfluous, and its interpretation of **§ 1325(a)(2)** rendered the entry offense in **§ 1325(a)(1)** superfluous. (***United States v. Corrales-Vasquez*** (9th Cir. 2019) 931 F.3rd 944.)

Also, defendant's conviction for running a stop sign (**Veh. Code § 22450**) was reversed on appeal to the Appellate Department of the Superior Court when what the defendant actually did was pass a stopped school bus's displayed stop sign and flashing red lights (**Veh. Code § 22454(a)**), in that the record on appeal did not contain substantial evidence in support of the essential elements of the offense, noting that the purpose of **section 22450** is to require a vehicle to stop before it is in a position where it could impede or hit pedestrians who could be in a crosswalk, or cross-traffic that could be in an intersection. (***People v. Kruschen*** (2020) 46

Cal.App.5th Supp. 12: The kind-hearted officer having cited the defendant for the lesser offense to avoid a stiffer penalty.)

Post-Arrest, Pre-Trial Detentions:

A pretrial detainee's claim that he was unlawfully detained in jail after his arrest, based upon a probable cause finding that relied upon fabricated evidence, was properly brought under the **Fourth Amendment** rather than the **Due Process Clause**. Pretrial detentions that follows the start of legal process (a magistrate's finding of probable cause, in this case) in a criminal case may violate the **Fourth Amendment**, depending upon the circumstances. It is only after a trial has occurred that the **Fourth Amendment** drops out, and a person challenging the sufficiency of the evidence to support both a conviction and any ensuing incarceration does so under the **Due Process Clause** of the **Fourteenth Amendment**. (***Manuel v. City of Joliet*** (2017) 580 U.S. 357 [137 S.Ct. 911; 187 L.Ed.2nd 312].)

The question was left to the trial court below to decide whether the detainee's **42 U.S.C. § 1983** civil claim accrued for statute of limitations purposes on the date legal process was initiated or on the date the criminal charges were dismissed.

Mistaken Belief in Existence of Probable Cause to Arrest or Search, an Arrest Warrant, or that a Fourth Waiver Exists, Based upon Erroneous Information Received from Various Sources:

The Problem: An officer arrests and/or searches a person under the mistaken belief that there is an arrest warrant outstanding for the person, the person is subject to a "***Fourth** Waiver*" (i.e., he has previously waived his **Fourth Amendment** search and seizure rights), *or* the officer is given other erroneous information through either court, law enforcement, or other official channels.

Generally, a police officer's good faith belief that he has probable cause to arrest will save what is later determined to be an illegal arrest, having been made without sufficient probable cause. However, where a reasonably well-trained officer would, or should, have known that an arrest or search was unlawful, good faith will not save any subsequently discovered evidence. (***People v. Macabeo*** (2016) 1 Cal.5th 1206, 1219-1226; officer should have known that a search of defendant's cellphone could not be justified under the "search incident to arrest" theory in that defendant had not yet been arrested until after the cellphone was searched.)

The Rule: The United States Supreme Court initially held that an officer's "*good faith*" will validate the resulting arrest and/or search, at least in those cases where the erroneous information came from a "*court source*." (***Arizona v. Evans*** (1995) 514 U.S. 1 [115 S.Ct. 1185; 131 L.Ed.2nd 34]; see also ***People v. Downing*** (1995) 33 Cal.App.4th 1641.)

Extension of the Rule: The United States Supreme Court subsequently ruled (in a 5-to-4 decision) that an officer's good faith reliance on erroneous information will *not* invalidate an arrest even when that information comes from a law enforcement source, so long as the error was based upon non-reoccurring negligence only. Deliberate illegal acts, or a reckless disregard for constitutional requirements, or reoccurring or systematic negligence, will not excuse the resulting unlawful arrest. (***Herring v. United States*** (2009) 555 U.S. 135 [129 S.Ct. 695; 172 L.Ed.2nd 496].)

> ***Herring*** has been interpreted as authority for extending the "good faith" rule to include instances when the erroneous information in a warrant is the result of the officers' own errors. (***United States v. Artis*** (9th Cir. 2019) 919 F.3rd 1123, 1132; "In light of ***Herring***, we can no longer declare the good-faith exception categorically inapplicable whenever a search warrant is issued on the basis of evidence illegally obtained as a result of constitutional errors by the police;" rejecting, nonetheless, the application of the "good faith" rule to this case.
>
> But see ***United States v. Camou*** (9th Cir. 2014) 773 F.3rd 932, 944-945, where the Ninth Circuit ruled that "*good faith*" has never been held to excuse an illegal search where erroneous information did not come from another source, where the negligence was the fault of the searching officer, and just because the searching officer did not act recklessly or intentionally.
>
> The Appellate Department of the San Diego Superior Court has held that the practice of sending blood results to a drug lab in those "driving while under the influence" cases where testing for alcohol failed to show sufficient alcohol to account for the degree that the suspect appeared to be under the influence, and where the defendant had consented only to have her blood tested for alcohol as opposed to drugs, constituted "a procedural recurring or systematic failure by the law enforcement agency's personnel to abide by the **Fourth Amendment**." As a result, good faith did not prevent a court from suppressing the test result for drugs as being beyond the scope of the consent given where the defendant is told only that her blood will be tested for alcohol. (***People v. Pickard*** (2017) 15 Cal.App.5th Supp. 12, 16-17.)

> Where defendant was arrested and released on bail, subject to the court's imposition of search conditions, and police later relied on those conditions prior to the appellate court invalidating them (in a related appeal), the Court refused suppression, finding that the exclusionary rule's purpose would not be advanced where the officers "had no reason to know the trial court's decision was insufficiently reasoned." (***People v. Maxwell*** (2020) 58 Cal.App.5th 546, 558-560.)
>
> An officer's good faith reliance on the existence of a subject's waiver of his **Fourth Amendment** search and seizure rights as a condition of his pre-trial release from custody, where that condition is later (after the search) deleted by an appellate court decision, justifies the search. Evidence recovered as a result of that **Fourth** waiver search will not be suppressed. (***People v. Maxwell*** (2020) 58 Cal.App.5th 546, 558-560.)

The Reasoning: This is because the "*Exclusionary Rule*" was implemented primarily to deter intentional or reckless *police misconduct*; not misconduct by the courts or other non-law enforcement sources, or even law enforcement when their error was simply non-reoccurring negligence. It is not necessary to suppress the resulting evidence when to do so does not further the purposes of the *Exclusionary Rule*. (***Arizona v. Evans***, *supra*, at pp. 15-16 [115 S.Ct. 1185; 131 L.Ed.2nd at pp. 47-48]; ***United States v. Leon*** (1984) 468 U.S. 897, 920-921 [104 S.Ct. 3405; 82 L.Ed.2nd 677, 697]; ***People v. Willis*** (2002) 28 Cal.4th 22; ***People v. Tellez*** (1982) 128 Cal.App.3rd 876, 880; ***Illinois v. Krull*** (1987) 480 U.S. 340 [107 S.Ct. 1160; 94 L.Ed.2nd 364].)

> "(E)vidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the **Fourth Amendment**.'" (***Illinois v. Krull***, *supra*., at pp. 348-349.)
>
> "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." (***Herring v. United States***, *supra*., at p. 144.)

Law Enforcement vs. Non-Law Enforcement Source: After the decision in ***Arizona v. Evans*** (1995) 514 U.S. 1 [115 S.Ct. 1185; 131 L.Ed.2nd 34], and before ***Herring v. United States***, *supra*, California courts debated what was a law enforcement source, and what was not, interpreting ***Evans*** as establishing a bright line test for the issue. These cases will likely still

be relevant in those cases where it is determined to be a law enforcement source and involves deliberate illegal acts, reckless disregard for constitutional requirements, or reoccurring or systematic negligence.

Law enforcement source cases where the resulting evidence was suppressed:

Police Computer Records: Arrest based upon an arrest warrant which was supposed to have been recalled six months earlier, but which was still reflected as outstanding in the police department's computer system. (***People v. Ramirez*** (1983) 34 Cal.3rd 541, 543-544; ***People v. Armstrong*** (1991) 232 Cal.App.3rd 228, 241; ***Miranda v. Superior Court*** (1993) 13 Cal.App.4th 1628.)

Parole is a law enforcement source. Erroneous information from a state Department of Corrections parole officer resulted in a belief that the defendant was subject to a **Fourth** Waiver. The resulting warrantless search was held to be illegal. (***People v. Willis*** (2002) 28 Cal.4th 22.)

But see ***People v. Tellez*** (1982) 128 Cal.App.3rd 876, where erroneous information from Parole did *not* preclude the use of the "*Good Faith*" exception to the exclusionary rule. This case is of questionable validity given the rule in ***Willis***.

Exception: Where an officer is erroneously told that the defendant is on *parole*, only to find out later that he was subject to a *probationary* **Fourth** waiver instead, the search will be upheld. It is not relevant what type of **Fourth** waiver applies to the defendant, the officer acting in "*good faith*." (***People v. Hill*** (2004) 118 Cal.App.4th 1344.)

Probation: Based upon the reasoning of ***People v. Willis*** (2002) 28 Cal.4th 22, it was held that an adult Probation Department, even when the error was made by a clerk, is a *law enforcement source*. This Court questioned the continuing validity of ***In re Arron C.*** (1997) 59 Cal.App.4th 1365 (finding Juvenile Probation to be a court source), but noted that ***Arron C.*** dealt with "Juvenile Probation," which works closer with the courts than does adult probation departments. (***People v. Ferguson*** (2003) 109 Cal.App.4th 367.)

See ***In re Arron*** (1997) 59 Cal.App.4th 1365, below.

Exception; *DMV Hearings*: Although evidence of a driving under the influence violation is subject to suppression in a criminal prosecution when it is discovered as a product of a traffic stop based upon outdated police records that the vehicle defendant was driving was stolen, that same evidence will *not* be suppressed in *Department of Motor Vehicles administrative proceedin*gs involving the suspension of defendant's driver's license. (***Park v. Valverde*** (2007) 152 Cal.App.4th 877; see also ***People v. Arredondo*** (2016) 245 Cal.App.4th 186, 201; ***People v. Mason*** (2016) 8 Cal.App.5th Supp. 11, 29.)

Note: Petition for Review in ***People v. Arredondo*** was dismissed and the case remanded in light of the decision in ***Mitchell v. Wisconsin*** (June 27, 2019) __ U.S.__, __ [139 S.Ct. 2525; 204 L.Ed.2nd 1040], where the U.S. Supreme Court held that when a DUI arrestee is unconscious, this fact alone will "almost always" constitute an exigency, allowing for a warrantless blood draw.

Non-law enforcement source cases where the resulting evidence was not suppressed:

Fourth Waiver Information from the Courts: Erroneous information concerning whether defendant was still on probation and subject to a **Fourth** Waiver, the error created by a *court clerk*, is a "*court source*." (***People v. Downing*** (1995) 33 Cal.App.4th 1641.)

However, the Court in ***Downing*** noted that once law enforcement is on notice of the defects in the court system, "*good faith*" may not apply the next time. (***People v. Downing***, *supra*, at p. 1657, fn. 26; "We caution, however, that where the police department has knowledge of flaws in a record or data base system, it would not seem '*objectively reasonable*' to rely solely on it without taking additional steps to ensure its accuracy.")

Reversed Prior Conviction: A probationary **Fourth** Waiver condition from a prior case that was legally in effect at the time of the search in issue justifies the search. The fact that the prior conviction is subsequently vacated,

thus nullifying the search condition, does not retroactively make the search in issue illegal. (***People v. Miller*** (2004) 124 Cal.App.4th 216.)

> Where defendant's prior conviction was overturned on appeal, but only after officers conducted a probationary search based upon that conviction. Same result as in ***Miller***. "(T)he integrity of the process is best served . . . by a rule which determines the validity of the search on the basis of the legal situation which exits at the time the search is made." (***People v. Fields*** (1981) 119 Cal.App.3rd 386, 390.)

Legislative Sources: Relying upon a statute authorizing a warrantless administrative search, after which that statute is later declared to be unconstitutional, is lawful as having come from a "*legislative source*" (***Illinois v. Krull*** (1987) 480 U.S. 340 [107 S.Ct. 1160; 94 L.Ed.2nd 364].), in that the exclusionary rule was not created to punish the Legislature any more than it was created to punish the courts.

> *See also*; ***Michigan v. DeFillippo*** (1979) 443 U.S. 31, 37-38 [99 S.Ct. 2627; 61 L.Ed.2nd 343, 439-350]; good faith reliance on an ordinance that was later declared to be unconstitutional.
>
> The alleged unconstitutionality of a statute, the violation for which serves as the basis for a search warrant, is irrelevant so long as officers reasonably relied upon the statute's validity at the time of the obtaining of the search warrant. (***United States v. Meek*** (9th Cir. 2004) 366 F.3rd 705, 714.)
>
> Good faith reliance upon the validity of the implied consent provisions of **V.C. § 23612(a)(5)**, for an unconscious or deceased DUI suspect to provide a blood sample, makes admissible defendant's blood/alcohol test results in this case although a search warrant should have been obtained under the **Fourth Amendment**. (***People v. Arredondo*** (2016) 245 Cal.App.4th 186, 206-210.)
>
> Note: Petition for Review was dismissed in ***People v. Arredondo*** and the case remanded in light of the

decision in ***Mitchell v. Wisconsin*** (June 27, 2019) __ U.S.__, __ [139 S.Ct. 2525; 204 L.Ed.2nd 1040], where the U.S. Supreme Court held that when a DUI arrestee is unconscious, this fact alone will "almost always" constitute an exigency, allowing for a warrantless blood draw.

Department of Motor Vehicles Sources: Invalid information concerning the status of a vehicle's registration, entered into the system by a non-law enforcement "*data entry clerk*," is a non-law enforcement source. The officer's arrest and search in reasonable reliance upon records showing that the defendant's vehicle's registration was expired and that a fraudulent tab had been placed on the license plate (displaying false registration tabs, per **V.C. §§ 20**, **31**, **4601** and **40000.1**), was upheld under the "*good faith*" exception. (***People v. Hamilton*** (2002) 102 Cal.App.4th 1311.)

Juvenile Probation: At least within the Juvenile Court, probation is more aligned with the courts than law enforcement, and is therefore a "*court source*." Erroneous information from Juvenile Probation does not preclude application of *good faith* to save the resulting search. (***In re Arron C.*** (1997) 59 Cal.App.4th 1365.)

Reliance upon a juvenile's **Fourth** Waiver, valid at the time, justifies a search irrespective of whether the waiver was lawfully imposed. (***People v. Rios*** (2011) 193 Cal.App.4th 584, 597-598.)

But see ***People v. Howard*** (1984) 162 Cal.App.3rd 8, at pp. 19-21, where Probation merely failed to inform a police officer of the correct limits of a particular probation search condition. The Court held the resulting search to be illegal. ***Howard***, however, is criticized by both ***Downing***, *supra*, at p. 1652, fn. 17, and ***Arron C.***, *supra*, at p. 1372.

Arresting and Searching in Ignorance of an Existing Warrant of Arrest: An arrest and search of a person without probable cause cannot be validated after the fact when it is belatedly discovered that an arrest warrant exists for that person. (***Moreno v. Baca*** (9th Cir. 2005) 431 F.3rd 633, 638-641.)

This may no longer be valid authority in light of the decision in ***Herring v. United States*** (2009) 555 U.S. 135 [129 S.Ct. 695; 172 L.Ed.2nd 496],

excusing an illegal arrest when the officer is acting in good faith; see above.

See "*Searching While In Ignorance of a Search Condition*," under "***Fourth** Waiver Searches*" (Chapter 19), below.

Minors:

Curfew Violations: There is a split of authority on the legality of "*arresting*" a minor for a curfew violation:

> Minors violating curfew may be *stopped*, *detained*, and *transported* to a curfew center, the police station, or other facility where the minor can await the arrival of a parent or other responsible adult. A search of the minor prior to placing him in a curfew center with other children is also reasonable. (***In re Ian C.*** (2001) 87 Cal.App.4th 856.)
>
> Before ***Ian C.***, it was held that a curfew violation *did not* justify the transportation of a minor to a police station for interrogation, such a custodial arrest not being one of the alternatives allowed under the Welfare and Institutions Code, referring to **W&I §§ 601, 626, 626** and **626.5**. The Court further held that such a transportation, as an illegal arrest, was also a violation of the **Fourth Amendment**. (***In re Justin B.*** (1999) 69 Cal.App.4th 879.)
>
> ***In re Justin B.*** was criticized in the later decision of ***In re Charles C.*** (1999) 76 Cal.App.4th 420. The Court in ***Charles C.*** held that the *arrest* and transportation of a minor to a police station for a violation of curfew, at least where the minor's parents could not be located while still in the field, was *not* improper. Under such circumstances, taking the minor to a police station is the least intrusive alternative left to the officer. (**W&I § 626**) Further **W&I § 207(b)(2)** provides that a minor as described by **W&I § 601** (which includes curfew violators) may be taken into custody and held in a "*secure facility*," which includes a police station, so long as not confined with adults, for up to 24 hours while the minor's parents are located. Lastly, the Court held that even if in violation of the **Welfare and Institutions Code**, the **Fourth Amendment** is *not* violated by transporting a curfew violator to a police station, so suppression of any resulting evidence is not required.
>
> > The Court further noted that taking a minor "*into temporary custody*," as authorized by **W&I § 625**, is the functional equivalent of an *arrest*. (***In re Charles C.***,

supra, at p. 425, fn. 3; see also ***In re Thierry S.*** (1977) 19 Cal.3rd 727, 734, fn. 6; and ***In re Justin B.***, *supra*, at p. 889.)

Note: ***In re Charles C.***, *supra*, is the better rule. ***In re Justin B.***, *supra*, criticized by both ***Charles C.*** (at pp. 426-427.) and ***In re Ian C.***, *supra*, at p. 860, is a strained decision at best, and of questionable validity.

Truancy Violations:

Observation of a minor carrying a backpack on the street during school hours within several miles of a high school was sufficient cause to stop and detain the minor and inquiry as to his status as a student. When defendant was unable to provide a satisfactory reason for why he was out of school, and had identification in someone else's name, he was properly arrested for being truant (**Ed. Code, § 48264**) and searched incident to arrest. (***In re Humberto O.*** (2000) 80 Cal.App.4th 237; recovery of a dagger from his backpack was lawful.)

***The Americans with Disabilities Act* ("*ADA*"):**

The Issue: The **Americans with Disabilities Act** has been held by some authorities (including the Ninth Circuit Court of Appeal) to apply to arrests, creating the potential for civil liability should law enforcement violate the **Act** in making an arrest. (***Sheehan v. City & County of San Francisco*** (9th Cir. 2014) 743 F.3rd 1211, 1231-1233; certiorari granted.)

The U.S. Supreme Court, after granting certiorari in this case, dismissed this issue as "improvidently granted" in that the parties changed the issue from whether or not the **ADA** applies to arrests to whether a mentally ill person being arrested qualified in the first place for the protections of the **Act**, without this later issue being properly raised and debated below. (***City & County of San Francisco v. Sheehan*** (2015) 575 U.S. 600 [135 S.Ct. 1765; 191 L.Ed.2nd 856].) So the issue was left undecided.

Title II** of the **ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." (**42 U.S.C. § 12132**)

Types of Disability: At least two types of **Title II** claims may be applicable to arrests:

Wrongful arrest, where police wrongly arrest someone with a disability because they misperceive the effects of that disability as criminal activity; *and*

Unreasonable accommodation, where, although police properly investigate and arrest a person with a disability for a crime unrelated to that disability, they fail to reasonably accommodate the person's disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees.

(See the Ninth Circuit's decision in ***Sheehan v. City & County of San Francisco***, *supra*., at p. 1232; certiorari granted.)

> The U.S. Supreme Court, after granting certiorari in this case, dismissed this issue as "improvidently granted" in that the parties changed the issue from whether or not the **ADA** applies to arrests to whether a mentally ill person being arrested qualified in the first place for the protections of the **Act**, without this later issue being properly raised below. (***City & County of San Francisco v. Sheehan*** (2015) 575 U.S. 600 [135 S.Ct. 1765; 191 L.Ed.2nd 856].) So the issue is left undecided.

What Qualifies as a "*Disability*:"

Under the **ADA**, "*disability*" is defined as "a physical or mental impairment that substantially limits one or more major life activities of such individual."

Obesity is not considered, at least by some courts, to be a disability under the **ADA**. (***Lumar v. Monsanto Co.*** (5th Cir. 2020) 795 F.Appx. 293.)

An **ADA** complaint filed by transgender woman with "*gender dysphoria*" stated an actionable claim because plaintiff plausibly alleged that gender dysphoria fell within the safe harbor for gender identity disorders due to physical impairments, such that dismissal for failure to state an actionable claim was not warranted. (***Williams v. Kincaid*** (4th Cir. 2022) 45 F.4th 759.)

> *Note*: Gender dysphoria describes an uncomfortable conflict between a person's assigned gender and the gender with which the person identifies, according to the American Psychiatric Association.

Case Law:

Police officers responded to a 911 call reporting that plaintiff had experienced an epileptic seizure, was trying to break windows, and had fled his home naked. In apprehending plaintiff on a sidewalk after he refused to comply with commands to stop, officers struggled physically with plaintiff, using a "reverse reap throw" to bring him to the ground where, after further struggle, he was finally subdued and arrested. In Plaintiff's federal **42 U.S.C. § 1983** lawsuit following his arrest, the city was properly granted summary judgment on his **ADA** claim for failure to accommodate his epilepsy because he had not shown that a lesser amount of force would have been reasonable under the circumstances. Plaintiff's **ADA** failure to train claim likewise failed because he had not shown how personnel with different training would have acted differently given the exigencies of the situation. (***O'Doan v. Sanford*** (9th Cir. 2021) 991 Cal.App.5th 1027.)

> Note: The "*reverse reap throw*" is described in the decision as a take-down tactic where an officer essentially trips the subject from behind to throw him off balance and then guides him to the ground with both hands. (***Id***., at p. 1033.)

The Second District Court of Appeal (Div. 1) held that the trial court correctly sustained a demurrer to a civil complaint alleging a violation of the **Unruh Civil Rights Act**, **Civ. Code**, **§ 51 et seq**., which was based on maintaining a retail website that was inaccessible to the visually impaired by reason of a lack of compatibility with screen reading software, because neither the discriminatory effects of facially neutral conduct nor the failure to ameliorate such effects could support inferring intentional discrimination under the **Unruh Act**. The complaint in this case failed to allege intentional discrimination. Also, because a standalone website is not a "place of public accommodation under **42 U.S.C. §§ 12181(7)**, **12182**, the complaint failed to state a claim under the **Unruh Act** based on an alleged violation of the **Americans with Disabilities Act**, **42 U.S.C. § 12101 et seq.**, which does not require proof of intentional discrimination. (***Martinez v. Cot'n Wash, Inc*** (2022) 81 Cal.App.5th 1026.)

In a suit brought by two deaf plaintiffs who alleged that a hospital failed to afford them effective communication during a series of hospital stays, in violation of **Title III** of the **Americans with Disabilities Act** (**ADA**), **Section 504** of the **Rehabilitation Act**, **Section 1557** of the **Affordable Care Act** (**ACA**), and **California's Unruh Civil Rights Act**, the Court held that in light of the circuit court's conclusion that the **Rehabilitation Act** does not require "primary consideration," the circuit court was persuaded that it would be anomalous to interpret the **ACA** as having imposed a primary consideration requirement before a Health and

Human Services (HHS) rule applying **ADA Title II's** effective communication standards became effective. Therefore, the circuit court held that the district court did not err in declining to apply such a requirement when analyzing the claims of one of the plaintiffs. And because plaintiffs' **ACA** claims were otherwise subject to the same analysis as their **Rehabilitation Act** claims, the district court did not err in concluding that plaintiffs failed to establish a violation of **section 1557** of the **ACA.**

***Information Provided to an Arrested Person*:**

***Pen. Code § 841*:**

Information to be Provided: The person making the arrest must inform the person being arrested of the following:

- The intention to arrest him;
- The cause of the arrest (i.e., the charges); and
- The authority to make it.

(See ***People v. Superior Court (Logue)*** (1973) 35 Cal.App.3rd 1, 5.)

Exceptions: There is no need to comply with the above when:

- The person making the arrest has reasonable cause to believe that the person to be arrested is actually engaged in the commission of, or an attempt to commit, an offense (See ***People v. Darnell*** (1951) 107 Cal.App.2nd 541 545; ***People v. Thomas*** (1957) 156 Cal.App.2nd 117, 130; ***People v. Valenzuela*** (1959) 171 Cal.App.2nd 331, 333.);

  Applies as well in a citizen's arrest situation. (See ***Lowrey v. Standford Oil Co.*** (1942) 54 Cal.App.2nd 782, 791-793.); *or*

- The person to be arrested is pursued immediately after commission of the offense, or after an escape. (See ***People v. Pool*** (1865) 27 Cal. 572, 576; ***Allen v. McCoy*** (1933) 135 Cal.App. 500, 508; ***People v. Campbell*** (1972) 27 Cal.App.3rd 849, 854; and ***Johanson v. Department of Motor Vehicles*** (1995) 36 Cal.App.4th 1209, 1218.)

  Even where an exception applies, if the arrestee asks what he or she is being arrested for, he or she must be told. (**P.C. § 841**)

Sanctions for Violations:

There is little authority describing what sanctions might apply should the **Pen. Code § 841** requirements be violated. But see ***People v. Villareal*** (1968) 262 Cal.App.2nd 438, at p. 446, where the Court notes that "even assuming (the officer) failed to comply with **section 841** of the **Penal Code**, and that such failure did not come within the exemption provisions of said section, such failure would not affect the admissibility of the evidence secured by a search incidental to an otherwise lawful arrest." (Citing ***People* v. *Maddox*** (1956) 46 Cal.2nd 301, 305; and ***People* v. *Cove*** (1964) 228 Cal.App.2nd 466, 472-473.)

And see ***People v. Olguin*** (1981) 119 Cal.App.3rd 39, 44-45, involving an arrest with excessive force used by the officer, where it was held that such a situation gives the arrestee the right to use self-defense, and negates the element of "*acting in the performance of his or her duties*" for any potential charge where this element must be proved. (E.g.; **P.C. §§ 148(a)**, **243(b)** & **(c)**, and **245(c) & (d)**. By analogy, an officer violating the **P.C. § 841** requirements, where none of the exceptions apply, is not acting in the performance of his or her duties.

> ""[T]he lawfulness of the officer's conduct is an essential element of the offense" of resisting a police officer' because the police officer is not engaged in 'duties' if the officer is engaged in unlawful conduct." (***In re T.F.-G.*** (Aug. 24, 2023) __ Cal.App.5th __, __ quoting ***People v. Fuentes*** (2022) 78 Cal.App.5th 670, 676.)

***Foreign Nationals; P.C. § 834c(a)(1)*:**

Vienna Convention on Consular Relations: **Pen. Code § 834c(a)(1)** is a statutory enactment of the 1963 **Vienna Convention on Consular Relations**, **Article 36**; a Treaty signed by the United States and 169 other countries.

> *Note*: If the subject is a foreign "diplomat," entitled by "diplomatic immunity" from arrest and prosecution, then the "**Vienna Convention on Diplomatic Relations**" (**22 U.S.C. § 245**) is the controlling document. (See https://www.state.gov/documents/organization/150546.pdf, and https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA_Manual_4th_Edition_August2016.pdf.)

Advisal to Arrestee/Detainee: Upon the arrest and booking or detention for more than two (2) hours of a known or suspected foreign national, the arrestee/detainee shall be advised "*without delay*" that he or she has a right to communicate with an

official from the consulate of his or her native country. If the arrestee/detainee chooses to exercise that right, the peace officer shall notify the pertinent official in his or her agency or department of the arrest or detention and that the foreign national wants his or her consulate notified. (***People v. Enraca*** (2012) 53 Cal.4th 735, 756-758; ***People v. Mendoza*** (2007) 42 Cal.4th 686, 709.)

> The officer's department is responsible for making the requested notification. (**Pen. Code § 834c(a)(2)**)
>
> The law enforcement official in charge of a custodial facility where a foreign national is housed shall ensure that the arrestee is allowed to communicate with, correspond with, and be visited by, a consular officer of his or her country. (**Pen. Code § 834c(a)(3)**)
>
> Local law enforcement agencies are to incorporate these requirements into their respective policies and procedures. (**Pen. Code § 834c(c)**)
>
> The **Vienna Convention** also provides that any communication addressed to the consular post by the person arrested, in prison, custody or detention *shall* be forwarded by the authorities "*without delay*." (**Art. 36(1)(b)**)

Standing:

> Although there is some disagreement, it is generally accepted that a foreign national has the "*standing*" necessary to invoke the provisions of the **Vienna Convention** in so far as they require notice to an arrestee/detainee of his right to contact his consulate. (See ***United States v. Superville*** (Vir. Islands, 1999) 40 F.Supp.2nd 672, 676-678.)
>
> The United States Supreme Court, until recently (see below), declined to decide whether a foreign national who had not been advised of his rights under the **Vienna Convention** had an enforceable right in U.S. courts. (***Sanchez-Llamas v. Oregon*** (2006) 548 U.S. 331, 343 [126 S.Ct. 2669; 165 L.Ed.2nd 557]; assuming for the sake of argument that they did, while specifically declining to decide the issue. Four dissenting opinions would have held that the defendants had a right to raise these issues. (At pp. 369-378.)

Automatic Notice to Foreign Country: Fifty-six (56) countries are listed in **subdivision (d)** which *must* be notified of the arrest or detention (pursuant to **subd. (a)(1)**; i.e., more than 2 hours) of one of their foreign nationals "without regard to an arrested or detained foreign national's request to the contrary."

> *Note*: Although Mexico *is* one of the 170 (which includes the United States) countries that signed the Convention, it is *not* one of the countries

listed that must be *automatically* notified of the arrest, booking or detention of a foreign national.

Sanctions for Violations: It has been generally accepted that a violation of the provisions of the **Vienna Convention** and, presumably, this statute, *will not* result in the suppression of any evidence. (***United States v. Lombera-Camorlinga*** (9th Cir. 2000) 206 F.3rd 882; ***People v. Corona*** (2001) 89 Cal.App.4th 1426; ***United States v. Rodriguez-Preciado*** (9th Cir. 2005) 399 F.3rd 1118, 1130.)

Not informing a Japanese national of his right to contact the Japanese consulate upon his arrest is not a violation of the **Japan Convention**, **Article 16(1)**. Even if **Article 16(1)** could be interpreted as requiring such notification, a violation would *not* result in the suppression of the defendant's later statements nor any physical evidence recovered as the result of a consensual search. (***United States v. Amano*** (9th Cir. 2000) 229 F.3rd 801, 804.)

Japan, although a signatory to the **Vienna Convention**, is *not* one of the 56 countries listed in **Pen. Code 834c** that must be notified upon the arrest or detention of one of their citizens.

The United States Supreme Court, until recently, has rejected appeals on this issue on *procedural* grounds, declining to decide this issue on its merits. (See ***Breard v. Greene*** (1998) 523 U.S. 371 [523 S.Ct. 371; 140 L.Ed.2nd 529].)

However, a number of justices have expressed dissatisfaction with avoiding the issue, in general, and not sanctioning states for violating the **Convention**, in particular. (See also ***Torres v. Mullin*** (2003) 540 U.S. 1035 [124 S.Ct. 562; 157 L.Ed.2nd 454].)

The "*International Court of Justice*" (ICJ), in a lawsuit brought against the United States by Mexico and decided on March 31, 2004, found that there are 54 death row inmates (27 of which are in California) who were *not* provided with a notification of their consular rights, in violation of the **Vienna Convention**. The Court concluded that the offending state and local jurisdictions violating these requirements were "*obligated*" to review and reconsider these cases. (See ***Mexico v. United States of America* [*Avena*]** (2004) 2004 I.C.J. No. 128.)

The United States Supreme Court, in ***Sanchez-Llamas v. Oregon*** (2006) 548 U.S. 331, 351-356 [126 S.Ct. 2669; 165 L.Ed.2nd 557], while finding that the rulings of the ICJ deserved "*respectful consideration*," held that they were not binding upon U.S. courts and declined to follow their guidance on this issue.

In May, 2005, the United States Supreme Court dismissed as improvidently granted a writ of certiorari in a Texas case challenging state law enforcement officers' failure to provide a capital defendant, and Mexican national, with a **Vienna Convention** notification. (***Medellin v. Dretke*** (2005) 544 U.S. 660 [161 L.Ed.2nd 982].)

> The Court in ***Medellin v. Dretke*** did not dismiss the writ out of a lack of interest, however, but rather because the defendant initiated new proceedings in the Texas' courts, based upon the ICJ's latest pronouncement (***Mexico v. United States of America* [*Avena*]**, *supra*.) and an executive order issued by President Bush for American courts to review violations of the **Vienna Convention** (see *International Herald Tribune* (3/4/05)), that might well resolve the issues.
>
> Even so, four U.S. Supreme Court justices dissented, noting that "(n)oncompliance with our treaty obligations is especially worrisome in capital cases," and that the defendant in this case had raised some "debatable" issues that "suggest the very real possibility of his victory in state court." (***Medellin v. Dretke***, *supra*.)
>
> Both the U.S. and the California Supreme Courts have noted that "'neither ***Avena*** nor the President's Memorandum constitutes directly enforceable federal law' binding on state courts." (***People v. Maciel*** (2013) 57 Cal.4th 482, 505; see also ***In re Martinez*** (2009) 46 Cal.4th 945, 949-950; and citing ***Medellin v. Texas*** (2008) 552 U.S. 491 [128 S.Ct. 1346; 170 L.Ed.2nd 190].)

The United States Supreme Court finally ruled on the issues of (1) the proper remedy for an **Article 36** violation and (2) whether failing to raise the issue at the trial court level precluded the raising of the issue post-conviction. (***Sanchez-Llamas v. Oregon*** (2006) 548 U.S. 331 [126 S.Ct. 2669; 165 L.Ed.2nd 557] (joined with ***Bustillo v. Johnson*** (#05-51), a case from the Virginia Supreme Court). In these two cases, the Court held that a violation of the **Vienna Convention** does not warrant the suppression of evidence, including a defendant's statements. The Court also held (in the ***Bustillo v. Johnson*** portion of the decision) that failing to raise the issue in the state courts will preclude, procedurally, the defendant from litigating the issue by way of a federal writ of habeas corpus.

> *Not decided* was whether the **Vienna Convention** grants individuals enforceable rights in a state court, or whether the provisions of the **Convention** are something to be enforced via political channels between countries, the Court assuming, for the sake of argument, that such rights were enforceable without

deciding the issue. (***Sanchez-Llamas v. Oregon***, *supra*., a p. 343.) Four dissenting opinions would have specifically held that the defendants had a right to raise these issues. (***Id***., at pp. 369-378.)

But note: An extradited defendant has standing to seek enforcement of an extradition treaty's restrictions on the potential punishment to which he may be subjected. (***Benitez v. Garcia*** (9th Cir. 2007) 476 F.3rd 676; extradited from Venezuela under the understanding that he would not be subjected to the death penalty or a life sentence.)

The **Vienna Convention** does *not* provide a foreign national any rights that are enforceable in a **42 U.S.C. § 1983** civil rights suit against law enforcement for violating the person's rights provided for under the **Convention**. (***Cornejo v. County of San Diego*** (9th Cir. 2007) 504 F.3rd 853.)

In November, 2006, the Texas appellate court refused to comply with the president's command to provide defendants whose **Vienna Convention** rights were violated with a hearing on the issue, deciding that it would not allow Jose Ernesto Medellin to file a second habeas petition seeking relief. (***Medellin v. Texas***, 06-984.)

The United States Supreme Court upheld Texas on this issue, finding that the terms of the **Vienna Convention** are not "self-executing," did not have the force of domestic law, and were not binding on U.S. Courts. The Court also held that the President had no authority to dictate the procedures to be used in state court and therefore could not legally order state courts to give prisoners hearings on this issue. (***Medellin v. Texas*** (2008) 552 U.S. 491 [128 S.Ct. 1346; 170 L.Ed.2nd 190].)

See also ***In re Martinez*** (2009) 46 Cal.4th 945, where the California Supreme Court concluded that petitioner was precluded from renewing his **Vienna Convention** claim because he had previously raised the issue and the court had denied relief on its merits. Therefore, his petition was successive, and he failed to demonstrate any change of circumstance or the applicability of any exception to the procedural bar of successiveness to warrant reconsideration of his claim.

The California Supreme Court has held that even assuming a defendant is not advised of his consular rights in violation of the **Vienna Convention**, relief will not be granted absent a showing of prejudice. (***People v. Mendoza*** (2007) 42 Cal.4th 686, 709-711.)

Failing to advise an arrested Filipino murder suspect of his right to have his consulate notified of his arrest does not, by itself, render a confession inadmissible. (***People v. Enraca*** (2012) 53 Cal.4th 735, 756-758.)

> Using the same reasoning, defendant's claim under the United States bilateral consular convention with the Philippines also failed. (***Id***, at p. 758.)

Defendant, a Mexican national, was convicted of murder and sentenced to death by a Texas court. The International Court of Justice (ICJ) held that the United States had violated the **Vienna Convention** by failing to notify him of his right to consular assistance. The Mexican national and the United States sought to stay the execution so that Congress could consider whether to enact legislation implementing the ICJ decision. The Supreme Court determined that a stay of execution was not warranted because (1) neither the ICJ decision nor the President's Memorandum purporting to implement that decision constituted directly enforceable federal law, (2) the **Due Process Clause** did not prohibit Texas from carrying out a lawful judgment and executing him in light of un-enacted legislation that might someday authorize a collateral attack on that judgment, (3) it had been seven years since the ICJ ruling and three years since the Supreme Court's previous decision, making a stay based on the bare introduction of a bill in a single house of Congress even less justified, and (4) the United States studiously refused to argue that he was prejudiced by the **Vienna Convention** violation. (***Garcia v. Texas*** (2011) 564 U.S. 940 [131 S.Ct. 2866; 180 L.Ed.2nd 872].)

A foreign national claiming relief pursuant to the provisions of the **Vienna Convention** is not entitled to relief via a direct appeal. He must proceed by way of a habeas corpus petition even though he will be required to establish prejudice under such a petition where the standard in a direct appeal is considerably less. (***People v. Maciel*** (2013) 57 Cal.4th 482, 504-506; ***People v. Mendoza*** (2016) 62 Cal.4th 856, 917.)

A "defendant can raise an **Article 36** claim as part of a broader challenge to the voluntariness of his statements to police," but alone is not grounds for the suppression of his statements. (***People v. Sanchez*** (2019) 7 Cal.5th 14, 51.)

Suppression was not required by the failure of officers to alert defendant to his right to have the Mexican consulate notified of his detention, as required by the **Vienna Convention** and **Pen. Code § 834c** because failure to notify does not, in itself, render a statement inadmissible. (***People v. Leon*** (2020) 8 Cal.App.5th 831, 845-847.)

Although law enforcement officials involved in questioning defendant, a Mexican national, technically violated the **Vienna Convention on Consular Relations**, defendant did not suffer prejudice as he had neither shown that the Mexican consulate would have provided him with resources that were not otherwise accessible, nor that those resources would have affected the outcome of his trial. (***People v. Vargas*** (2020) 9 Cal.5th 793, 830-835.)

"Although the failure to notify a suspect of his or her consular rights does not by itself require suppression of the suspect's statements, this court and the United States Supreme Court have recognized that "[a] consular notification claim may be raised as part of a broader challenge to the voluntariness of a confession." (***Miranda-Guerrero*** (2022) 14 Cal.5th 1, 20, citing ***People v. Leon*** (2020) 8 Cal.5th 831, 846, which in turn cited ***Sanchez-Llamas v. Oregon*** (2006) 548 U.S. 331, 350 [165 L.Ed.2nd 557; 126 S.Ct. 2669].)

In ***Miranda-Guerrero***, even though defendant claimed on appeal that he would have invoked his right to silence and to consult with the Mexican consulate had he been advised of his right to do so, the Court found that this was "too speculative." Defendant failed to show any prejudice caused by the officers having failed to advise him of the right to consult with the Mexican consulate was held not to require the suppression of admissions he made during his interrogation. (***People v. Miranda-Guerrero***, *supra*, at pp. 20-23.)

***United States/Mexico Treaty for Mutual Legal Assistance*:**

Treaty on Cooperation for Mutual Legal Assistance (Dec. 9, 1987, T.I.A.S. No. 91-503, effective *May 3, 1991*) between the United States and Mexico.

This treaty provides for mutual legal assistance between the United States and Mexico in criminal matters, including "the prevention, investigation and prosecution of crimes." (**Art. 1, Par. 1**.)

The formal provisions of this treaty are *not* mandatory, providing but one means of insuring cooperation between the United States and Mexico in the investigation of crimes. The failure to follow the formal protocols of the treaty, not being mandatory, is not evidence of the involved detectives' bad faith and does not establish a "due process" violation. (***People v. Flores*** (2020) 9 Cal.5th 371, 395-396.)

***Miranda*:**

Rule: Any person who is arrested, or who is subjected to a contact with law enforcement which has the formal attributes of an arrest, and is questioned, must

first be advised of, acknowledge his understanding of, and freely and voluntarily waive, his **Fifth Amendment** right against self-incrimination, pursuant to ***Miranda v. Arizona*** (1966) 384 U.S. 436 [86 S.Ct. 1602; 16 L.Ed.2nd 694]: See "***Miranda*** *and the Law*."

Real and Physical Evidence:

> The **Fifth Amendment** right "does not protect a suspect from being compelled by the State to produce 'real or physical evidence.'" (***Pennsylvania v. Muniz*** (1990) 496 U.S. 582, 589 [110 S.Ct. 2638; 110 L.Ed.2nd 528]; see also ***Schmerber v. California*** (1966) 384 U.S. 757, 766 [86 S.Ct. 1826; 16 L.Ed.2nd 908, 917]; **People *v.* Elizalde et al.** (2015) 61 Cal.4th 523, 532; ***People v. Sudduth*** (1966) 65 Cal.2nd 543, 546; blood or breath in a DUI case.)
>
> Examples of "*real or physical evidence*" include fingerprints, photographs, handwriting exemplars, blood samples, standing in a lineup, or speaking for voice identification. (**People *v.* Elizalde et al.**, *supra*; citing ***Pennsylvania v. Muniz***, *supra*, at pp. 591–592.)

Arrested Minors: A minor who is taken "*into temporary custody*," as authorized by **W&I § 625**, has been *arrested*. (***In re Charles C.*** (1999) 76 Cal.App.4th 420, 425; see also ***In re Thierry S.*** (1977) 19 Cal.3rd 727, 734, fn. 6.)

> ***Wel. & Inst. Code § 625(c)***: In any case where a *minor* (person under the age of 18) is taken "*into temporary custody*" with probable cause to believe he or she is in violation of **W&I §§ 601** or **602** (i.e., delinquent or status offender), or that he or she has violated an order of the juvenile court or escaped from any commitment ordered by the juvenile court, the officer *shall* advise such minor that anything he says can be used against him or her, and *shall* advise the minor of his or her constitutional rights including the right to remain silent, the right to have counsel present during any interrogation, and the right to have appointed counsel if he or she is unable to afford counsel.
>
> > A ***Miranda***-style admonishment obviously covers these requirements. (See ***Miranda v. Arizona*** (1966) 384 U.S. 436 [86 S.Ct. 1602; 16 L.Ed.2nd 694].)
> >
> > This admonishment, under the terms of the statute (**W&I 625(c)**), is to be made whether or not the minor is to be subjected to a custodial interrogation. However, there is no sanction for a failure to comply with the requirements of this statute, unless, of course, the minor is in fact interrogated in which case the standard ***Miranda*** rules apply.

Note: The statute does *not* require that this admonishment be made "*immediately*" upon arrest, and in fact, does not specify when between the arrest and the minor's release such admonishment must be performed, so long as done before the initiation of any custodial interrogation.

***Welf. & Inst. § 625.6*:** *Minors and Mandatory Attorney Consultations*: With amendments effective *January 1, 2021* (**SB 203**), section **625.6** of the **Welfare and Institutions Code** now provides the following protections for all minors (17 years of age and younger) from potentially coercive interrogations by requiring the following:

(a) Prior to a custodial interrogation, and before the waiver of any ***Miranda*** rights, a youth 17 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference. The consultation may not be waived.

(b) The court shall, in adjudicating the admissibility of statements of a youth 17 years of age or younger made during or after a custodial interrogation, consider the effect of failure to comply with **subdivision (a)** and, additionally, shall consider any willful violation of **subdivision (a)** in determining the credibility of a law enforcement officer under **Section 780** of the **Evidence Code**.

(c) This section does not apply to the admissibility of statements of a youth *17 years of age or younger* if both of the following criteria are met:

(1) The officer who questioned the youth reasonably believed the information he or she sought was necessary to protect life or property from an imminent threat.

(2) The officer's questions were limited to those questions that were reasonably necessary to obtain that information.

(d) This section does not require a probation officer to comply with **subdivision (a)** in the normal performance of his or her duties under **W&I §§ 625**, **627.5**, or **628**.

Case Law:

Welf. & Insti. Code § 625.6, requiring minors 17 years of age and younger, be given access to an attorney prior to being advised of his ***Miranda*** rights and authorizing a trial court to consider a failure to do so as a factor in determining the admissibility of the minor's statements,

due to enactment of California's **Proposition 8** (**Cal. Const. art. I, § 28(d)**), *does not* authorize a court to exercise its discretion to exclude statements if those statements are admissible under federal law. (***In re Anthony L.*** (2019) 43 Cal.App.5th 438, 448.)

Wel. & Inst. Code § 627.5*: Minor Taken Before a Probation Officer*:

When a minor taken before a probation officer pursuant to **W&I § 626** (Alternative Dispositions for Minors in Temporary Custody When Juvenile Court Proceedings are not Required), and it is alleged that the minor is a person described in **W&I §§ 601** (Status Offender) or **602** (Delinquent), the probation officer "*shall*" immediately advise the minor *and* his parent or guardian of rights equivalent to those provided in the ***Miranda*** decision.

See also **18 U.S.C. § 5033**, for a similar federal requirement.

Section 5033 requires that federal law enforcement agents also notify the parents of a juvenile's rights, and that it be done "immediately" after the child is taken into custody.

A one-hour delay in notifying the parents of the juvenile's ***Miranda*** rights was not unreasonable given the fact that it was done as soon as it was discovered that the arrested subject was a juvenile. (***United States v. Wendy G.*** (9th Cir. 2001) 255 F.3rd 761.)

***Follow-Up Requirements After Arrest*:**

Other Rights of the Arrestee:

Right to Access to an Attorney, per **Pen Code § 825(b)**: Any *attorney* entitled to practice in the courts of record of California may, at the request of the prisoner or any relative of the prisoner, visit the prisoner.

Any officer having charge of the prisoner who willfully refuses or neglects to allow that attorney to visit a prisoner is guilty of a *misdemeanor*, and "shall forfeit and pay to the party aggrieved the sum of $500, to be recovered by action in any court of competent jurisdiction." (***Ibid.***)

While the section does not specify *when* an attorney, at the request of the prisoner or a relative, should be allowed to see the prisoner, it is suggested the request be honored as soon as is practical. The courts tend to be critical of any purposeful delay in allowing an in-

custody suspect to consult with his attorney. (See ***People v. Stroble*** (1951) 36 Cal.2nd 615, 625-626; "The conduct of the officers (refusing to allow defendant's attorney access to him while officers obtained a confession) . . . *was patently illegal*.")

It was not an abuse of discretion for the trial court judge to order that confidential attorney-client contact visits be allowed at the county jail absent circumstances justifying a suspension of such visits in individual cases. In this case, there was substantial evidence that the partitioned rooms limited or prevented an inmate from privately confiding facts that might incriminate or embarrass the inmate and create an impermissible chilling effect on the **Sixth Amendment** constitutional right to counsel. There was also evidence that additional locks, cameras, and training could address the county's security concerns. Lastly, the record showed that the jail allowed ministers and teachers to meet with inmates in non-partitioned rooms, indicating that the jail's restrictions for visits by counsel were an exaggerated response the county's legitimate security concerns (***County of Nevada v. Superior Court*** (2015) 236 Cal.App.4th 1001, 1007-1011.)

However, see ***People v. Ledesma*** (1988) 204 Cal.App.3rd 682, 695-696, and fn. 8: Violating **P.C. § 825(b)** is not a constitutional violation requiring the suppression of the defendant's statements where the defendant had otherwise waived his rights under ***Miranda***.

Right to Access to a Physician or Psychiatrist: **Pen Code § 825.5**: Any *physician* or *surgeon*, including a *psychiatrist*, or *psychologist* with a doctoral degree and two years' experience, licensed to practice in this state, employed by the prisoner or his attorney, *shall* be permitted to visit the prisoner while he or she is in custody.

Note: The statute provides no sanction for failing to comply with this provision.

Right to Telephone Calls, per **Pen Code § 851.5(a)**:

Rule: An arrested person has the right, immediately after booking and, except when physically impossible, no later than *three* (3) *hours* after arrest, to make at least *three* (3) completed telephone calls. The calls are to be free if completed in the local calling area, and are at the arrestee's expense if outside the local area. The calls must be allowed immediately on request, or as soon as practicable. The calls may be made to:

- An attorney of the arrestee's choice, public defender, or other attorney assigned to assist indigents (which may not be monitored).
- A bail bondsman.
- A relative or other person.

This information, including the phone number of the public defender or other attorney assigned to assist indigent defendants, must be posted. (**Subd. (b)**)

An arresting or booking officer is also required to inquire as to whether an arrested person is a custodial parent with responsibility for a minor child and if so, to notify the arrestee that he or she is entitled to make two additional telephone calls (for a total of 5) to arrange child care. (**Subd. (c)**)

Police facilities and places of detention shall post a sign stating that a custodial parent with responsibility for a minor child has the right to two additional telephone calls. (**Subd. (d)**)

If the arrestee so requests, the three telephone calls shall be allowed "*immediately*," or as soon as is practicable. (**Subd. (e)**)

The signs posted pursuant to the above shall make the specified notifications in English and any non-English language spoken by a substantial number of the public, as specified in **Gov't. Code § 7296.2**, who are served by the police facility or place of detainment. (**Subd. (f)**)

The rights and duties set forth in this section shall be enforced regardless of the arrestee's immigration status. (**Subd. (g)**)

This section is not intended to "abrogate a law enforcement officer's duty to advise a suspect of his or her right to counsel or of any other right." (**Subd. (h)**)

It is a *misdemeanor* to willfully deprive an arrested person of these rights. (**Subd. (i)**)

Case Law:

The only recognized exception to this rule is "*physical impossibility*." (***Carlo v. City of Chino*** (9th Cir. 1997) 105 F.3rd 493.)

> Plaintiff's civil rights were violated by denying her access to a telephone while she was jailed after her arrest on charges of driving while under the influence of alcohol. The state right to a post-booking telephone call (**P.C. § 851.5**) creates a liberty interest protected by the **Fourteenth Amendment** of the United States Constitution; and *due process* protections of prisoners' liberty rights were clearly established long before plaintiff was arrested in 1991. (***Ibid***.)

The alleged fact that defendants were denied right to call an attorney immediately after they were booked had no bearing on admissibility of any extrajudicial statements made prior to time when defendants were booked. (***People v. Stout*** (1967) 66 Cal.2nd 184.)

Withholding permission to a motorist, arrested for driving a motor vehicle on a public highway while under the influence of intoxicating liquor, from telephoning an attorney within the statutory three-hour period after his arrest (**Pen Code § 851.5**), was *not* a denial of due process where booking procedures commenced approximately two hours and twenty-five minutes from the time of arrest and where, if defendant had been permitted to make the call then, and as a result of legal advice consented to submit to a chemical test, the results of such test would have little or no probative value. (***Lacy v. Orr*** (1969) 276 Cal App 2nd 198.)

Police may require arrestee first to disclose telephone number of person to whom call is being placed, and then place the call and overtly listen to defendant's side of any non-attorney-client conversation without invading defendant's right to privacy and without implicating his privilege against self-incrimination. (***People v. Siripongs*** (1988) 45 Cal.3rd 548.)

Denial of arrested person's right to make telephone call to bail bondsman did not prejudice him where there was no

sufficient showing that such a denial resulted in denial of fair trial in the matter or prevented him from obtaining and presenting evidence of his innocence. (***In re Newbern*** (1961) 55 Cal 2nd 508.)

Phone access may be restricted under unusual circumstances, such as to preclude a defendant and a potential witness (i.e., defendant's attorney) from fabricating evidence. (See ***People v. Clark*** (2016) 63 Cal.4th 522, 549-550; "Not every restriction on counsel's time or opportunity . . . to consult with his client or otherwise to prepare for trial violates a defendant's **Sixth Amendment** right to counsel;" citing ***Morris v. Slappy*** (1983) 461 U.S. 1, 11 [103 S.Ct. 1610; 75 L. Ed.2nd 610.)

W&I § 627(b): Right to Make Phone Calls: Arrested juveniles shall be advised of, and have the right to make *two* (2) completed telephone calls upon being taken to a place of confinement and, except when physically impossible, within *one* (1) *hour* after being taken into custody.

The calls are to be to a parent or guardian, a responsible relative, or to the minor's employer, and the second call to an attorney.

The calls are to be at public expense, if local, and made in the presence of a public officer or employee.

Willfully depriving a minor of his or her right to make these calls is a misdemeanor.

Violating this section is *not* grounds, however, for excluding evidence. (***People v. Castille*** (2003) 108 Cal.App.4th 469, 489-490; vacated and remanded on other grounds. See also ***People v. Lessie*** (2010) 47 Cal.4th 1152, 1161, fn. 2, and 1169-1170.)

Subd. (a) requires an officer to "*take immediate steps*" to notify a parent, guardian or responsible adult of the fact and location of a minor taken to juvenile hall (i.e., to a probation officer) or other place of confinement.

Other Statutory Obligations of the Arresting Officer:

Pen. Code § 848: *Arrests by Warrant*: An officer making an arrest *in obedience to a warrant must* proceed with the arrestee as commanded by the warrant, or as provided by law.

Pen. Code § 849(a): *Arrests Without a Warrant*: An officer (or private person) making an arrest *without a warrant shall*, without unnecessary delay, take the prisoner not otherwise released before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person shall be laid before such magistrate.

Pen. Code § 849(b): *Release From Custody*: Any peace officer may *release from custody*, instead of taking such person before a magistrate, any person arrested without a warrant whenever:

> The officer is satisfied that there are insufficient grounds for making a criminal complaint against the person. (**Subd. (b)(1)**)
>
> The person arrested was arrested for intoxication only, and no further proceedings are desirable. (**Subd. (b)(2)**)
>
> The person was arrested only for being under the influence of a controlled substance or drug and such person is delivered to a facility or hospital for treatment and no further proceedings are desirable. (**Subd. (b)(3)**)
>
> "The person was arrested for driving under the influence of alcohol or drugs and the person is delivered to a hospital for medical treatment that prohibits immediate delivery before a magistrate." (**Subd. (b)(4)**)
>
> "The person was arrested and subsequently delivered to a hospital or other urgent care facility, including, but not limited to, a facility for the treatment of co-occurring substance use disorders, for mental health evaluation and treatment, and no further proceedings are desirable." (**Subd. (b)(5)**)
>
> A release under **(b)(1)**, **(3)**, and **(5)** is to be deemed a detention only.
>
> See also **Pen. Code § 851.6**, requiring the releasing officer to issue to the arrestee a certificate describing the contact as a detention only.

Note: It is also arguable that a law enforcement officer may choose to release a subject for whom probable cause *does* exist. There is nothing in the case or statutory law that says that **Pen. Code § 849(b)** is the exclusive authority for releasing an arrested prisoner.

Note, however, **Pen. Code § 4011.10**, prohibiting law enforcement from releasing a jail inmate for the purpose of allowing the inmate to seek medical care at a hospital, and then immediately re-arresting the same individual upon discharge from the hospital, unless the hospital determines this action would enable it to bill and collect from a third-party payment source.

Pen. Code § 849(c): *Detention Only*: Any record of arrest of a person released pursuant to **P.C. § 849(b)(1)** or **(3)** shall include a record of release, and shall thereafter be deemed a detention only.

***Undocumented Aliens*:**

***Gov't. Code §§ 7283, 7283.1, & 7283.2*: *The* "*Transparent Review of Unjust Transfers and Holds*" (*TRUTH*) *Act*:**

The so-called "**TRUTH Act**" limits Immigration & Customs Enforcement (ICE) access to criminals in jail by imposing specific duties on local law enforcement, including requiring that local law enforcement provide a written consent form to an inmate before an ICE interview that explains the purpose of the interview, that it is voluntary, that the interview may be declined, and that the inmate can choose to be interviewed with an attorney present.

Also, a local law enforcement agency that receives an ICE hold, ICE notification, or ICE transfer request, must provide a copy of it to the inmate and to tell the inmate whether the local law enforcement agency intends to comply with the request.

If a local law enforcement agency is to provide ICE with a release date for an inmate, the agency must also provide notice of the release date to the inmate in writing and to the inmate's attorney.

All records relating to ICE access provided by a local law enforcement agency, including all communication with ICE, are public records for purposes of the **California Public Records Act** (**Gov't. Code §§ 6250–6276.48**), "including the exemptions provided by that act," and including the number of inmates to whom the agency provided ICE access, the date ICE access was provided, and whether ICE access was provided through a hold, transfer, or notification request.

Beginning *January 1, 2018*, the local governing body of a local law enforcement agency that provides ICE access to at least one individual in the previous year is to hold a community forum in order to provide information to the public about ICE's access to inmates and to receive and consider public comment.

Gov't. Code § 7283.2 provides: "Nothing in this chapter shall be construed to provide, expand, or ratify the legal authority of any state or local law enforcement agency to detain an individual based upon an ICE hold request."

Civil Code § 1670.9: *Detentions of Noncitizens for Purposes of Civil Immigration Custody*:

Any city, county, city and county, or local law enforcement agency that, as of *January 1, 2018*, does not yet have an existing contract with the federal government or any federal agency or a private corporation, to house or detain "*noncitizens*" for the purposes of civil immigration custody, shall not hereafter enter into any such contract. Nor shall such a contract, if already existing, be renewed or expanded.

Nor shall any such entity approve or sign a deed, instrument, or other document conveying land, or issuing permits to build or reuse existing buildings by any private corporation, contractor, or vender, for the purpose of housing or detaining such noncitizens for purposes of civil immigration proceeding unless public hearings, as described in the section, are first held.

Gov't. Code § 7282.5: *Limitations On Law Enforcement's Cooperation with Immigration Authorities*:

Law enforcement's cooperation with federal immigration authorities is limited to that which is permitted by the "**California Values Act**" (i.e., **Gov't. Code §§ 7284-7284.12**; see below). Such cooperation that is prohibited by **Gov't. Code § 7284.6(a)(1)(C)** (providing information regarding a non-citizen's release date or responding to requests for notification by providing release dates not available to the public) and **Gov't. Code § 7284.6(a)(4)** (transferring a non-citizen to immigration authorities without judicial warrant or judicial probable cause determination) *is permitted* with respect to the crimes listed in **Gov't. Code § 7282.5**.

See **Gov't. Code § 7282.5(a) & (b)**, below.

In no case shall cooperation with immigration authorities occur for individuals arrested, detained, or convicted of misdemeanors that were felonies (or felony-wobblers) prior to the passage of **Proposition 47** (the "**Safe Neighborhood and Schools Act of 2014**")

See also **Gov't. Code § 7282** (Amended) for definitions of "*hold request*," "*notification request*," and "*transfer request*," replacing "*immigration hold*," making reference to **Gov't. Code § 7283**, noting that these "*requests*" include requests made by U.S. Immigrations and Customs Enforcement (ICE), U.S. Customs, and Border Protection, or by any other immigration authorities.

Gov't. Code §§ 7284-7284.12: *The* "***California Values Act***:"

Gov't. Code § 7284: *Title of Chapter*:

This chapter (i.e., **Title 1**, **Division 7**, **Chapter 17.25**) shall be known, and may be cited, as the **California Values Act**.

Note: Also, as a part of **SB 54**, known as the "Sanctuary State" bill.

Gov't. Code § 7284.2: *Legislative Findings and Declarations*:

The Legislature finds and declares the following:

(a) Immigrants are valuable and essential members of the California community. Almost one in three Californians is foreign born and one in two children in California has at least one immigrant parent.

(b) A relationship of trust between California's immigrant community and state and local agencies is central to the public safety of the people of California.

(c) This trust is threatened when state and local agencies are entangled with federal immigration enforcement, with the result that immigrant community members fear approaching police when they are victims of, and witnesses to, crimes, seeking basic health services, or attending school, to the detriment of public safety and the well-being of all Californians.

(d) Entangling state and local agencies with federal immigration enforcement programs diverts already limited

resources and blurs the lines of accountability between local, state, and federal governments.

(e) State and local participation in federal immigration enforcement programs also raises constitutional concerns, including the prospect that California residents could be detained in violation of the **Fourth Amendment** to the United States Constitution, targeted on the basis of race or ethnicity in violation of the **Equal Protection Clause**, or denied access to education based on immigration status. See ***Sanchez Ochoa v. Campbell, et al.*** (E.D. Wash. 2017) 2017 WL 3476777; ***Trujillo Santoya v. United States, et al.*** (W.D. Tex. 2017) 2017 WL 2896021; ***Moreno v. Napolitano*** (N.D. Ill. 2016) 213 F. Supp. 3rd 999; ***Morales v. Chadbourne*** (1st Cir. 2015) 793 F.3rd 208; ***Miranda-Olivares v. Clackamas County*** (D. Or. 2014) 2014 WL 1414305; ***Galarza v. Szalczyk*** (3rd Cir. 2014) 745 F.3rd 634.

(f) This chapter seeks to ensure effective policing, to protect the safety, well-being, and constitutional rights of the people of California, and to direct the state's limited resources to matters of greatest concern to state and local governments.

(g) It is the intent of the Legislature that this chapter shall not be construed as providing, expanding, or ratifying any legal authority for any state or local law enforcement agency to participate in immigration enforcement.

Gov't. Code § 7284.4: *Definitions*: For purposes of this chapter, the following terms have the following meanings:

(a) "*California law enforcement agency*" means a state or local law enforcement agency, including school police or security departments. "*California law enforcement agency*" does *not* include the Department of Corrections and Rehabilitation.

(b) "*Civil immigration warrant*" means any warrant for a violation of federal civil immigration law, and includes civil immigration warrants entered in the National Crime Information Center database.

(c) "*Immigration authority*" means any federal, state, or local officer, employee, or person performing immigration enforcement functions.

(d) "*Health facility*" includes health facilities as defined in **H&S Code § 1250**, clinics as defined in **H&S Code §§ 1200** and **1200.1**, and substance abuse treatment facilities.

(e) "*Hold request*," "*notification request*," "*transfer request*," and "*local law enforcement agency*" have the same meaning as provided in **Gov't. Code § 7283**. Hold, notification, and transfer requests include requests issued by United States Immigration and Customs Enforcement or United States Customs and Border Protection as well as any other immigration authorities.

(f) "*Immigration enforcement*" includes any and all efforts to investigate, enforce, or assist in the investigation or enforcement of any federal civil immigration law, and also includes any and all efforts to investigate, enforce, or assist in the investigation or enforcement of any federal criminal immigration law that penalizes a person's presence in, entry, or reentry to, or employment in, the United States.

(g) "*Joint law enforcement task force*" means at least one California law enforcement agency collaborating, engaging, or partnering with at least one federal law enforcement agency in investigating federal or state crimes.

(h) "*Judicial probable cause determination*" means a determination made by a federal judge or federal magistrate judge that probable cause exists that an individual has violated federal criminal immigration law and that authorizes a law enforcement officer to arrest and take into custody the individual.

(i) "*Judicial warrant*" means a warrant based on probable cause for a violation of federal criminal immigration law and issued by a federal judge or a federal magistrate judge that authorizes a law enforcement officer to arrest and take into custody the person who is the subject of the warrant.

(j) "*Public schools*" means all public elementary and secondary schools under the jurisdiction of local governing boards or a charter school board, the California State University, and the California Community Colleges.

(k) "*School police and security departments*" includes police and security departments of the California State University, the California Community Colleges, charter schools, county offices of education, schools, and school districts.

Gov't. Code § 7284.5: *Exceptions to the Non-Cooperation Restrictions*:

(a) A law enforcement official shall have discretion to cooperate with immigration authorities only if doing so would not violate any federal, state, or local law, or local policy, and where permitted by the **California Values Act** (**Chapter 17.25** (commencing with **Section 7284)**). Additionally, the specific activities described in **subparagraph (C)** of **paragraph (1)** of **subdivision (a)** of, and in **paragraph (4)** of **subdivision (a)** of, **Section 7284.6** shall only occur under the following circumstances:

(1) The individual has been convicted of a serious or violent felony identified in **subdivision (c)** of **Section 1192.7** of, or **subdivision (c)** of **Section 667.5** of, the **Penal Code**.

(2) The individual has been convicted of a felony punishable by imprisonment in the state prison.

(3) The individual has been convicted within the past five years of a misdemeanor for a crime that is punishable as either a misdemeanor or a felony for, *or* has been convicted within the last 15 years of a felony for, any of the following offenses:

(A) *Assault*, as specified in, but not limited to, **Sections 217.1**, **220**, **240, 241.1**, **241.4**, **241.7**, **244, 244.5**, **245**, **245.2**, **245.3**, **245.5**, **4500**, and **4501** of the **Penal Code**.

(B) *Battery*, as specified in, but not limited to, Sections **242**, **243.1**, **243.3**, **243.4**, **243.6**, **243.7**, **243.9**, **273.5**, **347**, **4501.1**, and **4501.5** of the **Penal Code**.

(C) *Use of threats*, as specified in, but not limited to, **Sections 71**, **76**, **139**, **140**, **422**, **601**, and **11418.5** of the **Penal Code**.

(D) *Sexual abuse, sexual exploitation, or crimes endangering children*, as specified in, but not limited to, **Sections 266**, **266a**, **266b**, **266c**, **266d**, **266f**, **266g**, **266h**, **266i**, **266j**, **267**, **269**, **288**, **288.5**, **311.1**, **311.3**, **311.4**, **311.10**, **311.11**, and **647.6** of the **Penal Code**.

(E) *Child abuse or endangerment*, as specified in, but not limited to, **Sections 270**, **271**, **271a**, **273a**, **273ab**, **273d**, **273.4**, and **278** of the **Penal Code**.

(F) *Burglary, robbery, theft, fraud, forgery, or embezzlement*, as specified in, but not limited to, **Sections 211**, **215**, **459**, **463**, **470**, **476**, **487**, **496**, **503**, **518**, **530.5**, **532**, and **550** of the **Penal Code**.

(G) *Driving under the influence of alcohol or drugs*, but only for a conviction that is a felony.

(H) *Obstruction of justice*, as specified in, but not limited to, **Sections 69**, **95**, **95.1**, **136.1**, and **148.10** of the **Penal Code**.

(I) *Bribery*, as specified in, but not limited to, **Sections 67**, **67.5**, **68**, **74**, **85**, **86**, **92**, **93**, **137**, **138**, and **165** of the **Penal Code**.

(J) *Escape*, as specified in, but not limited to, **Sections 107**, **109**, **110, 4530**, **4530.5**, **4532**, **4533**, **4534**, **4535**, and **4536** of the **Penal Code**.

(K) *Unlawful possession or use of a weapon, firearm, explosive device, or weapon of mass destruction*, as specified in, but not limited to, **Sections 171b**, **171c**, **171d**, **246**, **246.3**, **247**, **417**, **417.3**, **417.6**, **417.8**, **4574**, **11418**, **11418.1**, **12021.5**, **12022**, **12022.2**, **12022.3**, **12022.4**, **12022.5**, **12022.53**, **12022.55**, **18745**, **18750**, and **18755** of, and **subdivisions (c)** and **(d)** of **Section 26100** of, the **Penal Code**.

(L) *Possession of an unlawful deadly weapon*, under the **Deadly Weapons Recodification Act of 2010** (**Part 6** (commencing with **Section 16000**) of the **Penal Code**).

(M) An offense involving the *felony possession, sale, distribution, manufacture, or trafficking of controlled substances*.

(N) *Vandalism* with prior convictions, as specified in, but not limited to, **Section 594.7** of the **Penal Code**.

(O) *Gang-related offenses*, as specified in, but not limited to, **Sections 186.22**, **186.26**, and **186.28** of the **Penal Code**.

(P) *An attempt*, as defined in **Section 664** of, or a *conspiracy*, as defined in **Section 182** of, the **Penal Code**, to commit an offense specified in this section.

(Q) A crime resulting in *death*, or involving the *personal infliction of great bodily injury*, as specified in, but not limited to, **subdivision (d)** of **Section 245.6** of, and **Sections 187**, **191.5**, **192**, **192.5**, **12022.7**, **12022.8**, and **12022.9** of, the **Penal Code**.

(R) *Possession or use of a firearm* in the commission of an offense.

(S) An offense that would require the individual to register as a *sex offender* pursuant to **Section 290**, **290.002**, or **290.006** of the **Penal Code**.

(T) *False imprisonment, slavery, and human trafficking*, as specified in, but not limited to, **Sections 181**, **210.5**, **236**, **236.1**, and **4503** of the **Penal Code**.

(U) *Criminal profiteering and money laundering*, as specified in, but not limited to, **Sections 186.2**, **186.9**, and **186.10** of the **Penal Code**.

(V) *Torture and mayhem*, as specified in, but not limited to, **Section 203** of the **Penal Code**.

(W) A crime *threatening the public safety*, as specified in, but not limited to, **Sections 219**, **219.1**, **219.2**, **247.5**, **404, 404.6**, **405a**, **451**, and **11413** of the **Penal Code**.

(X) *Elder and dependent adult abuse*, as specified in, but not limited to, **Section 368** of the **Penal Code**.

(Y) A *hate crime*, as specified in, but not limited to, **Section 422.55** of the **Penal Code**.

(Z) *Stalking*, as specified in, but not limited to, **Section 646.9** of the **Penal Code**.

(AA) *Soliciting the commission of a crime*, as specified in, but not limited to, **subdivision (c)** of **Section 286** of, and **Sections 653j** and **653.23** of, the **Penal Code**.

(AB) An offense committed *while on bail or released on his or her own recognizance*, as specified in, but not limited to, **Section 12022.1** of the **Penal Code**.

(AC) *Rape, sodomy, oral copulation, or sexual penetration*, as specified in, but not limited to, **paragraphs (2)** and **(6)** of **subdivision (a)** of **Section 261** of, **paragraphs (1)** and (**4)** of **subdivision (a)** of **Section 262** of, **Section 264.1** of, **subdivisions (c**) and **(d)** of **Section 286** of, **subdivisions (c)** and **(d)** of **Section 287** or of former **Section 288a** of, and **subdivisions (a)** and **(j)** of **Section 289** of, the **Penal Code**.

(AD) *Kidnapping*, as specified in, but not limited to, **Sections 207**, **209**, and **209.5** of the **Penal Code**.

(AE) A *violation* of **subdivision (c)** of **Section 20001** of the **Vehicle Code**.

(4) The individual is *a current registrant* on the California Sex and Arson Registry.

(5) The individual has been *convicted of a federal crime* that meets the definition of an *aggravated felony* as set forth in **subparagraphs (A)** to **(P)**, inclusive, of **paragraph (43)** of **subsection (a)** of **Section 101** of the federal **Immigration and Nationality Act** (**8 U.S.C. Sec. 1101**), *or* is identified by the United States Department of Homeland Security's Immigration and Customs Enforcement as the subject of an *outstanding federal felony arrest warrant*.

(6) In no case shall cooperation occur pursuant to this section for individuals arrested, detained, or *convicted of misdemeanors that were previously felonies*, or were previously crimes punishable as either misdemeanors or felonies, prior to passage of **the Safe Neighborhoods and Schools Act of 2014** as it amended the **Penal Code**.

(b) In cases in which the individual is arrested and taken before a magistrate on a charge involving a *serious or violent felony*, as identified in **subdivision (c)** of **Section 1192.7** or **subdivision (c)** of **Section 667.5** of the **Penal Code**, respectively, or *a felony that is punishable by imprisonment in state prison*, and the magistrate makes a finding of probable cause as to that charge pursuant to **Section 872** of the **Penal Code**, a law enforcement official shall additionally have discretion to cooperate with immigration officials pursuant to **subparagraph (C)** of **paragraph (1)** of **subdivision (a)** of **Section 7284.6**.

Gov't. Code § 7284.6: *Prohibited Activities; Exceptions; Annual Report; Information Exchange; Jurisdiction*:

(a) California law enforcement agencies *shall not*:

(1) Use agency or department moneys or personnel to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes, including any of the following:

(A) Inquiring into an individual's immigration status.

(B) Detaining an individual on the basis of a hold request.

(C) Providing information regarding a person's release date or responding to requests for notification by providing release dates or other information unless that information is available to the public, or is in response to a notification request from immigration authorities in accordance with **Gov't. Code § 7282.5**. Responses are never required, but are permitted under this subdivision, provided that they do not violate any local law or policy.

(D) Providing personal information, as defined in **Civ. Code § 1798.3**, about an individual, including, but not limited to, the individual's home address or work address unless that information is available to the public.

(E) Making or intentionally participating in arrests based on civil immigration warrants.

(F) Assisting immigration authorities in the activities described in **8 U.S.C. § 1357(a)(3)**.

(G) Performing the functions of an immigration officer, whether pursuant to **8 U.S.C. § 1357(g)** or any other law, regulation, or policy, whether formal or informal.

(2) Place peace officers under the supervision of federal agencies or employ peace officers deputized as special federal officers or special federal deputies for purposes of immigration enforcement. All peace officers remain subject to California law governing conduct of peace officers and the policies of the employing agency.

(3) Use immigration authorities as interpreters for law enforcement matters relating to individuals in agency or department custody.

(4) Transfer an individual to immigration authorities unless authorized by a judicial warrant or judicial probable cause determination, or in accordance with **Gov't. Code § 7282.5**.

(5) Provide office space exclusively dedicated for immigration authorities for use within a city or county law enforcement facility.

(6) Contract with the federal government for use of California law enforcement agency facilities to house individuals as federal detainees, except pursuant to **Gov't. Code §§ 7310 et seq.** (**Chapter 17.8**).

(b) Notwithstanding the limitations in **subdivision (a)**, this section does not prevent any California law enforcement agency from doing any of the following that does not violate any policy of the

law enforcement agency or any local law or policy of the jurisdiction in which the agency is operating:

(1) Investigating, enforcing, or detaining upon reasonable suspicion of, or arresting for a violation of, **8 U.S.C. § 1326(a)** that may be subject to the enhancement specified in **8 U.S.C. § 1326(b)(2)** and that is detected during an unrelated law enforcement activity. Transfers to immigration authorities are permitted under this subsection only in accordance with **subdivision (a)(4)**.

(2) Responding to a request from immigration authorities for information about a specific person's criminal history, including previous criminal arrests, convictions, or similar criminal history information accessed through the California Law Enforcement Telecommunications System (CLETS), where otherwise permitted by state law.

(3) Conducting enforcement or investigative duties associated with a joint law enforcement task force, including the sharing of confidential information with other law enforcement agencies for purposes of task force investigations, so long as the following conditions are met:

(A) The primary purpose of the joint law enforcement task force is not immigration enforcement, as defined in **Gov't. Code § 7284.4(f)**.

(B) The enforcement or investigative duties are primarily related to a violation of state or federal law unrelated to immigration enforcement.

(C) Participation in the task force by a California law enforcement agency does not violate any local law or policy to which it is otherwise subject.

(4) Making inquiries into information necessary to certify an individual who has been identified as a potential crime or trafficking victim for a T or U Visa pursuant to **8 U.S.C. §§ 1101(a)(15)(T)** or **1101(a)(15)(U)** or to comply with **18 U.S.C. § 922(d)(5)**.

(5) Giving immigration authorities access to interview an individual in agency or department custody. All interview

access shall comply with requirements of the **TRUTH Act** (**Gov't. Code §§ 7283 et seq.** (**Chapter 17.2**).

(c)

(1) If a California law enforcement agency chooses to participate in a joint law enforcement task force, for which a California law enforcement agency has agreed to dedicate personnel or resources on an ongoing basis, it shall submit a report annually to the Department of Justice, as specified by the Attorney General. The law enforcement agency shall report the following information, if known, for each task force of which it is a member:

(A) The purpose of the task force.

(B) The federal, state, and local law enforcement agencies involved.

(C) The total number of arrests made during the reporting period.

(D) The number of people arrested for immigration enforcement purposes.

(2) All law enforcement agencies shall report annually to the Department of Justice, in a manner specified by the Attorney General, the number of transfers pursuant to **subdivision (a)(4)**, and the offense that allowed for the transfer, pursuant to **subdivision (a)(4)**.

(3) All records described in this subdivision shall be public records for purposes of the **California Public Records Act** (**Gov't. Code §§ et seq. 6250**; **Chapter 3.5**), including the exemptions provided by that act and, as permitted under that act, personal identifying information may be redacted prior to public disclosure. To the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation, or would endanger the successful completion of the investigation or a related investigation, that information shall not be disclosed.

(4) If more than one California law enforcement agency is participating in a joint task force that meets the reporting requirement pursuant to this section, the joint task force

shall designate a local or state agency responsible for completing the reporting requirement.

(d) The Attorney General, by *March 1, 2019*, and annually thereafter, shall report on the total number of arrests made by joint law enforcement task forces, and the total number of arrests made for the purpose of immigration enforcement by all task force participants, including federal law enforcement agencies. To the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation, or would endanger the successful completion of the investigation or a related investigation, that information shall not be included in the Attorney General's report. The Attorney General shall post the reports required by this subdivision on the Attorney General's Internet Web site.

(e) This section does not prohibit or restrict any government entity or official from sending to, or receiving from, federal immigration authorities, information regarding the citizenship or immigration status, lawful or unlawful, of an individual, or from requesting from federal immigration authorities immigration status information, lawful or unlawful, of any individual, or maintaining or exchanging that information with any other federal, state, or local government entity, pursuant to **8 U.S.C. §§1373** and **1644**.

(f) Nothing in this section shall prohibit a California law enforcement agency from asserting its own jurisdiction over criminal law enforcement matters.

Case Law:

This statute, also known as California's "***Sanctuary State Law***," was held to constitutionally apply to so-called "Charter Cities" in ***City of Huntington Beach v. Becerra*** (2020) 44 Cal.App.5th 243.)

Gov't. Code § 7284.6, which prohibits state and local law enforcement from engaging in certain specifically identified acts related to immigration enforcement, is constitutional as applied to charter cities because it addresses matters of statewide concern (including public safety and health, effective policing, and protection of constitutional rights), is reasonably related to resolution of those statewide concerns, and is narrowly tailored to

avoid unnecessary interference in local government. (***Ibid.***)

Gov't. Code § 7284.8: *Model Policies for Other Governmental Entities; Database Use Guidance*:

> **(a)** The Attorney General, by *October 1, 2018*, in consultation with the appropriate stakeholders, shall publish model policies limiting assistance with immigration enforcement to the fullest extent possible consistent with federal and state law at public schools, public libraries, health facilities operated by the state or a political subdivision of the state, courthouses, Division of Labor Standards Enforcement facilities, the Agricultural Labor Relations Board, the Division of Workers Compensation, and shelters, and ensuring that they remain safe and accessible to all California residents, regardless of immigration status. All public schools, health facilities operated by the state or a political subdivision of the state, and courthouses shall implement the model policy, or an equivalent policy. The Agricultural Labor Relations Board, the Division of Workers' Compensation, the Division of Labor Standards Enforcement, shelters, libraries, and all other organizations and entities that provide services related to physical or mental health and wellness, education, or access to justice, including the University of California, are encouraged to adopt the model policy.
>
> **(b)** For any databases operated by state and local law enforcement agencies, including databases maintained for the agency by private vendors, the Attorney General shall, by *October 1, 2018*, in consultation with appropriate stakeholders, publish guidance, audit criteria, and training recommendations aimed at ensuring that those databases are governed in a manner that limits the availability of information therein to the fullest extent practicable and consistent with federal and state law, to anyone or any entity for the purpose of immigration enforcement. All state and local law enforcement agencies are encouraged to adopt necessary changes to database governance policies consistent with that guidance.
>
> **(c)** Notwithstanding the rulemaking provisions of the **Administrative Procedure Act** (**Gov't. Code §§ 11340 et seq.**; **Title 2**, **Division 3**, **Part 1**, **Chapter 3.4**), the Department of Justice may implement, interpret, or make specific this chapter without taking any regulatory action.

Gov't. Code § 7284.10: *Department of Corrections and Rehabilitation Duties and Responsibilities*:

(a) The Department of Corrections and Rehabilitation *shall*:

(1) In advance of any interview between the United States Immigration and Customs Enforcement (ICE) and an individual in department custody regarding civil immigration violations, provide the individual with a written consent form that explains the purpose of the interview, that the interview is voluntary, and that he or she may decline to be interviewed or may choose to be interviewed only with his or her attorney present. The written consent form shall be available in English, Spanish, Chinese, Tagalog, Vietnamese, and Korean.

(2) Upon receiving any ICE hold, notification, or transfer request, provide a copy of the request to the individual and inform him or her whether the department intends to comply with the request.

(b) The Department of Corrections and Rehabilitation *shall not*:

(1) Restrict access to any in-prison educational or rehabilitative programming, or credit-earning opportunity on the sole basis of citizenship or immigration status, including, but not limited to, whether the person is in removal proceedings, or immigration authorities have issued a hold request, transfer request, notification request, or civil immigration warrant against the individual.

(2) Consider citizenship and immigration status as a factor in determining a person's custodial classification level, including, but not limited to, whether the person is in removal proceedings, or whether immigration authorities have issued a hold request, transfer request, notification request, or civil immigration warrant against the individual.

Gov't. Code § 7284.12: *Severability*:

The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

Gov't. Code § 7310: *Contracts with Federal Government to Detain Non-Citizens*:

> **(a)** A city, county, city and county, or local law enforcement agency that does not, as of *June 15, 2017*, have a contract with the federal government or any federal agency to detain adult noncitizens for purposes of civil immigration custody, is prohibited from entering into a contract with the federal government or any federal agency, to house or detain in a locked detention facility owned and operated by a local entity, noncitizens for purposes of civil immigration custody.
>
> **(b)** A city, county, city and county, or local law enforcement agency that, as of *June 15, 2017*, has an existing contract with the federal government or any federal agency to detain adult noncitizens for purposes of civil immigration custody, shall not renew or modify that contract in such a way as to expand the maximum number of contract beds that may be utilized to house or detain in a locked detention facility noncitizens for purposes of civil immigration custody.

Gov't. Code § 7311: *Contracts with Federal Government to House or Detain Non-Citizen Minors*:

> **(a)** A city, county, city and county, or local law enforcement agency that does not, as of *June 15, 2017*, have a contract with the federal government or any federal agency to house or detain any accompanied or unaccompanied minor in the custody of or detained by the federal Office of Refugee Resettlement or the United States Immigration and Customs Enforcement is prohibited from entering into a contract with the federal government or any federal agency to house minors in a locked detention facility.
>
> **(b)** A city, county, city and county, or local law enforcement agency that, as of *June 15, 2017*, has an existing contract with the federal government or any federal agency to house or detain any accompanied or unaccompanied minor in the custody of or detained by the federal Office of Refugee Resettlement or the United States Immigration and Customs Enforcement shall not renew or modify that contract in such a way as to expand the maximum number of contract beds that may be utilized to house minors in a locked detention facility.
>
> **(c)** This section does not apply to temporary housing of any accompanied or unaccompanied minor in less restrictive settings when the State Department of Social Services certifies a necessity for a contract based on changing conditions of the population in need and if the housing contract meets the following requirements:

(1) It is temporary in nature and nonrenewable on a long-term or permanent basis.

(2) It meets all applicable federal and state standards for that housing.

Gov't. Code § 12532: *Review of Detention Facilities*:

Subd. (a) & **(b)(2):** The California Attorney General is required to "engage in reviews" of county, local, and private detention facilities in which "non-citizens," (including minors) are housed or detained for purposes of immigration proceedings, and report its findings to the Legislature and the Governor by March 1, 2019.

Sub. (b)(1): This review shall include, but not be limited to, the following:

(A) A review of the conditions of confinement.

(B) A review of the standard of care and due process provided to the individuals described in **subdivision (a)**.

(C) A review of the circumstances around their apprehension and transfer to the facility.

Subd. (c): The Attorney General, or his or her designee, shall be provided all necessary access for the observations necessary to effectuate reviews required pursuant to this section, including, but not limited to, access to detainees, officials, personnel, and records.

Pen. Code § 679.015: *Victim and Witnesses' Protection from being Turned over to Immigration Authorities*:

(a) It is the public policy of this state to protect the public from crime and violence by encouraging all persons who are victims of or witnesses to crimes, or who otherwise can give evidence in a criminal investigation, to cooperate with the criminal justice system and not to penalize these persons for being victims or for cooperating with the criminal justice system.

(b) Whenever an individual who is a victim of or witness to a crime, or who otherwise can give evidence in a criminal investigation, is not charged with or convicted of committing any crime under state law, a peace officer may not detain the individual exclusively for any actual or suspected immigration violation or turn the individual over to federal immigration authorities absent a judicial warrant.

***Use of Force in Making an Arrest*:** "*Use of Force*" (Chapter 6), below.

***Failure to Collect and/or Preserve Evidence*:**

The Rule of ***Trombetta***:

> Drivers, who had been stopped on suspicion of drunk driving on California highways, had submitted to a breath-analysis test, had registered blood-alcohol concentrations substantially higher than the concentration which gives rise to a presumption of intoxication under California law, and had been charged with driving while intoxicated under California law, filed motions to suppress the breath-analysis test results on the ground that the arresting officers had failed to preserve samples of the drivers' breath. All of the motions to suppress were denied by the trial court. Two of the drivers were subsequently convicted, and petitioned the California Court of Appeal for writs of habeas corpus, while two other drivers did not submit to trial but sought direct appeal from the trial court orders, and their appeals were eventually transferred to the Court of Appeal to be consolidated with the other drivers' habeas corpus petitions. The California Court of Appeal ruled in favor of the drivers. After implicitly accepting that breath samples would be useful to the drivers' defenses, and determining that the arresting officers had the capacity to preserve breath samples for the drivers, the California Court of Appeal concluded that due process demands simply that where evidence is collected by the state, as it is with the breath-analyzer, law enforcement agencies must establish and follow rigorous and systematic procedures to preserve the captured evidence or its equivalent for the use of the defendant (***People v. Trombetta*** (1983) 142 Cal App 3rd 138; Certiorari granted).
>
> On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Marshall, J., expressing the unanimous view of the court, it was held that the due process clause of the **Fourteenth Amendment** does *not* require law enforcement agencies to preserve breath samples of suspected drunk drivers in order for the results of breath-analysis tests to be admissible in criminal prosecutions. O'Connor, J., concurred, stating that the failure to preserve breath samples does not render a prosecution fundamentally unfair, and thus cannot render breath-analysis tests inadmissible as evidence against the accused, and that the failure to employ alternative methods of testing blood-alcohol concentrations is of no due process concern, both because persons are presumed to know their rights under the law and because the existence of tests not used in no way affects the fundamental fairness of the convictions actually obtained. (***California v. Trombetta*** (1984) 467 U.S. 479 [81 L.Ed.2nd 413; 104 S.Ct. 2528].)

Case Law:

> In ***People v. Fultz*** (2021) 69 Cal.App.5th 395, two co-defendants accepted plea agreements on the condition that they testify against the sole remaining defendant (i.e., Fultz), and that they do so truthfully. Unfortunately, the pre-trial interview of these two co-defendants, although recorded, was muted. Law enforcement argued that the muting was accidental. The trial court disbelieved them, finding the muting to have occurred in bad faith. The Appellate Court upheld the trial court's determination that this constituted a failure to preserve relevant evidence in violation of ***California v. Trombetta*** (1984) 467 U.S. 479 [81 L.Ed.2nd 413; 104 S Ct. 2528], and a "due process" violation. (***Id.***, at pp. 426-429.)
>
> > In ***Fultz***, *supra*, at p. 425; the Court noted that "there may be an appropriate case where the failure to collect evidence might warrant due process considerations," citing ***People v. Montes*** (2014) 58 Cal.4th 809, at p. 838; and ***Miller v. Vasquez*** (9th Cir. 1989) 868 F.2nd 1116, 1119.)
> >
> > The ***Fultz*** Court made similar findings as to law enforcement's loss of a photograph of a co-conspirator's (who testified with immunity) shoe and her taped interview. (***Id.***, at p. 430.)

See "*Duty to Preserve Evidence*," under "*Procedural Rules*" (Chapter 2), above.

***Post-Arrest Procedural Due Process*:**

> Plaintiff was arrested on suspicion of a DUI and his driver's license was suspended due to his refusal to consent to a blood test. After an administrative hearing before an Administrative Law Judge (ALJ), where the arresting officer testified that plaintiff did not recant his refusal to submit to a blood test, the license suspension was initially upheld. However, at a second hearing, an ALJ found that the arrestee had recanted his refusal to consent to the test when a video of his doing so was discovered, and voided the license suspension. The plaintiff later sued. The Ninth Circuit upheld the civil trial court's granting of summary judgment for the arresting officer, noting that the plaintiff's **42 U.S.C. § 1983 Fourteenth Amendment** due process suit failed because there was no "*procedural due process*" violation in that the plaintiff received all of the process he was due as he challenged the license suspension before an ALJ on two occasions. Regardless of whether the arresting officer testified falsely at the first hearing in his claim that the plaintiff did not recant his blood test refusal, the state's post-deprivation procedures were meaningful and sufficient as the plaintiff was allowed to present new evidence and arguments at a second hearing. (***Miranda v. City of Casa Grande*** (9th Cir. 2021) 15 F.4th 1219.)

C*hapter 6*:

***Use of Force*:**

Reasonable Force*:** Only that amount of *force* that is *reasonably necessary* under the circumstances may be used to affect an arrest, prevent escape, or overcome resistance. (Headwaters Forest Defense v. County of Humboldt*** (9th Cir. 2002) 276 F.3rd 1125.)

> "The **Fourth Amendment** prohibition against *unreasonable seizures* permits law enforcement officers to use only such force to effect an arrest as is '*objectively reasonable*' under the circumstances." (*Emphasis added*; ***Id.***, at p. 1130.)
>
> See also **34 U.S.C. § 2601**: "It shall be unlawful for any governmental authority . . . to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."
>
> "Allegations of excessive force are examined under **the Fourth Amendment's** prohibition on unreasonable seizures." (***Wheatcroft v. City of Glendale*** (U.S. Dist. AZ, 2022) 2022 U.S. Dist. LEXIS 57006, at p. 12, citing ***Graham v. Connor*** (1989) 490 U.S. 386, 388 [109 S.Ct. 1865; 104 L.Ed.2nd 443].)
>
> "When evaluating a **Fourth Amendment** claim of excessive force, a court must ask 'whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them[.]'" (***Wheatcroft v. City of Glendale***, *supra*, quoting ***Graham v. Connor***, *supra*, at p. 397. See also ***Brown v. County of San Bernardino*** (9th Cir. Feb. 7, 2023) __F.4th __ [2023 U.S.App. LEXIS 2941]; Petition denied by U.S. Supreme Court, Dec. 11, 2023, 2023 U.S. LEXIS 4763.)
>
> > "'[T]here are no per se rules in the **Fourth Amendment** excessive force context; rather, courts must still slosh [their] way through the fact bound morass of reasonableness.' ***Mattos v. Agarano***, 661 F.3rd 433, 441 (9th Cir. 2011) (en banc) (internal quotation marks omitted). This inquiry 'requires a careful balancing of "the nature and quality of the intrusion on the individual's **Fourth Amendment** interests' against the countervailing governmental interests at stake.' ***Graham*** (***v. Connor***), 490 U.S. at 396 (quoting ***Tennessee v. Garner***, 471 U.S. 1, 8, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)); ***Scott v. Harris***, 550 U.S. 372, 383, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). 'The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.' ***Graham***, 490 U.S. at 396-97. 'The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.' ***Id***. at 396." (***Wheatcroft v. City of Glendale***, *supra*.)

> The **Fourth Amendment** prohibits the unreasonable seizure of persons. **U.S. Const. amend. IV**. Even if a seizure is reasonable in a particular circumstance, *how* that seizure is carried out must also be reasonable. ***Graham v. Connor***, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). So the **Fourth Amendment** also prohibits the use of excessive force. ***Id***. Our 'calculus of reasonableness' in these circumstances 'must embody allowance for the fact that police officers are often forced to make split-second judgments' and we do not apply the '20/20 vision of hindsight.' ***Id***. at 396-97." (Italics in original; ***Estate of Strickland v. Nevada County*** (9th Cir. 2023) 69 F.4th 614, 619.)

The use of *excessive force* constitutes a **Fourth Amendment** violation. (***Bonivert v. City of Clarkston*** (9th Cir. WA 2018) 883 F.3rd 865, 879; ***Thompson v. Rahr*** (9th Cir. WA 2018) 885 F.3rd 582, 586.)

> "Any claim that an officer used excessive force 'in the course of an arrest, investigatory stop, or other "seizure" of a free citizen' is governed by the Fourth Amendment's standard of objective reasonableness." (***Demarest v. City of Vallejo*** (9th Cir. 2022) 44 F.4th 1209, 1225, quoting ***Graham v. Connor*** (1989) 490 U.S. 386, 395-397 [109 S.Ct. 1865; 104 L.Ed.2nd 443].)

"When police officers are sued for their conduct in the line of duty, courts must balance two competing needs: 'the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.'" (***Johnson v. Bay Area Rapid Transit Dist.*** (9th Cir. 2013) 724 F.3rd 1159, 1168; citing ***Pearson v. Callahan*** (2009) 555 U.S. 223, 231 [129 S.Ct. 808; 172 L.Ed.2nd 565].)

While non-government employees are not held accountable under the **Fourth Amendment** or other constitutional standards, a civil rights action pursuant to **42 U.S.C. § 1983** was held to be proper against non-law enforcement employees of a private corporation that operated a federal prison under contract. (***Pollard v. GEO Group, Inc.*** (9th Cir. 2010) 607 F.3rd 583.)

"In assessing a claim of excessive force, courts ask 'whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them.' ***Graham*** v. ***Connor***, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2nd 443 (1989). (fn. omitted) 'A court (judge or jury) cannot apply this standard mechanically.' ***Kingsley*** v. ***Hendrickson***, 576 U.S. 389, 397, 135 S.Ct. 2466, 192 L.Ed.2nd 416 (2015). Rather, the inquiry 'requires careful attention to the facts and circumstances of each particular case.' ***Graham***, 490 U.S., at 396, 109 S.Ct. 1865, 104 L.Ed.2nd 443. Those circumstances include 'the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force;

the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.' ***Kingsley***, 576 U.S., at 397, 135 S.Ct. 2466, 192 L.Ed.2nd 416." (***Lombardo v. City of St. Louis*** (June 28, 2021) __ U.S. __, __ [141 S.Ct. 2239; 210 L.Ed.2nd 609].)

See "*Kneeling on a Suspect's Back or Neck*," below.

An officer violates the **Fourth Amendment** when he uses "*gratuitous force*" against an arrestee who is fully secured, not resisting arrest, and not posing a safety threat to the officer. Despite the plaintiff's repeated verbal threats not to comply with the arresting officers' commands, plaintiff repeatedly did comply. Hitting the plaintiff in the face after plaintiff was secured inside his cell, as he was commanded, and despite his verbal refusals, was excessive, subjecting the offending officer to potential civil liability. (***Johnson v. City of Miami Beach*** (11th Cir. FL 2021) 18 F.4th 1267.)

See ***Baude v. Leyshock*** (8th Cir. 2022) 23 F.4th 1065, where the Court held that the plaintiff, who alleged that he was unlawfully caught up in a crowd of rioters who, earlier, had been ordered to disburse but who now were being denied the right to leave the area, were being forced into a group and pepper sprayed, handcuffed through the use of zip ties, and arrested, had been "seized" for **Fourth Amendment** purposes. The issue to be decided by a jury was whether plaintiff's seizure was lawful, and whether the force used was excessive.

Applying the ***Graham v. Connor*** factors (see below), the Tenth Circuit held that the officers, in a civil use-of-force case, were *not* entitled to dismissal of the lawsuit filed against them when the evidence, as alleged by the plaintiff, showed that the officers had no more than a reasonable suspicion to believe that the plaintiff, at the worst, committed only a misdemeanor offense (having physical control of a vehicle while intoxicated), that plaintiff did not constitute an immediate threat after he was taken to the ground and held there by three officers, and plaintiff did not resist nor attempt to flee. Nor were the officers entitled to qualified immunity in that the law was well-settled at the time that the force they were alleged by plaintiff to have used was excessive. (***Wilkins v. City of Tulsa*** (10th Cir. 2022) 33 F.4th 1265.)

The **Fourth Amendment** claim of excessive force in effectuating the arrest failed when there was no evidence that the officer should have been aware of plaintiff's existing back injury. (***Demarest v. City of Vallejo*** (9th Cir. 2022) 44 F.4th 1209, 1226; also noting that there was no evidence to the effect that the use of handcuffs constituted excessive force.

The reasonableness of the force used by a police officer must be judged from the perspective of a reasonable officer on the scene. Also, the court must allow for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving. The ultimate

question is whether an officer's actions are objectively reasonable in light of the facts and circumstances confronting him, the force allowed under the circumstances encompassing a range of conduct. The availability of a less intrusive alternative will not, by itself, render an officer's conduct as unreasonable. (***Wilkinson v. Torres*** (9th Cir. 2010) 610 F.3rd 546, 550-554.)

"O)fficers must act 'without the benefit of 20/20 hindsight,' and must often make "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.'" (***Nehad v. Browder*** (9th Cir. 2019) 929 F.3rd 1125, 1135, quoting ***Gonzalez v. City of Anaheim*** (9th Cir. 2014) 747 F.3rd 789, 794; see also ***Seidner v. De Vries*** (9th Cir. 2022) 39 F.4th 591, 596; and ***Estate of Strickland v. Nevada County*** (9th Cir. 2023) 69 F.4th 614, 619.)

An officer's pre-shooting conduct is properly included in the totality of the circumstances surrounding his use of deadly force. The officer's duty to act reasonably when using deadly force extends to pre-shooting conduct. (***Hayes v. County of San Diego*** (9th Cir. 2013) 736 F.3rd 1223, 1231, 1235-1236 (a negligence civil action); officers shot a suicidal person who approached them with a knife in hand.)

> In 2011, the Ninth Circuit, in ***Hayes v. County of San Diego*** (9th Cir. 2011) 638 F.3rd 688, remanded the case back to the California Supreme Court on the issue of the relevance of the reasonableness of the eventual use of force, of an officer's pre-use-of-force "tactical conduct," under California negligence law. Upon this invitation, the California Supreme Court decided that "tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability." (***Hayes v. County of San Diego*** (2013) 57 Cal.4th 622, 639.) The case then went back to the Ninth Circuit for it's December, 2013, decision on the issue, per the above cited decision.

The use of deadly force is lawful whenever an officer has a "*reasonable belief*" that defendant poses a threat of death or serious harm. However, this language does not negate the need for "*probable cause*" in that the later refers to the quantity of evidence required for such a reasonable belief. (***Price v. Sery*** (9th Cir. 2008) 513 F.3rd 962.)

The potential civil liability of an officer who shot a handcuffed prisoner, seated in the backseat of a patrol car with a semiautomatic pistol, killing him, under the mistaken belief that she was using her stun gun, is an issue for a civil jury to decide. The question was whether her conduct in mistakenly applying deadly force was objectively unreasonable under the totality of the circumstances. Instead of finding that the circumstances forced her to make a split-second judgment about firing a weapon, a reasonable jury could conclude that her own

poor judgment and lack of preparedness caused her to act with undue haste. (***Torres v. City of Madera*** (9th Cir. 2011) 648 F.3rd 1119.)

"To determine whether an officer used excessive force in violation of the **Fourth Amendment**, we balance 'the nature and quality of the intrusion on the individual's **Fourth Amendment** interests against the countervailing governmental interests at stake.' ***Felarca v. Birgeneau***, 891 F.3d 809, 816 (9th Cir. 2018) (quoting ***Graham v. Connor***, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)). This requires us to take into account the totality of the circumstances, including the 'type and amount of force inflicted,' 'the severity of injuries,' 'the severity of the crime at issue,' 'whether the suspect poses an immediate threat to the safety of the officers or others,' and 'whether he is actively resisting arrest or attempting to evade arrest by flight.' ***Id.*** at 817 (quotations omitted). We may also consider 'the availability of less intrusive alternatives to the force employed and whether warnings were given." ***Id***. Whether the suspect poses a threat is 'the most important single element.' ***Smith v. City of Hemet***, 394 F.3d 689, 702 (9th Cir. 2005) (en banc) (quotation omitted). We do not, however, consider these factors with clinical detachment. We must evaluate them appreciating that 'police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.' ***Graham***, 490 U.S. at 396-97." (***Hopson v. Alexander*** (9th Cir. 2023) 71 F.4th 692, 698.)

> "The most important factor is whether the suspect posed an immediate threat to the safety of the officers or others." (***Thomas v. Dillard*** (9th Cir. 2016) 818 F.3rd 864, 889.)
>
> In ***Hopson***, an experienced detective observed an individual in a gas station/convenience store parking lot, nervously move his vehicle several times and look around furtively as it to see if he might be observed by surveillance cameras, and eventually parking it in reverse, all as if he might want to make a quick exit and without any indication that he intended to buy anything from the store. From this the detective concluded that that subject was "casing" the gas station and that "an armed robbery was about to occur." After the eventual plaintiff drove into the lot and parked next to the first individual, that first individual got out of his car and sat in the passenger seat of the plaintiff's car. After the two conversed for a while, and upon seeing them exchange unknown items, the detective (later defendant in the resulting civil suit) and other covering officers approached the plaintiff—with guns drawn—and his co-suspect and physically arrested both without ever having identified themselves as police officers. Plaintiff alleged in a subsequent civil suit that the detention/arrest was illegal and that excessive force was used. The Ninth Circuit determined (in a split, 2-to-1 decision) that the officers were entitled to qualified immunity, holding that "it was *not* clearly established

that the officers lacked an objectively reasonable belief that criminal activity was about to occur." (Italics added; at p. 698.)

Defendant police officers *not* entitled to qualified immunity on the issue of whether they used unreasonable force by ordering an 83-year-old, 5'2", 117-pound, unarmed, completely compliant woman, to get on her knees and handcuffing her when it was suspected that she might be driving a stolen car. (***Brown v. County of San Bernardino*** (9th Cir. 2023) 2023 U.S.App. LEXIS 2941; Unpublished; Petition denied by U.S. Supreme Court, Dec. 11, 2023, 2023 U.S. LEXIS 4763.)

But see the dissenting opinion, where it was argued that the constitutionality of doing so was *not* "'beyond debate' by existing precedent," and that therefore, the officers were entitled to qualified immunity on the issue of whether the force used was unreasonable.

Note also, however, that the panel was unanimous on the issue of whether the officers were entitled to qualified immunity on the lawfulness of detaining (or arresting) the woman for auto theft, until it could be determined whether she was lawfully driving the car in question.

Where the plaintiff experienced only an inadvertent cut on his head from a take-down on the grassy lawn, under circumstances where the officers reasonably believed that they were dealing with a possible kidnapping, the Court concluded that the injuries were minimal and that the force used under the circumstances were reasonable. (***Hill v. City of Fountain Valley*** (9th Cir. 2023) 70 F.4th 507, 517-518.)

Note: The use of excessive force under the **Fourth** (seizure), **Fifth** and **Fourteenth** (due process violations) and **Eighth** (cruel and unusual punishment) **Amendments** all involve the possibility of the suppression of any resulting evidence in a criminal case, as well as the spectre of civil liability in a civil suit. The issue of excessive force is, for the most part, the same in both criminal and civil cases. The cases below, therefore, and considered interchangeable.

Additional Note: The Ninth Circuit in ***Hopson v. Alexander***, *supra*, at p. 709, offers some sage advice:

"The parties' competing perspectives underscore the competing considerations at stake when law enforcement officers approach a suspect. Police must be cautious not to point guns at people in haste when the circumstances do not warrant it. Such conduct can lead to accidents or violent escalations that might not otherwise have occurred. It can also under our precedents produce harm of a constitutional magnitude, even

> when no physical injury results. At the same time, police officers must have some latitude in relying on their judgment and experience to anticipate criminal conduct that may be about to occur. Officers are allowed and expected to be proactive. And when they have a basis for intervening, they are not inevitably required to use only the most minimal force and hope for the best."

***Use of 42 U.S.C. § 1983*:**

> **42 U.S.C. § 1983** is the federal statute by which a party, alleging that his constitutional rights were violated by a state actor under color of law, brings a civil suit asking for a redress of his or her grievances. (***Wheatcroft v. City of Glendale*** (U.S. Dist. AZ, 2022) 2022 U.S. Dist. LEXIS 57006, at pp. 10-11.)
>
> > "'**Section 1983** does not create any substantive rights, but is instead a vehicle by which plaintiffs can bring federal constitutional and statutory challenges to actions by state and local officials.' ***Anderson v. Warner***, 451 F.3rd 1063, 1067 (9th Cir. 2006). State officials or municipalities are liable for deprivations of life, liberty, or property that rise to the level of a "constitutional tort" under the **Due Process Clause** of the **Fourteenth Amendment**. ***Johnson v. City of Seattle***, 474 F.3rd 634, 638 (9th Cir. 2007)." (***Ibid***.)

Factors to consider in determining the amount of force that may be used include:

- The severity of the crime at issue;

- Whether the suspect posed an immediate threat to the safety of the officers or others;

> "Of all the use-of-force factors, the 'most important' is whether the suspect posed an 'immediate threat.'" (***Estate of Strickland v. Nevada County*** (9th Cir. 2023) 69 F.4th 614, 620, quoting ***Bryan v. MacPherson*** (9th Cir. 2010) 630 F.3rd 805, 826, and holding that "the objective facts must indicate that the suspect pose[d] an immediate threat to the officer or a member of the public."
>
> > "'If the person is armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat." (***Ibid***, quoting ***George v. Morris*** (9th Cir. 2013) 736 F.3rd 829, 838.)
> >
> > "At the other end of the spectrum, the Constitution does not tolerate the use of lethal force to "seize an unarmed, nondangerous suspect by shooting him dead" in the absence of probable cause of a threat of serious physical harm." (***Id***., at p. 621; citing ***Torres v.***

City of Madera (9th Cir.2011) 648 F.3rd 1119, 1128; which, in turn, quotes ***Tennessee v. Garner*** (1985) 471 U.S. 1, 11 [105 S.Ct. 1694; 85 L.Ed.2nd 1].)

Officers, under such circumstances, are entitled to reasonable mistakes. "'Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of' an immediate threat, and 'in those situations courts will not hold that they have violated the Constitution.'" (***Ibid.***, quoting ***Saucier v. Katz*** (2001) 533 U.S. 194, 206 [121 S.Ct. 2151; 150 L.Ed.2nd 272].)

> "When an officer's 'use of force is based on a mistake of fact, we ask whether a reasonable officer would have or *should* have accurately perceived that fact.'" (Italics in original; **Id**., quoting ***Torres v. City of Madera*** (9th Cir. 2011) 648 F.3rd 1119, 1124.)

In ***Estate of Strickland v. Nevada County***, the Court held that the decedent's act of pointing what turned out to be a plastic, airsoft replica gun, complete with the tip of the barrel being painted orange, and despite the decedent's verbal claims to the officers that it was nothing but a BB gun, was sufficient to create a reasonable conclusion on the officers' part that defendant was in fact armed with a real firearm, justifying their act of shooting and killing him. "(W)e conclude that the officers' mistaken belief that Strickland possessed a dangerous weapon was reasonable and they were justified in the use of deadly force when he pointed it at them." (pg. 621.)

"The most important factor is whether the suspect posed an immediate threat to the safety of the officers or others." (***Thomas v. Dillard*** (9th Cir. 2016) 818 F.3rd 864, 889.)

- Whether the suspect was actively resisting arrest or attempting to evade arrest by flight; *and*

- Any other exigent circumstances present at the time.

(***Graham v. Connor*** (1989) 490 U.S. 386, 397 [109 S. Ct. 1865; 104 L.Ed.2nd 443]; ***Bell v. Wolfish*** (1979) 441 U.S. 520 [99 S.Ct. 1861; 60 L.Ed.2nd 447]; ***Chew v. Gates*** (9th Cir. 1994) 27 F.3rd 1432, 1440-1441, fn. 5; ***Bryan v. MacPherson*** (9th Cir. 2010) 630 F.3rd 805; ***Espinosa v. City and County of San Francisco*** (9th Cir. 2010) 598 F.3rd 528, 537; ***Mattos v. Agarano*** (9th Cir. 2011) 661 F.3rd 433, 441; ***Young v. County of Los Angeles*** (9th Cir. 2011) 655 F.3rd 1156, 1163; ***Mendoza v. City of West Covina*** (2012) 206 Cal.App.4th 702, 712; ***Gravelet-Blondin v. Shelton*** (9th Cir. 2013) 728 F.3rd 1086, 1090-1091; ***Green v. City & County of San***

Francisco (9th Cir. 2014) 751 F.3rd 1039, 1049-1051; **Velazquez *v.* City of Long Beach** (9th Cir. 2015) 793 F.3rd 1010, 1024; ***Harmon v. City of Arlington*** (5th Cir. TX 2021) 16 F.4th 1159; ***Wilkins v. City of Tulsa*** (10th Cir. 2022) 33 F.4th 1265; ***Seidner v. De Vries*** (9th Cir. 2022) 39 F.4th 591, 596; ***Smith v Agdeppa*** *(9th Cir. 2023) 56 F.4th 1193; 1200;* ***Hopson v. Alexander*** (9th Cir. 2023) 71 F.4th 692, 698.)

- Warning before force is used.

The Ninth Circuit has also found that whether or not officers provided a warning prior to the use of force is a factor to consider when determining the reasonableness of the force used. (***Nelson v. City of Davis*** *(9th Cir. 2012) 685 F.3rd 867, 882; citing* ***Deorle v. Rutherford*** (9th Cir. 2001) 272 F.3rd 1272, 1283-1284; and ***Forrester v. City of San Diego*** (9th Cir. 1994) 25 F.3rd 804; ***Nehad v. Browder*** (9th Cir. 2019) 929 F.3rd 1125, 1137-1138.)

> The Court in ***Nehad*** further noted that whether or not the officer ordered the deceased *to halt* (***Id***, at p. 1137.) as he was slowly approaching the officer, as well as the officer's failure *to identify himself* (***Id***, at p. 1138.), were factors for a jury to consider in determining the reasonableness of the eventual use of lethal force.

See also ***Tennessee v. Garner*** (1985) 471 U.S. 1, 11-12 [105 S.Ct. 1694; 85 L.Ed.2nd 1]; "(I)f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, *and if, where feasible, some warning has been given*." (Italics added)

However, where an officer arrives late at an ongoing police action and witnesses shots being fired by one of several individuals in a house surrounded by other officers, and that officer then shoots and kills an armed occupant of the house without first giving a warning, the officer did not violate clearly established law based on his failure to provide a verbal warning before utilizing deadly force: "No settled **Fourth Amendment** principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one [the officer] confronted here." (***White v. Pauly*** (2017) 580 U.S. 73 [137 S.Ct. 548; 196 L.Ed.2nd 463].)

In ***Betts v. Brennan*** (5th Cir. 2022) 22 F.4th 577, the Fifth Circuit found the officer's repeated warnings that defendant would be tased if he did not comply with the officer's commands during what should have been a simple traffic stop except for the defendant's refusal to cooperate and

comply with the officer's commands, was a factor to consider in determining that the officer's eventual use of his Taser was reasonable.

"We have also repeatedly stated that an officer must give warning before using deadly force "whenever practicable*."* (***Smith v Agdeppa*** (9th Cir. 2023) 56 F.4th 1193, 1201; officer held not to be entitled to qualified immunity when he shot an unarmed (naked) resisting suspect who refused to submit to being handcuffed, and who was pummeling his partner at the time. The only warning given (which was also contested) was to "stop.")

However, see dissenting opinion at pgs. 1205 to 1220, as described at "*Duty to Warn*," below.

See "*Duty to Warn*," below.

- The Ninth Circuit Court of Appeals adds, in addition to the giving of a warning, yet two more factors to consider; "'the availability of less intrusive alternatives to the force employed, . . . and whether it should have been apparent to officers that the person they used force against was emotionally disturbed." (***Estate of Strickland v. Nevada County*** (9th Cir. 2023) 69 F.4th 614, 618; quoting ***S.B. v. County of San Diego*** (9th Cir. 2017) 864 F.3rd 1010, 1013.)

  The factors considered under ***Tennessee v. Garner*** (1985) 471 U.S. 1, 9-12 [105 S.Ct. 1694; 85 L.Ed.2nd 1] are:

  - The immediacy of the threat;
  - Whether force was necessary to safeguard officers or the public; *and*
  - Whether officers administered a warning, assuming it was practicable.

    (See also ***George v. Morris*** (9th Cir. 2013) 736 F.3rd 829, 837.)

  Three-Step Evaluation of an Excessive Force Claim, by "*Stages*:"

  - *The severity of the intrusion* on the individual's **Fourth Amendment** rights is assessed by evaluating the type and amount of force inflicted.

  - *The government's interests* are evaluated by assessing (1) the *severity of the crime*; (2) whether the suspect posed an immediate threat to the officers' or public's safety; and (3) whether the suspect was resisting arrest or attempting to escape.

  - The *gravity* of the intrusion on the individual is balanced against the *government's need for that intrusion.*

    (***Thompson v. Rahr*** (9th Cir. WA 2018) 885 F.3rd 582, 586; citing ***Espinosa v. City and County of San Francisco*** (9th Cir. 2010) 598 F.3rd

528, 537-538; ***Andrews v. City of Henderson*** (9th Cir. 2022) 35 F.4th 710, 715; see also ***Wheatcroft v. City of Glendale*** (U.S. Dist. AZ, 2022) 2022 U.S. Dist. LEXIS 57006, at p. 14; citing ***Glenn v. Washington County*** (9th Cir. 2011) 673 F.3rd 864, 871, and noting that these factors are not necessarily exclusive. See also ***Seidner v. De Vries*** (9th Cir. 2022) 39 F.4th 591, 596, 599.)

Upon Making an Arrest, the factors to consider in determining the reasonableness in using force are as follows:

- The severity of the intrusion on the individual's **Fourth Amendment** rights by evaluating the type and amount of force inflicted;

- The government's interest in the use of force; *and*

- The balance between the gravity of the intrusion on the individual and the government's need for that intrusion.

(***Williamson v. City of National City*** (9th Cir. 2022) 23 F.4th 1146, 1151; citing ***Graham v. Connor*** (1989) 490 U.S. 386, 397 [109 S. Ct. 1865; 104 L.Ed.2nd 443]; and ***Lowry v. City of San Diego*** (9th Cir. 2017 858 F.3rd 1248, 1256.)

***General Principles*; *Fourth Amendment Use of Force Issues*:**

General Case law:

See ***Tatum v. City and County of San Francisco*** (9th Cir. 2006) 441 F.3rd 1090, where the Ninth Circuit Court of Appeal meticulously discussed the issue of law enforcement's use of force:

> When a court analyzes excessive force claims, the initial inquiry is whether the police officer's actions were objectively reasonable in light of the facts and circumstances confronting him. A police officer had probable cause to arrest a suspect for being under the influence of a controlled substance or for disorderly conduct where the officer observed the suspect kicking the door to a police station for no apparent reason, the suspect disobeyed commands to stop, and when he was verbally unresponsive, perspiring heavily, and had bloodshot eyes. Whether a particular use of force was objectively reasonable depends on several factors including the severity of the crime that prompted the use of force, the threat posed by a suspect to the police or to others, and whether the suspect was resisting arrest. An arresting officer's use of a control hold on an arrestee in order to place him in handcuffs was held to be objectively reasonable in this case and thus did not support an

> excessive force claim; the officer had probable cause to arrest, the arrestee was behaving erratically, and the arrestee spun away from the officer and continued to struggle after officer told him to calm down. Detention of the arrestee after the arrest did not rise to the level of excessive force even though the officers positioned the arrestee on his stomach for approximately 90 seconds, then positioned him on his side, and failed to perform emergency resuscitation on the arrestee after the arrestee kicked and struggled so that the brief restraint on his stomach was necessary to protect the officers and the arrestee himself, the officers monitored the arrestee, and they called for an ambulance as soon as they noticed that arrestee was breathing heavily. Just as the Fourth Amendment does not require a police officer to use the least intrusive method of arrest, neither does it require an officer to provide what hindsight reveals to be the most effective medical care for an arrested suspect. (***Id.***, at pp. 1095-1100.)

"'We must judge the reasonableness of a particular use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."' (Citation). It is also well-established that police officers "are not required to use the least intrusive degree of force possible."'" (***Williamson v. City of National City*** (9th Cir. 2022) 23 F.4th 1146, 1151; quoting ***Graham v. Connor*** (1989) 490 U.S. 386, 396 [109 S.Ct. 1865; 104 L.Ed.2nd 443]; and ***Lowry v. City of San Diego*** (9th Cir. 2017) 858 F.3rd 1248, 1259.)

Where a police officer shot and killed plaintiff's mentally disturbed son seven times after the two were involved in a physical altercation, the Ninth Circuit reversed the district court's summary judgment for defendant police officer on plaintiff's state law negligence claim. The Court first noted that California negligence law regarding the use of deadly force overall is broader than federal Fourth Amendment law. Under California law, an officer's pre-shooting decisions can render his behavior unreasonable under the totality of the circumstances, even if his use of deadly force at the moment of the shooting might be reasonable in isolation. Federal law, however, generally focuses on the tactical conduct at the time of shooting, though a prior constitutional violation may proximately cause a later excessive use of force. The Court held that in this case, the district court erroneously conflated the legal standards under the Fourth Amendment and California negligence law. Specifically, the district court; (1) inaccurately concluded that plaintiff did not point to *any* evidence probative of the fact that the decedent exhibited symptoms of mental illness that would have been apparent to the officer; (2) did not consider that a jury could find the officer's pre-shooting conduct unreasonable under California law, given the decedent's potential mental illness; and (3) misinterpreted the Ninth Circuit precedent set forth

in ***Billington v. Smith*** (9th Cir. 2002) 292 F.3rd 1177, in assessing the reasonableness of Officer Esparza's conduct at the time of the shooting. The Court held that in considering all the evidence in the light most favorable to plaintiff, a reasonable jury could conclude that the officer should have suspected the decedent had mental health issues and that he unreasonably failed to follow police protocol when dealing with potentially mentally ill persons before using force. Finally, the officer's decision to shoot without warning six times—and then a seventh—could be found by a jury to be unreasonable. (***Tabares v. City of Huntington Beach*** (9th Cir. 2021) 988 F.3rd 1119.)

Re: ***Billington v. Smith***, *supra*, see "*Provocation Rule*," below.

"False arrest" issues are completely separate from whether excessive force was used in the arrest, even though both are **Fourth Amendment** "seizure" issues and both involve the same physical acts by the one accused of using excessive force. (***Sharp v. County of Orange*** (9th Cir. 2017) 871 F.3rd 901, 916.)

> In being arrested, plaintiff argued that deputies violated the **Fourth Amendment** by using excessive force by yanking his left arm behind his back—thereby causing a rotator-cuff tear which required surgery—and then applying handcuffs that were tight enough to break the skin. While the degree of force here was held to be significant, the Court held that the deputy sheriff was entitled to qualified immunity because Plaintiff failed to offer not offer anything other than general legal propositions which cannot clearly establish that the deputy's particular conduct was unlawful. (***Id.***, at pp. 916-917.)

The use of force to affect an arrest is evaluated in light of the **Fourth Amendment's** prohibition on *unreasonable seizures*. (***Graham v. Connor*** (1989) 490 U.S. 386 [109 S.Ct. 1865; 104 L.Ed.2nd 443]; see also **Felarca *v.* Birgeneau** (9th Cir. 2018) 891 F.3rd 809, 816.)

> The issue of reasonableness is assessed by "balancing 'the nature and quality of the intrusion on the individual's **Fourth Amendment** interests against the countervailing governmental interests at stake.'" (**Ibid**; citing ***Graham v. Connor***, *supra*, at p. 396.)

A seizure is a "governmental termination of freedom of movement through means intentionally applied." (***Jensen v. City of Oxnard*** (9th Cir. 1998) 145 F.3rd 1078, 1083.)

This includes the accidental use of the wrong weapon; e.g., accidentally using a firearm when the officer intended to use a Taser. (***Torres v. City of Madera*** (9th Cir. 2008) 524 F.3rd 1053.)

"A police officer may use force, including blocking a vehicle and displaying his or her weapon, to accomplish an otherwise lawful stop or detention as long as the force used is reasonable under the circumstances to protect the officer or members of the public or to maintain the status quo." (***People v. McHugh*** (2004) 119 Cal.App.4th 202, 211.)

The reasonableness of the force used to affect a particular seizure of a person is determined by a "careful balancing of 'the nature and quality of the intrusion on the individual's **Fourth Amendment** interests' against the countervailing governmental interest at stake." (***Graham v. Connor***, *supra*, at p. 396 [109 S.Ct. 1865; 104 L.Ed.2nd at p. 455], quoting ***Tennessee v. Garner*** (1985) 471 U.S. 1, 8 [105 S.Ct. 1694; 85 L.Ed.2nd 1, 7]; ***Jackson v. City of Bremerton*** (9th Cir. 2001) 268 F.3rd 646; ***Plumhoff v. Rickard*** (2014) 572 U.S. 765, 766 [134 S. Ct. 2012; 188 L. Ed. 2nd 1056].)

The use of a reasonable amount of force necessary in handcuffing and searching the plaintiff during a lawful arrest is not a battery. (***Fayer v. Vaughn*** (9th Cir. 649 F.3rd 1061, 1065.)

Taking an otherwise compliant 11-year-old juvenile into physical custody (i.e., a "*seizure*") and handcuffing him while transporting him from his school to a relative (unreasonable "*use of force*"), based upon no more than an unsubstantiated report from school officials that he was "out of control" and off his meds, violates the juvenile's **Fourth Amendment** rights. (***C.B. v. City of Sonora*** *(9th Cir. 2014) 769 F.3rd 1005, 1022-1040.)*

> The officers under these circumstances were held (by a 7-to-5 majority) to be entitled to qualified immunity on the first issue (illegal seizure), it not being a settled issue of law, but *not* as to the reasonableness of handcuffing the minor. (***Id.***, at pp. 1026-1031, 1038-1040.)

The use of reasonable force in extracting blood, when done in a medically approved manner, is lawful. (***Ritschel v. City of Fountain Valley*** (2005) 137 Cal.App.4th 107; a misdemeanor case.)

Officers had reasonable cause under the Washington statutes to take plaintiff for a mental evaluation on the basis of her paranoid comments to the officers and the 911 reports that she had been hiding under a car with her son, screaming that someone was trying to kill her and that she would

kill herself. The officers' use of force in arresting and detaining her was reasonable. There was no genuine dispute from the evidence that she posed a threat to herself, her neighbors, and the officers. The evidence was undisputed that she was actively resisting arrest. (***Luchtel v. Hagemann*** (9th Cir. 2010) 623 F.3rd 975.)

Thomas and Rosalie Avina sued the United States under the **Federal Tort Claims Act** (**FTCA**) for assault and battery and intentional infliction of emotional distress after agents from the Drug Enforcement Administration (DEA) executed a search warrant at their mobile home. Upon entering the home, the agents pointed guns at Thomas and Rosalie, handcuffed them and forcefully pushed Thomas to the floor. The agents handcuffed the Avina's fourteen-year-old daughter on the floor and then handcuffed their eleven-year-old daughter on the floor and pointed their guns at her head. The agents removed the handcuffs from the children approximately thirty minutes after they entered. The court held that the district court properly granted summary judgment in favor of the United States as to Thomas and Rosalie because the agents' use of force against them was reasonable. The agents were executing a search warrant at the residence of a suspected drug trafficker. This presented a dangerous situation for the agents and the use of handcuffs on the adult members of the family was reasonable to minimize the risk of harm to the officers and the Avinas. In addition, the agents did not act unreasonably when they forcefully pushed Thomas Avina to the floor. At the time of the push, Avina was refusing the agents' commands to get down on the ground. Because this refusal occurred during the initial entry, the agents had no way of knowing whether Avina was associated with the suspected drug trafficker, whom they thought lived there. The court however, found that the district court improperly granted summary judgment to the United States concerning the agents' conduct toward the Avinas' minor daughters. The court held that a jury could find that when the agents pointed their guns at the eleven-year-old daughter's head, while she was handcuffed on the floor, that this conduct amounted to excessive force. Similarly, the court held that a jury could find that the agents' decision to force the two girls to lie face down on the floor, with their hands cuffed behind their backs, was unreasonable. Genuine issues of fact existed as to whether the actions of the agents were excessive in light of girls' ages and the limited threats they posed. (***Avina v. United States*** (9th Cir. 2012) 681 F.3rd 1127, 1130-1134.)

Whether four to six officers pointing guns (and one shotgun) at the plaintiff during a felony "high risk" traffic stop, after an "automated license plate reader" had misidentified the plaintiff's car as being stolen, when the plaintiff was compliant and posed no threat to the officers, constituted excessive force is a jury question. (***Green v. City & County of San Francisco*** (9th Cir. 2014) 751 F.3rd 1039, 1049-1051.)

The degree of force used under any particular set of circumstances includes a consideration of the lawfulness of the arrest in the first place. "(T)he facts that gave rise to an unlawful detention or arrest can factor into the determination whether the force used to make the arrest was excessive." However, the fact that a particular arrest may have been unlawful (i.e., without probable cause) does not mean that any amount of force used in making that arrest is necessarily excessive. (***Velazquez v. City of Long Beach*** (9th Cir. 2015) 793 F.3rd 1010, 1023-1027.)

Responding to a *domestic violence* radio call, given the fact that more officers are killed at such situations than any other, is a factor a court can consider in determining the reasonableness of the use of deadly force. (***George v. Morris*** (9th Cir. 2013) 736 F.3rd 829, 839, 844; ***Mattos v. Agarano*** (9th Cir. 2011) 661 F.3rd 433, 450; ***United States v. Martinez*** (9th Cir. 2005) 406 F.3rd 1160, 1164.)

The use of expert testimony (pursuant to **Evid. Code § 801**) regarding police tactics and training and whether the officers, under the circumstances, used excessive force, is generally permissible, at least where the evidence offered relates to issues outside the scope of a lay juror's knowledge. (***People v. Sibrian*** (2016) 3 Cal.App.5th 127.)

Upon plaintiff calling 9-1-1 to summon an ambulance for her son's apparent suicide attempt, plaintiff refused to allow a deputy sheriff into her house with the emergency rescue crew. As a result, the deputy handcuffed plaintiff as she attempted to drive her son to the hospital. The deputy sheriff was entitled to qualified immunity as to plaintiff's **Fourth Amendment** excessive force claim because it was objectively reasonable for the deputy to execute three head slams and to use her knee to pin plaintiff to the ground since the deputy was acting in her community caretaking capacity, plaintiff presented an immediate danger to the deputy and others, and plaintiff was actively interfering with her son's medical treatment. Deputies were also entitled to qualified immunity as to plaintiff's unlawful search claim because they searched her truck in furtherance of their duties to assist in resolving an active medical emergency; i.e., an apparent overdose. (***Ames v. King County*** (9th Cir. 2017) 846 F.3rd 340.)

Where a sheriff's deputy was alleged to have aggressively grabbed plaintiff by the arm and pull him toward the curb, swinging him around, and then kick his feet out from under him causing him to fall to the pavement, after which a knee went into his back and a boot pushed his head into the pavement before being handcuffed, a jury found the force to be unreasonable under the circumstances. However, citing the United States Supreme Court's decision in ***White v. Pauly*** (2017) 580 U.S. 73 [137 S.Ct. 548; 196 L.Ed.2nd 463], the Court held that where no case could

be identified that would have put the sheriff's deputy on notice that the force he used was unreasonable, entitling the deputy to qualified immunity, the jury's verdict and damage award was set aside. (**Shafer *v. County of Santa Barbara* (*Padilla*)** (9th Cir. 2017) 868 F.3rd 1110, 1115-1118.)

Handcuffing plaintiffs at the scene of an officer-involved shooting of a teenager (one of the plaintiffs), and holding them at the scene while handcuffed for five hours while the shooting was investigated—long after probable cause had dissipated—is a **Fourth Amendment** violation. The fact that the defendant officer (Gutierrez), who was the shooting officer, was pulled aside (per department policy) and monitored during the investigation of the shooting, and no longer had any control over the scene, does not prevent that officer from being liable for the unlawfully prolonged detention. The Court held that an officer need not have been the sole party responsible for a constitutional violation before civil liability may attach. "An officer's liability under (**18 U.S.C.**) **Section 1983** is predicated on his 'integral participation' in the alleged violation. Officers, like other civil defendants, are generally responsible for the 'natural' or 'reasonably foreseeable' consequences. Thus, an officer can be held liable where he is just one participant in a sequence of events that gives rise to a constitutional violation." The trial court's denial of qualified immunity for that officer was upheld. (***Nicholson v. City of Los Angeles*** (9th Cir. 2019) 935 F.3rd 685: The officer's potential civil liability for shooting the one plaintiff was not at issue in this appeal.)

The force that one officer applied to the detainee/plaintiff (i.e., shooting him with a beanbag shotgun) was held to be objectively reasonable under the circumstances; i.e., defendant reported to have threaten family members with a chainsaw, exited the house with a visible knife in his pocket, and lowered his hands toward the knife despite being told to keep his hands up. However, by the time the second officer put pressure on the detainee's/plaintiff's back, holding him to the floor with his knee for about eight seconds as he was being handcuffed, a majority of the Court held that he no longer posed a risk, making such force unreasonable. If the use of force was excessive and there is a case on point that alerted the officer to the unconstitutionality of his conduct, then there was no added requirement for a specific level of damage or injury. The detainee's allegations that he now suffered ongoing neck and back pain, headaches, and emotional distress on account of the officer's actions was sufficient to create a genuine dispute of material fact that required resolution by a jury. As for the potential liability for a third officer who observed the incident, he was held to lack any realistic opportunity to intercede. (***Cortesluna v. Leon*** (9th Cir. 2020) 979 F.3rd 645; a split 2-to-1 decision, with dissent arguing that a video showed that plaintiff, while held to the floor,

continued to struggle and still constituted a potential danger to the officers.)

After plaintiff was stopped for failing to properly signal before changing lanes, he declined to give the officer his driver's license (showing it to him through the window) and car registration. Backup officers pulled plaintiff out of his car, tripped him so that he fell, pinned him to the ground and handcuffed him, resulting in plaintiff suffering some long-term physical injuries. The Ninth Circuit Court of Appeal ruled that the district court erred in granting the defendant police officers' summary judgment motion, noting that genuine factual disputes of material fact precluded summary judgment as to whether the officers were entitled to qualified immunity in the arrestee's **42 U.S.C. § 1983 Fourth Amendment** excessive force lawsuit. Per the Court, a reasonable jury could find that the plaintiff engaged in passive resistance only, and that the officers' take-down involved unconstitutionally excessive force. The right to be free from the application of non-trivial force for engaging in mere passive resistance was clearly established at the time of the arrest, thus, the officers are not immune from being civilly liable. (***Rice v. Morehouse*** (9th Cir. 2021) 989 F.3rd 1112.)

A protester who disrupted a city council meeting and was forcibly removed, going limp, had only herself to blame for injuries she incurred from being pulled and handcuffed. The trial court's denial of qualified immunity for the officers was reversed by the Ninth U.S. Circuit Court of Appeals, which so held. The totality of the circumstances established that the type and amount of force that the officers used was minimal where the officers did not strike the protestor, throw her to the ground, or use any compliance techniques or weapons for the purpose of inflicting pain on her. The risk posed by the protestors was not zero and was relevant in assessing the circumstances that the officers faced when they decided to remove the protestors participating in the demonstration. Also, plaintiff/protestor could have avoided or reduced the pain and injury she alleged she suffered by cooperating with the officers and leaving the room under her own power. Her choice in not doing so did not render the officer's conduct unreasonable. (***Williamson v. City of National City*** (9th Cir. 2022) 23 F.4th 1146.)

In ***Betts v. Brennan*** (5th Cir. 2022) 22 F.4th 577, the Fifth Circuit found the officer's repeated warnings that defendant would be tased if he did not comply with the officer's commands during what should have been a simple traffic stop except for the defendant's refusal to cooperate and comply with the officer's commands, was a factor to consider in determining that the officer's eventual use of his Taser was reasonable.

Henderson, Nevada, detectives forcibly tackled plaintiff to the ground with enough force to fracture his hip, resulting in excruciating pain and requiring two surgeries, such that the use of force by the detectives was substantial and, therefore, had to be justified by the need for the specific level of force employed. In this case, the detectives knew beforehand that plaintiff was not armed (despite being wanted for robbery) when they tackled him as he exited the courthouse. Plaintiff was not exhibiting any aggressive behavior, and there was no dispute that he was not resisting arrest or attempting to flee. Because any immediate threat to safety was minimal, the nature of the crime at issue (robbery) provided little, if any, basis for the officers' use of physical force. (***Andrews v. City of Henderson*** (9th Cir. 2022) 35 F.4th 710.)

"Because deadly force involves a serious intrusion on **Fourth Amendment** rights, deadly force is reasonable *only* if the officer has probable cause to believe the suspect poses an immediate and significant threat of death or serious physical injury to the officer or others." (***Smith v Agdeppa*** (9th Cir. 2023) 56 F.4th 1193, 1200-1201.)

Plaintiff brought a **42 U.S.C. § 1983** action after her son was shot and killed by a City of Minneapolis Police Officer; Officer Neal Walsh. The district court found the defendant officer and the City were entitled to qualified immunity as to the officer's initial use of deadly force but not the continued use of force after the deceased dropped his knife and had fallen to the ground. In this interlocutory appeal, defendant officer asserted he is entitled to qualified immunity as to the entire encounter, which lasted a total of about two seconds. The Eighth Circuit reversed the denial of qualified immunity. The Court explained that its review of the videos of the incident establishes that the defendant officer never paused during the shooting, which lasted less than two seconds, and he continued shooting for only approximately one second after plaintiff's son fell to the ground, dropping the knife. Given the swift and continuous progression of the incident and defendant officer's limited time to observe and process the circumstances, a jury could not find reasonably that the officer had sufficient time to reassess the threat presented before he stopped firing. Further, the court explained that even if plaintiff's son's emotional condition perhaps mitigated the threat he posed to the responding officers, a question we need not reach, this detail does not sufficiently distinguish this case from prior cases law such that the defendant officer would have had "fair warning" that his conduct violated a constitutional right. (***Ching v. City of Minneapolis*** (8th Cir. 2023) 73 F.4th 617.)

The Ninth Circuit Court of Appeals held that two officers who shot and killed an unarmed man who was physically charging them down a hallway at the scene of a domestic violence call were entitled to qualified immunity under circumstances where it was not obvious that the officers'

use of force was objectively unreasonable "in light of the facts and circumstances confronting them." (Citing ***Graham v. Connor*** (1989) 490 U.S. 386, 397 [109 S.Ct. 1865; 104 L.Ed.2nd 443].) "Even assuming that (the decedent) was unarmed and not reaching for a weapon, there is no dispute that he used aggressive language with the officers, ignored an order from the officers, and rushed towards them in a small and confined space. It is not obvious that the officers were constitutionally precluded from firing in this situation, where they were responding to an active domestic violence situation, lacked the benefit of having time to fully assess the circumstances, and needed to make split-second decisions as they were being charged." **(*Waid v. County of Lyon*** (9th Cir. 2023) 87 F.4th 383, 389.)

> However, see the well-reasoned dissenting opinion at pp. 393-404, arguing a number of factors indicating that shooting any unarmed man was excessive and unreasonable under the circumstances of this case.

An officer was properly denied qualified immunity for having shot an individual twice after ordering him to show his hands. The victim initially appeared to reach for something in his pocket but then (as it appeared in the officer's bodycam) raised both hands (that were empty) when the officer shot and killed him. Per the Court, a jury could well find that, at the moment he was shot, (1) Mr. Lopez presented no immediate threat to Officer Wright and (2) Officer Wright's use of deadly force was a violation of Mr. Lopez's **Fourth Amendment** rights. (***Lopez v. City of Riverside*** (9th Cir. 2023) 2023 U.S.App. LEXIS 32066; Unpublished.)

> *Note*: Appellants' emergency motion for a stay of proceedings before the district court below is GRANTED pending issuance of the mandate or further order from this Court. (Jan. 12, 2024; 2024 U.S. App. LEXIS 898.)

Kneeling on a Suspect's Back or Neck:

In a case where an officer grabbed the plaintiff, knocked him to the ground, straddled him, and handcuffed him, followed by another officer then "forcefully put his knee into LaLonde's back, causing him significant pain" and a lingering back injury, the Ninth Circuit Court of Appeal reversed the summary judgment entered in favor of the officers because the allegations, if true, "constitute[d] a clear violation of plaintiff's **Fourth Amendment** rights." (***LaLonde v. County of Riverside*** (9th Cir. 2000) 204 F.3rd 947, 962.)

Where a sheriff's deputy was alleged to have aggressively grabbed plaintiff by the arm and pull him toward the curb, swinging him around,

and then kick his feet out from under him causing him to fall to the pavement, after which a *knee went into his back* and a boot pushed his head into the pavement before being handcuffed, a jury found the force to be *unreasonable* under the circumstances. However, citing ***White v. Pauly*** (2017) 580 U.S. 73 [137 S.Ct. 548; 196 L.Ed.2nd 463], the Court held that where no case could be identified that would have put the sheriff's deputy on notice that the force he used was unreasonable, entitling the deputy to qualified immunity, the jury's verdict and damage award was set aside. (***Shafer v. County of Santa Barbara* (*Padilla*)** (9th Cir. 2017) 868 F.3rd 1110, 1115-1118.)

Upon plaintiff calling 9-1-1 to summon an ambulance for her son's apparent suicide attempt, plaintiff refused to allow a deputy sheriff into her house with the emergency rescue crew. As a result, the deputy handcuffed plaintiff as she attempted to drive her son to the hospital. The deputy sheriff was entitled to qualified immunity as to plaintiff's **Fourth Amendment** excessive force claim because it was objectively reasonable for the deputy to execute three head slams and to *use her knee to pin plaintiff to the ground* since the deputy was acting in her community caretaking capacity, plaintiff presented an immediate danger to the deputy and others, and plaintiff was actively interfering with her son's medical treatment. Deputies were also entitled to qualified immunity as to plaintiff's unlawful search claim because they searched her truck in furtherance of their duties to assist in resolving an active medical emergency; i.e., an apparent overdose. (**Ames *v. King County*** (9th Cir. 2017) 846 F.3rd 340.)

After ruling that shooting defendant with a beanbag shotgun was reasonable under the circumstances, a majority of the Court held that a second officer putting pressure on the detainee's/plaintiff's back, *holding him to the floor with his knee* for about eight seconds as he was being handcuffed, was unreasonable. If the use of force was excessive and there is a case on point that alerted the officer to the unconstitutionality of his conduct, then there was no added requirement for a specific level of damage or injury. The detainee's allegations that he now suffered ongoing neck and back pain, headaches, and emotional distress on account of the officer's actions was sufficient to create a genuine dispute of material fact that required resolution by a jury. (***Cortesluna v. Leon*** (9th Cir. 2020) 979 F.3rd 645; a split 2-to-1 decision, with dissent arguing that a video showed that plaintiff, while held to the floor, continued to struggle and still constituted a potential danger to the officers.)

> In ruling that kneeling on a suspect's back was unreasonable in this case, the Court limited its ruling by specifically noting that: "We hold only, as we have before, that police may not kneel on a prone

and non-resisting person's back so hard as to cause injury." (***Id.***, at p. 656.)

In a civil suit where plaintiffs claimed that officers used excessive force against an arrestee (decedent Aguirre) by contorting and holding his body in a prone, hog-tie-like "maximal restraint position" for five-and-a-half minutes (described as placing him prone on his stomach, while an officer pushed his legs up and crossed them near his buttocks and kneeled forward on his legs, holding them near his bound hands in a hog-tie-like position, while another officer knelt with one knee on the ground and the other on the decedent's back, causing him to die from asphyxiation), the Court held that defendant officers were not entitled to qualified immunity. First, the court noted the lack of visible resistance by decedent, the presence of numerous officers surrounding him, and the fact that the officers had already blocked off several lanes of traffic, all weighed against the inference of any immediate safety threat or other need that would justify holding the decedent down as described above. Second, the court held that, at the time of the incident, it was clearly established that when a suspect is not resisting, it is unreasonable for an officer to apply unnecessary, injurious force against a restrained individual, even if the person had previously not followed commands or initially resisted the seizure. Evidence presented by the officers to the contrary was contradicted by dashcom videos. The court added that, in this case, a jury could credit the plaintiff's version of the incident and conclude "that no reasonable officer would have perceived [Aguirre] as posing an immediate threat to the [O]fficers' safety or thought that he was resisting arrest." Therefore, if a jury believed: 1) that the officers unnecessarily placed the decedent in the maximal restraint position when there was no reason to believe he had committed a serious crime; 2) that he posed a continuing threat to the officers or public safety; or, 3) that he was resisting arrest, the officers violated the decedent's clearly established constitutional rights (***Estate of Aguirre v. City of San Antonio*** (5th Cir. 2021) 995 F.3rd 395.)

In subduing a fighting, kicking, resisting inmate in a holding cell, at least one of the officers applied pressure to the inmate's back (referred to as a "prone restraint") for a full 15 minutes after the inmate was already handcuffed, hands and feet, until he quit resisting, despite the inmate's complaint that "it hurts." The inmate died as a result. In the subsequent civil suit pursuant to **42 U.S.C. § 1983**, brought by the decedent's parents, the U.S. Supreme Court (in a 6-to-3 per curiam decision) reversed the Eight Circuit Court of Appeal's upholding of the district court's summary judgement in favor of the defendant officers. In so ruling, the Court noted the Eight Circuit's failure to consider as "significant" "well-known police guidance recommending that officers get a subject off his stomach as soon as he is handcuffed" due to the risk of suffocation. It was also noted by that same guidance that "the struggles of a prone suspect may be due to

oxygen deficiency, rather than a desire to disobey officers' commands." It was held, therefore, that "such evidence, when considered alongside the duration of the restraint and the fact that inmate was handcuffed and leg shackled at the time, may be pertinent to the relationship between the need for the use of force and the amount of force used, the security problem at issue, and the threat—to both (the decedent) and others—reasonably perceived by the officers." "Such a *per se* rule would contravene the careful, context-specific analysis required by this Court's excessive force precedent." (***Lombardo v. City of St. Louis*** (June 28, 2021) __ U.S. __ [141 S. Ct. 2239; 210 L.Ed.2nd 609]; remanding the case to the Eighth Circuit Court of Appeal for a reconsideration of certain factors.

> The Eight Circuit cited its own prior precedent—***Ryan v. Armstrong*** (8th Cir. 2017)850 F.3rd 419—in which that court found reasonable a resisting detainee being held in a prone position for three minutes until officers were able to get him handcuffed.

With five officers, two paramedics, and two private security guards, all present, and with the plaintiff's son (i.e., Timpa, who was exhibiting signs of extreme mental distress, perhaps aggravated by ingestion of cocaine), who was already handcuffed, being held face down to the ground by an officer (Dallas P.D. Officer Dillard), kneeling on the subject's back for fourteen minutes and seven seconds, Timpa eventually quit breathing. Upon moving him to a paramedic's gurney, it was finally noticed that the subject was deceased. Plaintiff and others sued Dillard and other officers at the scene in federal court for using excessive force, resulting in Timpa's death. The trial court found all the civil defendant's to be entitled to qualified immunity, and dismissed the lawsuit. The Fifth Circuit Court of Appeal reversed as to all but one of the officers who had left the scene early in the confrontation. As for the others, the Court (using body camera evidence) described the fourteen minute ordeal, minute by minute, finding that the officers should have noticed that Timpa was slowly suffocating. Other officers not directly involved had a duty to intervene but did not only fail to do so, instead mocked Timpa when it appeared that he had passed out. The court held that a jury could find that the use of a prone restraint with bodyweight force on an individual with three apparent risk factors—obesity, physical exhaustion, and excited delirium—constituted unreasonable deadly force. The court based this holding on the fact; (1) that the officers involved in this case were trained that the prolonged use of a prone restraint on subjects in a state of excited delirium can result in positional asphyxia death; (2) prominent guidance from the Department of Justice concerning risks, including sudden death, associated with prone handcuffing and positional asphyxia; and (3) expert witness testimony from the plaintiffs concerning the substantial risks of a prone restraint with weight on an obese and physically exhausted person in a state of excited delirium. (***Timpa v. Dillard*** (5th Cir. 2021) 20 F.4th 1020.)

Kneeling on a subject's back (that subject being high on drugs and physically resisting) for approximately four to five minute until he was no longer breathing raised an issue of excessive force that must be decided by a jury. Summary judgment in favor of the defendant officers on an allegation of excessive force was denied by the federal district court. Per the Court: "'Prevailing precedent in the Ninth Circuit is that law enforcement officers' use of body weight to restrain a "prone and handcuffed individual[ ] in an agitated state" can cause suffocation "under the weight of restraining officers," therefore, such conduct may be considered deadly force.'" ***Garlick v. Cnty. of Kern***, 167 F. Supp. 3d 1117, 1155 (E.D. Cal. 2016) . . . "[K]nown as 'compression asphyxia,' prone and handcuffed individuals in an agitated state have suffocated under the weight of restraining officers." ***Id.***'" (***Quinto-Collins v. City of Antioch*** (Dist.Ct. Feb. 25, 2024) __ F. Supp. 3rd __ [2024 U.S. Dist. LEXIS 31860]; quoting ***Drummond ex rel. Drummond v. City of Anaheim*** (9th Cir. 2003) 343 F.3rd 1052, 1056-1057.)

Gang Tackle:

"The **Fourth Amendment** requires police officers making an arrest to use only an amount of force that is objectively reasonable in light of the circumstances facing them. ***Tennessee v. Garner***, 471 U.S. 1, 7-8, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). Neither tackling nor punching a suspect to make an arrest necessarily constitutes excessive force. ***Graham v. Connor***, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) ('"Not every push or shove, even if it may seem unnecessary in the peace of the judge's chambers," . . . violates the Fourth Amendment') (quoting ***Johnson v. Glick***, 481 F.2d 1028, 1033 (2d Cir. 1973)). But 'even where some force is justified, the amount actually used may be excessive.' ***Santos v. Gates***, 287 F.3d 846, 853 (9th Cir. 2002). The question in all cases is whether the use of force was 'objectively reasonable in light of the facts and circumstances confronting' the arresting officers. *Graham*, 490 U.S. at 397 (internal quotation marks omitted)." (***Blankenhorn v. City of Orange*** (9th Cir. 2007) 485 F.3rd 463, 477; noting at p. 478 that "A rational jury could find that the use of a gang tackle by (the officers involved) under these circumstances was unreasonable.")

The ***Blankenhorn*** Court eventually held (at p. 481) that under the circumstances of this case, "this clear principle would have put a prudent officer on notice that gang-tackling without first attempting a less violent means of arresting a relatively calm trespass suspect—especially one who had been cooperative in the past and was at the moment not actively resisting arrest—was a violation of that person's **Fourth Amendment** rights.

Two plain-clothed detectives "gang-tackled" plaintiff under circumstances where, despite knowing that he was a suspect in a series of armed robberies, they knew he was not armed (having just left a courthouse where metal detectors were being used) and did not resist. As alleged by the plaintiff, he was tackled to the ground with enough force to fracture his hip. The injury resulted in "excruciating pain" and required two surgeries. Under these circumstances, the Court concluded that this use of force by the detectives was "substantial" and, therefore, "must be justified by the need for the specific level of force employed." The civil defendants having failed to justify the need for such force, and because a jury could reasonably determine that such force was excessive, summary judgment in the defendants' favor was not appropriate (upholding the trial court's decision on this issue). (***Andrews v. City of Henderson*** (9th Cir. 2022) 35 F.4th 710, 715-718.)

PIT ("*Pursuit Intervention Technique*") *Maneuver*:

The Ninth Circuit Court of Appeal affirmed the district court's summary judgment for law enforcement officers in an action alleging, in part, that defendants violated Remi Sabbe's **Fourth Amendment** rights by entering his private property without a warrant, using an armored vehicle to intentionally collide with Sabbe's pickup truck while he was inside, and shooting and killing him. Defendant officers responded to calls from Sabbe's neighbor that Sabbe was driving a pickup truck erratically on a rural field on his own property, that he was drunk and belligerent and may have fired a gun. An hour after thirty officers arrived at the property in marked police cars with their overhead lights on, defendants used an unmarked armored vehicle to twice execute a "Pursuit Intervention Technique" ("PIT") maneuver by intentionally colliding with Sabbe's truck in the field. The officers reportedly shot Sabbe after they thought they heard a gunshot and saw a rifle pointed at them. The Court first rejected plaintiff's argument that defendants violated Sabbe's **Fourth Amendment** rights by entering the property without a warrant. Sabbe's response to the warrantless entry was a superseding cause of his death and unforeseeable given the circumstances. Accordingly, the officers' decision not to obtain a warrant before entering the property—regardless of whether that decision constituted a **Fourth Amendment** violation—was not the proximate cause of Sabbe's death. The Court next held that a jury could find that defendants' second PIT maneuver constituted deadly and excessive force because (1) it created a substantial risk of serious bodily injury, (2) Sabbe did not pose an imminent threat to the officers or others at that point, and (3) less intrusive alternatives were available. Nevertheless, no clearly established law would have provided adequate notice to reasonable officers that their use of the armored vehicle to execute a low-speed PIT maneuver under these circumstances was

unconstitutional. The Court held that the district court correctly ruled that the officers were entitled to qualified immunity for shooting and killing Sabbe because the officers' split-second decision to open fire did not constitute excessive force. Finally, the panel rejected plaintiff's failure-to-train claim against the County, finding that the record did not give rise to a genuine dispute that the County's failure to establish guidelines for using the armored vehicle to execute PIT maneuvers rose to the level of deliberate indifference. Concurring in part and dissenting in part, Judge Berzon stated that, viewing the evidence in the light most favorable to Sabbe, he did not point a rifle or shoot at the officers, nor did the officers reasonably believe that he did. Defendants therefore were not entitled to summary judgment as to whether the fatal shooting of Sabbe was excessive force. Additionally, defendant officers' mode of entry onto Sabbe's property in an unmarked military vehicle was a proximate cause of his death. Although Judge Berzon concurred in the conclusion that a reasonable jury could find that the second PIT maneuver constituted excessive force, she would deny qualified immunity because a reasonable officer would have understood that the action was likely to cause death or serious injury. Finally, Judge Berzon agreed that the district court properly dismissed plaintiff's failure-to-train claim against the County. (***Sabbe v. Washington County Board of Supervisors*** (9th Cir. 2023) 84 F.4th 807.)

***Statutory Unlawful Restraint*: *Gov't. Code § 7286.5*; *The* "*Carotid Restraint*:"**

On *January 1, 2021*, **Calif. Gov't. Code § 7286.5** became effective via **AB 1196**, prohibiting a law enforcement agency from authorizing the use by its officers of either the "*carotid restraint*" (defined as "a vascular neck restraint or any similar restraint, hold, or other defensive tactic in which pressure is applied to the sides of a person's neck that involves a substantial risk of restricting blood flow and may render the person unconscious in order to subdue or control the person") or the "*choke hold*" (defined as "any defensive tactic or force option in which direct pressure is applied to a person's trachea or windpipe"). Effective **January 1, 2022**, via **AB 490**, the section was expanded with the addition of a new **subd. (a)(2)**, adding a prohibition on "techniques or transport methods that involve a substantial risk of positional asphyxia." "*Positional asphyxia*" is defined as "situating a person in a manner that compresses their airway and reduces the ability to sustain adequate breathing. This includes, without limitation, the use of any physical restraint that causes a person's respiratory airway to be compressed or impairs the person's breathing or respiratory capacity, including any action in which pressure or body weight is unreasonably applied against a restrained person's neck, torso, or back, or positioning a restrained person without reasonable monitoring for signs of asphyxia."

***Duty to Intervene* (*or Intercede*):**

Case Law:

"'(P)olice officers have a duty to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen.' ***Cunningham v. Gates***, 229 F.3rd 1271, 1289 (9th Cir. 2000) (quoting ***United States v. Koon***, 34 F.3rd 1416, 1447 n.25 (9th Cir. 1994), . . . If an officer fails to intercede, 'the constitutional right violated by the passive defendant is analytically the same as the right violated by the person who' performed the offending action. ***Koon***, 34 F.3rd at 1447 n. 25. For example, 'an officer who failed to intercede when his colleagues were depriving a victim of his Fourth Amendment right to be free from unreasonable force in the course of an arrest would, like his colleagues, be responsible for subjecting the victim to a deprivation of his Fourth Amendment rights.' ***Id.***; *see also* ***Robins v. Meecham***, 60 F.3rd 1436, 1442 (9th Cir. 1995) holding that 'a prison official can violate a prisoner's Eighth Amendment [cruel and unusual] rights by failing to intervene' when another official acts unconstitutionally. '[H]owever, officers can be held liable for failing to intercede only if they had an opportunity to intercede.' ***Cunningham***, 229 F.3rd at 1289; *see also* ***Ramirez v. Butte-Silver Bow Cnty.***, 298 F.3rd 1022, 1029-30 (9th Cir. 2002) (no violation of duty to intercede where there was no evidence that the defendant was aware of the constitutional violation as it occurred), *aff'd sub nom.* ***Groh v. Ramirez***, 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2nd 1068 (2004)." (***Tobias v. Arteaga*** (9th Cir. 2021) 996 F.3rd 571, 583-584; noting that two of a 13-year-old minor's interrogators failed to intercede when a third detective illegally threatened the minor with a more severe sentence if he did not confess, and were therefore prevented from claiming qualified immunity when sued.)

See also ***Timpa v. Dillard*** (5th Cir. 2021) 20 F.4th 1020, where the Fifth Circuit ruled that officers standing around, mocking the decedent as he passed out, had a duty to intercede when one officer kept his knee on the prone, handcuffed, decedent's back for fourteen minutes and seven seconds, resulting in the decedent's suffocation and death.

"Officers can be held liable for failing to intercede in situations where excessive force is claimed to be employed by other officers only if 'they had an opportunity to intercede.'" (Citation) Furthermore, officers can be held liable for excessive force on a theory of integral participation only if they participate 'in some meaningful way' in the specific actions that constituted the violation." (***Hughes v. Rodriguez*** (9th Cir. 2022) 31 F.4th 1211, at p. 1223; quoting ***Cunningham v. Gates*** (9th Cir. 2000) 229 F.3rd 1271, 1289-1290, finding a failure to intervene claim failed because there

was no realistic opportunity for officers to prevent a rapidly unfolding shooting; and ***Boyd v. Benton County*** (9th Cir. 2004) 374 F.3rd 773, 780.)

The Third Circuit Court of Appeal reviewed a lower court's denial of qualified immunity status for officers involved in the arrest of the deceased Thomas. Upon Thomas' arrest, he appeared to have recently ingested a large amount of crack cocaine for the purpose of hiding it from the arresting officers. Each officer present, two initially, and later five total, concluded that Thomas had likely ingested the drugs. Upon his arrest, but in violation of department policy, he was not taken to a hospital but booked into jail instead. Two hours after booking, Thomas passed out in his cell and was finally taken to the hospital. He died three days later without regaining consciousness. His Estate sued in federal court, claiming two separate **Fourteenth Amendment** causes of action: (1) Failure to Render Aid and Fourteenth Amendment and (2) Failure to Intervene. Thomas's Estate claimed a violation of the well-established constitutional right to medical care. To plead a violation of the right to medical care, an individual must allege (1) "a serious medical need" and (2) "acts or omissions by [individuals] that indicate a deliberate indifference to that need." In inadequate medical care cases, courts have specifically found deliberate indifference where objective evidence of a serious need for care was ignored and where "necessary medical treatment is delayed for non-medical reasons." The Court found the officers were *not* entitled to qualified immunity on the claim of failure to render medical care. The Appeals Court then conducted a separate analysis regarding the second claim that "failure to intervene" involved a constitutional violation. However, it also concluded that no previous appeals court has recognized any such right, nor has the Supreme Court. Though courts have recognized a right to have a government actor intervene when the underlying constitutional violation involves excessive force or sexual assault of a person in custody or detention, courts have since concluded that there is no precedent, let alone a clearly established right to intervention in other contexts. Because there is not a clearly established right to intervention to prevent a violation of the right to medical care, the Officers were entitled to qualified immunity as to Thomas's Estate's second claim failure to intervene. (***Thomas v. City of Harrisburg*** (3rd Cir. 2023) 88 F.4th 275.)

Statutory Law:

See also **Gov't. Code § 7286** (**SB 230**): By *January 2, 2021*, all California law enforcement agencies are required to have established a policy that provides a minimum standard on the use of force and to make the policy accessible to the public which is to include a requirement that an officer intercede when seeing another officer use excessive force.

Gov't. Code § 7286(a)(4) (effective *Jan. 1, 2023*): "*Intercede*" is defined as "includ(ing), but . . . not limited to, physically stopping the excessive use of force, recording the excessive force, if equipped with a body-worn camera, and documenting efforts to intervene, efforts to deescalate the offending officer's excessive use of force, and confronting the offending officer about the excessive force during the use of force and, if the officer continues, reporting to dispatch or the watch commander on duty and stating the offending officer's name, unit, location, time, and situation, in order to establish a duty for that officer to intervene."

***Provocation Rule*:**

The Ninth Circuit Court of Appeal invented a so-called "*provocation rule*," holding that even when it is held that reasonable force is used by law enforcement, the officers using that force may still be civilly liable if they provoked the need to use force by violating some other constitutional principle, at least when that earlier violation was done intentionally or recklessly. (See ***Billington v. Smith*** (9th Cir. 2001) 292 F.3rd 1177.)

The provocation rule permitted a civil claim for excessive force under the **Fourth Amendment** where an officer intentionally or recklessly provoked a violent confrontation, so long as the provocation is an independent **Fourth Amendment** violation. (See ***Mendez v. County of Los Angeles*** (9th Cir. 2016) 815 F.3rd 1178; certiorari granted, reversed and remanded.)

The U.S. Supreme Court overruled the Ninth Circuit on this issue in ***County of Los Angeles v. Mendez*** (2017) 581 U.S. 420, 430-432 [137 S.Ct. 1539; 198 L.Ed.2nd 52], finding that there is no basis for such a rule, but rather that a court must determine whether a warrantless entry, conceded to have been in violation of the **Fourth Amendment**, was the "*proximate cause*" of a plaintiff's injuries.

On remand, the Ninth Circuit Court of Appeals affirmed in part and reversed in part the district court's judgment in an action under **42 U.S.C. § 1983** and state law because police officers violated the **Fourth Amendment** by entering a home without a warrant, consent, or exigent circumstances while searching for a parole-at-large. The unlawful entry itself, as well as the failure to comply with the "knock and announce" rules, were held to be separate and distinct proximate causes of the homeowners being shot by the officers and seriously injured. The homeowner's action of moving a BB gun so that it was pointed in the officers' direction was held not to be a superseding or intervening cause. The officers were also held to be negligent, under California law, as their conduct in entering the residence on high alert, with guns drawn, and without announcing their presence, was reckless. They were *not* entitled

to qualified immunity for their failure to knock and announce under California law. Lastly, immunity under **California Government Code §§ 821.6 and 820.2** did not apply. (***Mendez v. County of Los Angeles*** (9th Cir. 2018) 897 F.3rd 1067, 1074-1084.)

> In so-holding, the Court provided a discussion on the issue of "*proximate cause*." Specifically: "We have held that 'the touchstone of proximate cause in a (**42 U.S.C.) § 1983** action is foreseeability.' ***Phillips v. Hust***, 477 F.3rd 1070, 1077 (9th Cir. 2007), vacated on other grounds, 555 U.S. 1150, 129 S.Ct. 1036, 173 L.Ed.2nd 466 (2009). The Supreme Court has observed that '[p]roximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct.' ***Paroline v. United States***, 572 U.S. 434, 134 S.Ct. 1710, 1719, 188 L.Ed.2nd 714 (2014). 'A requirement of proximate cause thus serves, inter alia, to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity.'" (***Id.***, at p. 1076.)

Even prior to ***Mendez***, it had been noted by the U.S. Supreme Court that the provocation rule has been "*sharply questioned*" outside the Ninth Circuit. (***County of Los Angeles v. Mendez*** (2017) 581 U.S. 420, 427 [137 S.Ct. 1539; 198 L.Ed.2nd 52]; citing ***City and County of San Francisco v. Sheehan*** (2015) 575 U.S. 600, 615, fn. 4 [135 S.Ct. 1765; 191 L.Ed.2nd 856, 869]; which in turn cites ***Livermore v. Lubelan*** (6th Cir. 2007) 476 F.3rd 397, 406-407; and ***Hector v. Watt*** (3rd Cir. 2001) 235 F.3rd 154, 160: "[I]f the officers' use of force was reasonable given the plaintiff's acts, then despite the illegal entry, the plaintiff's own conduct would be an intervening cause.")

See also ***City of Tahlequah v. Bond*** (Oct. 18, 2021) __ U.S. __ [142 S.Ct. 9; 211 L.Ed.2nd 170], where the U.S. Supreme Court rejected the argument advanced by the Ninth Circuit that by stepping towards the decedent and cornering him in the garage, the officers "recklessly" caused him to react when the decedent grabbed the hammer and took a fighting stance. The Court reversed the Ninth Circuit's ruling in this case that the officers were not entitled to qualified immunity where the officers shot and killed the decedent.

***Intervening* (or *Superseding*) *Circumstances*:**

The U.S. Supreme Court in ***County of Los Angeles v. Mendez*** (2017) 581 U.S. 420, at p. 427 [137 S.Ct. 1539; 198 L.Ed.2nd 52]; cites ***City and County of San Francisco v. Sheehan*** (2015) 575 U.S. 600, [135 S.Ct. 1765; 191 L.Ed.2nd 856, 869], where at pg. 615, footnote 4, the Court states: "[I]f the officers' use of force was reasonable given the plaintiff's acts, then despite the (officers') illegal entry, the plaintiff's own conduct would be an intervening cause." (Further citing

Livermore v. Lubelan (6th Cir. 2007) 476 F.3rd 397, 406-407; and ***Hector v. Watt*** (3rd Cir. 2001) 235 F.3rd 154, 160.)

In discussing the fact that the plaintiff pointed what appeared to be a firearm (but turned out to be a BB gun) at officers who were illegally (i.e., without a warrant, consent, or exigent circumstances) entering the plaintiff's residence, causing the officers to shoot him (and his wife), the Ninth Circuit Court of Appeal held that plaintiff's action of pointing what appeared to be a gun at the officers was *not* a superseding or intervening cause sufficient to negate the officers' potential civil liability for the injuries caused. (**Mendez *v. County of Los Angeles*** (9th Cir. 2018) 897 F.3rd 1067, 1081-0183.)

> "To be sure, officers are free from liability if they can show that the behavior of a shooting victim was a superseding cause of the injury. A superseding or intervening cause involves a shifting of responsibility away from a party who would otherwise have been responsible for the harm that occurs. (Citing *W. Page Keeton et al., Prosser and Keeton on Torts* § 44 (5th ed. 1984) If a resident sees that an officer has entered and intentionally tries to harm the officer, who in turn draws his weapon and shoots, the resident's intentional action would be a superseding cause of the injury. See, e.g., ***Bodine v. Warwick***, 72 F.3rd 393, 400 (3rd Cir. 1995) (noting that if a suspect were to shoot at persons known to be officers, the suspect's act would be a superseding cause absolving the officers of liability for harm caused as a result of an unlawful entry)." (***Id***., at p. 1081.)
>
> In ***Mendez***, the Ninth Circuit ultimately sustained the district court's finding that plaintiff Angel Mendez's act of pointing the BB gun at the officers was not intentional; that the act of picking up the BB gun to be merely "normal efforts" enabling him to sit up on the futon. As such, per the Court, plaintiff's actions was *not* a superseding act relieving the officers of their liability. (***Id***., at p. 1082**.**)

Violation of "Familial Rights**:**

While plaintiff asserted a claim for "civil rights violations," which he defined as "a constitutionally protected liberty interest under the **Fourteenth Amendment** in the companionship and society of the parent/child relationship without governmental interference," stemming from his arrest which plaintiff argued was illegal and accomplished through unnecessary force, the Court held that the defendant had a potential cause of action and that the officers were not entitled to qualified immunity in that the right is clearly established. (***Wheatcroft v. City of Glendale*** (U.S. Dist. AZ, 2022) 2022 U.S. Dist. LEXIS 57006; holding that a jury could conclude that the Officers had a "purpose to harm" plaintiff outside of legitimate law enforcement objectives.

The decedent being the plaintiffs' adult brother (a "non-cohabitating sibling") does *not* give the plaintiffs a familial right sufficient to bring a lawsuit seeking damages, having failed to show that the "objective characteristics" of the relationship in question were "sufficiently personal or private to warrant constitutional protection." (***Mann v. City of Sacramento*** (9th Cir. 2022) 2022 U.S.App. LEXIS 16453, unpublished.)

A child of a decedent has a constitutionally protected liberty interest under the **Fourteenth Amendment** due process clause in the "companionship and society" of her father or mother. "'Official conduct that shocks the conscience' in depriving [a child] of that interest is cognizable as a violation of due process." (***Hayes v. County of San Diego*** (9th Cir. 2013) 736 F.3rd 1223, 1229-1231; quoting ***Wilkinson v. Torres*** (9th Cir. 2010) 610 F.3rd 546, 544; ***A. D. v. State of California Highway Patrol*** (9th Cir. 2013) 712 F.3rd 446, 453.)

> In ***Hayes***, it was discussed how where actual deliberation by the officer using deadly force is practical, an officer's "deliberate indifference" may suffice to "shock the conscience." Where, on the other hand, the officer must make a "snap judgment" due to a rapidly escalating situation, then his conduct may be found to shock the conscience only if the officer acts with a purpose to harm unrelated to legitimate law enforcement objectives. (***Ibid***; where decedent came at the officer from about 8 feet away with a knife in hand, giving the officer only 4 seconds to react, was determined to be a "snap judgment" situation.)
>
> "*Shocking the conscience*," by the way has been defined elsewhere as actions that are those taken with (1) "*deliberate indifference*" or (2) a "*purpose to harm . . . unrelated to legitimate law enforcement objectives*." (See ***A. D. v. State of California Highway Patrol*** (9th Cir. 2013) 712 F.3rd 446, 453.)

In a **42 U.S.C. § 1983** action, judgment for decedent's father on **Fourth Amendment** excessive use of force claim was affirmed because the jury found the officer retreated from decedent after firing the first shot and that decedent did not have scissors as he approached the officer before the second shot. The district court was correct in denying qualified immunity as a matter of law because the law was clearly established at the time of the shooting that an officer could not constitutionally kill a person who did not pose an immediate threat. The law was also clearly established at the time of the incident that firing a second shot at a person who had previously been aggressive, but posed no threat to the officer at the time of the second shot, would violate the victim's rights. (***Lam v. City of Los Banos*** (9th Cir. 2020) 976 F.3rd 986.)

Officers who entered a decedent's house and, within seconds, were confronted by an uncooperative and angry male half of a reported domestic violent situation, and who was out of control and who charged the officers despite the officers'

commands to go to the floor, did not violate the **Fourteenth Amendment** due process clause when they shot and killed the decedent. Per the Court: "Liability turns on 'whether the circumstances are such that 'actual deliberation is practical.' ***Moreland v. Las Vegas Metro. Police Dep't***, 159 F.3d 365, 372 (9th Cir. 1998) (quoting ***County of Sacramento v. Lewis***, 523 U.S. 833, 851, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)). '[W]here a law enforcement officer makes a snap judgment because of an escalating situation, his conduct may only be found to shock the conscience if he acts with a purpose to harm unrelated to legitimate law enforcement objectives.'" (***Waid v. County of Lyon*** (9th Cir. 2023) 87 F.4th 383, 392.)

***Duty to Warn*:**

The Ninth Circuit Court of Appeal has held a number of times that where it is possible to do so, the officer must warn a person before applying force, at least when the force is likely to cause injury. (***Deorle v. Rutherford*** (9th Cir. 2001) 272 F.3rd 1272, 1283-1284, beanbag; ***Bryan v. MacPherson*** (9th Cir. 2010) 630 F.3rd 805; Taser; ***Hayes v. County of San Diego*** (9th Cir. 2013) 736 F.3rd 1223, 1234-1235, firearm.)

> *See also* ***Nelson v. City of Davis*** *(9th Cir. 2012) 685 F.3rd 867, 882;* and ***Forrester v. City of San Diego*** (9th Cir. 1994) 25 F.3rd 804.)
>
> See also ***Tennessee v. Garner*** (1985) 471 U.S. 1, 11-12 [105 S.Ct. 1694; 85 L.Ed.2nd 1]; "(I)f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, *and if, where feasible, some warning has been given*." (Italics added)

However, where an officer arrives late at an ongoing police action and witnesses shots being fired by one of several individuals in a house surrounded by other officers, and that officer then shoots and kills an armed occupant of the house without first giving a warning, the officer did not violate clearly established law based on his failure to provide a verbal warning before utilizing deadly force: "No settled **Fourth Amendment** principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one [the officer] confronted here." (***White v. Pauly*** (2017) 580 U.S. 73 [137 S.Ct. 548; 196 L.Ed.2nd 463].)

> In a case where the civil defendant (an off-duty correctional officer) shot the plaintiff, who had been threatening a crowd of people with a firearm, shooting into the air and in the general direction of the crowd, the court noted that even if the officer did not identify himself as a police officer or warn the plaintiff before firing, he was not required to do so. Officers are

> only required to warn "where feasible," and not under all circumstances. (***Lopez v. Sheriff of Cook County*** (7th Cir. 2021) 993 F.3rd 981.)

"(A)n important consideration in evaluating the City's interest in the use of force is 'whether officers gave a warning before employing the force.'" (***Lowry v. City of San Diego*** (9th 2017) 858 F.3rd 1248, 1259; quoting ***Glenn v. Washington County*** (9th Cir. 2011) 673 F.3rd 864, 876.)

> In ***Lowry***, an officer did in fact give a warning that he was about to deploy a service dog although plaintiff, who was asleep inside a darkened commercial business, was asleep and did not hear it.

The officers' failure to warn a subject carrying a firearm before shooting him, when the subject, as he approached the officers, was pointing it at the ground, even though the officers had already seen the subject hit his daughter with it moments earlier, was held to be unreasonable, requiring a reversal of the trial court's summary judgment motion granted in favor of the defendant officers. (***Hensley v. Price*** (4th Cir. 2017) 876 F.3rd 573.)

The failure to warn a thirteen-year-old boy who was observed carrying what appeared to be an AK-47 (but turned out to be a toy with the bright orange tip removed), and who failed to drop the weapon when ordered but who did not act aggressively toward the officer or ever point the weapon at the officer, was a factor in denying the officer qualified immunity in a resulting civil suit for having shot and killed the victim. (***Estate of Lopez v. Gelhaus*** (9th Cir. 2017) 871 F.3rd 998, 1011.)

An officer's failure to warn that lethal force was about to be used absent compliance with the officer's orders, a "seemly obvious principle," held to be significant factor in whether the officer's use of lethal force (i.e., shooting him) was reasonable under the circumstances. (***Nehad v. Browder*** (9th Cir. 2019) 929 F.3rd 1125, 1137-1138.)

> The Court further noted that whether or not the officer ordered the deceased *to halt* (***Id***, at p. 1137.) as he was slowly approaching the officer, as well as the officer's failure *to identify himself* (***Id.***, at p. 1138.), were factors for a jury to consider in determining the reasonableness of the eventual use of lethal force.

An officer's failure to warn a subject before shooting him may be a factor for a civil jury to consider on the issue of the officer's state-based negligence in a civil action. (***Tabares v. City of Huntington Beach*** (9th Cir. 2021) 988 F.3rd 1119.)

In a different context (i.e., a government agency's "duty to warn" a potential victim), it was held that the trial court erred by denying the Department of Corrections and Rehabilitation's motions for nonsuit and judgment

notwithstanding the verdict after a jury found the Department was partially at fault for a parolee's crimes (raping and murdering the victim) based upon the Department's failure to warn the victim of the parolee's dangerous propensities. The Court ruled that the evidence was insufficient to establish that a "*special relationship*" existed between the parole agents and the victim. Absent evidence that either agent who had been assigned to supervise the parolee had made an express or implied promise of protection causing detrimental reliance by the victim, who was the parolee's grandmother, in opening her home to the parolee, the Department had no civil liability. The evidence also did not demonstrate that either agent had created a foreseeable peril that was not readily discoverable by the victim because neither agent was shown to have been aware that the parolee posed a particularized threat of harm to the victim. (***Russell v. Department of Corrections and Rehabilitation*** (2021) 72 Cal.App.5th 916.)

Failing to warn the plaintiff before gang-tackling him where the officers knew he was not armed (having just exited a courthouse where metal detectors were in use) and he was not resisting is a factor for the Court to consider in determining whether the force used in taking him into custody was reasonable. (***Andrews v. City of Henderson*** (9th Cir. 2022) 35 F.4th 710, 717.)

"We have also repeatedly stated that an officer must give warning before using deadly force "whenever practicable." ***(Smith v Agdeppa*** (9th Cir. 2023) 56 F.4th 1193, 1201.)

> An officer who shot and killed a resisting suspect was held not to be entitled to qualified immunity despite the fact that the suspect refused to submit to being handcuffed, and who was allegedly pummeling his partner at the time. The only warning given (which was also contested) was to "stop," or "words to the effect that Dorsey (the deceased) needed to stop*."* (pg. 1204.) "It (was) uncontested that Dorsey posed some danger to the officers' safety by actively resisting arrest, but our case law required (Officer) Agdeppa to give a deadly force warning if doing so was practicable." (Pg. 1203.) But per the Court: *"*Because the officers had tased Dorsey at least five times, a command to 'stop' would have done nothing to warn Dorsey that Agdeppa was preparing to ramp up to use deadly force." (Pg. 1204.)
>
> However, see the lengthy dissent (at pgs. 1205-1220) where it was argued that the deceased had been warned a number of times to cease resisting while conceding that he had never actually been warned that he would be shot. It was also noted that the deceased was nearly twice the size of either of the officers (6'1" tall and weighing 280 pounds, vs. approximately 145 pounds each and 5'1" and 5'5", respectively.) and that the officers were losing a fight which ultimately resulted in serious injuries to the officers, while also noting that when deadly force was finally used, "it was objectively reasonable to believe that there was an

imminent threat to the officers of death or serious bodily injury." (Pg. 1214.) Ultimately, the dissent argues that it was not "clearly established that the officers in this extreme situation were required to give a further warning before using deadly force." (Pgs. 1215, 1220.)

See "*On the Issue of a Government Agency's* '*Duty to Warn*' *a Potential Victim and* '*Special Relationships*,'" under "*Procedural Rules*" (Chapter 2), above.

***"Suicide by Cop" Situations*:**

No reasonable trier of fact could find that police officers involved in a lethal shooting were negligent or had acted unreasonably, as the officers patiently waited approximately 40 minutes before resorting to less-than-lethal weapons, negotiations with the decedent had been futile, he was armed with a deadly weapon—a knife with a long blade—and was behaving erratically, the officers reasonably used less-lethal weapons in an attempt to safely subdue him, and despite stabbing himself three times in the abdomen and slashing his throat with the knife, the decedent was unable to kill himself and thus provoked the police into killing him. (***Villalobos v. City of Santa Maria*** (2022) 85 Cal.App.5th 383.)

***Applicable Statutes*:**

Pen. Code § 147: *Inhumanity to Prisoners*:

"Every officer who is guilty of willful inhumanity or oppression toward any prisoner under his care or in his custody, is punishable by fine not exceeding four thousand dollars ($4,000), and by removal from office."

An officer who uses excessive force is subject to prosecution for a felony (**Pen. Code § 149**) and/or, if the victim is a prisoner and the officer is guilty of "willful inhumanity or oppression towards (the) prisoner," a $4,000 fine and removal from office (**Pen. Code § 147**), in addition to any other applicable assault or battery violations. (See ***People v. Perry*** (2019) 36 Cal.App.5th 444.)

Pen. Code § 149: *Assaults by Officers Under Color of Authority*:

Every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in a county jail not exceeding one year, or pursuant to **subdivision (h)** of Section 1170, or by both that fine and imprisonment.

An officer who uses excessive force is subject to prosecution for a felony (**Pen. Code § 149**) and/or, if the victim is a prisoner and the officer is guilty of "willful inhumanity or oppression towards (the) prisoner," a

$4,000 fine and removal from office (**Pen. Code § 147**), in addition to any other applicable assault or battery violations. (See ***People v. Perry*** (2019) 36 Cal.App.5th 444.)

Pen. Code § 196: *Homicide*: *Use of Justifiable Deadly Force by Police Officers*:

Homicide is *justifiable* when committed by *peace officers* and those acting by their command in their aid and assistance, under either of the following circumstances:

(a) In obedience to any judgment of a competent court.

(b) When the homicide results from a peace officer's use of force that is in compliance with **Section 835a**. (See below)

Pen. Code § 197: *Justifiable Homicide*: Homicide is also *justifiable* when committed by *any person* in any of the following situations:

1. When resisting any attempt to *murder*, commit a *felony*, or to do *great bodily injury* upon any person; *or*

2. When committed in *defense of habitation*, *property* or *person*, at least in cases of violent felonies; *or*

3. When committed in *defense of person*, or of a *wife* or *husband*, *parent*, *child*, *master*, *mistress*, or *servant* of such person, at least in cases of violent felonies; *or*

4. When necessarily committed in attempting to *apprehend any person* for any *felony*, or in *suppressing any riot*, or in *keeping* and *preserving the peace*.

Pen. Code § 692: *Lawful Resistance to the Commission of a Public Offense* may be made:

1. By the party about to be injured;
2. By other parties.

See also **CALCRIM, # 3470**, "*Self-Defense and Defense of Another*."

Rule:

A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself, and if reasonably necessary, to pursue an assailant until the danger of (death/bodily

injury/insert crime) has passed. This is so even if safety could have been achieved by retreating. (See below)

Case law:

A defendant has a right of self-defense if he "reasonably believed that he was in imminent danger of suffering bodily injury" through the application of unreasonable force applied by a person attempting to make a citizen's arrest. (***People v. Adams*** (2009) 176 Cal.App.4th 946.)

"Self-defense" does not justify an assault absent a "an immediate threat of unlawful force, and the need for the action to be commensurate with the threat, with no more force used than reasonably necessary to meet it." Harsh, insulting, nor demeaning words alone are insufficient to trigger the right to use self-defense in return. (***United States v. Urena*** (9th Cir. 2011) 659 F.3rd 903, 906-907; being called a "*bitch*" hours earlier did not justify a preemptive strike by defendant.)

Belief in future harm is not sufficient, no matter how great or likely the harm is believed to be. For the definition of "imminent," the jury instruction refers to the definition in ***People v. Arias*** (1989) 215 Cal.App.3d 1178, 1187 (overruled on another ground *in* ***People v. Humphrey*** (1996) 13 Cal.4th 1073, 1089), meaning that the danger is "immediate and present" and "must be instantly dealt with."

After defendant shot and killed his father and three other men who he believed were plotting to kill him, he was charged with multiple counts of special circumstance murder. He pleaded not guilty by reason of insanity and claimed that his delusional state caused him to believe that he was acting in self-defense. The Court held that an instruction on self-defense in the sanity phase must inform the jury that a defendant's delusion caused *him* to believe that he was in danger of great bodily injury or death that required the use of deadly force and that he would be legally justified in doing so. The trial court erred when it instructed the jury that defendant's beliefs also had to be reasonable; an "*objective*" standard. (***People v. Leeds*** (2015) 240 Cal.App.4th 822, 829-833.)

A trial court abused its discretion and deprived defendant, who was homeless, of his constitutional right to present a complete defense by excluding expert testimony concerning chronic homelessness during defendant's first degree murder trial, including a homeless

man's "heightened perception" of a deadly threat. The expert's proposed opinion was relevant to defendant's actual belief, as well as the reasonableness of his belief, in the need to use lethal force to defendant himself. The expert's opinion was relevant to defendant's credibility. Because the subject of the expert opinion was sufficiently beyond common experience that it would have assisted the jury, and a reasonable probability existed that if presented with the expert's testimony on chronic homelessness the jury would have found defendant guilty of a lesser included offense, the error was prejudicial. (***People v. Sotelo-Urena*** (2016) 4 Cal.App.5th 732.)

To justify an act of self-defense for [an assault charge], the defendant must have an honest and reasonable belief that bodily injury is about to be inflicted on him. (***People v. Minifie*** (1996) 13 Cal.4th 1055, 1064; "[A]ny right of self-defense is limited to the use of such force as is reasonable under the circumstances.' " (***Id.*** at p. 1065.)

> The reasonableness requirement "is determined from the point of view of a reasonable person in the defendant's position." (***Ibid***.)

Displays of deadly force are an unreasonable means of defending property where there is no home invasion or threat of death or serious bodily harm. Whether or not defendant's neighbors complied with civil rules and statutes did not entitle defendant to brandish a shotgun to protect against the removal of a fence. (***People v. Chen*** (2020) 50 Cal.App.5th 952, 958-960.)

In a murder prosecution, evidence of the victim's propensity for violent aggression should have been admitted under **Evid. Code § 1103(a)(1)**, because it was relevant to defendant's claim of self-defense. It did not matter whether defendant knew of the victim's arrests for domestic violence. The error in excluding the evidence in the close case was not harmless. Defendant was the only eyewitness and testified that he shot after the victim aggressively racked and aimed a semiautomatic at him. (***People v. DelRio*** (2020) 54 Cal.App.5th 47.)

Defendant, who was 73 years of age and charged with shooting the victim, was entitled to have the jury consider his spinal problems and fear of paralysis in determining whether his belief in the need for self-defense was objectively reasonable. Those circumstances bore on what a reasonable person in a similar situation, with

similar knowledge, would believe. (***People v. Horn*** (2021) 63 Cal.App.5th 672.)

In a case where it was held that there was sufficient evidence of second degree murder to sustain defendant's conviction, the court noted that no error occurred in instructing on self-defense without adding "imminent danger of robbery" as a basis for self-defense since self-defense requires danger of death or great bodily injury—not danger of being robbed. It was also held that there was no error in not modifying the "imperfect self-defense" instruction to apply when a defendant's belief he needed to use deadly force was reasonable but the sort of force used was excessive and more than necessary to repel the attack, as no authority for distinguishing between kinds of deadly force. Also, there was no error in the trial court refusing an instruction on voluntary intoxication as the witness doctor talked about effects of methamphetamine and the lab results showed methamphetamine in defendant's blood but neither defendant nor the doctor discussed how effects of methamphetamine would have impacted the defendant. One justice wrote a concurring opinion explaining why on some other record he might not rule out the possibility that a threatened robbery could be sufficiently serious to qualify for a self-defense instruction. (***People v. Morales*** (2021) 69 Cal.App.5th 978.)

"Under the doctrine of self-defense, 'a homicide is justifiable and noncriminal where the actor possessed both an actual and reasonable belief in the need to defend.'" (Quoting ***People v. Stitely*** (2005) 35 Cal.4th 514, 551.) Because the defendant testified that he killed the victim in self-defense, the prosecution was required to prove he did not act in self-defense or imperfect self-defense. (***People v. Morales*** (2021) 69 Cal.App.5th 978, 988; citing ***People v. Frye*** (1992) 7 Cal.App.4th 1148, 1158–1159; prosecution required to disprove justifications or excuses.)

Defendant was charged with first degree murder. It was further alleged that defendant had personally used and discharged a firearm causing death. Defendant pleaded not guilty by reason of insanity and the case proceeded to trial. The jury found defendant guilty of first degree murder. The second jury found that defendant was legally sane at the time of the shooting. On appeal, defendant argued the trial court erred in refusing to instruct on imperfect self-defense because the evidence showed his fear of the victim was not based purely on delusion. The Court of Appeal, Third Dist., affirmed the conviction, agreeing with defendant that the trial court erred in refusing to instruct on imperfect self-defense because defendant's account of the shooting was not entirely delusional.

However, the Court of Appeal held that the error was harmless under ***Chapman*** v. ***California*** (1967) 386 U.S. 18 [17 L.Ed.2nd 705; 87 S.Ct. 824]. The California Supreme Court reversed, holding that when the record contains substantial evidence of imperfect self-defense, the trial court's failure to instruct on that theory amounts to constitutional error and is thus subject to review under the federal ***Chapman*** standard. The Court further held that the court of appeal's harmless error analysis did not comport with the standards for evaluating prejudice required under the ***Chapman*** "beyond a reasonable doubt standard." Without an instruction on imperfect self-defense, the jurors were never informed that if they harbored a reasonable doubt whether defendant was operating under an actual but unreasonable belief in the need for self-defense, they would have had to acquit him of murder for lack of malice. The court of appeal's harmless error analysis demonstrated that it misapprehended the standard that ***Chapman*** requires. (***People v. Schuller*** (2023) 15 Cal.5th 237.)

Pen. Code § 693: *Party About to be Injured*; circumstances in which force is authorized: By the party, in what cases and to what extent:

1. To prevent an offense against his person, or his family, or some member thereof.

2. To prevent an illegal attempt by force to take or injure property in his lawful possession.

In a prosecution under **Pen. Code § 245**, for assault with a deadly weapon (i.e., a knife), the video evidence supported the jury's rejection of a self-defense claim for want of an objective reasonableness because it showed that the victim did not advance on defendant or otherwise act in a physically threatening manner but rather was looking away from defendant when he was stabbed. (***People v. Brady*** (2018) 22 Cal.App.5th 1008, 1014-1019.)

See also **CALCRIM, # 3470**, "*Self-Defense and Defense of Another*."

Pen. Code § 694: *Other Parties*; circumstances in which force is authorized: Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense.

See also **CALCRIM, # 3470**, "*Self-Defense and Defense of Another*."

Pen. Code § 834a: *Resisting Arrest*: "If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a

peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest."

> Every citizen has duty to submit to lawful arrest, and when an arrest is lawful, the offense of resisting officer can be committed without employing actual violence or direct force. (***In re Bacon*** (1966) 240 Cal. App.2nd 34, 51-55; holding that by going limp and relaxing their extremities, defendants' acts did in fact constitute "resistance, delay or obstruction" within the meaning of **P.C. § 148**.)
>
> It is illegal to resist any arrest or detention by a peace officer, even if it is determined to be an *illegal* (i.e., without probable cause) arrest or detention. (***Evans v. City of Bakersfield*** (1994) 22 Cal.App.4th 321; ***In re Richard G.*** (2009) 173 Cal.App.4th 1252, 1260-1263: ***People v. Chavez*** (2020) 54 Cal.App.5th 477.)
>
> > The person who is illegally arrested or detained has a civil remedy against the offending officer(s). (See **42 U.S.C. § 1983**, and California's "**Bane Act**" [**Civil Code § 52.1**].)
> >
> > See ***People v. Southard*** (2021) 62 Cal.App.5th 424, 434, fn. 8; also citing ***People v. Cox*** (2008) 168 Cal.App.4th 702.
> >
> > In ***People v. Southard***, *supra*, the Court held that the rule of ***In re Richard G.*** and ***People v. Cox*** pertain to a "motion to suppress" (pursuant to **P.C. § 1538.5**) only. At trial, the fact of a defendant's commission of an illegal act (such as battery on the arresting officer) subsequent to, or during an officer's illegal act (e.g., use of excessive force or an illegal arrest) is *not* excused by the fact that the officer had acted illegally. (An exception to *this* rule is when the defendant is reasonably acting in self-defense.) Neither case supports the argument that the same rule applies to trial, where the prosecution is obligated to prove beyond a reasonable doubt, each element of a charged offense, and the relevant jury instructions that are to be given to a jury in determining guilt or innocence.
> >
> > Note that the law relevant to the issue of what needs to be proved in relation to an officer acting in the performance of his duties differs depending upon the circumstances:
> >
> > > Motion to Suppress, per **P.C. § 1538.5**: See ***People v. Cox*** (2008) 168 Cal.App.4th 702, and ***In re Richard G.*** (2009) 173 Cal.App.4th 1252, 1260-1263.
> > >
> > > Civil case: See ***Evans v. City of Bakersfield*** (1994) 22 Cal.App.4th 321.

Criminal Trial: ***People v. Southard*** (2021) 62 Cal.App.5th 424.

Also, an excessive use of force used by the officer *after* the arrest does not itself negate the "in the performance of his (or her) duties" element of **P.C. §§ 148(a)** (or **69**). (**People *v.* Williams** (2018) 26 Cal.App.5th 71.)

The use of deadly force is unreasonable if used after an arrestee has submitted and is no longer resisting. (***Strand v. Minchuk*** (7th Cir. IN 2018) 908 F.3rd 300.)

Where police officers act unlawfully (e.g., using excessive force, or arresting or detaining a suspect without sufficient probable cause or reasonable suspicion, respectively), it has been held that the officers are *not* acting in the performance of their duties (an element of the resisting arrest statute; **P.C. § 148(a)(1)**; see CALCRIM Nos. 2656 & 2670.)), and that as such, a suspect may use reasonable force in defending himself from the use of unreasonable force or in resisting the detention or arrest. (***People v. Mackreth*** (2020) 58 Cal.App.5th 317, 338-339.)

See also ***Lemos v. County of Sonoma*** (9th Cir. 2021) 5 F.3rd 979, at p. 985; "(I)n California, the lawfulness of an officer's conduct is an essential element of the offense of resisting, delaying, or obstructing a peace officer. ***In re Muhammed C.***, 95 Cal.App.4th 1325, 1329, . . . (2002). For the **§ 148(a)(1)** conviction to be valid, a criminal defendant must have 'resist[ed], delay[ed], or obstruct[ed]' a police officer in the *lawful* exercise of his duties. ***Id.***"

Note: A motion for rehearing was granted on January 21, 2022, in ***Lemos***, and is scheduled to be reheard by an en banc panel of the Court.

Pen. Code § 835: *Restraint of Detained or Arrested Person*: "The person arrested may be subjected to such restraint as is reasonable for his arrest and detention."

Pen. Code § 835a: *Reasonable Force to Effect Arrest; Resistance*:

(a) The Legislature finds and declares all of the following:

(1) That the authority to use physical force, conferred on peace officers by this section, is a serious responsibility that shall be exercised judiciously and with respect for human rights and dignity and for the sanctity of every human life. The Legislature further

finds and declares that every person has a right to be free from excessive use of force by officers acting under color of law.

(2) As set forth below, it is the intent of the Legislature that peace officers use *deadly force only when necessary in defense of human life*. In determining whether deadly force is necessary, officers shall evaluate each situation in light of the particular circumstances of each case, and shall use other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer.

> *Note*: This, in effect, raises the standard for when the use of deadly force is lawful from one of "*reasonableness*" (see ***Graham v. Connor*** (1989) 490 U.S. 386, 396-397 [109 S.Ct. 1865; 104 L.Ed.2nd 443].) to "*when necessary in defense of human life*;" arguably, a higher threshold.

(3) That the decision by a peace officer to use force shall be evaluated carefully and thoroughly, in a manner that reflects the gravity of that authority and the serious consequences of the use of force by peace officers, in order to ensure that officers use force consistent with law and agency policies.

(4) That the decision by a peace officer to use force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight, and that the totality of the circumstances shall account for occasions when officers may be forced to make quick judgments about using force.

(5) That individuals with physical, mental health, developmental, or intellectual disabilities are significantly more likely to experience greater levels of physical force during police interactions, as their disability may affect their ability to understand or comply with commands from peace officers. It is estimated that individuals with disabilities are involved in between one-third and one-half of all fatal encounters with law enforcement.

(b) Any peace officer who *has reasonable cause* to believe that the person to be arrested has committed a public offense *may use objectively reasonable force to effect the arrest, to prevent escape, or to overcome resistance*. (Italics added.)

(c)

(1) Notwithstanding **subdivision (b)**, a peace officer is justified in using *deadly force* upon another person only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary for either of the following reasons:

(A) To defend against an imminent threat of death or serious bodily injury to the officer or to another person.

(B) To apprehend *a fleeing person* for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended. Where feasible, a peace officer shall, prior to the use of force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts.

(2) A peace officer shall not use deadly force against a person based on the danger that person poses to themselves, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person.

(d) A peace officer who makes or attempts to make an arrest need not retreat or desist from their efforts by reason of the resistance or threatened resistance of the person being arrested. A peace officer shall not be deemed an aggressor or lose the right to self-defense by the use of objectively reasonable force in compliance with **subdivisions (b)** and **(c)** to effect the arrest or to prevent escape or to overcome resistance. For the purposes of this subdivision, "retreat" does not mean tactical repositioning or other de-escalation tactics.

(e) For purposes of this section, the following definitions shall apply:

(1) "*Deadly force*" means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm.

(2) A threat of death or serious bodily injury is "*imminent*" when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person. An imminent harm is not merely a fear of future harm, no

matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.

(3) "*Totality of the circumstances*" means all facts known to the peace officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force.

Case Law:

An officer is not required to desist in his or her efforts merely because the accused offers some resistance. (***People v. Hardwick*** (1928) 204 Cal. 582, 587.)

Use of excessive force by an officer gives the arrestee the right to use self-defense, and negates the element of "*acting in the performance of his or her duties*" for any potential charge where this element must be proved. (E.g.; **P.C. §§ 148(a)**, **243(b)** & **(c)**, and **245(c) & (d)**; see ***People v. Olguin*** (1981) 119 Cal.App.3rd 39, 44-45.)

However, an excessive use of force used by the officer *after* the arrest does not itself negate the "in the performance of his (or her) duties" element of **P.C. §§ 148(a)** (or **69**). (**People *v.* Williams** (2018) 26 Cal.App.5th 71.)

Pen. Code § 843: *Arrest by Warrant; Use of Force***:** "When the arrest is being made by an officer under the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either flees or forcibly resists, the officer may use all necessary means to effect the arrest."

Pen. Code § 844: *Knock and Notice*: "To make an arrest, a private person, if the offense is a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing the person to be, after having demanded admittance and explained the purpose for which admittance is desired."

Note: This is California's "*knock and notice*" statute, for making arrests. (See "*Knock and Notice*," under "*Arrests*" (Chapter 5), above, a "*Knock and Notice*," under "*Searches With a Search Warrant* (Chapter 10), below.

Pen. Code § 845: *Use of Force to Exit a House*: "Any person who has lawfully entered a house for the purpose of making an arrest, may break open the door or window thereof if detained therein, when necessary for the purpose of liberating himself, and an officer may do the same, when necessary for the purpose of

liberating a person who, acting in his aid, lawfully entered for the purpose of making an arrest, and is detained therein."

Pen. Code § 846: *Securing Weapons*: "Any person making an arrest may take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken."

Pen. Code § 490.5(f)(2): *Use of Force by Merchant, Library Employee or Theater Owner*: A merchant, library employee or theater owner may use a reasonable amount of non-deadly force necessary to protect himself and to prevent escape or prevent loss of tangible or intangible property.

***Use of Force in Making a Blood Draw*:**

Rule: Where otherwise lawful (see ***McNeely***, below), using physical force to effect a blood draw, so long as the officers "act reasonably and use only that degree of force which is necessary to overcome a defendant's resistance in taking a blood sample," is lawful. (***People v. Rossetti*** (2014) 230 Cal.App.4th 1070, 1077-1079; quoting ***Carlton v. Superior Court*** (1985)170 Cal.App.3rd 1182, 1187-1191.)

Examples:

In ***Rossetti***, four officers held a handcuffed defendant on the floor when defendant was "kicking around and not doing what [he was] told to do," while a licensed phlebotomist drew blood. The use of force was upheld as reasonable. (***People v. Rossetti***, *supra*.)

Also, in ***Carlton***, a struggling defendant was held by six officers to the floor in a "temporary carotid restraint" position, with his face to the floor, as blood was withdrawn by a registered nurse. The force used was upheld as reasonable. (***Carlton v. Superior Court***, *supra*.)

The force used was upheld as reasonable when a resisting defendant was restrained by five police officers as a technician removed the blood sample from his left arm, without any showing that the officers "introduced any wantonness, violence or beatings." (***People v. Ryan*** (1981) 116 Cal.App.3rd 168.)

But see ***People v Kraft*** (1970) 3 Cal.App.3rd 890, where defendant refused to submit to a blood test. Taken to a hospital, defendant resisted being taken inside, resulting in an officer striking him in the cheek with a closed fist. While being carried to a bed in an examination room, defendant fell or was pushed to the floor. While on the floor, police immobilized him while a physician withdrew blood. One officer held defendant's arm while also holding a scissor lock on his legs. It was acknowledged in

testimony that defendant's behavior had not been aggressive but was "defensive." The court concluded that the officers' "strong arm" tactics were "aggressive beyond all need" and exceeded the limits of permissible force. (***Id***., at pp. 895-899.)

McNeely** Limitation*: The Supreme Court has held that being arrested for driving while under the influence does not allow for a non-consensual warrantless blood test absent exigent circumstances beyond the fact that the blood was metabolizing at a normal rate. (Missouri v. McNeely*** (2013) 569 U.S. 141 [133 S.Ct. 1552; 185 L.Ed.2nd 696].)

See "*Searches of Persons*" (Chapter 11), below.

History: See ***Birchfield v. North Dakota*** (2016) 579 U.S. 444-450 [136 S.Ct. 2160; 195 L.Ed.2nd 560], for a historical review of the development of DUI statutes and the importance of obtaining a reading of the suspect's "BAC" ("Blood Alcohol Concentration").

Deadly Force, In General:

"*Deadly Force*" *Defined*: "Force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing *death or serious bodily injury*." (*Emphasis added*; See **Model Penal Code § 3.11(2)** (1962))

See **P.C. § 835a(a)(2)**, above: "(I)t is the intent of the Legislature that peace officers use *deadly force only when necessary in defense of human life*. In determining whether deadly force is necessary, officers shall evaluate each situation in light of the particular circumstances of each case, and shall use other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer." (Italics added).

Note: To be classified as "*deadly force*," it is not necessary that death actually occur. See below.

Causing Death: When the use of force results in the death of another person, a "*homicide*," or a "*killing of a human being by another human being*," has occurred. (***People v. Antick*** (1975) 15 Cal.3rd 79, 87.)

CALCRIM, #500, "*Homicide: General Principles*."

*A **Fourteenth Amendment** Due Process Violation* occurs only if a police officer's actions deprive the decedent's children of a "*liberty interest*;" i.e., their "*right to familial association*." Per prior case law, all children have a **Fourteenth Amendment** due process "*liberty interest*" in the "*companionship and society*" of a parent. The **due process clause** is implicated if an officer's actions "*shock the conscience*." Conscience-shocking actions are those taken with (1) "*deliberate*

indifference" or (2) a "*purpose to harm . . . unrelated to legitimate law enforcement objectives*." The former involves those circumstances where the officer has the opportunity to deliberate; i.e., think about what he is doing. The latter involves those circumstances where an officer cannot practically deliberate, such as where he has to make a "*snap judgment because of an escalating situation*." (***A. D. v. State of California Highway Patrol*** (9th Cir. 2013) 712 F.3rd 446, 452-454, 456-460; where a CHP officer shot and killed the plaintiffs' mother following a high-speed chase after she was boxed in and had no means of escape, but was continuing to ram a CHP vehicle with her car. A jury verdict for the plaintiffs was upheld. The officer was determined *not* to be protected by qualified immunity. (***Id***., at pp. 453-460.)

Non-Criminal Homicides: Not all homicides, however, are criminal. The non-criminal homicides are commonly grouped into two general categories; "*excusable*" (**Pen. Code § 195**; when committed by "*accident or misfortune*") and "*justifiable*" (**Pen. Code §§ 196 et seq.**), when authorized by law.

Case Law:

> The use of *deadly force*, and the resulting killing of a human being, may be "*justifiable*" (i.e., not illegal) when committed as authorized by statute, and as limited by case law. (See ***People v. Velez*** (1983) 144 Cal.App.3rd 558, 566-568, ***People v. Frye*** (1992) 7 Cal.4th 1148, 1155; and **CALCRIM # 505-509** (*Justifiable*) and **# 510-511 (***Excusable*) Homicide.)
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> "Self-defense, when based on a reasonable belief that killing is necessary to avert an imminent threat of death or great bodily injury, is a complete justification, and such a killing is not a crime." (***People v. Elmore*** (2014) 59 Cal.4th 121, 132.)
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> See ***People v. McNally*** **(**2015) 236 Cal.App.4th 1419, 1425, upholding a second degree "implied malice" murder conviction where defendant claimed the shooting was an accident: "(T)here is a difference between an 'accidental discharge' and a 'negligent discharge' where the shooter is doing something he or she should not be doing with the firearm. Appellant brandished the loaded pistol and pointed it at (the victim). The jury was instructed that the killing is an accident if appellant 'was doing a lawful act in a lawful way' and 'acting with usual and ordinary caution.' (**CALCRIM No. 510**.) There is no evidence that appellant (in this case) was doing a lawful act in a lawful way. Appellant's intentional act of pointing a loaded pistol at the victim was, at the least, negligent. It was dangerous to human life. The natural and probable consequences of the act created a probable risk of harm."

The trial court's refusal to give the standard jury instruction related to self-defense (See **CALCRIM # 505**: "If you find that ___ <*insert name of decedent/victim*> threatened or harmed the defendant [or others] in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable].") because "no evidence showed defendant was aware of [the victim's] prior conduct." (***People v. Bates*** (2019) 35 Cal.App.5th 1.)

Despite evidence that an officer's fatal shooting of the deceased was unreasonable, absent evidence that it done with an improper motive (e.g., in retaliation for something the deceased may have done), the force used was held *not* to constitute a due process violation. (***Nehad v. Browder*** (9th Cir. 2019) 929 F.3rd 1125, 1139-1140.)

"Although '[o]bjective reasonableness is one means of assessing whether' conduct meets the 'shocks the conscience' standard, an unreasonable use of force does not necessarily constitute a **Fourteenth Amendment** substantive due process violation. ***Brittain v. Hansen***, 451 F.3rd 982, 991 n.1 (9th Cir. 2006) (citing ***Moreland v. Las Vegas Metropolitan*** Police Dep't, 159 F.3rd 365, 371 n.4 (9th Cir. 1998) ('[I]t may be possible for an officer's conduct to be objectively unreasonable yet still not infringe the more demanding standard that governs substantive due process claims.')." (***Ibid***; citing ***Gonzalez v. City of Anaheim*** (9th Cir. 2014) 747 F.3rd 789, 793.)

Officers' use of deadly force (shooting at armed robbers' fleeing vehicle) during a high speed chase was reasonable as a matter of law under Pen. Code, § 835a (as it read prior to January 1, 2020). Therefore, a hostage taken from a bank robbery did not have claims against them for injuries sustained when she jumped from the fleeing vehicle to avoid being shot by the police during the chase. One of the robbers was firing an assault rifle, providing probable cause to believe that he posed a significant threat to pursuing officers and to bystanders. A general order on when officers were prohibited from firing at moving or fleeing vehicles did not establish the standard of care for using deadly force. To the extent the claims against the city were vicarious to the officers' actions, the city's motion for summary judgment was also properly granted. (***Koussaya v. City of Stockton*** (2020) 54 Cal.App.5th 909.)

However, where the speed of the deceased's vehicle was reasonable, and despite him carrying an officer off with him and while refusing to stop, the officer's use of deadly force was held to be unreasonable and a violation of the **Fourth Amendment**. But because there was no legal precedent in the Sixth Circuit for such a situation, the officer was entitled to a finding of qualified immunity. (***Stewart v. City of Euclid*** (6th Cir. OH, 2020) 970 F.3rd 667.)

If deputy sheriffs did indeed shoot the sixty-four-year-old decedent without objective provocation, as the decedent was holding onto his walker with his gun trained on the ground, as plaintiff alleged, then a reasonable jury could determine that the officers violated the **Fourth Amendment** by shooting and killing him. The officers were therefore not entitled to qualified immunity. (***George v. Morris*** (9th Cir. 2013) 736 F.3rd 829, 836-839.)

> Where it is shown, however, that the suspect did in fact point a firearm at officers, the use of deadly force is justified. (***Id***., at p. 838; "When an individual points his gun 'in the officers' direction,' the Constitution undoubtedly entitles the officer to respond with deadly force."

The use of deadly force by shooting into a subject's vehicle in a dangerous high-speed chase situation is lawful so long as the danger continues to exist (***Plumhoff v. Rickard*** (2014) 572 U.S. 765, 766 [134 S. Ct. 2012; 188 L.Ed.2nd 1056].), but not so when the subject is surrounded and poses no immediate danger to others. (***A.D. v. State of California Highway Patrol*** (9th Cir. 2013) 712 F.3rd 446.)

A police officer violates the **Fourteenth Amendment** due process clause if he kills a suspect when acting with the purpose to harm, unrelated to a legitimate law enforcement objective. An officer was properly found to be civilly liable after shooting and killing the decedent (plaintiffs' mother) at the end of a high speed chase, but where the decedent was blocked in without a means of escape, and where no weapons were observed. (***Id***, at pp. 452-454, 456-460.)

> The officer held *not* to be entitled to qualified immunity. (***Id***., at pp. 454-455.)

Where officers shot and killed the plaintiff's father, there was no violation of the plaintiff/minor's **Fourteenth Amendment** rights because there was no evidence that the deputies acted with a purpose to harm unrelated to the legitimate law enforcement objective of defending themselves when the decedent approached with a knife in his hand. However, remand of the plaintiff/minor's negligent wrongful death claim was required because a reasonable jury could conclude that the use of deadly force was not objectively reasonable under the circumstances. (***Hayes v. County of San Diego*** (9th Cir. 2013) 736 F.3rd 1223, 1229-1235; a negligence civil action.)

> An officer's *pre-shooting conduct* is properly included in the totality of the circumstances surrounding his use of deadly force.

> The officer's duty to act reasonably when using deadly force extends to pre-shooting conduct when officers shot a suicidal person who approached them with a knife in hand. (***Id***., at pp. 1235-1236; see also ***Mendez v. County of Los Angeles*** (9th Cir. 2018) 897 F.3rd 1067, 1073, 1082-1084.)
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> See ***Tabares v. City of Huntington Beach*** (9th Cir. 2021) 988 F.3rd 1119, holding that California's negligence rules are different than the **Fourth Amendment** excessive (i.e., "deadly") force rules, holding that the former may be violated despite an officer's use of force being reasonable under **the Fourth Amendment**. Citing ***Hayes***, *supra*, at pg. 254, the Court noted that "(o)fficers are liable (under California's negligence standards) 'if the tactical conduct *and decisions leading up to the use of deadly force* show, as part of the totality of circumstances, that the use of deadly force was unreasonable.'" (Italics in original.) **Fourth Amendment** rules generally preclude the consideration of pre-incident decisions. (See ***Scott v. Henrich*** (9th Cir. 1994) 39 F.3rd 912, 914.)
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> > "Thus, California negligence law regarding the use of deadly force overall is 'broader than federal Fourth Amendment law.'" (***Tabares v. City of Huntington Beach***, *supra*, at p. 1125; quoting ***Villegas ex rel. C.V. v. City of Anaheim*** (9th Cir. 2016) 823 F.3rd 1252, 1257, fn.6.)

A police officer who shoots a person is not entitled to qualified immunity from a father's **Fourteenth Amendment** claim for deprivation of a familial relationship where the evidence shows that the decedent was already subdued, creating a genuine issue as to whether the officer's actions were required by a legitimate law enforcement purpose. (***Johnson v. Bay Area Rapid Transit Dist.*** (9th Cir. 2013) 724 F.3rd 1159, 1168-1170.)

Shooting a mentally ill, mid-50's year-old-woman who threatened to kill the officers as she aggressively moved towards them (coming to within two to four feet) while wielding a knife, held to be legally justified as a matter of law under the circumstances. (***City & County of San Francisco v. Sheehan*** (2015) 575 U.S. 600, 612-617 [135 S.Ct. 1765; 191 L.Ed.2nd 856].)

> The Court declined to decide whether making a second entry of plaintiff's room, having initially backed out when confronted by the knife-wielding plaintiff, was constitutional under the circumstances, it not having been briefed on appeal, but rather (in overruling the Ninth Circuit Court of Appeal) found that the officers had qualified immunity from civil liability in that the

officers' choice to reenter the room without waiting for backup or otherwise planning a strategy did not violate clearly established law. (***Id.***, at pp. 612-616.)

Where a police officer shot and killed plaintiff's mentally disturbed son seven times after the two were involved in a physical altercation, the Ninth Circuit reversed the district court's summary judgment for defendant police officer on plaintiff's state law negligence claim. The Court first noted that California negligence law regarding the use of deadly force overall is broader than federal **Fourth Amendment** law. Under California law, an officer's pre-shooting decisions can render his behavior unreasonable under the totality of the circumstances, even if his use of deadly force at the moment of the shooting might be reasonable in isolation. Federal law, however, generally focuses on the tactical conduct at the time of shooting, though a prior constitutional violation may proximately cause a later excessive use of force. The Court held that in this case, the district court erroneously conflated the legal standards under the **Fourth Amendment** and California negligence law. Specifically, the district court; (1) inaccurately concluded that plaintiff did not point to *any* evidence probative of the fact that the decedent exhibited symptoms of mental illness that would have been apparent to the officer; (2) did not consider that a jury could find the officer's pre-shooting conduct unreasonable under California law, given the decedent's potential mental illness; and (3) misinterpreted the Ninth Circuit precedent set forth in ***Billington v. Smith*** (9th Cir. 2002) 292 F.3rd 1177, in assessing the reasonableness of Officer Esparza's conduct at the time of the shooting. The Court held that in considering all the evidence in the light most favorable to plaintiff, a reasonable jury could conclude that the officer should have suspected the decedent had mental health issues and that he unreasonably failed to follow police protocol when dealing with potentially mentally ill persons before using force. Finally, the officer's decision to shoot without warning six times—and then a seventh—could be found by a jury to be unreasonable. (***Tabares v. City of Huntington Beach*** (9th Cir. 2021) 988 F.3rd 1119.)

Re: ***Billington v. Smith***, *supra*, see "*Provocation Rule*," above.

Specific Weapons or Techniques in the Use of Force:

The Taser (or "*Electronic Control Weapon*" ["*ECW*"]):

"*TASER*" is an acronym for "*Thomas A. Swift's Electric Rifle*." (***Marquez v. City of Phoenix*** (9th Cir. 2012) 693 F.3rd 1167. 1170, fn. 1.)

"When a taser is used in drive[-]stun mode, the operator removes the dart cartridge and pushes two electrode contacts located on the

front of the taser directly against the victim. In this mode, the taser delivers an electric shock to the victim, but it does not cause an override of the victim's central nervous system as it does in dart-mode." (***Mattos v. Agarano*** (9th Cir. 2011) 661 F.3rd 433, 443; **Bonivert *v. City of* Clarkston** (9th Cir. 2018) 883 F.3rd 865, 869, fn. 2.)

Sometimes referred to as a "*conductive electrical weapon*" ("CEW"), or stun gun. (***People v. Mackreth*** (2020) 58 Cal.App.5th 317, 323, fn. 5.)

Pen. Code § 13660 (**AB 1406**); effective *January 1, 2023*: *Wearing of an Electroshock Device by Law Enforcement*:

(a) Any law enforcement agency that authorizes peace officers to carry an *electroshock device* shall prohibit that device from being holstered or otherwise carried on the same lateral side of the officer's body as the officer's primary firearm is holstered or otherwise carried.

(b) As used in this section, the following terms have the following meanings:

(1) "*Electroshock device*" means a *taser, stun gun,* or similar weapon that is designed to temporarily incapacitate a person through the controlled delivery of an electric shock, and is designed to be held in a manner similar to a pistol and operated using a finger trigger.

(2) "*Law enforcement agency*" means any agency or department of the state, or any political subdivision thereof, that employs any peace officer described in **Chapter 4.5** (commencing with **Section 830**) of **Title 3** of **Part 2**.

Note: The purpose of this statutory requirement is to reduce "*weapon confusion*," whereby an officer intends to use a Taser or stun gun but mistakenly draws a firearm instead.

Case Law:

An officer used a Taser to subdue the plaintiff after he was stopped for a seat belt violation. The Taser, model X26, using compressed nitrogen to propel a pair of "probes" (i.e., aluminum darts tipped with stainless steel barbs connected to the X26 by insulated wires) at its target, was held to be a form of "non-lethal force," constituting an "intermediate or medium, though not insignificant,

quantum of force." (***Bryan v. MacPherson*** (9th Cir. 2010) 630 F.3rd 805, 823-833.)

> Plaintiff was obviously irate, yelling expletives and other "gibberish," and hitting his thighs, while dressed only in boxer shorts and tennis shoes. Plaintiff got out of his car after being ordered to stay in it. He also may have taken a step towards the officer although he was still 15 to 25 feet away from him. Use of the Taser on the plaintiff, who never verbally threatened the officer nor made any attempt to flee, was held to be excessive under these circumstances. (***Ibid***.)

The use of a Taser to subdue non-threatening, although uncooperative, suspects, depending upon the circumstances, absent a threat to the safety of the officers or others, may constitute excessive force and a **Fourth Amendment** violation. (***Mattos v. Agarano*** (9th Cir. 2011) 661 F.3rd 433: Two cases; one involving the Tasing of the victim in a domestic violence situation where she was the victim, and the other being of an uncooperative driver who refused to sign a traffic citation. Both cases resulted in a finding of a **Fourth Amendment** excessive force violation, but with qualified immunity for the officers, the incidents happening before there was any relevant case law.)

> The Court cited three prior cases, being the only federal cases on the issue, where it had been held that the use of a Taser was *not* a **Fourth Amendment** violation; i.e., ***Russo v. City of Cincinnati*** (6th Cir. 1992) 953 F.2nd 1036; ***Hinton v. City of Elwood*** (10th Cir. 1993) 997 F.2nd 774; and ***Draper v. Reynolds*** (11th Cir. 2004) 369 F.3rd 1270. These three cases, respectively, involved officers being attacked by a suicidal, homicidal, mental patient who was armed with two knives, a violently resisting suspect who was flailing at, kicking, and biting the arresting officers, and a lone officer being confronted by an angry, confrontational, and agitated truck driver who refused five times to produce certain documents as he paced back and forth, yelling at the officer. (***Id***., at pp. 446-448.)

Punching and Tasing a non-resisting and compliant arrestee who the officer knew was emotionally troubled and physically ill, and continued to do so when the arrestee did no more than flinch from the pain and cry for help, and then asphyxiating him by sitting on his chest, was unreasonable force. The officer also was not

entitled to qualified immunity under the circumstances. (***Mendoza v. City of West Covina*** (2012) 206 Cal.App.4th 702, 714-720.)

Using a Taser in nine five-second cycles, two while it was ineffectively deployed in probe mode and seven when it was deployed in drive-stun mode, was held to be reasonable where officers were attempting to rescue a three-year-old child from a suspect's grasp (a "chokehold"), and to subdue the violently resisting suspect who died as a result. (***Marquez v. City of Phoenix*** (9th Cir. 2012) 693 F.3rd 1167, 1173-1177.)

> The Court further determined that the warnings provided on the Taser itself, which included the possibility of death, were sufficient as a matter of law, at least in so far as required under Arizona statutory law. (***Id***., at pp. 1172-1173.)

An officer was held not to be entitled to qualified immunity from **Fourth Amendment** claims in a federal civil rights lawsuit arriving out of a detention of individuals during an investigation of a completed misdemeanor because there was no likelihood for repeated danger and there was a dispute as to whether it was reasonable to threaten to use a Taser under the circumstances. (***Johnson v. Bay Area Rapid Transit Dist.*** (9th Cir. 2013) 724 F.3rd 1159, 1168-1170.)

Use of a Taser in dart mode "(involves) an intermediate level of force with 'physiological effects, high levels of pain, and foreseeable risks of physical injury.' (Citation omitted)" Using a Taser on a subject who was standing up to 37 feet away, and who hadn't reacted quickly enough when told to "back away," held to be excessive force under the circumstances. (***Gravelet-Blondin v. Shelton*** (9th Cir. 2013) 728 F.3rd 1086, 1090-1092.)

> The Court further noted that the officer in this case was not entitled to qualified immunity in that the rules on the use of Tasers is now well-established in the law. (***Id***., pp. 1092-1096; describing the many cases on this issue.)

Use of a Taser on a jail prisoner in order to subdue him preparatory to an extraction of a baggie from his rectum during a visual body cavity search held to be unreasonable. (***United States v. Fowlkes*** (9th Cir. 2015) 804 F.3rd 954, 967-968.)

Using a Taser to remove a non-threatening mental patient from his grip onto a pole held to be excessive. The Court held that a Taser,

being a "serious use of force," like a gun, a baton, or other weapon, is expected to inflict pain or injury when deployed. It, therefore, may only be deployed when a police officer is confronted with an exigency that creates an immediate safety risk and that is reasonably likely to be cured by using the Taser. The subject of a seizure does not create such a risk simply because he is doing something that can be characterized as resistance, even when that resistance includes physically preventing an officer's manipulations of his body. Erratic behavior and mental illness do not necessarily create a safety risk either. To the contrary, when a seizure is intended solely to prevent a mentally ill individual from harming himself, the officer effecting the seizure has a lessened interest in deploying potentially harmful force. (***Estate of Armstrong v. Village of Pinehurst*** (4th Cir. 2016) 810 F.3rd 892; officers held to have qualified immunity, however, in that the true was not yet well-settled in the law.)

"Using a Taser in dart mode constitutes an "intermediate, significant level of force." (Citation). ¶ The pain is intense, is felt throughout the body, and is administered by effectively commandeering the victim's muscles and nerves. Beyond the experience of pain, Tasers result in immobilization, disorientation, loss of balance, and weakness, even after the electrical current has ended. Moreover, tasering a person may result in serious injuries when intense pain and loss of muscle control cause a sudden and uncontrolled fall. (Citation) The experience of being shot with a Taser is a "painful and frightening blow." (***Thomas v. Dillard*** (9th Cir. 2016) 818 F.3rd 864, 889-991; holding that the use of a Taser on an uncooperative, but illegally detained suspect, even though the suspected crime might have been domestic violence-related, was excessive.)

In confronting a very large man (more than six feet tall and over 250 pounds) who was likely under the influence of drugs and was violently resisting arrest, the officer, in the resulting civil suit, was entitled to qualified immunity for his use of a Taser even under plaintiff's version of the facts, particularly where the officer used the Taser only once and in the less incapacitating drive-stun mode. (***Isayeva v. Sacramento Sheriff's Department*** (9th Cir. 2017) 872 F.3rd 938, 947-950.)

Continually tasing a subject for over 90 seconds, even after he was on the ground and had gone limp, while being subdued by five officers, actions which contributed to the subject's death, was held to present a triable issue in a subsequent civil suit brought by the

decedent's parents. *(**Jones v. Las Vegas Metro. Police Department*** (9th Cir. 2017) 873 F.3rd 1123, 1128-1132.)

Reversing a trial court's granting of summary judgment, the Ninth Circuit Court of Appeal held that the evidence did not support the conclusion that no reasonable jury could find the use of force within the home excessive. Plaintiff remained inside the home. He did not threaten or advance toward the officers. Despite plaintiff's lack of resistance, an officer threw plaintiff across the back room while another officer tasered him several times in drive-stun mode. A reasonable jury could find this, under the circumstances, to be excessive force. (***Bonivert v. City of Clarkston*** (9th Cir. 2018) 883 F.3rd 865, 879-881.)

Using a Taser in dart mode on an auto-theft suspect when the suspect, who complied with orders to get down on his knees but refused numerous demands to lie on the ground all the while becoming more belligerent, was held to be reasonable force. The offending officer was entitled to qualified immunity for tasing him under these circumstances. (***Shanaberg v. Licking County*** (6th Cir. OH, 2019) 936 F.3rd 453: The plaintiff was subsequently determined to be the lawful owner of the car, the car having been recovered but the computerized records not updated.)

The Eighth Circuit Court of Appeals held that civil defendant officers acted reasonably under the circumstances where they tased plaintiff's son (i.e., the "victim"), high on methamphetamine and acting erratically, about eight times, contributing to his demise. The Court concluded that the officers did not violate the victim's right to be free from excessive force and were therefore entitled to qualified immunity. The Court found that the officers were justified in their use of force against the victim because the victim's aggression did not stop until after the final shot of the Taser. The court added that the fact that the victim was tased three times in drive-stun mode while handcuffed was reasonable because the victim continued to resist the officers while he was in handcuffs. The court recognized that a handcuffed suspect can still pose a danger to the officers and that it has "allowed the use of Tasers on detainees in handcuffs in appropriate circumstances." Finally, the court held that the officers' decision to remove the victim's handcuffs before securing him in the isolation cell was reasonable. First, the officers testified that they wanted the victim to be able to move about the cell freely, as they were concerned that if he remained handcuffed in his drug-influenced state he may have fallen while cuffed and possibly injure his arms, wrists or head. Next, the court found that it was reasonable for the officers

to be concerned that the victim might be able to maneuver his hands and body in such a way as to use the cuffs as a weapon when someone entered the cell. (***Franklin v. Franklin County*** (8th Cir. 2020) 956 F.3rd 1060.)

The use of a Taser by a police officer on a non-violent misdemeanant who is not actively resisting arrest and without giving subject an opportunity to comply with the officer's command to roll over and submit to being handcuffed, is objectively unreasonable. The officer was held not to be entitled to qualified immunity when sued by the person who was tased. (***Emmett v. Armstrong*** (10th Cir. 2020) 973 F.3rd 1127.)

Following a high speed chase where the vehicle plaintiff was in (as a passenger) crashed into another car, the pursuing officer Tased the plaintiff who was sitting in the back seat, rocking back and forth, and ignoring the officer's commands to show his hands. The Court held that the officer was not entitled to qualified immunity in that there was no sign of verbal hostility or physical resistance by the plaintiff. While the officer might have had a suspicion that the plaintiff was armed (based upon ammunition being thrown from the car during the chase), he did not attribute the plaintiff's rocking back-and-forth as verbal hostility or physical resistance. In addition, it was not disputed that plaintiff was found slumped over in the backseat following the collision. The court added that at the time of the incident it was clearly established that plaintiff had a constitutional right *not* be tased where he showed no resistance other than a passive failure to respond to an order to show his hands, and where an obvious reason not to respond was the shock of the collision. (***Browning v. Edmonson County*** (6th Cir. KY 2021) 18 F.4th 516.)

In ***Betts v. Brennan*** (5th Cir. 2022) 22 F.4th 577, the Fifth Circuit found the officer's repeated warnings that defendant would be tased if he did not comply with the officer's commands during what should have been a simple traffic stop except for the defendant's refusal to cooperate and comply with the officer's commands, was a factor to consider in determining that the officer's eventual use of his Taser was reasonable.

The use of a Taser in dart mode constitutes an intermediate, significant level of force. (Citing ***Bryan v. MacPherson*** (9th Cit. 2010) 630 F.3rd 805, 826.) In contrast, a Taser used in drive stun mode "delivers an electric shock to the victim, but it does not cause an override of the victim's central nervous system as it does in dart-mode." (Citing ***Mattos v. Agarano*** (9th Cir. 2011) 661 F.3d

433, 443.) (***Wheatcroft v. City of Glendale*** (U.S. Dist. AZ, 2022) 2022 U.S. Dist. LEXIS 57006, at p. 15; finding the six uses of a Taser, including four drive stuns and two darts, as well as the foot strikes, constitutes serious intrusions upon the plaintiff's liberty and thus must be justified by a commensurately serious state interest.)

Chemical Irritants; *Pepper Spray, Pepperball Guns and Tear Gas*:

Case Law:

The use of pepper spray on non-violent demonstrators was determined to be excessive where there were less intrusive alternatives. (***Headwaters Forest Defense v. County of Humboldt*** (9th Cir. 2002) 276 F.3rd 1125.)

It has been held that squirting pepper spray randomly into a crowd of demonstrators where there was insufficient cause to believe the demonstrators posed an immediate threat to the safety of the officers or others might be excessive and expose the offending police officers to civil liability. (***Lamb v. Decatur*** (C.D. Ill. 1996) 947 F.Supp. 1261.)

However, the use of a "*chemical irritant*" against party-goers who are impeding a lawful arrest and fighting with law enforcement officers, particularly after a warning, was *not* improper, or excessive. (***Jackson v. City of Bremerton*** (9th Cir. 2001) 268 F.3rd 646, 651-653.)

The use of *pepper spray* on fighting prison inmates in a maximum security prison, in an attempt to stop the fight, was held to be reasonable, although the failure to provide medical attention to other inmates who might also have been affected by the pepper spray vapors, showing a "*deliberate indifference*" to their health, will subject correctional authorities to potential civil liability. (***Clement v. Gomez*** (9th Cir. 2002) 298 F.3rd 898.)

The use of pepper spray and a baton on a non-combative, albeit uncooperative, citizen during a traffic stop is excessive force and a **Fourth Amendment** violation. (***Young v. County of Los Angeles*** (9th Cir. 2011) 655 F.3rd 1156.)

In an appeal of a denial of a summary judgment motion, it was ruled that intentionally firing a pepperball projectile at a group of demonstrators, hitting plaintiff in the eye, was a seizure of the plaintiff despite the fact that he was not specifically targeted.

Also, absent evidence that the crowd was violent, committing a crime, threatening the officers, or actively avoiding arrest, the use of force by firing pepperballs into a crowed of party goers was excessive. (***Nelson v. City of Davis*** (9th Cir. 2012) 685 F.3rd 867.)

> Pepperball guns are similar to paintball guns that fire rounds containing oleoresin capsicum ("OC") powder, also known as pepper spray. These rounds are fired at a velocity of 350 to 380 feet per second, with the capacity to fire seven rounds per second. They break open on impact and release OC powder into the air, which has an effect similar to mace or pepper spray. Pepperballs therefore combine the kinetic impact of a projectile with the sensory discomfort of pepper spray. (***Id***., at p. 873.)

Officers are not entitled to summary judgment based on qualified immunity as to an inmate's **Eighth Amendment** excessive force claim because, under the ***Hudson*** factors (citing ***Hudson v. McMillian*** (1992) 503 U.S. 1, 4 [112 S.Ct. 995; 117 L.Ed.2nd 156].), a significant amount of force was employed without significant provocation from the inmate or warning from the officers since (1) his injuries caused by the pepper spray were moderate, though relatively enduring, (2) it was not clear that the application of force was required under his version of the facts, and (3) the force used seemed quite extensive and disproportionate relative to the disturbance posed by his fingertips on the food port, and (4) it remained a disputed fact whether he posed a threat to the officers. (***Furnace v. Sullivan*** (9th Cir. 2013) 705 F.3rd 1021, 1026-1030.)

> The "***Hudson*** *Factors*" mentioned are listed as follows" (1) the extent of injury suffered by an inmate; (2) the need for application of force; (3) the relationship between that need and the amount of force used; (4) the threat reasonably perceived by the responsible officials; and (5) any efforts made to temper the severity of a forceful response. (***Hudson v. McMillian***, *supra*., at p. 6.)
>
> See "*Force Used Against a Prison or Jail Inmate*," in "*Bill of Rights Protects*" (Chapter 7), below.

Officers were not entitled to qualified immunity from civil liability for using a chokehold and pepper spray on a non-resisting subject. (***Barnard v. Theobald*** (9th Cir. 2013) 721 F.3rd 1069, 1075-1076.)

Under the circumstances of this case, the defendant county of Tuolumne was immune from civil liability for the conduct of its officers. Once officers decided to arrest plaintiff's son, they were vested with the discretion in determining the best way to accomplish that goal, using personal deliberation, decision, and professional judgment. This discretion included the possible use of tear gas as a way to determine whether plaintiff's son was in plaintiff's mobile home. Given the potential impact of liability on such decisions, **Gov't. Code § 820.2** provided immunity for the officers' actions. (***Conway v. County of Tuolumne*** (2014) 231 Cal.App.4th 1005, 1013-1021.)

In a **42 U.S.C. § 1983** civil action against a city (Clovis) and a county (Fresno), whose SWAT teams had caused substantial damage to plaintiffs' property while attempting to make an arrest, the federal district court was held to have properly found that the plaintiffs' evidence failed to create a genuine issue of fact because record evidence showed that the city and county defendants had a general policy of obtaining warrants prior to entry, of using reasonable force, *and the reasonable use of tear gas*. The plaintiffs failed to establish a triable issue that any of these policies caused any constitutional injuries, or that there was a persistent and widespread violation of these policies. The district court did not err in concluding that the defendants were immune from liability for negligence because public entities like defendants were immune if the alleged injuries were caused by the officers' "discretionary acts," pursuant to **Cal. Gov't Code §§ 820.2** and **815.2(b)**. (***Jessen v. County of Fresno*** (9th Cir. 2020) 808 F. Appx. 432; unpublished.)

Two police officers attempted to arrest plaintiff for disorderly conduct. After plaintiff refused to place her hands behind her back to be handcuffed, one of the officers kicked her legs out from under her, causing her to fall to the ground. While plaintiff was on the ground, one of the officers used his hand to push her face onto the pavement as she continued to struggle with the officers. After the officer twice administered a burst of pepper spray directly into plaintiff's face, the officers were able to handcuff her. The officer warned plaintiff before each application of the pepper spray. The Second Circuit Court of Appeal held that the officers were entitled to qualified immunity. Following the guidance provided by the Supreme Court, the court held that no precedential decision of the Supreme Court or the Second Circuit Court of Appeal clearly established that the officers' use of force, viewed in the circumstances in which they were taken, violated the **Fourth**

Amendment. (***Brown v. City of New York*** (2nd Cir. N.Y. 2017) 862 F.3rd 182.)

Relevant Statutes:

Gov't. Code § 820.2: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

Pen. Code § 13652: Use by Law Enforcement of Kinetic Energy Projectiles and Chemical Agents:

> This new section limits law enforcement's use of "*kinetic energy projectiles*" and chemical agents, requiring a law enforcement agency to publish on its website a summary of all instances in which a kinetic energy projectile or chemical agent is used.
>
> "*Kinetic energy projectile*" is defined as a device designed to be launched as a projectile that may cause bodily injury and blunt force trauma, including, but not limited to, items commonly referred to as *rubber bullets*, *plastic bullets*, *beanbag rounds*, and *foam tipped plastic rounds*.
>
> "*Chemical agent*" is defined as a chemical that can rapidly produce sensory irritation or disabling physical effects, which disappear within a short time, including, but not limited to, *CN tear gas*, *CS gas*, and items commonly referred to as *pepper spray*, *pepper balls*, and *oleoresin capsicum*.
>
> The use of kinetic energy projectiles and chemical agents may be used only by a peace officer who has received training on their proper use for crowd control by the Commission on Peace Officer Standards and Training (POST), if the use is objectively reasonable to defend against a threat to life or serious bodily injury, or to bring an objectively dangerous and unlawful situation safely and effectively under control, and then only when the following requirements are met:
>
> 1. De-escalation techniques or other alternatives to force were attempted and failed;

2. Repeated, audible announcements are made about the intent to use kinetic energy projectiles and chemical agents, and the announcements are made in multiple languages, if appropriate;

3. Persons are given an objectively reasonable opportunity to disperse and leave the scene;

4. An objectively reasonable effort has been made to identify persons engaged in violent acts and those who are not, and projectiles and chemical agents are targeted toward those engaging in violent acts. Projectiles are prohibited from being "aimed indiscriminately into a crowd or group of persons;"

5. Projectiles and chemical agents are used only with the frequency, intensity, and in a manner that is proportional to the threat;

6. The possible incidental impact of projectiles and chemicals on bystanders, medical personnel, journalists, and other unintended targets is minimized;

7. An objectively reasonable effort has been made to extract individuals in distress;

8. Medical assistance is promptly provided, if properly trained personnel are present, when it is reasonable and safe to do so; *and*

9. If the chemical agent to be deployed is tear gas, only a commanding officer at the scene of the assembly, protest, or demonstration may authorize its use.

Aiming projectiles at the head, neck, or vital organs is prohibited. Also prohibited is the use of projectiles and chemicals solely due to a curfew violation, a verbal threat, or noncompliance with a law enforcement directive.

This new section does *not* apply to any county detention facility or to any correctional facility of the Department of Corrections and Rehabilitation.

Pen. Code § 13652.1: A Published Summary of the Use of Kinetic Energy Projectiles and Chemical Agents:

> A law enforcement agency, within *60 days* of an incident involving the use of kinetic energy projectiles or chemical agents for crowd control, is required to publish a summary of the incident on its Internet Web site. The summary may be posted as late as *90 days* after the incident if the agency demonstrates just cause for the delay.
>
> The summary must include a description of the assembly, protest, demonstration, or incident, including the approximate crowd size and number of officers; the type of projectile or chemical agent used; the number of rounds or quantity of agent dispersed; the number of documented injuries resulting from the projectiles or chemicals; the justification for using the projectiles or chemicals; and a description of the de-escalation tactics and other measures used to avoid the need for projectiles or chemicals. The Department of Justice is also to post on its Internet Web site a compiled list, linking each agency's posted reports.

Chokehold and Carotid Restraint:

Defined:

Gov't. Code § 7286.5(b)(1): "*Carotid restraint*" means a vascular neck restraint or any similar restraint, hold, or other defensive tactic in which pressure is applied to the sides of a person's neck that involves a substantial risk of restricting blood flow and may render the person unconscious in order to subdue or control the person.

Gov't. Code § 7286.5(b)(2): "*Chokehold*" means any defensive tactic or force option in which direct pressure is applied to a person's trachea or windpipe.

> See "*Relevant Statutes*," below.
>
> A "*chokehold*" is sometimes confused with a "*carotid restrain*." (See ***Tuuamalemalo v. Greene*** (9th Cir. 2019) 946 F.3rd 471, at p. 475.) The latter is more correctly described as a "lateral vascular neck restraint" ("LVNR"), which, by applying pressure to the carotid arteries at the sides of one's neck, restricts the flow of blood to the brain rather than restricting air flow. (***Ibid***.)

Note: A "*carotid restraint*," if properly applied, is an effective technique used by some law enforcement agencies to subdue an otherwise uncooperative subject for the purpose of rendering him unconscious for *20 or 30 seconds*; long enough to handcuff or otherwise secure him. If *improperly* applied, a carotid restraint can cause serious injury or even death to the subject. In fact, a version of the chokehold taught by the military, which includes violently pushing the subject's head forward, is capable of breaking the subject's neck and paralyzing, or even killing him. For this reason, many law enforcement agencies have ceased using this technique to subdue an individual. However, there is no current case law holding the use of the carotid restraint to be unconstitutional *except* when applied to a non-resisting, already restrained, suspect (see below). Law enforcement agencies are now prohibited from authorizing their officers to use of either the choke hold or the carotid restraint. A "*choke hold*," on the other hand, puts pressure on one's trachea, and can cause serious injury. (See **Gov't. Code § 7286.5(b)(1)** & **(2)**, below.

Case Law:

An officer who uses excessive force is subject to prosecution for a felony (**Pen. Code § 149**) and/or, if the victim is a prisoner and the officer is guilty of "willful inhumanity or oppression towards (the) prisoner," a $4,000 fine and removal from office (**Pen. Code § 147**), in addition to any other applicable assault or battery violations. (See ***People v. Perry*** (2019) 36 Cal.App.5th 444.)

The district court properly denied a police officer qualified immunity from civil liability under **42 U.S.C. § 1983** in ***Tuuamalemalo v. Greene*** (9th Cir. 2019) 946 F.3rd 471, because it was "*clearly established*" that the use of a *chokehold* on a non-resisting, already restrained person violated the **Fourth Amendment's** prohibition on the use of excessive force.

The district court also properly denied the police officer qualified immunity under Nevada law because applying a chokehold to a non-resisting, pinned person violated the arrestee's clearly established federal rights, and a jury could have concluded that the officer's decision was so excessive that it amounted to willful or deliberate disregard of those rights. (***Id.***, at pp. 477-478.)

"(A)ny reasonable person . . . should have known that squeezing the breath from a compliant, prone, and handcuffed individual despite his pleas for air involves a degree of force that is greater than reasonable." (***Drummond ex rel. Drummond v. City of Anaheim*** (9th Cir. 2003) 343 F.3rd 1052, 1059.)

Officers were *not* entitled to qualified immunity from civil liability for using a chokehold and pepper spray on a non-resisting subject. (***Barnard v. Theobald*** (9th Cir. 2013) 721 F.3rd 1069, 1075-1076.)

See also ***Coley v. Lucas Cty***. (6th Cir.) 799 F.3rd 530, 541, "Chokeholds are objectively unreasonable where an individual is already restrained or there is no danger to others."; ***United States v. Livoti*** (2nd Cir 1999) 196 F.3rd 322, 324-327, finding that use of a chokehold against a handcuffed, non-resistant subject was an excessive use of force; and ***Valencia v. Wiggins*** (5th Cir 1993) 981 F.2nd 1440, 1447, holding the use of a "choke hold and other force . . . to subdue a non-resisting [detainee] and render him temporarily unconscious was unreasonable and was an excessive use of force."

A district court's denial of qualified immunity and upholding the jury's finding that defendant officers used excessive force and violated California's **Tom Bane Civil Rights Act** and that defendant city was liable under the ***Monell*** test was affirmed since substantial evidence supported the jury's finding of excessive force in violation of the deceased's **Fourth Amendment** rights as the officers kept the deceased in multiple, extended chokeholds even as he gagged, wheezed, turned purple, and screamed he could not breathe, substantial evidence supported the jury's finding of ***Monell*** liability against the city, and that the three officers knew the "carotid hold" could cause serious injury or death, all three were aware of the department's limits on its use, but, nonetheless, they applied multiple, extended holds against the deceased, even while he was lying down and restrained. (***Valenzuela v. City of Anaheim*** (9th Cir. 2021) 2021 U.S.App. LEXIS 22933; an unpublished decision.)

Relevant Statutes:

Gov't. Code § 7286.5: (Effective as of *Jan. 1, 2021* (**AB 1196**), as amended *Jan. 1, 2022* (**AB 490**)): *Use of the Carotid Restraint and Chokehold*:

Subd. (a)

(1) Law enforcement agencies are now prohibited from authorizing the use of a "*carotid restraint*" or "*choke hold*" by any peace officer employed by the agency.

(2) A law enforcement agency shall not authorize techniques or transport methods that involve a substantial risk of positional asphyxia.

Subd. (b) As used in this section, the following terms are defined as follows:

(1) *Carotid restraint*" means a vascular neck restraint or any similar restraint, hold, or other defensive tactic in which pressure is applied to the sides of a person's neck that involves a substantial risk of restricting blood flow and may render the person unconscious in order to subdue or control the person.

(2) "*Choke hold*" means any defensive tactic or force option in which direct pressure is applied to a person's trachea or windpipe.

(3) "*Law enforcement agency*" means any agency, department, or other entity of the state or any political subdivision thereof, that employs any peace officer described in **Chapter 4.5** (commencing with **Section 830)** of **Title 3** of **Part 2** of the **Penal Code**.

(4) "*Positional asphyxia*" means situating a person in a manner that compresses their airway and reduces the ability to sustain adequate breathing. This includes, without limitation, the use of any physical restraint that causes a person's respiratory airway to be compressed or impairs the person's breathing or respiratory capacity, including any action in which pressure or body weight is unreasonably applied against a restrained person's neck, torso, or back, or positioning a restrained person without reasonable monitoring for signs of asphyxia.

Pain Compliance, "Take Down" Maneuvers, and other Control Holds:

The use of "*pain compliance*" to arrest passively resistant demonstrators was upheld as reasonable in that it was used only after a warning, was not applied any more than necessary to gain compliance, and was something that could be ended instantaneously when the protestor submitted. (***Forrester v. City of San Diego*** (9th Cir. 1994) 25 F.3rd 804.)

In a **42 U.S.C. § 1983**, **Fourth Amendment** excessive force case involving two police officers who had responded to a 911 domestic disturbance call, and where one of the officers "took him . . . to the ground and handcuffed him," the U.S. Supreme Court held that the Ninth Circuit Court of Appeal erred, again, in reversing and remanding the district court's ruling where both officers had been granted qualified immunity. As to one officer, the Ninth Circuit offered no explanation for its decision, which was erroneous in light of the district court's conclusion that only the other officer was involved in the excessive force claim. The Ninth Circuit also erred as to the other officer because it defined the clearly established right at a "high level of generality" by saying only that the "right to be free of excessive force" was clearly established, and this formulation of the clearly established right was too general, particularly as the Circuit Could made no effort to explain how the case law prohibited the officer's actions in this case. (***Escondido v. Emmons*** (Jan. 7, 2019) __ U.S. __ [139 S.Ct. 500; 202 L.Ed.2nd 455].)

Causing plaintiff to go to the ground where she was handcuffed (and breaking her collarbone in the process) was held not to be unreasonable when plaintiff had been told that she was to be arrested but refused to comply with the officer's demands that she not walk away. "Even if a jury could find that (plaintiff) posed no danger to anyone at the time of the seizure, a reasonable officer in (Officer) Ernst's position could have believed that it was important to control the situation and to prevent a confrontation between patrons that could escalate." The officer was entitled to qualified immunity from civil liability under the circumstances. (***Kelsay v. Ernst*** (8th Cir. NE 2019) 933 F.3rd 975; certiorari denied.)

Citing local and U.S. Supreme Court precedent (i.e. ***Escondido v. Emmons***, *supra*.), the Eight Circuit held that "it was clearly established that an officer could use force against an uncooperative suspect who refused to follow the officer's orders. . . ." In this case, the officer was alleged to have forced plaintiff (stopped as a possible DUI suspect) to the ground (breaking her knee in the process) when she refused the officer's commands to remain in the patrol vehicle while he checked the validity of her driver's license. The officer was held to be entitled to summary judgement on plaintiff's excessive force claim. (***Murphy v. Engelhart*** (8th Cir. MO 2019) 933 F.3rd 1027.)

"Hard pulling and twisting" used to remove a fleeing armed robbery suspect from a car was held to be a "minimal intrusion" under the circumstances. (***Johnson v. County of Los Angeles*** (9th Cir. 2003) 340 F.3rd 787, 793.)

Handcuffing and lifting demonstrators who had gone limp, done for the purpose of removing them from a city council meeting where they disrupted the meeting to the point where the meeting had to be discontinued, was held to be reasonable under the circumstances even though the plaintiff suffered a sprained wrist, mild swelling, and a torn rotator cuff. Although such injuries were not trivial, they were minimal under the circumstances. The injuries caused are but one factor to consider in determining the reasonableness of the force used. (***Williamson v. City of National City*** (9th Cir. 2022) 23 F.4th 1146, 1151-1155.)

The arm bar, a type of control hold, is a minimal use of force. (***Donovan v. Phillips*** (9th Cir. 2017) 685 F. App'x 611, 612-613; officer's use of a control hold when plaintiff exited his car by grabbing his wrist, and pulling his arm downward, causing him to roll onto the ground, was a "relatively minimal" use of force.) However, the use of "foot strikes" (i.e., kicking) may constitute a significant use of force. (***Wheatcroft v. City of Glendale*** (U.S. Dist. AZ, 2022) 2022 U.S. Dist. LEXIS 57006; citing ***Lopez v. City of Imperial*** (S.D. Cal. 2015) [2015 U.S. Dist. LEXIS 87441]; where the use of fist and knee strikes was found to likely be "a significant use of force")

Flashbang Devices:

While officers were executing a search warrant for stolen goods by an armed robber, one officer, without looking, tossed a flashbang device near the front of the door where the resident was sleeping, resulting in an injury to the resident when the device exploded. The resident sued and the trial court granted summary judgment to the defendant officers. On appeal, the Ninth Circuit Court of Appeal ruled that for summary judgment purposes, the use of the device was excessive force because the officers knew that up to eight people were asleep in the apartment. However, because the few cases dealing with the use of such devices are conflicting as to whether the use of a flashbang device constitutes excessive force, the resident's rights with respect to those devices was not clearly established. Thus, the offices were entitled to qualified immunity. Also, because there was no evidence that the city deliberately failed to train its officers in the use of a flashbang device, the city also had immunity. (***Boyd v. Benton County*** (9th Cir. 2004) 374 F.3rd 773, 778-784.)

See also ***Dukes v. Deaton*** (11th Cir. Ga. 2017) 852 F.3rd 1035; failing to look before throwing the device constitutes an unreasonable use of force, but the officers were entitled to qualified immunity from civil liability.

Batons:

The use of pepper spray and a baton on a non-combative, albeit uncooperative, citizen during a traffic stop is excessive force and a **Fourth Amendment** violation. (***Young v. County of Los Angeles*** (9th Cir. 2011) 655 F.3rd 1156.)

Where the facts are in dispute, a police officer does not have qualified immunity for using his baton to break the plaintiff's car window and pulling him out of the car through the window. Such force may be excessive. (***Coles v. Eagle*** (9th Cir. 2012) 704 F.3rd 624, 627-631.)

Use of a baton in subduing a resisting subject, striking him eleven times, may have been excessive despite a civil jury's finding to the contrary. The jury verdict was overturned in that the trial court improperly removed from consideration an unlawful arrest allegation, precluding the jury from considering whether the force used was excessive under the circumstances; the lawfulness of the arrest being one of the factors necessarily relevant to the excessive force claim. (***Velazquez v. City of Long Beach*** (9th Cir. 2015) 793 F.3rd 1010, 1023-1027.)

"While baton blows are a type of force capable of causing serious injury, (***Young v. County of Los Angeles*** (9th Cir. 2011) 655 F.3rd 1156,) at 1162, jabs with a baton are less intrusive than overhand strikes. Defendants' expert opined that officers are trained that tip end jabbing, pushing, shift striking, and chopping are reasonable uses of force when individuals actively resist lawful orders. (The University of California) PD's crowd management policy permitted the use of batons 'in a crowd control situation' 'to move, separate, or disperse people,' except to strike intentionally a prohibited area, such as the head, unless confronting deadly force." (***Felarca v. Birgeneau*** (9th Cir. 2018) 891 F.3rd 809, 817; finding the use of such force to be "minimal.")

Beanbag Firearms:

"A beanbag shotgun is a twelve-gauge shotgun loaded with beanbag rounds, consisting of lead shot contained in a cloth sack. . . . By design, beanbag shotguns typically cause serious injury rather than death, although death can result." (***Cortesluna v. Leon*** (9th Cir. 2020) 979 F.3rd 645, 650, fn. 2, citing ***Deorle v. Rutherford*** (9th Cir. 2001) 272 F.3rd 1272, at p. 1277 & fn. 8.)

> "(B)ecause beanbag rounds are 'potentially lethal at thirty feet and could be lethal at distances up to fifty feet,' they are 'not to be deployed lightly.'" (***Cortesluna v. Leon***, *supra*, at p. 652, quoting ***Deorle v. Rutherford***, *supra*, at pp. 1279-1280.)
>
> Use of "less-lethal" cloth-cased beanbag shot against an unarmed, mentally deranged suspect, particularly when not warned first, may be excessive. (***Deorle v. Rutherford***, *supra*.)
>
> "Their use 'is permissible only when a strong governmental interest compels the employment of such force.' (***Deorle v. Rutherford***, *supra*, at 1280.) In assessing the governmental interest, we consider '(1) "whether the suspect poses an immediate threat to the safety of the officers or others," (2) "the severity of the crime at issue," and (3) "whether he is actively resisting arrest or attempting to evade arrest by flight."'" (***Cortesluna v. Leon***, *supra*, at p. 652, quoting ***Glenn v. Washington County*** (9th Cir. 2011) 673 F.3rd 864, 872 [below].)

As a "*less lethal*" weapon, the lawfulness of the use of a beanbag shotgun is dependent upon a determination that its use was reasonable under the circumstances. In this case, where the out-of-control subject wasn't threatening anyone but himself, its use was held to be unjustified. (***Glenn v. Washington County*** (9th Cir. 2011) 673 F.3rd 864, 878-880.)

> In assessing the governmental interest, a court is to consider "(1) whether the suspect poses an immediate threat to the safety of the officers or others, (2) the severity of the crime at issue, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight." (***Id***., at p. 872; quoting ***Graham v. Connor*** (1989) 490 U.S. 386, 396 [109 S.Ct. 1865; 104 L.Ed.2nd) 443]; see also ***Cortesluna v. Leon***, *supra*, at p. 652.)

See also **Pen. Code §§ 13652** & **13652.1**, restricting the use of beanbag firearms, and similar devices, under "Use by Law Enforcement of Kinetic Energy Projectiles and Chemical Agents," above under "*Chemical Irritants*."

Brandishing (*or Pointing*) *a Firearm*:

It has been held that an officer "pointing of a gun at someone may constitute excessive force, even if it does not cause physical injury." (***Tekle v. United States*** (9th Cir. 2007) 511 F.3rd 839, 845.

Pointing a gun at close range at an unarmed, unresisting suspect who is only being detained, is probably excessive, and could result in civil liability. (***Robinson v. Solano County*** (9th Cir. 2002) 278 F.3rd 1007.)

"(P)ointing a loaded gun at a suspect, employing the threat of deadly force, is use of a high level of force." (***Espinosa v. City and County of San Francisco*** (9th Cir. 2010) 598 F.3rd 528, 538.)

"(W)here the officers have an unarmed felony suspect under control, where they easily could have handcuffed the suspect while he was sitting on the squad car, and where the suspect is not in close proximity to an accessible weapon, a gun to the head constitutes excessive force." (***Thompson v. Rahr*** (9th Cir. WA 2018) 885 F.3rd 582, 586-587.)

> However, the officer was held to be entitled to qualified immunity, in that this rule was not "clearly established" at the time it occurred. (***Id***., at pp. 587-590.)

Similarly, pointing a firearm at a suspect while he's being arrested when it is apparent that the arrestee is not a threat to officer safety is excessive force sufficient to create civil liability. (***Hopkins v. Bonvicino*** (9th Cir. 2009) 573 F.3rd 752, 776-777.)

See also ***Stamps v. Town of Framingham*** (1st Cir. 2016) 813 F.3rd 27: A reasonable officer would have understood that pointing a loaded rifle at the head of a prone, non-resistant individual, with the safety off and a finger on the trigger, constituted excessive force in violation of the **Fourth Amendment**. Consequently, when the officer accidentally shoots and kills the suspect, the office is not entitled to qualified immunity in the resulting civil action.

A SWAT team holding children at gunpoint after officers gained control of a situation is unreasonable, and could result in civil liability. (***Holland v. Harrington*** (10th Cir. 2001) 268 F.3rd 1179.)

Pointing and "training" a firearm at a five-week-old infant while conducting a **Fourth** Waiver search is excessive, and a **Fourth Amendment** violation. (***Motley v. Parks*** (9th Cir. 2005) 432 F.3rd 1072, 1088-1089.)

Recognizing that even lawful arrests may be unreasonably executed, such as when excessive force is applied, the Ninth Circuit Court of Appeal found that plaintiff may have a valid claim that using "SWAT-like" tactics, with guns drawn and pointed at her, was excessive given that only a non-violent credit card offense was alleged. Whether or not the victim's claims that plaintiff was "violent and unstable" were sufficient to justify

the force used is something a civil jury should be allowed to determine. (***Cameron v. Craig*** (9th Cir. 2013) 713 F.3rd 1012, 1020-1022.)

Pointing a gun at the head of an 18-year-old occupant of a residence where there was no probable cause to support the officer's belief that he was committing a burglary held to be in violation of clearly established law. (***Sandoval v. Las Vegas Metro. Police Dep't.*** (9th Cir. 2014) 756 F.3rd 1154, 1165; citing ***Robinson v. Solano County*** (9th Cir. 2002) 278 F.3rd 1007.)

See also ***Avina v. United States*** (9th Cir. 2012) 681 F.3rd 1127, 1130-1134, below, under "*Use of Handcuffs*."

Use of Handcuffs:

An IRS agent was not entitled to qualified immunity where he handcuffed a nonviolent resident of a house during an IRS search of the premises, and further that he was not entitled to qualified immunity where there was a genuine issue of fact as to whether he handcuffed the resident in a manner that caused her pain. "(H)andcuffing substantially aggravates the intrusiveness of a detention." The use of handcuffs must be "justified by the totality of the circumstances." (***Meredith v. Erath*** (9th Cir. 2003) 342 F.3rd 1057, 1061-1063.)

The lawfulness of the use of any type of force, including handcuffs to secure criminal suspects, requires a balancing of the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." Handcuffing individuals without any probable cause to believe they have committed a crime may be excessive, giving rise to potential civil liability. And even if lawful, the handcuffing of a detainee may be found to be unreasonable if it is unnecessarily painful. (***Sandoval v. Las Vegas Metro. Police Dep't.*** (9th Cir. 2014) 756 F.3rd 1154, 1165-1167.)

Handcuffing an otherwise complaint 11-year-old minor (even though reported to be out of control, uncooperative, and "off his meds" by school officials) and transporting him from his school to a relative held to be an excessive use of force under the circumstances, and an unlawful seizure. Officers were not entitled to qualified immunity. (***C.B. v. City of Sonora*** (9th Cir. 2014) 769 F.3rd 1005, 1029-1031, 1039-1040.)

Thomas and Rosalie Avina sued the United States under the **Federal Tort Claims Act** (**FTCA**) for assault and battery and intentional infliction of emotional distress after agents from the Drug Enforcement Administration (DEA) executed a search warrant at their mobile home. Upon entering the home, the agents pointed guns at Thomas and Rosalie, handcuffed them

and forcefully pushed Thomas to the floor. The agents handcuffed the Avina's fourteen-year-old daughter on the floor and then handcuffed their eleven-year-old daughter on the floor and pointed their guns at her head. The agents removed the handcuffs from the children approximately thirty minutes after they entered. The court held that the district court properly granted summary judgment in favor of the United States as to Thomas and Rosalie because the agents' use of force against them was reasonable. The agents were executing a search warrant at the residence of a suspected drug trafficker. This presented a dangerous situation for the agents and the use of handcuffs on the adult members of the family was reasonable to minimize the risk of harm to the officers and the Avinas. In addition, the agents did not act unreasonably when they forcefully pushed Thomas Avina to the floor. At the time of the push, Avina was refusing the agents' commands to get down on the ground. Because this refusal occurred during the initial entry, the agents had no way of knowing whether Avina was associated with the suspected drug trafficker, whom they thought lived there. The court however, found that the district court improperly granted summary judgment to the United States concerning the agents' conduct toward the Avinas' minor daughters. The court held that a jury could find that when the agents pointed their guns at the eleven-year-old daughter's head, while she was handcuffed on the floor, that this conduct amounted to excessive force. Similarly, the court held that a jury could find that the agents' decision to force the two girls to lie face down on the floor, with their hands cuffed behind their backs, was unreasonable. Genuine issues of fact existed as to whether the actions of the agents were excessive in light of girls' ages and the limited threats they posed. (***Avina v. United States*** (9th Cir. 2012) 681 F.3rd 1127, 1130-1134.)

Handcuffing plaintiffs at the scene of an officer-involved shooting of a teenager (one of the plaintiffs), and holding them at the scene while handcuffed for five hours while the shooting was investigated—long after probable cause had dissipated—is a **Fourth Amendment** violation. The fact that the defendant officer (Gutierrez), who was the shooting officer, was pulled aside (per department policy) and monitored during the investigation of the shooting, and no longer had any control over the scene, does not prevent that officer from being liable for the unlawfully prolonged detention. The Court held that an officer need not have been the sole party responsible for a constitutional violation before civil liability may attach. "An officer's liability under (**18 U.S.C.) Section 1983** is predicated on his 'integral participation' in the alleged violation. Officers, like other civil defendants, are generally responsible for the 'natural' or 'reasonably foreseeable' consequences. Thus, an officer can be held liable where he is just one participant in a sequence of events that gives rise to a constitutional violation." The trial court's denial of qualified immunity for that officer was upheld. (***Nicholson v. City of Los Angeles*** (9th Cir.

2019) 935 F.3rd 685: The officer's potential civil liability for shooting the one plaintiff was not at issue in this appeal.)

Roadblocks as a Use of Force:

Where a motorcyclist fled from law enforcement and reached speeds "as high as 100 miles per hour during the chase," to end the pursuit, an officer pulled his police car across both lanes of the divided highway. The motorcycle crashed into the police car and the two riders suffered "severe and permanent" injuries. The Sixth Circuit characterized this roadblock as *deadly force* because the officer that created the blockade did not turn on his overhead lights and pulled out in front of the motorcycle seconds before impact. (***Buckner v. Kilgore*** (6th Cir. 1994) 36 F.3rd 536.)

The First Circuit held that a roadblock "brightly illuminated and located at the end of a long straightaway" that the suspect could have avoided hitting if the brakes on his vehicle were working properly was not deadly force. (***Seekamp v. Michaud*** (1st Cir. 1997) 109 F.3rd 802.)

A partial roadblock created to stop a fleeing motorcyclist traveling at high speeds that caused an unavoidable collision was held to be an unreasonable use of force. (***Hawkins v. City of Farmington*** (8th Cir. 1999) 189 F.3rd 695, 698-702.)

A so-called "rolling roadblock," where several police vehicles "surrounded" the suspect's fleeing vehicle, began braking, and stopped the suspect's vehicle with a "low-impact collision," was characterized as "de minimis force." (***Tucker v. McCormack*** (M.D. Tenn. 2010), 2010 U.S. Dist. LEXIS 94157.)

A police officer's use of his vehicle to stop the plaintiff on his bicycle who had refused to stop when commanded to do so constitutes a use of force. The officer accomplished this by pulling his patrol car in front of plaintiff, knocking him off his bike, causing plaintiff suffer an injured wrist. The Court here classified the officer's use of force as "*intermediate*" described by the Court (at p. 599) as "force *capable* of inflicting significant pain and causing serious injury." Even so, the force used under the circumstances was held to be excessive and a violation of the **Fourth Amendment**. However, given the slow speed of the bike, the Court held that the officer was entitled to qualified immunity from civil liability. The fact that the plaintiff did not have working brakes on his bike is a fact the officer could not have known. (***Seidner v. De Vries*** (9th Cir. 2022) 39 F.4th 591.)

Factors the Court considered in reaching this conclusion included that the blockade was not obscured, the officer activated his overhead lights well before maneuvering his car to block plaintiff's

path, and the car was also continuously within plaintiff's view. Additionally, plaintiff was not traveling at anything near the speeds involved in other cases where deadly force was found. (***Id***, at p. 598.)

Despite the above, the Court concluded that the officer was *not* entitled to summary judgment as a matter of law. However, because the issue was not clearly defined, he *was* entitled to a finding of qualified immunity. (***Id***, at pp. 601-603.)

***Applicable Statutes*:**

Pen. Code § 196: Justifiable Homicide: Homicide is justifiable when committed by *peace officers* and those acting by their command in their aid and assistance, under either of the following circumstances:

(a) In obedience to any judgment of a competent court.

(b) When the homicide results from a peace officer's use of force that is in compliance with (**P.C.**) **Section 835a**.

See ***Kortum v. Alkire*** (1977) 69 Cal.App.3rd 325, 333; ***Foster v. City of Fresno*** (N.D. Cal. 2005) 392 F.Supp.2nd 1140, 1159; and **CALCRIM # 507**: "*Justifiable Homicide*: *By Public Officer*."

Pen. Code § 197: Justifiable Homicide: Homicide is also *justifiable* when committed by *any person* in any of the following situations:

1. When resisting any attempt to *murder*, commit a *felony*, or to do *great bodily injury* upon any person; *or*

2. When committed in *defense of habitation*, *property* or *person*, at least in cases of violent felonies; *or*

3. When committed in *defense of person*, or of a *wife* or *husband*, *parent*, *child*, *master*, *mistress*, or *servant* of such person, at least in cases of violent felonies; *or*

4. When necessarily committed in attempting to *apprehend any person* for any *felony*, or in *suppressing any riot*, or in *keeping* and *preserving the peace*.

The trial court was not required to instruct the jury sua sponte on the law of justifiable homicide in making an arrest, per **Pen. Code § 197(4)**, where defendant himself claimed he chased the victim for about a quarter of a mile with an axe and killed him, not in an attempt to arrest him for

burglary, but rather because the victim looked like he was not a good person. (**People *v. Zinda*** (2015) 233 Cal.App.4th 871, 877-880.)

The Court further rejected defendant's argument that he was also entitled to a "*mistake of fact*" instruction, arguing that he believed his victim had burglarized his home. (***Id.***, at pp. 880-881; "The defense of mistake of fact requires, at a minimum, an actual belief in the existence of circumstances, which, if true, would make the act with which the person is charged an innocent act," quoting **People v. Lawson** (2013) 215 Cal.App.4th 108, 115, in that even if the victim had burglarized defendant's home, killing him would not have been legally justified.

See also **CALCRIM # 508**: "*Justifiable Homicide*: *Citizen Arrest* (*Non-Peace Officer*),"and **# 509**: "*Justifiable Homicide*: *Non-Peace Officer Preserving the Peace*."

History*:** The wording in the statutes, referring to felonies seemingly without limitation, comes from the "*Common Law*" which, in its early history, made *all felonies*, of which there were only a few, capital offenses and, arguably, subject to the use of deadly force. (See ***People v. Williams (2013) 57 Cal.4th 776, 782.)

The Common Law justification for this rule has been quoted, for historical value only, by more recent cases: "'Ordinarily, an officer or private person, in making an arrest for a felony, may use whatever force is reasonably necessary to overcome a resisting felon or to stop a fleeing felon, even to the extent of taking his life; and, if deadly force is used, the homicide is justifiable. The supportive theory is that "felons ought not to be at large, and that the life of a felon has been forfeited; for felonies at common law were punishable with death."'" (See ***People v. Martin*** (1985) 168 Cal.App.3rd 1111, 1115.)

Today, with the law vastly expanded, there are many non-violent, non-capital felonies for which deadly force is *not* an appropriate response. (***People v. Ceballos*** (1974) 12 Cal.3rd 470; ***Tennessee v. Garner*** (1985) 471 U.S. 1 [105 S.Ct. 1694; 85 L.Ed.2nd 1].)

***Limitations On the Lawful Use of Deadly Force*:** In reading these statutes (**P.C. §§ 196** & **197**) (at least as these statutes existed *prior to January 1, 2010*), a literal interpretation would seem to indicate the conclusion that killing a suspect in *any felony* situation, even if only a property offense, to prevent the commission of a felony against a person, or to arrest or stop any fleeing felony suspect, nonviolent as well as violent, is lawful.

Forcible and Atrocious Crimes: Although maybe true at one time, modern case law no longer allows such a liberal application of the justifiable homicide defense. Today, the use of deadly force is specifically limited to defending against, or in the attempt to arrest someone, for "*forcible and atrocious*" crimes only (defined

below). (***People v. Ceballos*** (1974) 12 Cal.3rd 470, 478; ***Tennessee v. Garner*** (1985) 471 U.S. 1, 12-15 [105 S.Ct. 1694; 85 L.Ed.2nd 1, 10-12]; ***People v. Martin*** (1985) 168 Cal.App.3rd 1111, 1124; and **CALCRIM # 509**: "*Justifiable Homicide: Non-Peace Officer Preserving the Peace*.")

The ***Fourth Amendment***: The restrictions on the use of deadly force have their genesis in the United States Constitution. A **Fourth Amendment** "*seizure*" occurs whenever "there is a governmental termination of freedom of movement through means intentionally applied." (***Brower v. Inyo*** (1989) 489 U.S. 593, 597 [109 S.Ct. 1378; 103 L.Ed.2nd 628, 635].)

> "The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally *unreasonable*." (Emphasis added; ***Tennessee v. Garner***, *supra*, at p. 11 [105 S.Ct. 1694; 85 L.Ed.2nd at p. 9].)
>
> Similarly, the indiscriminate use of a "*booby trap*" (a felony, per **P.C. § 12355**) (or a "*trap gun*," a misdemeanor per **Fish & Game Code, § 2007**), set up in the house or elsewhere to ward off expected intruders, has been held to constitute an illegal use of force which, by its very nature, cannot be limited to those trespassers who constitute a threat of death or great bodily injury. (***People v. Ceballos***, *supra*.)
>
> See **CALCRIM # 500 et seq.**

"*Forcible and Atrocious Crime*" *Defined*: A "*forcible and atrocious crime*," warranting the use of deadly force; "is any felony that by its nature and the manner of its commission threatens, or is reasonably believed by the "*defendant*" (i.e., the *victim* of an assault who uses deadly force in response, and who is now being charged with a homicide) to threaten life or great bodily injury so as to instill in him or her a reasonable fear of death or great bodily injury." (***Tennessee v. Garner*** (1985) 471 U.S. 1, 12-15 [105 S.Ct. 1694; 85 L.Ed.2nd 1, 10-12].)

> Forcible and atrocious crimes have been held to include *murder, rape, robbery* (at least, when the suspect is armed) and *mayhem*. (***People v. Ceballos*** (1974) 12 Cal.3rd 470.)
>
> Depending upon the circumstances, they might also include the so-called "*inherently dangerous felonies*" (with the exception of *burglary*; discussed below) listed in the "*felony murder*" statute; i.e., *arson, carjacking, kidnapping, train wrecking, torture, felony child molest* and other *forcible sex offenses*, and *murder perpetrated by means of discharging a firearm from a motor vehicle with the intent to inflict death*. (See **P.C. § 189**)
>
> > *Note*: Viable arguments might be made to include other felonies as well, depending upon the circumstances of an individual case.

"(T)he crime of vehicular theft . . . without more, does not support a finding that [the suspect] pose[s] a threat" justifying the use of force when the suspect is outnumbered, unarmed, and compliant." (***Green v. City & County of San Francisco*** (9th Cir 2014) 751 F.3rd 1039, 1049-1051).

Similarly, contrary to a literal reading of the justifiable homicide statutes (e.g., **P.C. § 197.2**), killing someone in *defense of property*, even one's own home, when not provoked by a threat of death or serious bodily harm to any person, is probably *not* justifiable. (***People v. Ceballos***, *supra.*) (But, see **P.C. § 198.5**, below.)

Although a trespasser may be physically ejected, using whatever non-deadly force is reasonably necessary under the circumstances should he or she refuse to leave when requested, killing the nonviolent trespasser is only likely to leave the landowner, who thought he had a right to defend his property interests at all costs, facing possible civil and criminal penalties. (***People v. Corlett*** (1944) 67 Cal.App. 27, 35-36; **CALCRIM # 506**: "*Justifiable Homicide*: *Defending Against Harm to Person with Home or on Property*.")

Burglary of a Residence was considered at Common Law to be a dangerous felony. Modernly, however, burglary is not normally considered a forcible and atrocious crime, at least where the character and manner of the burglary does not reasonably create a fear of death or great bodily harm to any person within the home. (***People v. Ceballos*** (1974) 12 Cal.3rd 470, 479.)

Pen. Code § 198.5; the "***Home Protection Bill of Rights***:" California has enacted a *statutory presumption* that a resident of a home *is in fact* in reasonable fear of death or great bodily injury to himself, his family, or any member of the household, when someone, not a member of the family or household, has forcibly and unlawfully entered the residence, thus legalizing the resident's use of deadly force *within the residence*, absent evidence tending to rebut the presumption. (***People v. Owen*** (1991) 266 Cal.App.3rd 996, 1003-1004.)

The "resident" need not necessarily be living there lawfully. (***People v. Grays*** (2016) 246 Cal.App.4th 679; defendant not legally subletting the unit where he'd been staying for four to five months, paid rent, and had a key.)

This presumption, however, is *rebuttable*. Should the homeowner have known under the circumstances that the burglar *was not* a threat, he might very well be criminally and civilly liable for using deadly force against the intruder. (See ***People v. Owen***, *supra*, at

pp. 1003-1007; and **CALCRIM # 506** ("*Justifiable Homicide*: *Defending Against Harm to Person Within Home or on Property*.")

Case Law:

Being the victim of a residential burglary is not sufficient to arouse sufficient "heat of passion" to reduce a killing of someone believed to have been the burglar from murder to voluntary manslaughter. The defendant (victim of the burglary) himself must reasonably believe that the homicide victim provoked defendant's heat of passion. Where defendant arrived home to find a burglary in progress, and chased a person he believed to be one of the burglars with an axe, killing him, a jury verdict of second degree murder was upheld. A person who acts in the heat of passion—without reflection in response to adequate provocation—does not act with malice. An unlawful killing in such a circumstance is reduced from murder to voluntary manslaughter. But the provocation must be caused by the victim or be conduct reasonably believed by defendant to have been engaged in by the victim. The Court here, where the homicide victim was not one of the burglars, concluded that "a reasonable person in defendant's position, even under the stress of coming home to find his house being burglarized, would have more carefully assessed the situation . . . before concluding [that the victim] was involved in the burglary." (***People v. Zinda*** (2015) 233 Cal.App.4th 871, 877-880.)

Federally, it is not necessary for a trial court to instruct the jury that: "In the home, the need for self-defense and property defense is most acute." The standard federal self-defense jury instructions (**9th Cir. Model Crim. Jury Instr. 6.7**) are sufficient. (***United States v. Morsette*** (9th Cir. 2010) 622 F.3rd 1200.)

Although **P.C. § 198.5** allows for the use of deadly force in defense of habitation, "it is never acceptable to use or threaten deadly force solely to defend property." Absent evidence that the victim neighbors forcibly entered defendant's home or that they committed any felonies, or that they threatened death or serious bodily harm (intending only to remove and replace a shared fence), defendant's use of deadly force was unjustified. Accordingly, whether or not the neighbors complied with the homeowners' association rules or the Civil Code, defendant was not legally justified in brandishing a deadly firearm. (***People v. Chen*** (2020) 50 Cal.App.5th 952, 960.)

The Court found it *not* to be error to refuse to instruct the jury on the so-called **Home Protection Bill of Rights** (**Pen. Code**

§ 198.5), which creates a presumption that persons using force within their residence while believing an unlawful forcible entry occurred had a reasonable fear of imminent death or GBI to a member of their household, where the use of force occurred outside at a gate between the stairs to the porch and not within the residence. (***People v. Wilson*** (2021) 67 Cal.App.5th 819.)

Self-Defense and Defense of Others:

General Rules:

"Self-defense, when based on a reasonable belief that killing is necessary to avert an imminent threat of death or great bodily injury, is a complete justification, and such a killing is not a crime." (***People v. Elmore*** (2014) 59 Cal.4th 121, 132.)

Any person, including a peace officer, may use deadly force against another when the circumstances reasonably create a fear of imminent death or serious bodily harm to the person, and the use of deadly force reasonably appears necessary to resist the threat. (***People v. Humphrey*** (1996) 13 Cal.4th 1073, 1082; ***People v. Hardin*** (2000) 85 Cal.App.4th 625, 629-630; ***People v. Harris*** (1971) 20 Cal.App.3rd 534, 537.)

In defending oneself or another, deadly force may only be used in response to the illegal application of deadly force from the aggressor. Thus, "a misdemeanor assault must be suffered without the privilege of retaliating with deadly force." (***People v. Jones***, *supra*, at p. 482; ***People v. Clark*** (1982) 130 Cal.App.3rd 371, 380.)

Exception: A personal assault which itself is not sufficient to cause a reasonable apprehension of death or great bodily injury, even if the assault constitutes a felony, is *insufficient* to justify the use of deadly force against the assailant. "(T)he felony contemplated by the (justifiable homicide) statute is one that is more dangerous than a personal assault." (***People v. Jones*** (1961) 191 Cal.App.2nd 478, 481-482; and see **P.C. §§ 197.1**, **197.3**, above; see also **CALCRIM # 500 et seq.**

Examples: An assault by fists does not justify the person being assaulted in using a deadly weapon in response unless that person reasonably believes that the assault is so aggravated that it is likely to result in the infliction of death or great bodily injury.

See ***People v. Ramirez*** (2015) 233 Cal.App.4th 940, 945-953: In a murder case where one of the two defendants shot and killed a rival gang member during what was up until then merely a

fistfight, the trial court erroneously instructed the jury, pursuant to **CALCRIM # 3472** (*Right of Self-Defense*: *May Not Be Contrived*; see below), that a person does not have the right to claim self-defense if the person provokes a fight or quarrel with the intent to create an excuse to use force. The problem with contrived self-defense instruction in this case was that it did not include the word "*deadly*." Thus, the instruction "erroneously required the jury to conclude that in contriving to use force, even to provoke only a fistfight, defendants entirely forfeited any right to self-defense" even if the victim escalated the force used in return to "deadly force."

In a trial for assault and battery, the jury was properly instructed pursuant to **CALCRIM # 3472**, i.e., that a person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force because the jury could have rationally concluded that defendant provoked the conflict and continued to be the aggressor until the victim finally responded, at which point defendant knocked her out with a series of punches. The instruction is a generally correct statement of the law, and the facts of this case did not implicate case law relating to an intent to use only non-deadly force and an adversary's sudden escalation to deadly violence because defendant's claim of self-defense and defense of another was not based upon his use of deadly force. (***People v. Eulian*** (2016) 247 Cal.App.4th 1324, 1332-1335.)

An officer who shot and killed the decedent (without first providing a warning) when the decedent had already turned away from his intended victim (the victim having entered his own home and shut the door), was held to be unreasonable despite the decedent holding a rifle (which, was pointed either at the ground or the sky). The officer was not entitled to qualified immunity from civil liability. (***Cole v. Hutchins*** (8th Cir. 2020) 959 F.3rd 1127.)

Elements of Self-Defense: In order for the defense of self-defense to apply, it must be shown that there existed:

- A reasonable belief that the use of force was necessary to defend oneself against the immediate use of unlawful force; *and*

- The use of no more force than was reasonably necessary in the circumstances. (***People v. Minifie*** (1996) 13 Cal.4th 1055, 1065; and see ***United States v. Biggs*** (9th Cir. 2006) 441 F.3rd 1069; rejecting the argument that the defendant must also show that there were no reasonable alternatives to the use of force.)

Important Issues:

Imminent Peril: Deadly force is justified only when the apparent peril is *imminent*; meaning at the very time of the deadly response. A threat of future harm does not legally justify the application of deadly force in self-defense. (But see "*Fleeing Felon*," below.)

"*Imminent peril*" refers to the situation which, from all reasonable appearances, must be instantly dealt with. (***People v. Aris*** (1989) 215 Cal.App.3rd 1178, 1187-1188; ***In re Christian S.*** (1994) 7 Cal.4th 768-783.)

The homicide of the defendant's grandfather was not mitigated (which would have reduced the offense to a voluntary manslaughter under a "heat of passion" theory) by the fact that the grandfather had been overly critical and "mean" to the defendant in the past. (***People v. Kanawyer*** (2003) 113 Cal.App.4th 1233.)

A person using a firearm to scare off attacking dogs may have a viable self-defense argument. (***People v. Lee*** (2005) 131 Cal.App.4th 1413; conviction for discharging a firearm with gross negligence reversed for failure of the court to allow a self-defense argument.)

A convicted felon, charged with being a felon in possession of a firearm (**P.C. §§ 29800 et. seq.**; formerly **§ 12021**), may use the defense of self-defense where he grabbed a firearm when confronted with an imminent danger in those instances where "the firearm only became available during an emergency and was possessed temporarily in response to the emergency and there was no other means of avoiding the danger," and the firearm was then immediately thereafter transported to or given to law enforcement. (***People v. King*** (1978) 22 Cal.3rd 12, 24; see also **P.C. § 29850**, formerly **P.C. § 12021(h)**.)

Similarly, an inmate of a penal institution has a potential defense to a **P.C. § 4502** (Inmate in Possession of a Weapon) charge when the possession was in response to an imminent danger, where there is no opportunity to seek the help of authorities, and the weapon is given to authorities as soon as the danger has passed. (***People v. Saavedra*** (2007) 156 Cal.App.4th 561, 568-570.)

But note that the danger has to be imminent. A threat of some future harm is not justification for possessing a

prohibited weapon in violation of **P.C. § 4502**. (***People v. Velasquez*** (1984) 158 Cal.App.3rd 418, 420.)

In attempting to stop the driver of a motor vehicle from driving away, the officer was holding onto the driver's side open door, leaving into the vehicle. As this occurred, the officer shot the driver twice, killing him. After a grand jury returned a "no bill," the estate of the driver sued. The Fifth Circuit Court of Appeal upheld the trial court's finding of qualified immunity for the officer, ruling that "at the moment of the threat," the officer was in reasonable fear for his life. Per the court, it is well-established that the excessive-force inquiry is confined to whether the officer or other persons were in danger at the moment of the threat that resulted in the officers' use of deadly force. This "moment of threat test" means that "the focus of the inquiry should be on the act that led the officer to discharge his weapon." Any of the officers' actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry. The court determined that the moment of threat occurred in the two seconds before the driver of the vehicle in this case was shot. At that time, the officer was still hanging onto the moving vehicle and believed it would run him over, which could have made him "reasonably believe his life was in imminent danger." (***Barnes v. Felix*** (5th Cir. 2024) 91 F.4th 393.)

Bare Fear, or the killer's subjective fear, by itself, is not sufficient to justify self-defense or the defense of others.

Not only must the person attempting to exercise the right to self-defense or defense of others honestly feel the need to use force, but the circumstances must be sufficient to excite the fears of a *reasonable person* as well. (***People v. Sonier*** (1952) 113 Cal.App.2nd 277, 278; ***People v. Lopez*** (1948) 32 Cal.2nd 673, 675; ***People v. Williams*** (1977) 75 Cal.App.3rd 731, 739; **P.C. § 198**; **CALJIC # 5.14**; "Homicide in Defense of Member of Family.")

Apparent Necessity is all that is required. As long as the person is acting reasonably, he may act on appearances even though it is later discovered that there in fact was no real need for self-defense. (***People v. Dawson*** (1948) 88 Cal.App.2nd 85, 96; ***People v. Pena*** (1984) 151 Cal.App.3rd 462, 475-478.)

For example, in using deadly force to prevent a residential burglary, whether or not the deceased actually had the intent to commit a burglary is irrelevant to the issue of whether the person who killed him could legally use deadly force. (***People v. Walker***

(1973) 32 Cal.App.3rd 897.) The issue will be what the person who applied the force *reasonably believed* the circumstances to be.

However, an honest but *unreasonable* belief, while insufficient to establish a claim of self-defense in a murder case, might be enough to negate malice aforethought and thus reduce murder to a non-statutory voluntary manslaughter, sometimes referred to as "*imperfect self-defense*." (***People v. Flannel*** (1979) 25 Cal.3rd 688, 674; ***People v. Uriarte*** (1990) 223 Cal.App.3rd 192; see also ***People v. Saille*** (1991) 54 Cal.3rd 1103, 1107, fn. 1; ***McNeil v. Middleton*** (9th Cir. 2005) 402 F.3rd 920; ***People v. Morales*** (2021) 69 Cal.App.5th 978, 988.)

The California Supreme Court has held that such an "*honest, but unreasonable belief*" theory applies to the commission of a homicide in the defense of a third person as well. (See ***People v. Randle*** (2005) 35 Cal.4th 987.)

But see **P.C. § 835a(a)(2)**, as amended effective 1/1/2020, where the use of deadly force by law enforcement has been limited to "*when necessary in defense of human life*," presumably imposing a standard stricter than "*when reasonable*."

Imperfect Self-Defense:

"Under the doctrine of imperfect self-defense, '[a]n unlawful killing involving either an intent to kill or a conscious disregard for life constitutes voluntary manslaughter, rather than murder, when the defendant acts upon an actual but unreasonable belief in the need for self-defense.'" (***People v. Morales*** (2021) 69 Cal.App.5th 978, 988; quoting ***People v. Stitely*** (2005) 35 Cal.4th 514, 551.)

The theory of an "*imperfect self-defense*" is not available where the defendant's acts are based only upon his own delusions. (***People v. Mejia-Lenares*** (2006) 135 Cal.App.4th 1437.)

The "*imperfect self-defense*" theory did not apply where the victim had the right to use force to try to escape an unlawful, hour's long imprisonment and to protect himself and the other victim when defendant's accomplice attacked the other victim in another room. Thus, when the victim charged defendant upon the sound of the accomplice snapping the other victim's neck, defendant had the option of fleeing, stepping out of the way, or taking what he had coming to him. He did not have the right to defend himself from

the victim's lawful resort to self-defense and the defense of the other victim. (***People v. Frandsen*** (2011) 196 Cal.App.4th 266.)

It was also held that there was no error in not modifying the "imperfect self-defense" instruction to apply when a defendant's belief he needed to use deadly force was reasonable but the sort of force used was excessive and more than necessary to repel the attack (driving a knife 5½ inches into the victim's torso), as there is no authority for distinguishing between kinds of deadly force. (***People v. Morales*** (2021) 69 Cal.App.5th 978.)

A trial court erred during defendant's first-degree murder trial in refusing to instruct a jury on voluntary manslaughter based on imperfect self-defense because while defendant's testimony included evidence of delusion (i.e., he shot his friend in the head nine times, then set his body on fire, claiming that the victim had a knife and he feared an attack by him), his account pertaining to the actual shooting was not entirely delusional and thus provided substantial evidence of an actual but unreasonable belief in the need for self-defense. The instructional error was harmless, however, because a more favorable result was not reasonably probable given the overwhelming evidence that defendant was not acting in any form of self-defense. (***People v. Schuller*** (2021) 72 Cal.App.5th 221.); review granted.)

Original Aggressor Claiming Self-Defense: Goading another into a deadly quarrel also imposes some restrictions on the use of self-defense.

The one who initiates a quarrel with the intention of forcing a deadly response in an attempt to justify the use of deadly force in return cannot claim self-defense when he kills his victim. (***People v. Garnier*** (1950) 95 Cal.App.2nd 489, 496.)

In a murder case where one of the two defendants shot and killed a rival gang member during what was up until then merely a fistfight, the trial court erroneously instructed the jury, pursuant to **CALCRIM # 3472** (*Right of Self-Defense*: *May Not Be Contrived*), that a person does not have the right to claim self-defense if the person provokes a fight or quarrel with the intent to create an excuse to use force. The problem with contrived self-defense instruction in this case was that it did not include the word "*deadly*." Thus, the instruction "erroneously required the jury to conclude that in contriving to use force, even to provoke only a fistfight, defendants entirely forfeited any right to self-defense" even if the victim escalated the force used in return to "deadly force." (***People v. Ramirez*** (2015) 233 Cal.App.4th 940, 945-953.)

> See **CALCRIM # 3471**: "*Right to Self-Defense*: *Mutual Combat or Initial Aggressor*," and **CALCRIM # 3472**: "*Right to Self-Defense*: "*May Not Be Contrived*."

However, in ***People v. Eulian*** (2016) 247 Cal.App.4th 1324, 1332-1335, it was held that **CALCRIM # 3472** is a correct statement of the law and that the instruction was properly given under the facts in this case (i.e., where no deadly force was used), and that the reasoning of ***Ramirez***, *supra*, has no application where the party claiming a right to self-defense did not use deadly force.

Similarly, a person who starts the confrontation with an unjustifiable attack or who voluntarily engages in a fight or mutual combat, and suddenly finds himself losing, cannot claim self-defense unless he first attempts to withdraw from the affray and communicates that withdrawal to his adversary. (***People v. Bolton*** (1979) 23 Cal.3rd 51, 68; **P.C. § 197.3**.)

An "*original aggressor*," or a person engaged in "*mutual combat*," may claim the right to self-defense *if* he first effectively communicates (or attempts to communicate) by *words or conduct* that he wants to both (1) stop the fighting and (2) is in fact stopping the fighting. (***People v. Hernandez*** (2003) 111 Cal.App.4th 582.)

> See ***People v. Nem*** (2003) 114 Cal.App.4th 160, at pp. 166-167, disagreeing with ***Hernandez's*** conclusion that the word "*inform*," in former **CALJIC 5.54**, was misleading because it necessarily caused a jury to believe that the original aggressor's *words* were the only way to communicate an intent to withdraw.

Also, if the original aggressor used less than deadly force, his intended victim may not respond with deadly force, and if he does, then the original aggressor has the right to use deadly force in self-defense. (***People v. Hecker*** (1895) 109 Cal. 451, 464.)

On the other hand, the one originally attacked has no duty to attempt to withdraw. He may stand his ground and need not take advantage of an opportunity to escape from, or avoid another's attack or any attempt to use deadly force against him. (***People v. Dawson*** (1948) 88 Cal.App.2nd 85, 95; ***People v. Gonzales*** (1887) 71 Cal. 569, 578.)

> "(W)hen a man without fault himself is suddenly attacked in a way that puts his life or bodily safety at imminent hazard, he is not compelled to fly or to consider the proposition of flying, but may stand his ground, and defend himself to the extent of taking the life of the assailant, if that be reasonably necessary. (***People v. Newcomer*** (1897) 118 Cal. 263, 273.)
>
> This "rule applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene." (***People v. Dawson***, *supra*.)

Self-Defense is not available to a person charged with murder under the felony murder statute; i.e., one who kills another during the commission of one of the dangerous felonies listed in the murder statute; **P.C. § 189**. The purpose of the "*felony murder rule*" is to deter even accidental killings by imposing strict liability on anyone who causes another's death while committing any one or more of the specified felonies. (***People v. Loustaunau*** (1986) 181 Cal.App.3rd 163, 170.)

Neither self-defense nor defense of property is available to one who uses force to resist a lawful arrest or to deter a lawful entry upon one's land. (See **P.C. § 693**)

Mutual Combat:

"*Mutual Combat*" has a legal definition. It consists of fighting by mutual intention or consent, as most clearly reflected in an express or implied agreement to fight. There must be evidence from which the jury could reasonably find that both combatants actually consented or intended to fight before the claimed occasion for self-defense arose. (***People v. Ross*** (2007) 155 Cal.App.4th 1033, 1043-1047.)

> Also, "*mutual combat*" means not merely a reciprocal exchange of blows but one pursuant to mutual intention, consent, or agreement preceding the initiation of hostilities. . . . In other words, it is not merely the combat, but the preexisting intention to engage in it, that must be mutual." (***People v. Nguyen*** (2015) 61 Cal.4th 1015, 1044; quoting ***People v. Ross***, *supra*, at p. 1045.)
>
> > In ***Nguyen***, evidence that rival gangs had a preexisting intention to engage in hostilities whenever the opportunity presented itself supported

a finding that a murder of one gang member was a part of "mutual combat." (***People v. Nguyen***, *supra*.)

"[A]s used in this state's law of self-defense, 'mutual combat' means not merely a reciprocal exchange of blows but one pursuant to mutual intention, consent, or agreement preceding the initiation of hostilities. . . . In other words, it is not merely the combat, but the preexisting intention to engage in it, that must be mutual." (Italics in original: **People *v. Nguyen***, *supra*, at pp. 1048-1052; quoting ***People v. Ross***, *supra*, at p. 1045.)

Note, however, that a "*public officer*" does not lose his or her right of self-defense due to initiating a confrontation through the use of reasonable force to affect an arrest, prevent escape, or overcome resistance. (**P.C. § 836.5(b)**)

Once the aggressor makes a good faith attempt at withdrawal, and attempts to inform his opponent of this fact, he regains his right to claim self-defense should the original victim continue the attack. (***People v. Button*** (1895) 106 Cal. 628, 632-635; ***People v. Hecker*** (1895) 109 Cal. 451, 463-465.)

See **CALCRIM # 3474**: "*Danger No Longer Exists or Attacker Disabled*."

A jury instruction based upon a mutual combat theory is erroneous when it infers that one engaged in mutual combat must be successful in communicating his intent to withdraw. It need only be shown that the defendant "*really and in good faith have endeavored to decline any further struggle . . . .*" (***People v. Quach*** (2004) 116 Cal.App.4th 294, 300-303; see also **P.C. § 197.3**)

An "*original aggressor*," or a person engaged in "*mutual combat*," may claim the right to self-defense *if* he first effectively communicates (or attempts to communicate) by *words or conduct* that he wants to both (1) stop the fighting and (2) is in fact stopping the fighting. (***People v. Hernandez*** (2003) 111 Cal.App.4th 582.)

See ***People v. Nem*** (2003) 114 Cal.App.4th 160, at pp. 166-167, disagreeing with ***Hernandez's*** conclusion that the word "*inform*," in former **CALJIC 5.54**, was misleading

because it necessarily caused a jury to believe that the original aggressor's *words* were the only way to communicate an intent to withdraw.

If the one who originally had a right to self-defense continues the altercation after the aggressor has broken off his assault and there is no longer imminent peril to the original victim, that victim cannot claim the defense when he catches and assaults the former aggressor. (***People v. Smith*** (1981) 122 Cal.App.3rd 581, 590; ***People v. Perez*** (1970) 12 Cal.App.3rd 232, 236.)

See also **CALCRIM # 3474**: "*Danger No Longer Exists or Attacker Disabled*."

However, if the original victim reasonably and in good faith feels that he must pursue his attacker in order to effectively secure himself from further danger, then self-defense is still applicable. (***People v. Hatchett*** (1942) 56 Cal.App.2nd 20, 22.)

The pursuit, however, must not be motivated by revenge nor after the necessity for self-defense has ceased. (***People v. Finali*** (1916) 31 Cal.App. 479; ***People v. Conkling*** (1896) 11 Cal. 616, 626.)

See also **CALCRIM # 3471**; "*Right to Self-Defense*: *Mutual Combat or Initial Aggressor*."

Burden of Proof: Under federal law, it has been held that justification for possessing a firearm (otherwise illegal under **18 U.S.C. § 922(g)(1)**) in self-defense is an *affirmative defense* for which the defendant must prove by a "*preponderance of the evidence*" the necessity for doing so. (***United States v. Beasley*** (9th Cir. 2003) 346 F.3rd 930.)

Fleeing Felon: The use of "*deadly force*" to stop a "*dangerous person*" fleeing from the scene of a "*forcible and atrocious crime*," or suspected of having committed such a crime, is legally justifiable. (See ***Tennessee v. Garner***, (1985) 471 U.S. 1 [105 S.Ct. 1694; 85 L.Ed.2nd 1]; **P.C. §§ 196.3, 197.4**, above.)

See **CALCRIM # 507**: "*Justifiable Homicide*: *By Public Officer*."

An officer may not use deadly force to apprehend a suspect in those circumstances where the suspect poses no immediate threat to the officer or others. But on the other hand, it is constitutionally reasonable to use deadly force to prevent an escape whenever an officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others. In making this decision, a court must consider:

(1) The severity of the crime at issue;

(2) Whether the suspect poses an immediate threat of serious physical harm to the officers or others; *and*

(3) Whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

(***Wilkinson v. Torres*** (9th Cir. 2010) 610 F.3rd 546, 550-554.)

A "*dangerous person*" is one who "poses a significant threat of death or serious bodily injury to the person attempting the apprehension or to others, or has committed a forcible and atrocious felony." (***People v. Martin*** (1985) 168 Cal.App.3rd 1111, 1124.)

Police may use deadly force to stop an escaping violent felony suspect who would pose a substantial risk to others if apprehension is delayed. (***Forrett v. Richardson*** (9th Cir. 1997) 112 F.3rd 416; deadly force used to stop a "*home invasion*" suspect who had previously shot and wounded a victim.)

While the commission of a violent crime in the immediate past is an important factor, it is *not* justification for using deadly force "*on sight*." (***Harris v. Roderick*** (9th Cir. 1997) 126 F.3rd 1189, 1203.)

See also ***Hopkins v. Andaya*** (9th Cir. 1992) 958 F.2nd 881, 887; holding that an officer's second use of deadly force was unreasonable even though the suspect had violently assaulted the officer a few minutes before, but by the time of the second use of deadly force, although he was advancing towards the officer, he was wounded and unarmed.

The force used must still be no greater than necessary under the circumstances. The use of so-called "*less lethal*" (e.g., bean bag ammunition) force may still be deadly, and not necessarily appropriate despite the fact that the suspect upon which it is used is threatening violence. (***Deorle v. Rutherford*** (9th Cir. 2001) 272 F.3rd 1272, 1283-1284; imposing a *duty to warn*, where appropriate, before using potentially deadly force.)

Absent circumstances that elevate an incident into a dangerous felony assault, deadly force is *not* lawful in attempting to arrest a misdemeanor suspect. (***People v. Wild*** (1976) 60 Cal.App.3rd 829, 832-833.)

However: "(T)he harm resulting from failing to apprehend him does not (by itself) justify the use of deadly force to do so." (***Espinosa v. City and County of San Francisco*** (9th Cir. 2010) 598 F.3rd 528, 537; quoting ***Tennessee v. Garner*** (1985) 471 U.S. 1, 11-12 [105 S.Ct. 1694; 85 L.Ed.2nd 1].)

A police officer's use of deadly force is constitutional where an escaping suspect constitutes a threat of serious physical harm to officers or others. (***Wilkinson v. Torres*** (9th Cir. 2010) 610 F.3rd 546, 550-554; attempts to flee in a stolen vehicle endangered two officers lying on the ground and/or standing nearby.)

Where an off-duty correctional officer (defendant, in this civil suit) shot and wounded the plaintiff (who had been shooting into the air and in the general direction of an angry crowd), and then after the plaintiff dropped his gun one second later, but then turned and started to run, after which the officer fired for two more seconds, with all three shots occurring in the span of three seconds, the Court held that plaintiff could not point to a case that clearly established that a reasonable officer could not use lethal force over the span of three seconds on an individual he had just seen fire his weapon, who had not surrendered, and was still moving to evade capture. The Court emphasized that while it had the benefit of reviewing security footage, it would have been tempting to parse the multiple shots into separate individual events. However, the Court recognized that it had to consider the shots together in light of how quickly the incident transpired, recognizing that "police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." Qualified immunity from civil liability was upheld for the officer. (***Lopez v. Sheriff of Cook County*** (7th Cir. 2021) 993 F.3rd 981.)

But see newly amended (effective *1/1/20*) **P.C. § 835a(b)** & **(c)(1)(B)**:

> **(b)** Any peace officer who *has reasonable cause* to believe that the person to be arrested has committed a public offense *may use objectively reasonable force to effect the arrest, to prevent escape, or to overcome resistance*. (Italics added.)
>
> **(c)**
>
> > **(1)** Notwithstanding **subdivision (b)**, a peace officer is justified in using *deadly force* upon another person *only* when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary for either of the following reasons:

(B) To apprehend *a fleeing person* for *any felony that threatened or resulted in death or serious bodily injury*, if the officer *reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended*. Where feasible, a peace officer shall, prior to the use of force, make reasonable efforts to *identify themselves as a peace officer* and to *warn that deadly force may be used*, unless the officer has objectively reasonable grounds to believe the person is aware of those facts. (Italics added.)

Note: This new statute appears to severely limit the circumstances where an officer can use deadly force to stop a fleeing felon.

See "**P.C. § 835a**," under "*Applicable Statutes*," and under "*Fleeing Felon*," above, seriously limiting when a police officer may use deadly force.

Doctrine of Transferred Intent: In attempting to determine the legality of a claim of self-defense, and presumably the other legal justifications for committing a homicide, it is important to note that the *doctrine of transferred intent* applies.

E.g.: Accidentally shooting an innocent person while lawfully attempting to defend oneself from someone else's use of deadly force is a "*justifiable homicide*," there being no criminal intent. (***People v. Mathews*** (1979) 91 Cal.App.3rd 1018, 1024; ***People v. Levitt*** (1984) 156 Cal.App.3rd 500, 507-508.)

***Use of Deadly Force by Police Officers*:**

Rule: "When someone points a gun at a law enforcement officer, the Constitution 'undoubtedly entitles the officer to respond with deadly force.'" (***Estate of Strickland v. Nevada County*** (9th Cir. 2023) 69 F.4th 614, 617; quoting ***George v. Morris*** (9th Cir. 2013) 736 F.3rd 829, 838.)

"So it's well-settled that lethal force is justified if an officer has 'probable cause to believe that [a] suspect poses a significant threat of death or serious physical injury to the officer or others.'" (***Estate of Strickland v. Nevada County***, *supra*, at p. 620; quoting ***Long v. City & County. of Honolulu*** (9th Cir. 2007) 511 F.3rd 901, 906.)

In **Fourth Amendment** excessive force cases, (a court must) examine whether (the) police officers' actions are objectively reasonable given the

totality of the circumstances." (***Nehad v. Browder*** (9th Cir. 2019) 929 F.3rd 1125, 1132; citing ***Byrd v. Phoenix Police Dep't*** (9th Cir. 2018) 885 F.3rd 639, 642; and ***Bryan v. MacPherson*** (9th Cir. 2010) 630 F.3rd 805, 823.)

"Deadly force is reasonable if 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'" (***Lam v. City of San Jose*** (9th Cir. 2017) 869 F.3rd 1077; civil jury verdict of officer liability upheld where the officer shot the victim in the back (paralyzing him) when the victim would not drop a knife he held, and even though the victim had turned away from the officer, holding the knife to his own stomach while threatening to hurt himself.)

The Suspect's Mental Condition:

As a factor to consider when determining the reasonableness of an officer's use of deadly force, the courts are now recognizing that whether or not the target of the force was "*emotionally disturbed*" must be considered. (***Tabares v. City of Huntington Beach*** (9th Cir. 2021) 988 F.3rd 1119, 1126, citing ***Glenn v. Washington County*** (9th Cir. 2011) 673 F.3rd 864, 872; ". . . whether it should have been apparent to officers that the person they used force against was emotionally disturbed.")

> The ***Tabares*** Court noted that a reasonable jury could find that the officer failed to "deescalate" the situation by not following P.O.S.T. (Peace Officers Standards and Training) recommendations for the handling of mentally disturbed individuals (i.e., "request backup, calm the situation, avoid physical contact, determine if the person is taking medication, acknowledge the person's feelings, and not to make threats."). Such a failure to handle the situation properly was a factor in finding possible negligence on the officer's part. (***Id***., at p. 1128.)

"Even when an emotionally disturbed individual is 'acting out' and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual." (***Deorle v. Rutherford*** (9th Cir. 2001) 272 F.3rd 1272, 1283.)

> "[W]here it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under ***Graham***, the reasonableness of the force employed." (***Ibid***. See also ***Estate of***

Strickland v. Nevada County (9th Cir. 2023) 69 F.4th 614, 619-620, below.)

Punching and tasing a non-resisting and compliant arrestee who the officer knew was emotionally troubled and physically ill, and continued to do so when the arrestee did no more than flinch from the pain and cry for help, and then asphyxiating him by sitting on his chest, was unreasonable force. The officer also was not entitled to qualified immunity under the circumstances. (***Mendoza v. City of West Covina*** (2012) 206 Cal.App.4th 702, 714-720.)

Plaintiff brought a **42 U.S.C. § 1983** action after her son was shot and killed by a City of Minneapolis Police Officer; Officer Neal Walsh. The district court found the defendant officer and the City were entitled to qualified immunity as to the officer's initial use of deadly force but not the continued use of force after the deceased dropped his knife and had fallen to the ground. In this interlocutory appeal, defendant officer asserted he is entitled to qualified immunity as to the entire encounter, which lasted a total of about two seconds. The Eighth Circuit reversed the denial of qualified immunity. The Court explained that its review of the videos of the incident establishes that the defendant officer never paused during the shooting, which lasted less than two seconds, and he continued shooting for only approximately one second after plaintiff's son fell to the ground, dropping the knife. Given the swift and continuous progression of the incident and defendant officer's limited time to observe and process the circumstances, a jury could not find reasonably that the officer had sufficient time to reassess the threat presented before he stopped firing. Further, the court explained that even if plaintiff's son's emotional condition perhaps mitigated the threat he posed to the responding officers, a question we need not reach, this detail does not sufficiently distinguish this case from prior cases law such that the defendant officer would have had "fair warning" that his conduct violated a constitutional right. (***Ching v. City of Minneapolis*** (8th Cir. 2023) 73 F.4th 617.)

Responding to a call concerning a man in the street carrying a possible shotgun, officers found Gabriel Strickland—who the officers recognized as one with serious mental issues—carrying a possible rifle, but which had an orange-painted tip, indicating that the weapon may be a replica firearm (i.e., a BB gun). Told the drop the weapon, Strickland refused, slapping its side (sounding more like plastic than metal) while telling the officers that it was a BB gun. Strickland continued to refuse to drop the weapon, eventually pointing it at the officers. Three officers fired, killing Strickland. When the officers were later sued in federal court, the Ninth Circuit upheld the district court's decision that the officers acted reasonably in killing Strickland, finding that the officers had probable cause to believe that the weapon could have been a firearm. Of primary

importance was that "the objective facts . . . indicate(d) that the suspect pose[d] an immediate threat to the officer or a member of the public." Despite indications that the weapon could have been a replica firearm, the officers were not required to delay while attempting to verify that fact. The shooting was held to be reasonable under the circumstances. (***Estate of Strickland v. Nevada County*** (9th Cir. 2023) 69 F.4th 614.)

See "**Pen. Code § 835a**," under "*Applicable Statutes*," above.

Balancing Test:

"Our analysis must balance the nature of the intrusion upon an individual's rights against the countervailing government interests at stake, without regard for the officers' underlying intent or motivations." (***Nehad v. Browder*** (9th Cir. 2019) 929 F.3rd 1125, 1132; citing **G*raham v. Connor*** (1989) 490 U.S. 386, 396-97 [109 S.Ct. 1865; 104 L.Ed.2nd 443].)

> "Whether a use of force was reasonable will depend on the facts of the particular case, including, but not limited to, whether the suspect posed an immediate threat to anyone, whether the suspect resisted or attempted to evade arrest, and the severity of the crime at issue. [Citation] Only information known to the officer at the time the conduct occurred is relevant." (***Nehad v. Browder***, *supra*.)

Case Law:

"(P)ointing a loaded gun at a suspect, employing the threat of deadly force, is use of a high level of force." ***Espinosa v. City and County of San Francisco*** (9th Cir. 2010) 598 F.3rd 528, 538.)

The use of a police dog may be "*deadly force*." (***Smith v. City of Hemet*** (2005) 394 F.3rd 689; overruling prior authority to the contrary and defining deadly force as "*force that creates a substantial risk of death or serious bodily injury*.") But it depends upon the circumstances. (***Thompson v. County of Los Angeles*** (2006) 142 Cal.App.4th 154.)

The survivors of an individual killed as a result of an officer's excessive use of force may assert a ***Fourth Amendment*** claim on that individual's behalf if the relevant state's law authorizes a survival action. "A cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent's successor in interest . . . , and an action may be commenced by the decedent's personal representative or, if none, by the decedent's successor in interest." (**CCP § 337.30**) (See ***Hayes v. County of San Diego*** (9th Cir. 2013) 736 Fd.3rd 1223, 1228-1229.)

Leaving open the question of whether the **Fourth Amendment** was violated by shooting a female suspect who was observed walking towards another female with a knife in hand, after the suspect had been reported hacking at a tree with the knife and acting erratically, the U.S. Supreme Court held that the officer was "at least" entitled to qualified immunity from civil liability. (***Kisela v. Hughes*** (Apr. 2, 2018) __ U.S. __, __ [200 L.Ed.2nd 449; 138 S. Ct. 1148].)

Where police responded to a call about a man behaving erratically and brandishing a pair of scissors at a convenience store, and where the shooting happened while the police were deciding how to handle the situation and when the victim/suspect unexpectedly charged the store's doorway with what appeared to be a weapon raised above his head, there were disputed factual issues relevant to an excessive force (Fourth Amendment) claim. A reasonable jury could conclude that the government's interest were insufficient to justify the use of deadly force. In particular, the officers were not responding to the report of a crime; once the officers were at the scene, there was little opportunity for the victim/suspect to flee; the victim/suspect did not appear to pose an immediate threat to the officers; and a reasonable jury could conclude that the use of less-lethal force might have been effective. (***Vos v. City of Newport Beach*** (9th Cir. 2018) 892 F.3rd 1024, 1030-1036.)

The Ninth Circuit Court of Appeal, in overruling the trial court's granting of the police officer-defendant's motion for summary judgement in a case where the officer shot and killed the decedent who had threatened another with a knife, held that a triable issue remained regarding the reasonableness of the police officer's use of deadly force. More specifically, there were genuine disputes about: (1) the officer's credibility; (2) whether the decedent posed a significant, if any, danger to anyone; (3) whether the severity of the decedent's alleged crime warranted the use of deadly force; (4) whether the officer gave or the decedent resisted any commands; (5) the significance of the officer's failure to identify himself as a police officer or warn the decedent of the impending use of force; and (6) the availability of less intrusive means of subduing the decedent. (***Nehad v. Browder*** (9th Cir. 2019) 929 F.3rd 1125, 1133-1137.)

A federal district court's denial of qualified immunity for officers in a **Fourth Amendment** excessive force case was reversed because a reasonable officer under the circumstances would have perceived the decedent's actions to constitute a significant and immediate threat to the officers in the path of her vehicle and to other members of the public who were in the vicinity. The officers' use of deadly force was objectively reasonable at the time of the shooting. The determination that the officers'

use of force was objectively reasonable necessarily also resolved the state law battery and **Bane Act** claims. With respect to state law negligence and wrongful death claims—which "may be premised on a broader set of conduct than conduct amounting to excessive force under federal law"—the district court on remand should consider whether the officers acted unlawfully prior to and at the time they shot at the decedent and her vehicle. (***H.B. v. City of Torrance*** (9th Cir. 2019) 790 Fed.Appx. 60; unpublished.)

> The underlying facts, shown on video and which led to the decedent being shot and killed by officers, proved that "the decedent drove in an erratic manner, including by swerving repeatedly into oncoming traffic, that posed a danger to members of the public in a busy metropolitan area. The videos also show that the decedent, having been boxed in by the police officers, accelerated outward in the direction of at least one of the officers, toward a lane for oncoming traffic and a nearby gas station. Because the decedent accelerated toward the officers from only a few feet away, a reasonable officer under these circumstances would have perceived the decedent's actions to constitute a significant and immediate threat to the officers in the path of her vehicle and to other members of the public who were in the vicinity." Shooting her, therefore, was held by the Ninth Circuit to be "reasonable," and not in violation of the **Fourth Amendment**. (***Ibid***.)

An officer shot and killed the decedent (plaintiff's father) as he attempted to arrest him. The Seventh Circuit Court of Appeal first noted the rule: "(I)f a reasonable officer in (the officer's) shoes would have believed that (the decedent) posed an imminent threat of serious physical harm, or that he had committed a crime involving serious physical harm and was about to escape, the Officer's use of force was reasonable." In this case, when the officer shot and killed the decedent, it was undisputed that: (1) At the tail end of an extensive chase (by vehicle and on foot), the decedent, ignoring the possibility of escape through an open garage door, had belligerently defied the officer's command by daring the officer to shoot him. (2) The decedent stepped towards the officer while holding something in his hand. (3) The decedent was a young man (26 years old) and significantly larger (6'4" and 243 pounds) than the officer (42 years old, 5'7" and 155 pounds) and had a reputation for physical violence. (4) The decedent refused every opportunity to surrender during an extensive chase, and had decided to change the status quo of a standoff. (5) Despite the fact that the officer had his pistol in his hand, the decedent became aggressive, thus causing the officer to reasonably believe he was at risk of being overcome and disarmed. Based on these facts, the court found that it was reasonable for the officer to use deadly force to protect himself and

the other individuals in the garage from the threat posed by the decedent. (***Siler v. City of Kenosha*** (7th Cir. 2020) 957 F.3rd 751.)

In a civil rights action brought by the family of a van driver shot by police and the van occupant against the city and police officers following a police chase that ended when the van crashed into a cruiser and the driver was killed, the trial court properly granted summary judgment to defendant officers on the **42 U.S.C.S. § 1983** and **Fourth Amendment** claims. The Court held that the use of deadly force was reasonable where the driver was actively resisting arrest and attempting to drive toward the officers, who were on foot. The severity of the crime weighed in favor of the use of force. Also the officers did not use excessive force when they deployed a canine to physically apprehend the detainee after the shooting. Plaintiffs' state claims also failed because they could not show battery where the officers did not use unreasonable force. The negligence claim required the court to assess the reasonableness of the officers' actions. Lastly, the **Bane Act** claim failed where plaintiffs failed to show the officers interfered with any constitutional rights using threats, intimidation, or coercion. (***Monzon v. City of Murrieta*** (9th Cir. 2020) 978 F.3rd 1150.)

In granting summary judgment to a police officer on the basis of qualified immunity, the trial court did not err in finding that no controlling precedent had clearly established that plaintiff's son's right under the Fourth Amendment to be free from the excessive use of deadly force by police would be violated when he was shot and killed as he advanced toward an individual he had earlier that day assaulted, while carrying a drawn knife and while defying specific police orders to stop. (***Ventura v. Rutledge*** (9th Cir. 2020) 978 F.3rd 1088.)

Shooting and killing the decedent in an attempt to stop him from escaping in his car was held to be lawful where the decedent had fled from the officer during rush hour in the middle of a major road in a populated Detroit suburb, adjacent to residential neighborhoods and businesses. It was also noted that the officer saw the decedent make a reckless left turn in the face of oncoming traffic near a busy intersection in order to escape, causing oncoming cars to brake to avoid colliding with decedent as he turned into the a restaurant's parking lot. Third, several cars were parked in the parking lot and multiple patrons and employees were inside the establishment when the officer blocked the decedent at the drive-thru window, decedent reversed into the occupied vehicle behind him before accelerating forward and hitting the officer's police vehicle. The Court concluded that, while decedent's contact with those vehicles occurred at a relatively low speed, his conduct showed a willingness to strike both police and civilian vehicles to effectuate his escape from the police. Based on these facts, the Court held that the decedent's reckless driving posed a materially higher risk of harm to the surrounding public than in at least

one similar case where the streets were deserted and no one else was in the area. (***Gordon v. Bierenga*** (6th Cir. MI 2021) 20 F.4th 1077.)

In granting summary judgment to a police officer on the basis of qualified immunity, the trial court did not err in finding that no controlling precedent had clearly established that plaintiff's son's right under the Fourth Amendment to be free from the excessive use of deadly force by police would be violated when he was shot and killed as he advanced toward an individual he had earlier that day assaulted, while carrying a drawn knife and while defying specific police orders to stop. (***Ventura v. Rutledge*** (9th Cir. 2020) 978 F.3rd 1088.)

Officers shot and killed the deceased when he violently drove his car into a police car and, alternatively, towards an officer on foot, while intoxicated, refusing to stop and surrender. The deceased's estate sued, alleging the unreasonable use of deadly force. The Court held that the officers' use of force was objectively reasonable for three separate reasons. First, the deceased was using his car as a weapon. Second, he exhibited volatile behaviors that contributed to the officers' justification in firing to prevent death or great bodily harm to the officers. Specifically, before the incident, the decedent was drinking and using drugs; he pepper sprayed his girlfriend and her daughter in a fit of rage; he stole his girlfriend's wallet and drove away while intoxicated; he repeatedly told his girlfriend and the officers that he was suicidal; he repeatedly yelled, "Kill me!" at one officer while ignoring commands from other officers; and he repeatedly rammed his car into a patrol unit and a concrete pillar while only inches away from hitting the one officer on foot. Third, the plaintiffs did not produce any evidence that suggested the officers might have had a reasonable alternative course of action, the Court ruling that "whatever reasonable alternatives officers might've had, doing nothing and praying for the best [was] not one of them." (***Jackson v. Gautreaux*** (5th Cir. 2021) 3 F.4th 182.)

During a lawful traffic stop conducted by one officer, a second officer contacted the occupants through the passenger side window, stepping onto the running board as he did so. (Harmon was the passenger in the right front seat.) As the officer talked with the vehicle's occupants, the driver started the engine and began to drive away, ignoring the officer's commands to turn the engine off again. Within a second of the vehicle starting to move forward, the officer shot the driver four time, killing him. As the the car continued to move forward, the officer fell off and was almost hit by the back wheels of the car. Both the estate for the driver and plaintiff Harmon sued in federal court. The 5th Circuit upheld the trial court's dismissal of the case, ruling that the officer's actions were lawful, and that either way, he was entitled to qualified immunity. The Court held that it was reasonable for the officer to believe that he was at risk of

serious physical harm while he was clinging to the accelerating vehicle. The court concluded that common sense dictated that falling off a moving vehicle onto the street can result in serious physical injuries. The fact that nearly running over the officer occurred after the officer shot the driver was irrelevant, as it confirmed that the officer could reasonably perceive a serious threat of harm as the driver drove away with him holding onto the car. Finally, the court noted that, in previous opinions, it had recognized the obvious threat of harm to an officer on the side of a fleeing vehicle. (***Harmon v. City of Arlington*** (5th Cir. TX 2021) 16 F.4th 1159.)

Responding to a call concerning a man with a gun, police confronted a man named Dillon Taylor who matched the description given by the caller, and who was in the presence of two others. Ordered to stop and raise their hands, the other two men complied while Taylor walked away, ignoring the officers' repeated demands to show his hands. Taylor, instead, held his hands at or near his waistband, concealed by an untucked shirt, finally turning towards the defendant officer and making a move consistent with drawing a pistol. Taylor was shot and killed. He was found to be unarmed. Sued by Taylor's estate, the Tenth Circuit Court of Appeals noted that a police officer is entitled to qualified immunity as long as the officer's conduct does not violate a clearly established constitutional right. In excessive use of force claims, the plaintiff must establish that the officer's use of force was objectively unreasonable. In evaluating whether an officer used unreasonable force, the courts must consider: 1) the severity of the crime at issue; 2) whether the suspect poses an immediate threat to the safety of the officer or others; and 3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. Finding the first and third factors favored the decedent in this case, the Court held that the second factor—whether there was an immediate threat to safety—weighted heavily in the officer's favor. An officer's use of force is justified if the officer has "probable cause to believe that there was a threat of serious physical harm to himself or others." In this case, Taylor's lack of cooperation while moving his hands into a position where it appeared he was about to draw a firearm made the officer's decision to use deadly force reasonable. "Officers cannot be mind readers and must resolve ambiguities immediately." As a result, the court held that the officer's split-second decision to use deadly force against Taylor was reasonable, entitling the officer to qualified immunity. (***Estate of Taylor v. Salt Lake City*** (10th Cir. UT 2021) 16 F.4th 744.)

Where a law enforcement officer is falsely yet publicly accused of using deadly force, note that the officer may have civil recourse in seeking civil damages against his or her accuser, at least where the adverse public accusations identify the officer sufficiently so that those public comments can reasonably be interpreted to be "*of and concerning*" the plaintiff officer. In this case, a city council member accused the plaintiff officers

of being guilty of a "*brutal* (*and*) . . . *blatant murder*," demanding that the officers be brought to justice. Although the civil defendant counsel woman did not specifically identify the officers in her public statements alleging this, corresponding newspaper articles did. The Court held that whether this fact was sufficient to find that the defendant's comments could be interpreted to be "*of and concerning*" the plaintiffs (i.e., publicly identifying them) was a jury question; reversing the trial court's conclusion to the contrary. (***Miller v. Sawant*** (9th Cir. 2021) 18 F.4th 328.)

Officers were entitled to qualified immunity when they shot and killed an armed, fleeing (on foot) suspect who refused orders to stop and drop his gun. The officers had a report that a suspect matching the decedent's description had been brandishing a firearm at an apartment complex. Upon arriving at the scene and observing him get out of his vehicle visibly armed with a pistol, the first officer ordered him to drop his weapon. Instead, he turned and ran. He was eventually cornered with the help of a second officer. The decedent, however, continued to run, and continued to ignore demands that he drop his pistol until he was finally shot and killed. Applying the rules of ***Tennessee v. Garner*** (1985) 471 U.S. 1 [105 S.Ct. 1694; 85 L.Ed.2nd 1], the Court held that the officers were not required to "wait until a defendant turns towards them, with weapon in hand, before applying deadly force to ensure their safety." Similarly, the court added, "officers need not wait until a fleeing suspect turns his weapon toward bystanders before using deadly force to protect them." (***Wilson v. City of Bastrop*** (5th Cir. 2022) 26 F.4th 709.)

Officers, however, are not entitled to qualified immunity from civil liability where the plaintiff's version of the force used—arguing that it was unreasonable—is supported by some evidence, even if that evidence is from one witness only, and even if that one witness is contradicted by other witnesses. The court is bound to accept as true the plaintiff's version of the facts in such a circumstance. Where officers used Tasers, blunt instruments (i.e., flashlights), kicking, and eventually a firearm (shooting and killing the decedent), to subdue the decedent who was violently resisting until finally shot and killed, the reasonableness of the force used by the officers must be left to a jury to decide. (***Gambrel v. Knox County*** (6th Cir. 2022) 25 F.4th 391.)

Where an officer responding to a "shots fired and woman screaming" 911 call to a non-specified address ("two or three houses" down from the caller's house), at night and in the dark, and is suddenly confronted by the home owner (apparently being at the wrong house) coming out of his garage with a pistol in his hand, and where the home-owner starts to raise his firearm towards the officer (who is in the shadows and presumably unrecognizable as a police officer), the officer shooting and killing the home-owner was held to be reasonable under the circumstances. Per the

Eleventh Circuit: Although the "mere presence of a gun or other weapon is not enough to warrant the exercise of deadly force and shield an officer from suit," when a suspect's gun is "available for ready use"—even when the suspect has not "drawn his gun"—an officer is "not required to wait and hope for the best." In addition, the Court reiterated that the law (citing ***Tennessee v. Garner*** (1985) 471 U.S. 1 [105 S.Ct. 1694; 85 L.Ed.2nd 1]) does not require an officer to always provide a warning before using deadly force but, instead, only "if feasible." An officer in this officer's position during the rapidly unfolding events on that dark night reasonably could have believed that the man raising a pistol in his direction was about to shoot him. While in hindsight, that decision might have been a mistake, courts "do not view an officer's actions with the 20/20 vision of hindsight," as qualified immunity leaves "room for mistaken judgments." The Court also explained that under these circumstances, Eleventh Circuit case law establishes that the officer could "respond with deadly force to protect himself" and was not required to wait until the home owner fired his gun to return fire in self-defense. In conclusion, the court recognized that "the shooting was tragic, as such shootings always are, but tragedy does not equate with unreasonableness under clearly established law." (***Powell v. Snook*** (11th Cir. 2022) 25 F.4th 912.)

Following a high speed chase, ending with plaintiff crashing into a tree, plaintiff was slow to exit his vehicle. Upon doing so, however, officers shot him, severely wounding him. Upon plaintiff's lawsuit for the use of excessive force, plaintiff claimed that he was shot without justification in that he was not armed and offered no resistance, and that he reached for his wallet to provide identification as he was commanded to do so. The defendant police officers claimed that plaintiff reached for his waistband where a dark handled object could be seen. The Court found that the officers were not entitled to qualified immunity in that their defense was based upon their version of the facts where the Court is required to accept as true the plaintiffs. Factual issues, therefore, had to be left for a jury to decide. (***Bayon v. Berkebile*** (7th Cir. 2022) 29 F.4th 850.)

Officers are also not entitled to qualified immunity were it was disputed as to whether the decedent—shot and killed by officers after a foot pursuit—had dropped his gun. In this case, one frame of an officer's body-camera footage appeared to look directly at the items dropped by the decedent—including the gun—while the officers ran after him. In addition, the autopsy results and re-creations of the scene supported the plaintiff's claim that the decedent was nearly prone on the ground when he was fatally shot, rather than in the upright "firing position" as alleged by the officer. The Court held that this evidence presented by the plaintiff, if credited by the jury, would support a finding that the officer used excessive force against the decedent. The Court added that if the jury believed that the officer used excessive force against decedent, it was clearly established in

2017 that the use of deadly force against a fleeing suspect who does not pose a significant threat of death or serious physical injury to the officers or others is unlawful. (***Williams v. City of Burlington*** (8th Cir. 2022) 27 F.4th 1346.)

The district court did not err by denying the officer qualified immunity in a **42 U.S.C. § 1983** action filed by the decedent's children because a question of fact remained regarding the level of threat the decedent posed immediately before he died. While the officer's use of excessive force, shooting the decedent six times with no warning, violated the **Fourth Amendment**, a key disputed fact was whether the decedent was facing the officer and on the attack as the officer contended, or whether he was turned away from the officer as indicated by the coroner's report. (***Estate of Aguirre v. County of Riverside*** (2022) 29 F.4th 624.)

If deputy sheriffs did indeed shoot the sixty-four-year-old decedent without objective provocation, as the decedent was holding onto his walker with his gun trained on the ground, as plaintiff alleged, then a reasonable jury could determine that the officers violated the **Fourth Amendment** by shooting and killing him. The officers were therefore not entitled to qualified immunity. (***George v. Morris*** (9th Cir. 2013) 736 F.3rd 829, 836-839.)

> Where it is shown, however, that the suspect did in fact point a firearm at officers, the use of deadly force is justified. (***Id***., at p. 838; "When an individual points his gun 'in the officers' direction,' the Constitution undoubtedly entitles the officer to respond with deadly force."

The use of deadly force by shooting into a subject's vehicle in a dangerous high-speed chase situation is lawful so long as the danger continues to exist (***Plumhoff v. Rickard*** (2014) 572 U.S. 765, 766 [134 S. Ct. 2012; 188 L.Ed.2nd 1056].), but not so when the subject is surrounded and poses no immediate danger to others. (***A.D. v. State of California Highway Patrol*** (9th Cir. 2013) 712 F.3rd 446.)

A police officer violates the **Fourteenth Amendment** due process clause if he kills a suspect when acting with the purpose to harm, unrelated to a legitimate law enforcement objective. An officer was properly found to be civilly liable after shooting and killing the decedent (plaintiffs' mother) at the end of a high speed chase, but where the decedent was blocked in without a means of escape, and where no weapons were observed. (***Id***, at pp. 452-454, 456-460.)

> The officer held *not* to be entitled to qualified immunity. (***Id***., at pp. 454-455.)

Where officers shot and killed the plaintiff's father, there was no violation of the plaintiff/minor's **Fourteenth Amendment** rights because there was no evidence that the deputies acted with a purpose to harm unrelated to the legitimate law enforcement objective of defending themselves when the decedent approached with a knife in his hand. However, remand of the plaintiff/minor's negligent wrongful death claim was required because a reasonable jury could conclude that the use of deadly force was not objectively reasonable under the circumstances. (***Hayes v. County of San Diego*** (9th Cir. 2013) 736 F.3rd 1223, 1229-1235; a negligence civil action.)

> An officer's *pre-shooting conduct* is properly included in the totality of the circumstances surrounding his use of deadly force. The officer's duty to act reasonably when using deadly force extends to pre-shooting conduct when officers shot a suicidal person who approached them with a knife in hand. (***Id***., at pp. 1235-1236; see also ***Mendez v. County of Los Angeles*** (9th Cir. 2018) 897 F.3rd 1067, 1073, 1082-1084.)

See ***Tabares v. City of Huntington Beach*** (9th Cir. 2021) 988 F.3rd 1119, holding that California's negligence rules are different than the **Fourth Amendment** excessive (i.e., "deadly") force rules, holding that the former may be violated despite an officer's use of force being reasonable under **the Fourth Amendment**. Citing ***Hayes***, *supra*, at pg. 254, the Court noted that "(o)fficers are liable (under California's negligence standards) 'if the tactical conduct *and decisions leading up to the use of deadly force* show, as part of the totality of circumstances, that the use of deadly force was unreasonable.'" (Italics in original.) **Fourth Amendment** rules generally preclude the consideration of pre-incident decisions. (See ***Scott v. Henrich*** (9th Cir. 1994) 39 F.3rd 912, 914.)

> "Thus, California negligence law regarding the use of deadly force overall is 'broader than federal **Fourth Amendment** law.'" (***Tabares v. City of Huntington Beach***, *supra*, at p. 1125; quoting ***Villegas ex rel. C.V. v. City of Anaheim*** (9th Cir. 2016) 823 F.3rd 1252, 1257, fn.6.)

A police officer who shoots a person is not entitled to qualified immunity from a father's **Fourteenth Amendment** claim for deprivation of a familial relationship where the evidence shows that the decedent was already subdued, creating a genuine issue as to whether the officer's actions were required by a legitimate law enforcement purpose. (***Johnson v. Bay Area Rapid Transit Dist.*** (9th Cir. 2013) 724 F.3rd 1159, 1168-1170.)

Shooting a mentally ill, mid-50's year-old-woman who threatened to kill the officers as she aggressively moved towards them (coming to within two to four feet) while wielding a knife, held to be legally justified as a matter of law under the circumstances. (***City & County of San Francisco v. Sheehan*** (2015) 575 U.S. 600, 612-617 [135 S.Ct. 1765; 191 L.Ed.2nd 856].)

> The Court declined to decide whether making a second entry of plaintiff's room, having initially backed out when confronted by the knife-wielding plaintiff, was constitutional under the circumstances, it not having been briefed on appeal, but rather (in overruling the Ninth Circuit Court of Appeal) found that the officers had qualified immunity from civil liability in that the officers' choice to reenter the room without waiting for backup or otherwise planning a strategy did not violate clearly established law. (***Id.***, pgs. 612-616.)

An officer was properly denied qualified immunity for having shot an individual twice after ordering him to show his hands. The victim initially appeared to reach for something in his pocket but then (as it appeared in the officer's bodycam) raised both hands (that were empty) when the officer shot and killed him. Per the Court, a jury could well find that, at the moment he was shot, (1) Mr. Lopez presented no immediate threat to Officer Wright and (2) Officer Wright's use of deadly force was a violation of Mr. Lopez's **Fourth Amendment** rights. (***Lopez v. City of Riverside*** (9th Cir. 2023) 2023 U.S.App. LEXIS 32066; Unpublished.)

> *Note*: Appellants' emergency motion for a stay of proceedings before the district court below was GRANTED pending issuance of the mandate or further order from this Court. (Jan. 12, 2024; 2024 U.S. App. LEXIS 898.)

The analysis did not change because the weapon turned out to be a replica given the officers' reasonable belief that the resident possessed a real firearm. The officers were reasonably justified in not taking the resident's assurances that the gun was not real at face value. Under the totality of the circumstances, it was objectively reasonable for the officers to believe the resident posed an immediate threat. Given the immediacy of the threat presented by these allegations, the estate could not state a plausible claim for excessive force, regardless of whatever additional facts the resident might allege. The district court did not abuse its discretion in denying the estate leave to amend the complaint. (***Estate of Strickland v. Nevada County*** (9th Cir. 2023) 69 F.4th 614.)

Law Enforcement's Written Policy RE: Use of (Deadly) Force:

Seattle Example: In 2012, the Seattle Police Department issued a "*Use of Force Policy*" which necessarily included the use of deadly force through the use of firearms:

> *Per the policy*: "Officers shall only use objectively reasonable force, proportional to the threat or urgency of the situation, when necessary, to achieve a law-enforcement objective." The Use of Force Policy provides a set of factors that officers must consider to determine whether a proposed use of force is objectively reasonable, necessary, and proportional to the threat at issue. Although the Use of Force Policy requires officers to consider those factors before using a firearm, it also states that officers must consider those factors only "[w]hen safe under the totality of circumstances and time and circumstances permit[.]" The Use of Force Policy also requires officers to use de-escalation tactics to reduce the need for force only"[w]hen safe and feasible under the totality of circumstances[.]"
>
> In a civil suit filed by 125 Seattle Police Officers challenging the constitutionality of this policy under the **Second Amendment** right to bear arms, arguing that the policy unconstitutionally restricted the officers' right to use firearms, the Ninth Circuit Court of Appeal, in ***Mahoney v. Sessions*** (9th Cir. 2017) 871 F.3rd 873, upheld the trial court's determination that said policy was constitutional, concluding as follows:
>
> > "The City of Seattle has a significant interest in regulating the use of department-issued firearms by its police officers, and the UF (Use of Force) Policy does not impose a substantial burden on the **Second Amendment** right to use a firearm for the core lawful purpose of self-defense. Therefore, we apply intermediate scrutiny to determine whether the UF Policy violates the Second Amendment right of its police officers. We conclude that the UF Policy is constitutional under the **Second Amendment** because there is a reasonable fit between the UF Policy and the City of Seattle's important government interest in ensuring the safety of both the public and its police officers. We affirm the district court's dismissal of Appellants' Second Amendment claim." (pg. 883.)

Gov't. Code § 7286 (**SB 230**): California Law Enforcement and Established Policies: By *January 2, 2021*, all California law enforcement agencies are required to have established a policy that provides a

minimum standard on the use of force and to make the policy accessible to the public.

The policy is required to include *20 items*, including (but not limited to):

The requirement that officers use "*de-escalation techniques*," *crisis intervention tactics*," and other alternatives to force "*when feasible*."

See ***Estate of Strickland v. Nevada County*** (9th Cir. 2023) 69 F.4th 614, 619-620: Officers' failure to employ de-escalation techniques viewed as a factor in determining whether they used excessive force in subduing the soon-to-be deceased mentally disturbed individual.

That an officer may use only that level of force that is proportional to the seriousness of the offense or threat.

That officers are required to report excessive force to a superior officer.

Specific guidelines regarding situations in which an officer may or may not draw a firearm or point a firearm.

A requirement that officers consider the potential risks to bystanders before discharging a firearm.

A requirement that an officer intercede when seeing another officer use excessive force.

Specific guidelines under which the discharge of a firearm at or from a moving vehicle may or may not be permitted.

For purposes of these policies, the following definitions apply:

"*Deadly force*" is defined as force reasonably anticipated to create a substantial likelihood of causing death or great bodily injury.

"*Feasible*" is defined as reasonably capable of being done or carried out under the circumstances to successfully achieve the arrest or lawful objective without increasing risk to the officer or another person.

Note: This bill also created new **Pen. Code § 13519.10**, which requires the Commission on Peace Officer Standards and Training (POST) to implement a course for the regular and periodic training of law enforcement officers in the use of force, and to develop minimum use of force guidelines for adoption by California law enforcement agencies.

Effective *Jan. 1, 2022*, the following list of necessary requirements that a law enforcement agency's policy on the use of force was added to **Gov't. Code § 7286** by **AB 26**:

> 1. Procedures to prohibit an officer from training other officers for a period of at least three years from the date that an "abuse of force" complaint against that officer is substantiated.
>
> 2. A requirement that an officer who has received all required training on the requirement to intercede and fails to act, be disciplined up to and including in the same manner as the officer who committed the excessive force.
>
> > *Note*: Existing language in this section requires an officer to intercede when he or she observes another officer "using force that is clearly beyond that which is necessary."
>
> 3. A prohibition on retaliation against an officer who reports a suspected violation of a law or regulation by another officer, to a supervisor or other person at the agency that has the authority to investigate the violation.
>
> The following definitions were added:
>
> > "*Retaliation*" is defined as a demotion, failure to promote, denial of access to training, denial of access to resources necessary to properly perform duties, intimidation, harassment, or threat of injury.
> >
> > "*Excessive force*" is defined as a level of force that is found to have violated existing **Pen Code § 835a**, the requirements on the use of force in this section, or any other law or statute.
> >
> > "*Intercede*" is defined as physically stopping the excessive use of force; recording the excessive force if equipped with a body-worn camera;

documenting efforts to intervene or efforts to de-escalate; confronting the officer about the excessive force during the use of force; and, if the officer continues the excessive use of force, reporting to dispatch or the watch commander the offending officer's name, unit, location, time, and situation. *Note*: **Pen Code § 835a** describes the requirement that an officer use no more than "objectively reasonable force to effect the arrest, to prevent escape, or to overcome resistance," while defining all the relevant terms. (See **Pen Code § 835a**, above.)

Deadly Force Used Against Armed Individuals:

The simple fact that a suspect is known to be armed is not necessarily enough by itself to justify the use of deadly force against that person. (***Nehad v. Browder*** (9th Cir. 2019) 929 F.3rd 1125, 1134; citing ***N.E.M. v. City of Salinas*** (9th Cir. 2019) 761 F. App'x. 698, 699-700, affirming denial of summary judgment to officers who shot garden shear-wielding suspect when he turned toward officers less than nine feet away, after having swung shears at officers; ***S.B. v. Cty. of San Diego*** (9th Cir. 2017) 864 F.3rd 1010, 1014, finding triable issue where decedent was armed with a knife; ***Hayes v. County of San Diego*** (9th Cir. 2013) 736 F.3rd 1223, at 1233-34 (same); ***Glenn v. Washington Cty*** (9th Cir. 2011) 673 F.3rd 864, at 878-979, finding triable issue where police used beanbag rounds on knife-wielding subject prior to using lethal force); ***Estate of Lopez v. Gelhaus*** (9th Cir. 2017) 871 F.3rd 998, 1017, denying summary judgment where decedent was holding toy AK-47 rifle.)

In ***Nehad***, the evidence as presented in the civil defendant's motion for summary judgment showed that the decedent was some 17 feet away when shot, although walking towards the officer, it was at a "relatively slow pace," he was "not aggressive in nature" and "didn't make any offensive motions" towards the officer, and "did not say anything, make any sudden movements, or move the supposed knife in any way." Under these circumstances, a jury could reasonably find that shooting the decedent constituted an unreasonable use of force even if armed with a knife (an object which, after the fact, turned out to be a ballpoint pen). (***Nehad v. Browder***, *supra*.)

Exacerbating the situation by aggressively shouting directions at the suspect is also a factor to consider in evaluating the necessity to use deadly force. (***Estate of Strickland v. Nevada County*** (9th Cir.

May 31, 2023) 69 F.4th 614, 620 citing ***Nehad v. Browder***, *supra*, at p. 1135.)

The estate of the deceased, Bernardo Palacios Carbajal, filed suit pursuant to **42 U.S.C. § 1983** against Defendants-Appellees Salt Lake City Police Officers Neil Iversen and Kevin Fortuna in their individual capacities, as well as Salt Lake City Corporation. Plaintiff alleged the officers violated Palacios' **Fourth Amendment** rights when he was fatally shot during a police pursuit. The district court granted summary judgment on the basis of qualified immunity in favor of defendants, finding a lack of a constitutional violation and that plaintiff failed to show a violation of clearly established law. On appeal, plaintiff contended that disputes about material and historical facts precluded summary judgment. According to plaintiff, the district court erred by not making reasonable factual inferences in plaintiff's favor, primarily that: (1) Palacios may have been unaware he was being pursued by police because officers did not verbally identify themselves, because he was severely intoxicated, and he did not match the full description of the robbery suspect. (2) Once Palacios fell onto his side during the shooting and did not point his gun at officers, he was effectively subdued. (3) Palacios' conduct showed he was attempting to avoid confrontation, not evade arrest. Plaintiff also contended that officers exaggerated the seriousness of the offenses that precipitated the pursuit and that officers should have used less intrusive means of apprehension because Palacios did not pose an imminent threat. The Eighth Circuit held that the district court did not abuse its discretion as to any of the above issues. Finding no reversible error, the Court affirmed the district court's dismissal of Plaintiff's case. (***Palacios v. Fortuna*** (10th Cir. Mar. 7, 2023) 61 F.4th 1248.)

Use of a Police Dog and Deadly Force: The Ninth Circuit Court of Appeal had previously held that "*deadly force*," when evaluating the use of force by a law enforcement agency through the use of a police dog, should be defined as: "*Force which is reasonably likely to cause* (*or which 'had a reasonable probability of causing'*) *death*." (***Vera Cruz v. City of Escondido*** (9th Cir. 1997) 139 F.3rd 659, 663; use of a police dog is *not* deadly force.)

E.g.: Use of a police dog to bite and hold a potentially dangerous fleeing felon for up to a minute, until the arresting officer could insure that the situation was safe, did not constitute the use of "*deadly force*," and was therefore not a violation of the **Fourth Amendment** (seizure), despite the fact that the suspect's arm was severely injured by the dog. (***Miller v. Clark County*** (9th Cir. 2003) 340 F.3rd 959.)

The above, however, appears to be a minority opinion. As a result, the Ninth Circuit has recently changed its mind, adopting the majority rule, agreeing that even in the use of a police dog, "*deadly force*" should be

defined as "*force that creates a substantial risk of death or serious bodily injury*." (***Smith v. City of Hemet*** (9th Cir. 2005) 394 F.3rd 689.)

Note: The Ninth Circuit Court of Appeal further held in ***Smith*** that the defendant pleading guilty to resisting arrest, per **P.C. § 148(a)(1)**, does not preclude him from suing the officers for using unreasonable force so long as the officer's legal actions can be separated from his use of unreasonable force. The California Supreme Court later ruled in ***Yount v. City of Sacramento*** (2008) 43 Cal.4th 885, that it is not necessary to find the officers' lawful actions divisible from their use of unreasonable use of force in order for the criminal defendant to be guilty of resisting arrest and still sue. Based upon this theory, the Ninth Circuit found that a criminal defendant, even after pleading guilty to resisting arrest per **P.C. § 148(a)(1)**, may sue the officer for using unreasonable force in a continuous course of action so long as at least part of the officer's actions were lawful. (***Hooper v. County of San Diego*** (9th Cir. 2011) 629 F.3rd 1127.) Both ***Smith*** and ***Hooper*** are dog bite cases.

Where the dog's handler closely followed his police dog and called her off very quickly after the initial contact with the plaintiff, and due to the officer's close proximity to his dog, the encounter between plaintiff and the dog was so brief that the officer did not even know if contact had occurred, where the risk of harm posed by this particular use of force, and the actual harm caused, was moderate, the district court properly determined that the use of force in this instance was not severe. Summary judgment for the City of San Diego was upheld. (***Lowry v. City of San Diego*** (9th 2017) 858 F.3rd 124.)

Use of Deadly Force Upheld:

Where the suspect violently resisted arrest, physically attacked the officer, and grabbed the officer's gun, the use of deadly force upheld. (***Billington v. Smith*** (9th Cir. 2002) 292 F.3rd 1177, 1185.)

Where a suspect, who had been behaving erratically, swung a knife at an officer. (***Reynolds v. County of San Diego*** (9th Cir. 1996) 84 F.3rd 1162, 1168.)

Pointing a gun at a police officer. (See ***Scott v. Henrick*** (9th Cir. 1994) 39 F.3rd 912, 914; ***George v. Morris*** (9th Cir. 2013) 736 F.3rd 829, 838-839.)

Although "(l)aw enforcement officials may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed" (see ***Harris v. Roderick*** (9th

> Cir. 1997) 126 F.3rd 1189, 1204), "(w)hen an individual points his gun 'in the officers' direction,' the Constitution undoubtedly entitles the officer to respond with deadly force." (***George v. Morris***, *supra*, at p. 838.)
>
> > However, the mere fact alone that a person possesses deadly weapons does not justify the use of deadly force. (***Harris v. Roderick***, *supra*, at p. 1202.)

When the suspect attacked an officer with a rock and a stick. (***Garcia v. United States*** (9th Cir. 1987) 826 F.2nd 806, 812.)

Defendant, acting in a bizarre manner, reported to have already assaulted someone, and apparently under the influence of drugs, holding a pen with its point facing toward the officers which "may inflict lethal force," justified three officers holding him down while he was handcuffed. (***Gregory v. County of Maui*** (9th Cir. 2008) 523 F.3rd 1103; suspect died of a heart attack while being held down.)

Although "(l)aw enforcement officials may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed" (see ***Harris v. Roderick*** (9th Cir. 1997) 126 F.3rd 1189, 1204), "(w)hen an individual points his gun 'in the officers' direction,' the Constitution undoubtedly entitles the officer to respond with deadly force." (***George v. Morris*** (9th Cir. 2013) 736 F.3rd 829, 838.)

Officers were held to be entitled to qualified immunity where the officers shot and killed the decedent after he led them on a 45 minute chase following a domestic disturbance, tried to injure himself and provoke the officers into shooting him, threw rocks at the officers, and then finally advanced on the officers with a large rock over his head as if to assault the officers with it as the officers warned him that he would be shot if he didn't desist. The only alternative force then available, pepper spray, would not have alleviated the danger, and there was no reason to believe that the decedent would have acted rationally. Under the totality of the circumstances, the officers feared immediate serious physical harm. A reasonable officer would have believed that the decedent was threatening them with immediate serious harm that shooting him was a reasonable response. (***Lal v. California*** (9th Cir. 2014) 746 F.3rd 1112, 1115-1119.)

When the fleeing felon was known to have shot a victim in the course of a burglary from which he was escaping, the use of deadly force to stop him is justified. (***Forrett v. Richardson*** (9th Cir. 1997) 112 F.3rd 416, 420.)

A police officer was held *not* to have violated the **Fourth Amendment** when the decedent began reaching for the officer's gun, rushed at the

officer, violently grappled with him, and slammed the officer into multiple cars. As a matter of law, decedent's violent, precipitate, and illegal attack on the officer severed any causal connection between the officer's initial actions and his subsequent use of deadly force during the struggle in the street. (***Johnson v. City of Philadelphia*** (3rd Cir. 2016) 837 F.3rd 343.)

> See also fn. 2: "The question of proximate causation in this case is made straightforward by the exceptional circumstances presented—namely, a sudden, unexpected attack that instantly forced the officer into a defensive fight for his life. As discussed above, that rupture in the chain of events, coupled with the extraordinary violence of Newsuan's assault, makes the ***Fourth Amendment*** reasonableness analysis similarly straightforward. Given the extreme facts of this case, our opinion should not be misread to broadly immunize police officers from ***Fourth Amendment*** liability whenever a mentally disturbed person threatens an officer's physical safety. Depending on the severity and immediacy of the threat and any potential risk to public safety posed by an officer's delayed action, it may be appropriate for an officer to retreat or await backup when encountering a mentally disturbed individual. It may also be appropriate for the officer to attempt to de-escalate an encounter to eliminate the need for force or to reduce the amount of force necessary to control an individual. Nor should it be assumed that mentally disturbed persons are so inherently unpredictable that their reactions will always sever the chain of causation between an officer's initial actions and a subsequent use of force. If a plaintiff produces competent evidence that persons who have certain illnesses or who are under the influence of certain substances are likely to respond to particular police actions in a particular way that may be sufficient to create a jury issue on causation. And of course, nothing we say today should discourage police departments and municipalities from devising and rigorously enforcing policies to make tragic events like this one less likely. The facts of this case, however, are extraordinary. Whatever the ***Fourth Amendment*** requires of officers encountering emotionally or mentally disturbed individuals, it does not oblige an officer to passively endure a life-threatening physical assault, regardless of the assailant's mental state."

> But see newly enacted (effective 1/1/2020) **P.C. § 835(a)(c)(2)**; "A peace officer shall not use deadly force against a person based on the *danger that person poses to themselves*, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person." (Italics added.)

Where an officer arrives late at an ongoing police action and witnesses shots being fired by one of several individuals in a house surrounded by other officers, and that officer then shoots and kills an armed occupant of the house without first giving a warning, the officer did not violate clearly established law based on his failure to provide a verbal warning before utilizing deadly force: "No settled **Fourth Amendment** principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one [the officer] confronted here." (***White v. Pauly*** (2017) 580 U.S. 73 [137 S.Ct. 548; 196 L.Ed.2nd 463].)

> However, the Court left open the issue of Officer White's civil liability if plaintiffs can prove that he witnessed deficient performance by other officers upon his arrival and should have realized that corrective action was necessary before he used deadly force in that this theory was not argued in the courts below.

Where officers shot and killed a minor who, while apparently high on drugs and alcohol, grabbed a knife in a threatening manner while within three to eight feet (the testimony varied) of the officers, the officers were entitled to qualified immunity even though a reasonable jury could find that the decedent's **Fourth Amendment** rights had been violated. It was not clearly established as of the date of the incident (i.e., August 24, 2013) that using deadly force in this situation, even viewed in the light most favorable to the plaintiffs, would constitute excessive force under the **Fourth Amendment**. (***S.B. v. County of San Diego*** (9th Cir. 2017) 864 F.3rd 1010.)

When the decedent charged at officers from inside an apartment bedroom that was supposed to be vacant, wielding two feet of a broken hockey stick by holding it in a manner as if to strike the officers while within several feet of both police officers, and growling like an animal, shooting him in self-defense was held to be justified, the officers having qualified immunity from civil liability. (***Woodward v. City of Tucson*** (9th Cir. 2017) 870 F.3rd 1154, 1161-1163.)

A number of officers shooting the decedent 61 times in eight seconds when he pointed what appeared to be a handgun (but was later discovered to be a BB gun) at one of the officers was not unreasonable, and not a violation of the **Fourth Amendment**. Officers are not required to stop shooting until the threat is neutralized. Also, the fact that a supervisor was told by a witness that the decedent's pistol was only a BB gun did not alter this conclusion when there was insufficient time to verify that fact. (***Garza v. Briones*** (5th Cir. 2019) 943 F.3rd 740.)

An officer was held to be entitled to qualified immunity when he fatally shot a male suspect to death, where the male was over six feet tall and 250 pounds and apparently on drugs and violently resisting arrest, and where using a Taser merely aggravated him, prompting the decedent to knock the officer into a wall and then come at him, hitting him on the head, neck and back with his fists. Under these circumstances, where the decedent "clearly had the upper hand in the fight," the Court found that "there are strong reasons to believe that (the decedent) posed a risk of death or serious injury to the officers or to the family members in the home." (***Isayeva v. Sacramento Sheriff's Department*** (9th Cir. 2017) 872 F.3rd 938, 950-953.)

"(W)hen an initially compliant suspect stops following officer commands and instead grabs a readily accessible firearm (and then points it at the officer), an officer "need not wait for [the] suspect to open fire on him . . . before the officer may fire back." (***Jordan v. Howard*** (6th Cir. 2021) 987 F.3rd 537.)

See also ***Nehad v. Browder*** (9th Cir. 2019) 929 F.3rd 1125, at page 1135, where the Court concluded that a reasonable jury could find that the police officer acted with undue haste, unnecessarily creating a situation where shooting and killing an inebriated suspect became necessary, when the decedent was apparently walking (or staggering) towards the officer but still some 17 feet away, and although reported to have threatened others with a knife but where no knife was visible at the time, and where the officer failed to identify himself (the suspect being blinded by the high beams of the officer's patrol vehicle) and stepped out from behind the protection of his patrol car's door before shooting the decedent two seconds later.

The Court's analysis did not change just because the weapon turned out to be a replica given the responding officers' reasonable belief that the resident possessed a real firearm. The officers were reasonably justified in not taking the resident's assurances that the gun was not real at face value. Under the totality of the circumstances, it was objectively reasonable for the officers to believe the resident posed an immediate threat. Given the immediacy of the threat presented by these allegations, the estate could not state a plausible claim for excessive force, regardless of whatever additional facts the resident might allege. The district court, therefore, did not abuse its discretion in denying the estate leave to amend the complaint. (***Estate of Strickland v. Nevada County*** (9th Cir. 2023) 69 F.4th 614.)

Deadly Force Held to be Unreasonable:

Civil jury verdict of officer liability upheld where the officer shot the victim in the back (paralyzing him) when the victim would not drop a

knife he held, and even though the victim had turned away from the officer, holding the knife to his own stomach while threatening to hurt himself. (**Lam *v. City of* San Jose** (9th Cir. 2017) 869 F.3rd 1077.)

See also ***Curnow v. Ridgecrest Police*** (9th Cir. 1991) 952 F.2nd 321, 324-325; holding that deadly force was unreasonable where the suspect possessed a gun but was not pointing it at the officers and was not facing the officers when they shot.

And ***Ting v. United States*** (9th Cir. 1991) 927 F.2nd 1504, 1508-1511; use of deadly force held to be unreasonable when the suspect had already dropped his gun.

Possession of a pocket knife, with which the deceased was threatening to cut his own throat but not brandishing it towards officers, resulting in the officers shooting and killing him after beanbag rounds failed to subdue him, may not have warranted the use of firearms (nor even the beanbag shotgun) and thus subjecting the officers to potential civil liability. (***Glenn v. Washington County*** (9th Cir. 2011) 673 F.3rd 864, 870-880.)

> As a "*less lethal*" weapon, the lawfulness of the use of a beanbag shotgun is dependent upon a determination that its use was reasonable under the circumstances. In this case, where the out-of-control subject wasn't threatening anyone but himself, its use was unjustified. (***Id.***, at 878-880.)

Officers were not entitled to qualified immunity for having shot and killed the decedent despite the lack of any evidence by plaintiffs contradicting the officers' version of the circumstances. Between the five officers involved, there were discrepancies as to whether defendant reached for his waistband with his left or his right hand, and whether he was inside or outside his car when he did so. A jury, therefore, could plausibly find the officers' civilly liable for the decedent's death. (***Cruz v. City of Anaheim*** (9th Cir. 2014) 765 F.3rd 1076, 1078-1080.)

Pointing and "training" a firearm at a five-week-old infant while conducting a **Fourth** Waiver search is excessive, and a **Fourth Amendment** violation. (***Motley v. Parks*** (9th Cir. 2005) 432 F.3rd 1072, 1088-1089.)

Shooting a person who had not yet been accused of any crime, did not appear to be a threat to the public, and could not escape, even though he had been uncooperative and refused to show his hands, held to raise questions of fact for a civil jury to decide whether the officers had used excessive force by shooting and killing him. (***Espinosa v. City and County of San Francisco*** (9th Cir. 2010) 598 F.3rd 528. 537-538.)

Where a **42 U.S.C. § 1983** action requires a jury to sift through various disputed factual contentions, including whether officers were telling the truth about when, why, and how one officer shot the decedent, summary judgment was inappropriate. Specifically, the report from the autopsy performed on decedent's body conflicted with the officer's version of the events. A video taken by the sergeant's dashboard camera was inconsistent with the officer's version of the events. And the officer's and sergeant's statements were inconsistent with one another. (***Newmaker v. City of Fortuna*** (9th Cir. 2016) 842 F.3rd 1108, 1115-1117.)

A police officer was held not to be entitled to qualified immunity for having shot and killed an unarmed suspect during an attempted investigatory stop. Deadly force was not justified as a matter of law when the reported domestic dispute had ended before the police became involved and information from the victim indicated that defendant was not known to carry weapons. With the decedent walking away from officers, he did not pose an immediate threat to the safety of the officers or others. Shooting the decedent without warning as he pulled his hand out of his pocket, as he was ordered to do by the defendant officer, with no indication that he had a weapon (or anything else) in his hand, violated the **Fourth Amendment**. Deadly force is permissible only if the suspect threatens the officer with a weapon or there is probable cause to believe that he had committed a crime involving the infliction or threatened infliction of serious physical harm. (***A.K.H. v. City of Tustin*** (9th Cir. 2016) 837 F.3rd 1005, 1010-1013.)

An officer observing a thirteen-year-old boy walking down the street carrying what appeared to be an AK-47 rifle, shot and killed the victim after he ignored the officer's command to drop the weapon. The rifle turned out to be a toy with the bright orange tip removed. The officer was not entitled to qualified immunity where the plaintiff's evidence showed that the officer failed to warn the victim that he might get shot, the rifle was pointed towards the ground at all times, and the victim made no aggressive moves toward the officer. (***Estate of Lopez v. Gelhaus*** (9th Cir. 2017) 871 F.3rd 998, 1005-1017.)

A sheriff's deputy was not entitled to qualified immunity where he shot a violent knife-wielding suspect 18 times (and then, because he was still moving, stomped him in the head three times), killing him. A jury could determine that the decedent no longer posed an immediate threat before shooting him the last 9 times, and that any deadly force used after that point violated the **Fourth Amendment**. Although it is not necessary that a police officer cease shooting until the threat is over, a jury could reasonably conclude that the deputy in this case could have sufficiently protected himself and others after the decedent had fallen by pointing his

gun at him and pulling the trigger only if he attempted to flee or attack. (**Zion *v. County of Orange*** (9th Cir. 2017) 874 F.3rd 1072, 1075-1076.)

An officer is *not* entitled to qualified immunity for having shot an uncooperative mental patient who, after announcing that he was not going to allow the officer or hospital employees to recommit him to the hospital, was stabbing himself, and without any evidence in the record to show that anyone else was in any danger. (***Begin v. Drouin*** (1st Cir. ME, 2018) 908 F.3rd 829.)

The use of deadly force by officers against a subject who is threatening himself only (holding a knife to his own throat), and not making any threatening moves towards officers (who, in this case, were some 34 feet away), is unreasonable and will subject the officers to potential civil liability. (***Studdard v. Shelby County*** (6th Cir. TN, 2019) 934 F.3rd 478; denying the officers summary judgment.)

Shooting and killing an inebriated suspect, walking (or staggering) towards the officer but still some 17 feet away, and although reported to have threatened others with a knife but where no knife was visible at the time, and where the officer failed to identify himself (the suspect being blinded by the high beams of the officer's patrol vehicle), held to raise issues as to the reasonableness of the officer's conclusion that shooting him was necessary. The civil defendants' motion for summary judgment, granted by the trial court, was reversed and remanded for trial. (***Nehad v. Browder*** (9th Cir. 2019) 929 F.3rd 1125.)

Where a **42 U.S.C. § 1983** action requires a jury to sift through various disputed factual contentions, including whether officers were telling the truth about when, why, and how one officer shot the decedent, summary judgment was inappropriate. Specifically, the report from the autopsy performed on decedent's body conflicted with the officer's version of the events. A video taken by the sergeant's dashboard camera was inconsistent with the officer's version of the events. And the officer's and sergeant's statements were inconsistent with one another. (**Newmaker *v.* City of Fortuna** (9th Cir. 2016) 842 F.3rd 1108, 1115-1117.)

Where an officer arrives late at an ongoing police action and witnesses shots being fired by one of several individuals in a house surrounded by other officers, and that officer then shoots and kills an armed occupant of the house without first giving a warning, the officer did not violate clearly established law based on his failure to provide a verbal warning before utilizing deadly force: "No settled **Fourth Amendment** principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one [the officer] confronted

here." (***White v. Pauly*** (2017) 580 U.S. 73 [137 S.Ct. 548; 196 L.Ed.2nd 463].)

Whether four to six officers pointing guns (and one shotgun) at the plaintiff during a felony "high risk" traffic stop, after an "automated license plate reader" had misidentified the plaintiff's car as being stolen, when the plaintiff was compliant and posed no threat to the officers, constituted excessive force is a jury question. (***Green v. City & County of San Francisco*** (9th Cir. 2014) 751 F.3rd 1039, 1049-1051.)

> See "*High Speed Pursuits*," under *Use of Deadly Force by Police Officers*," above.

An officer observing a thirteen-year-old boy walking down the street carrying what appeared to be an AK-47 rifle, shot and killed the victim after he ignored the officer's command to drop the weapon. The rifle turned out to be a toy with the bright orange tip removed. The officer was not entitled to qualified immunity where the plaintiff's evidence showed that the officer failed to warn the victim that he might get shot, the rifle was pointed towards the ground at all times, and the victim made no aggressive moves toward the officer. (***Estate of Lopez v. Gelhaus*** (9th Cir. 2017) 871 F.3rd 998, 1005-1017.)

A sheriff's deputy was not entitled to qualified immunity where he shot a violent knife-wielding suspect 18 times, and then, because he was still moving, stomped him in the head three times. A jury could determine that the decedent no longer posed an immediate threat before shooting him the last 9 times, and that any deadly force used after that point violated the **Fourth Amendment**. Although it is not necessary that a police officer cease shooting until the threat is over, a jury could reasonably conclude that the deputy in this case could have sufficiently protected himself and others after the decedent had fallen by pointing his gun at him and pulling the trigger only if he attempted to flee or attack. (**Zion *v. County of Orange*** (9th Cir. 2017) 874 F.3rd 1072, 1075-1076.)

Where a sheriff's deputy shot an unarmed plaintiff in the chest, the Court ruled that the trial judge was correct in his determination that there was insufficient legal precedent to forewarn the deputy that when he was within striking distance of a suspect who had held a knife in a threatening manner a fraction of a second earlier, that it was objectively unreasonable to use deadly force (as a civil jury had so-held) instead of waiting to determine whether the suspect still possessed the knife and continued to be an immediate threat to the deputy's safety. The deputy, therefore, was held to be entitled to qualified immunity on this issue. (**Reese *v. County of* Sacramento** (9th Cir. 2018) 888 F.3rd 1030, 1036-1040.)

An officer is *not* entitled to qualified immunity for having shot an uncooperative mental patient who, after announcing that he was not going to allow the officer or hospital employees to recommit him to the hospital, was stabbing himself, and without any evidence in the record to show that anyone else was in any danger. (***Begin v. Drouin*** (1st Cir. ME, 2018) 908 F.3rd 829.)

A reserve, off-duty (out of uniform) officer, holding three unresisting and compliant teenagers at gun point for two minutes while failing to identify himself, where one of the minors was guilty at worst of traffic infractions only (leading to a collision with the officer's personal vehicle), balancing the nature of the intrusion on an individual's **Fourth Amendment** interests against countervailing governmental interests, was held to be unreasonable and a violation of the teenagers' **Fourth Amendment** rights. Also, the rule is well-settled, making qualified immunity unavailable to the officer. (***Vanderhoef v. Dixon*** (6th Cir. TN 2019) 938 F.3rd 271.)

Shooting and killing an inebriated suspect, walking (or staggering) towards the officer but still some 17 feet away, and although reported to have threatened others with a knife but where no knife was visible at the time, and where the officer failed to identify himself (the suspect being blinded by the high beams of the officer's patrol vehicle), held to raise issues as to the reasonableness of the officer's conclusion that shooting him was necessary. The civil defendants' motion for summary judgment, granted by the trial court, was reversed and remanded for trial. (***Nehad v. Browder*** (9th Cir. 2019) 929 F.3rd 1125.)

A number of officers shooting the decedent 61 times in eight seconds when he pointed what appeared to be a handgun (but was later discovered to be a BB gun) at one of the officers was not unreasonable, and not a violation of the **Fourth Amendment**. Officers are not required to stop shooting until the threat is neutralized. Also, the fact that a supervisor was told by a witness that the decedent's pistol was only a BB gun did not alter this conclusion when there was insufficient time to verify that fact. (***Garza v. Briones*** (5th Cir. 2019) 943 F.3rd 740.)

Officers who used deadly force (23 shots, 15 of which hit the decedent) to stop the decedent, armed with a knife, from running towards others and/or into traffic, when the decedent, acting irrationally, appeared to be under the influence of methamphetamine and after the use of a Taser failed to stop him, were held to be entitled to qualified immunity from civil liability. The court noted that even if the officers caused Kong to get out of this car by confronting him, it was reasonable for the officers to believe that the law allowed them to shoot him if he posed an immediate and significant threat. Consequently, the court held that the officers were entitled to qualified immunity because existing Supreme Court and Eighth

Circuit precedent did not provide fair warning to the officers that shooting Kong under these circumstances might be unreasonable. (***Sok Kong v. City of Burnside*** (8th Cir. 2020) 960 F.3rd 985.)

In a **42 U.S.C. § 1983** action, judgment for decedent's father on **Fourth Amendment** excessive use of force claim was affirmed because the jury found the officer retreated from decedent after firing the first shot and that decedent did not have scissors as he approached the officer before the second shot. The district court was correct in denying qualified immunity as a matter of law because the law was clearly established at the time of the shooting that an officer could not constitutionally kill a person who did not pose an immediate threat. The law was also clearly established at the time of the incident that firing a second shot at a person who had previously been aggressive, but posed no threat to the officer at the time of the second shot, would violate the victim's rights. (***Lam v. City of Los Banos*** (9th Cir. 2020) 976 F.3rd 986.)

Punching and tasing a non-resisting and compliant arrestee who the officer knew was emotionally troubled and physically ill, and continued to do so when the arrestee did no more than flinch from the pain and cry for help, and then asphyxiating him by sitting on his chest, was unreasonable force. The officer also was not entitled to qualified immunity under the circumstances. (***Mendoza v. City of West Covina*** (2012) 206 Cal.App.4th 702, 714-720.)

Where a police officer shot and killed the decedent at point-blank range when the decedent had begun to drive away with the officer in the car (the officer having entered the car in a futile attempt to subdue him as he resisted two officers), pre-trial summary judgment in favor of the officer was not warranted where a reasonable jury could have found that the decedent's vehicle was not traveling at a high rate of speed and that the officer did not reasonably perceive an immediate threat of death or serious bodily injury when he shot the decedent in the head. Also, a jury could find that the officer reasonably perceived a threat, but not one that justified the immediate use of deadly force. A jury could also find that a warning was practicable and that the failure to give a warning before shooting the decedent was not reasonable. (***Gonzalez v. City of Anaheim*** (9th Cir. 2014) 747 F.3rd 789, 793-797.)

> However, the Court also found that summary judgment on a **Fourteenth Amendment** substantive due process claim was warranted because there was no evidence that the officers had any ulterior motives for using force against the decedent unrelated to legitimate law enforcement objectives. (***Id.***, at pp. 797-798.)

Where officers investigating a 911 call about a suspected drug dealer with a shotgun at an apartment complex found a suspect next to or holding a shotgun and an officer shot and killed him, deadly force was not objectively reasonable because none of the officers was able to provide a clear time line of when they switched from ordering the suspect to raise his arms to ordering him to drop the gun, or how long after that switch the suspect had to comply with the new command before the officer opened fire. However, the officer was entitled to qualified immunity as to the **Fourth Amendment** excessive force claim because it was not clearly established in the law that using deadly force in this situation would constitute excessive force. Summary judgment was inappropriate, however, as to the state law claims because the use of deadly force was not objectively reasonable as a matter of law. (**C.V. *v. City of* Anaheim** (9th Cir. 2016) 823 F.3rd 1252, 1255-1257.)

Shooting and killing an inebriated suspect, walking (or staggering) towards the officer but still some 17 feet away, and although reported to have threatened others with a knife but where no knife was visible at the time, and where the officer failed to identify himself (the suspect being blinded by the high beams of the officer's patrol vehicle), held to raise issues as to the reasonableness of the officer's conclusion that shooting him was necessary. The civil defendants' motion for summary judgment, granted by the trial court, was reversed and remanded for trial. (***Nehad v. Browder*** (9th Cir. 2019) 929 F.3rd 1125.)

***Supremacy Clause Immunity*:**

Issue: There is an argument that federal officers are not necessarily bound by California's stricter "*use of deadly force*" statutes (i.e., **P.C. § 835a**; see above.), or at least, cannot be held accountable for any more than what the federal law requires.

The Westfall Act: It has been noted that this federal act, at **28 U.S.C. § 2679(b)(1)**, "accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties." (***Hoffman v. Preston*** (9th Cir. 2020) 26 F.4th 1059, 1066; quoting ***Osborn v. Haley*** (2007) 549 U.S. 225, 229 [127 S.Ct. 881; 166 L.Ed.2nd 819].)

28 U.S.C. § 1442; *Removal Statute*: Under the federal "*removal statute*" (**28 U.S.C. § 1442**), a federal civil or criminal case can be removed from state to federal court, increasing the likelihood of an outright dismissal, if the federal officer involved shows: (1) that he or she is a federal official; (2) that the prosecution arises out of acts committed by him or her under color of federal law; and, (3) that he or she has a "*colorable*" federal defense.

"*Colorable*" only means that the defense is "*plausible*," not necessarily "*clearly sustainable*." If the defense is plausible, the district court judge should remove the case. Removal provides the officer with a federal forum for the state trial, meaning the federal court shall decide the question of guilt or innocence and the availability of any defense, like immunity. (See **28 U.S.C. § 1442(a)(1)**; ***Texas v. Kleinhert*** (5th Cir. 2017) 855 F.3rd 305, 311-313.)

Case Law:

In re Neagle (1890) 135 U.S. 1 [10 S.Ct. 658; 34 L.Ed. 55]: Deputy United States Marshal David Neagle, after shooting and killing a person who was assaulting a U.S. Supreme Court Justice, was held to be immune from state prosecution for murder where he was doing no more than performing "an act which he was authorized to do by the law of the United States, which it was his duty to do as a marshal of the United States, and [] in doing that act he did no more than what was necessary and proper for him to do." Under such circumstances, "he cannot be guilty of a crime under the law of the State of California."

Clifton v. Cox (9th Cir. 1977) 549 F.2nd 722: Petitioner federal agent was a member of a task force from various agencies that secured a federal search warrant authorizing a search of a ranch, the alleged location of an illegal drug manufacturing operation. Petitioner, thinking that another agent had been shot, rushed the cabin and kicked in the door. As petitioner entered the front door, the owner started to flee, but petitioner leveled his pistol at the running figure, called halt twice, waited a second or two and then fired, killing the owner. Petitioner was indicted in the state court for second-degree murder and involuntary manslaughter. He subsequently petitioned and was granted a writ of habeas corpus and was released from state custody. On appeal, the court affirmed, holding that a federal agent could not be held on a state criminal charge where the alleged crime arose during the performance of his federal duties under the **Supremacy Clause, U.S. Const. art. VI**. The court concluded that even though petitioner federal agent's acts may have exceeded his express authority, this did not necessarily strip petitioner of his lawful power to act under the scope of authority given to him under the laws of the United States.

***Use of Deadly Force Against Foreign Nationals, in a Foreign Country*:**

Where a U.S. Border Patrol agent, in reaction to subjects throwing rocks at him while he attempted to detain a subject who had illegally crossed the international border with Mexico, shot across the border into Mexico, killing a Mexican national standing on the Mexico side, the U.S. Supreme Court (reversing the Fifth Circuit Court of Appeal's holding that the agent was entitled to qualified immunity; see ***Hernandez v. Mesa*** (5th Cir. 2015) 785 F.3rd 117.) remanded the

case to reconsider the viability of a civil suit on **Fourth Amendment** (excessive force) grounds in light of the Court's decision in ***Ziglar v. Abbasi*** (2017) 582 U.S. 120 [137 S.Ct. 1843; 198 L.Ed.2nd 290], which discussed various "special factors" that "counsel hesitation" in allowing a federal civil action per ***Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*** (1971) 403 U.S. 388 [91 S.Ct. 1999; 29 L.Ed.2nd 619] against a federal officer for his alleged use of excessive force. (***Hernandez v. Mesa*** (2017) 582 U.S. 548 [137 S.Ct. 2003; 198 L.Ed.2nd 625].)

> The Court also ruled that granting the federal agent qualified immunity from **Fifth Amendment** "due process" liability was inappropriate when the nationality and the extent of the victim's ties to the United States were unknown to the agent at the time of the shooting. "The qualified immunity analysis thus is limited to the facts that were knowable to the defendant officers at the time they engaged in the conduct in question." (***Id***., at p. 554.)

The federal district court properly denied qualified immunity to a U.S. Border Patrol agent who, while standing on American soil, shot and killed a teenage Mexican citizen who was walking down a street on the Mexico side of the border. The use of force was held to be unreasonable under the **Fourth Amendment** given that the teenager was not suspected of any crime, was not fleeing or resisting arrest, and did not pose a threat to anyone. No reasonable officer could have thought that he could shoot the teenager if, as pleaded, the teenager was innocently walking down a street in Mexico. (**Rodriguez *v.* Swartz** (9th Cir. 2018) 899 F.3rd 719, 728-734.)

> Plaintiff was also held to be entitled to bring a "***Bivens*** cause of action" for money damages, per ***Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*** (1971) 403 U.S. 388 [91 S.Ct. 1999; 29 L.Ed.2nd 619]. (***Id***., at pp. 734-739.)
>
> See **CALCRIM # 500 et seq.**

***High Speed Pursuits*:**

General Case Law:

> A police officer does not violate substantive due process by causing death through deliberate or reckless indifference to life in a high speed automobile chase aimed at apprehending a suspected offender. (***County of Sacramento v. Lewis*** (1998) 523 U.S. 833, 840-855 [118 S.C. 1708; 140 L.Ed.2nd 1043].)

> The Court here first coined the phrase, "*shocks the conscious*," when referring to official misconduct that violates substantive due process.

A high speed pursuit may or may not allow for the use of deadly force, each case depending upon its individual circumstances. (***Brosseau v. Haugen*** (2004) 543 U.S. 194 [125 S. Ct. 596; 160 L.Ed.2nd 583]; finding that an officer who shot a suspect who was attempting to flee in his vehicle did not have "*fair notice*" based upon the conflicting case law as to whether the force she used was excessive. She was therefore entitled to "*qualified immunity*" from civil liability.)

The issue of whether the **Fourth Amendment** allows for the shooting of a suspect in a high-speed pursuit situation, where the fleeing suspect does not necessarily pose a sufficient threat of harm to the officer or others, remains an open question, but, whether legal or not, at least allows for a finding that the officer is entitled to qualified immunity. (***Mullenix v. Luna*** (2015) 577 U.S. 7 [193 L.Ed.2nd 255; 136 S. Ct. 305] Per the Court: "(E)xcessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted." (***Id***., at p. 14.)

> A police officer was held to be entitled to qualified immunity for shooting and killing a reportedly intoxicated fugitive who was fleeing in a vehicle at high speed, twice threatened to kill officers, and was racing towards another officer's location before the vehicle reached a spike strip placed on the road. "It was not beyond debate that the officer acted unreasonably in the unclear border between excessive and acceptable force." (***Mullenix v. Luna***, *supra*, summary; reversing the Fifth Circuit Court of Appeal's affirmance of a Texas federal trial court's denial of the officer's motion for summary judgment. Per the Court: "(E)xcessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted." (***Id***., at p. 14.)

Federally, police officers involved in high speed chases are entitled to qualified immunity under **42 U.S.C. § 1983** unless a person who is injured (i.e., the plaintiff in the resulting civil suit) can prove that the officer acted with a deliberate intent to harm. (***Bingue v. Prunchak*** (9th Cir. 2008) 512 F.3rd 1169; see also **Veh. Code § 17004.7**.)

For an officer to be entitled to qualified immunity on a claim that a high speed pursuit violated the plaintiff's rights, it must be shown that the officer's conduct was: 1) a discretionary act or function; 2) performed in good faith; and 3) within the scope of his authority. In this case, the officer's decision to initiate, and then continue, a high speed pursuit upon plaintiff's failure to stop when the officer observed the plaintiff's license

plate light to be out, was within the officer's discretion pursuant to his department's written policies. The officer, therefore, was entitled to qualified immunity on this issue. (***Browning v. Edmonson County*** (6th Cir. KY 2021) 18 F.4th 516)

Ending a dangerous high speed vehicle chase with speeds in excess of 85 miles per hour, where the suspect was driving recklessly and forcing other motorists off the road, by bumping the suspect's car and pushing him off the road severely injuring him, is reasonable force. Also, there is no duty to break off the chase. (***Scott v. Harris*** (2007) 550 U.S. 372 [127 S.Ct. 1769; 167 L.Ed.2nd 686].)

> The Court held in ***Scott*** that there was no special **Fourth Amendment** standard for unconstitutional deadly force, but all that matters is whether the police officer's actions were reasonable. (***Id***., at pp. 381-383; see also ***Acosta v. Hill*** (9th Cir. 2007) 504 F.3rd 1323.)

A police officer's use of deadly force is constitutional where an escaping suspect constitutes a threat of serious physical harm to officers or others. (***Wilkinson v. Torres*** (9th Cir. 2010) 610 F.3rd 546, 550-554; attempts to flee in a stolen vehicle endangered two officers lying on the ground and/or standing nearby.)

> It was further held that the officer's use of deadly force under these circumstances, where the officer did not act with an "*intent to harm*," but rather with a "*legitimate law enforcement objective*," did not deprive plaintiffs of their **Fourteenth Amendment** due process right to "familial association" with the deceased. (***Id***., at pp. 554-555.)

The United States Supreme Court held that using deadly force (firing 15 shots at the driver and his passenger) to stop a dangerous high-speed chase is appropriate where the driver's flight posed a grave public safety risk and never abandoned his attempt to flee. (***Plumhoff v. Rickard*** (2014) 572 U.S. 765, 766 [134 S. Ct. 2012; 188 L. Ed.2nd 1056].)

> And even if not, the officers were entitled to qualified immunity in that as of the date of the shooting, the law was not clearly settled. (***Id***., at p. 766-767.)

Other federal circuits have approved the use of deadly force to halt a dangerous high-speed vehicular police pursuit, although under circumstances which, arguably, were more aggravated than in ***Brosseau v. Haugen***, *supra*. *See*:

Scott v. Clay County (6th Cir. 2000) 205 F.3rd 867, 877: Shooting a fleeing felon whose reckless driving posed an immediate threat to the safety of officers and innocent civilians.

Smith v. Freland (6th Cir. 1992) 954 F.2nd 343, 347-348: Shooting a fleeing *misdemeanant* who posed a danger to officers at a police roadblock when it appeared likely he would "do almost anything to avoid capture."

Cole v. Bone (8th Cir. 1993) 993 F.2nd 1328, 1330-1333: Shooting a defendant fleeing in a truck when he posed a threat to travelers on a crowded highway.

Pace v. Capobrianco (11th Cir. 2002) 283 F.3rd 1275, 1281: Shooting a fleeing felon in a vehicle when it appeared likely he would continue to use his car aggressively during a police pursuit.

Bland v. City of Newark (3rd Cir. N.J. 2018) 900 F.3rd 77: At the end of a high speed pursuit of a carjacking suspect who was reportedly armed (although it turned out he was not), the suspect (plaintiff) refused to give up after several crashes and threatened to kill pursuing officers, resulting in the officers shooting him 16 to 18 times, causing extensive injuries. The officers were held to be, at the very least, entitled to qualified immunity.

The Ninth Circuit Court of Appeal, however, has not been so forgiving:

Deadly force may *not* be justified in a "nonchalant," or "rapid Sunday drive" speed pursuit where the driver was rammed twice (under circumstances that were contrary to CHP policy) and then shot six times without a prior warning and without a showing that the officer, or any other officer, was in immediate danger. (***Adams v. Speers*** (9th Cir. 2007) 473 F.3rd 989.)

A police officer violates the **Fourteenth Amendment** due process clause if he kills a suspect when acting with the purpose to harm, unrelated to a legitimate law enforcement objective. An officer was properly found to be civilly liable after shooting and killing the decedent (plaintiffs' mother) at the end of a high speed chase, but where the decedent was blocked in without a means of escape, and where no weapons were observed. (***A. D. v. State of California Highway Patrol*** (9th Cir. 2013) 712 F.3rd 446, 452-454, 456-460.)

The officer was also held not to be entitled to qualified immunity. (***Id***., at pp. 454-455.)

Following a 70-minuite high speed pursuit, during which time no weapons were observed in the decedent's possession (despite an earlier report that he was armed), shooting the decedent in the back and killing him after he was out of the vehicle and had his empty hands raised as if giving up (which the defendant-officer believed to be a "shooting stance"), the officer was *not* entitled to qualified immunity in the decedent's estate's **Fourth Amendment** excessive force **42 U.S.C. § 1983** lawsuit. (***Longoria v. Pinal County*** (9th Cir. 2017) 873 F.3rd 699, 705-711; noting that only the decedent's estate, and not his relatives, had a valid **Fourth Amendment** claim; pg. 711.)

But see ***Wilkinson v. Torres*** (9th Cir. 2010) 610 F.3rd 546, 550-554, above, holding in a case where the defendant attempted to flee in a stolen vehicle endangered two officers lying on the ground and/or standing nearby, that a police officer's use of deadly force is constitutional where an escaping suspect constitutes a threat of serious physical harm to officers or others.

Because Sheriff's Deputies had been trained in accordance with the sheriff's vehicle pursuit policy, which included adequate consideration of speed limits under **Pen. Code, § 13519.8(b)**, the sheriff's office was entitled to immunity under **Veh. Code § 17004.7** in a personal injury suit brought by a motorcyclist who had been struck by fleeing suspects. The policy satisfied the promulgation requirement of **V.C. § 17004.7(b)(2)** because a general order requiring officers to sign off on all policies adequately ensured certification, an electronic sign-off procedure provided certification in writing consistent with **Evid. Code § 250**, and noncompliance by some officers did not amount to a failure to implement the policy. The policy complied with **subdivision (c)(8)** of **V.C. § 17004.7** because it did not give officers unfettered discretion in determining whether to request air support. (***Riley v. Alameda County Sheriff's Office*** (2019) 43 Cal.App.5th 492.)

California Statutes:

Gov't. Code § 815(a) provides a public entity with civil immunity for any injuries caused by its employees.

Veh. Code § 17001 creates a statutory exception, providing "(a) public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment."

However, **V.C. § 17004.7(b)(1)** provides that "(a) public agency employing peace officers that adopts and promulgates a written policy on, and provides regular and periodic training on an annual basis for, vehicular pursuits complying with **subdivisions (c)** and **(d)** is immune from liability for civil damages for personal injury to or death of any person or damage to property resulting from the collision of a vehicle being operated by an actual or suspected violator of the law who is being, has been, or believes he or she is being or has been, pursued in a motor vehicle by a peace officer employed by the public entity."

> **Subd. (a)** provides that "(t)he immunity provided by this section is in addition to any other immunity provided by law. The adoption of a vehicle pursuit policy by a public agency pursuant to this section is discretionary."
>
> **Subd.(b)(2):** The promulgation of the written policy must include "a requirement that all peace officers of the public agency certify in writing that they have received, read, and understand the policy. (However,) (t)he failure of an individual officer to sign a certification shall not be used to impose liability on an individual officer or a public entity."
>
> A California police agency which fails to "promulgate" and/or provide periodic training in vehicle pursuits is not entitled to qualified immunity when a plaintiff suffers injury as a result of such a pursuit. (**Morgan *v.* Beaumont *Police Dept.*** (2016) 246 Cal.App.4th 244.)
>
> Although an agency's policy must require the written certification in order to qualify for immunity, 100% compliance with that requirement is *not* a prerequisite to receiving the immunity provided for in **subd. (b)(1)**. **Ramirez *v.* City of Gardena** (2018) 5 Cal.5th 995; disapproving **Morgan v. Beaumont**, supra, to the extent it is inconsistent with this ruling, i.e., that *all* of the entity's peace officers must have complied with the written policy.)
>
> **Subd. (c)** lists the "*minimum standards*" for an agency's written policy.
>
> **Subd. (d)** defines "*regular and periodic training*" to be annual training which includes, at a minimum, those standards listed in **Subd. (c)**.

Pen. Code § 13519.8 provides that the "commission" shall implement training courses for handling high-speed vehicle pursuits. The

"commission" referred to is the "Commission on Peace Officer Standards and Training" (i.e., "POST commission; **Pen. Code § 13500(a)**.)

***Chapter 7*:**

***<u>The Bill of Rights Protections</u>*:**

***Scope of the Chapter*:** This chapter covers the various constitutional issues under the **Bill of Rights** (i.e., the first ten amendments to the U.S. Constitution), *other than* the **Fourth Amendment**.

Specifically covered is:

- The **First Amendment:**

  Freedom of Speech:

  True Threats
  Threatening Texts/Facebook Messages
  Freedom of Expression
  In Retaliation for Engaging in Protected Speech
  Compelling Governmental Interests
  Bullying
  Beauty Pageants
  Noise Regulation
  Anti-SLAPP
  Additional Case Law

  Religion
  Retaliation
  Verbally uncooperative
  A prisoner's access to the courts
  A newsman's shield law

- **Fifth Amendment:** Due process, as applied to the federal government.
- **Eighth Amendment:** Jail and prison prisoners.
- **Fourteenth Amendment:** Due process, as applied to the states.

***First Amendment*:** "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Freedom of Speech:

True Threats:

Rioting, and Advocating a Riot: Rioting or threatening to riot have sometimes been defended under the guise of a **First Amendment**

free speech right However, the courts have drawn the line between one's freedom of expression and "*true threats*." The Ninth Circuit has explained the differences between the two where it held that a district court erred in finding the federal **Anti-Riot Act** was facially overbroad and dismissed an indictment against defendants that charged them with conspiracy to violate, and violating, the **Act**. The Ninth Circuit, in reversing the district court, held that **18 U.S.C. § 2101(a)(1)**, **(2)**, and **(4)** do not violate the **First Amendment** *except* insofar as **§ 2101(a)(2)** prohibits speech tending to "*organize*," "*promote*," or "*encourage*" a riot, and **18 U.S.C.S. § 2102(b)** expands the prohibition to "*urging*" a riot and to mere advocacy. However, those offending portions of the **Act** were held by the Ninth Circuit to be severable from the remainder of the **Act**, and that once the offending language was removed, the remainder of the **Act** is not unconstitutional on its face. (***United States v. Rundo*** (9th Cir. 2021) 990 F.3rd 709.)

> In discussing "*true threats*," the Ninth Circuit in ***Rundo*** meticulously defines its applicability under the **First Amendment** where the defendant was claiming that the term "*riot*" is unconstitutional on its face. Per the Court; "A 'riot' requires either one or more 'acts of violence' or one or more 'threats' to commit one or more acts of violence. (**18 U.S.C.) § 2102(a)**. The completed acts of violence (or the threatened acts of violence) must 'constitute a clear and present danger of, or . . . result in, damage or injury to the property . . . or to the person of any other individual.' Id. (⁋) Acts of violence are not protected under the **First Amendment.** See ***NAACP v. Claiborne Hardware Co***., 458 U.S. 886, 916 . . . (1982). Nor are 'true threats," which involve subjective intent to threaten. See (**United States v. *Cassel***, 408 F.3rd (622) at 633 (9th Cir. 2005); see also ***Virginia v. Black***, 538 U.S. 343, 359-60 . . . (2003). 'True threats' are not limited to bodily harm only but also include property damage. See ***Cassel***, 408 F.3rd at 636-37; see also (***United States v.***) ***Miselis***, 972 F.3rd at 540 (4th Cir. 2020); ***United States v. Coss***, 677 F.3d 278, 283-84, 289-90 (6th Cir. 2012); ***United States v. Parr***, 545 F.3rd 491, 497 (7th Cir. 2008). (⁋) '[W]e do not hesitate to construe' a statute punishing threats 'to require . . . intent' to threaten. ***Cassel***, 408 F.3rd at 634; cf. ***Elonis v. United States***, 575 U.S. 723, . . . (2015). By requiring proof of 'intent' and proof that the overt act was committed 'for [the] purpose' of a riot, (fn. omitted) which also indicates subjective intent, (fn. omitted) Congress limited the 'threats' part of the definition of a riot to 'true threats.'

> Thus, a 'riot,' as defined in the **Act**, is not protected under the **First Amendment**." (***Id.***, at p. 719)

Stalking: Defendant appealed his conviction for stalking, pursuant to **Pen. Code § 646.9**. The Court reversed, holding that defendant's speech or speech-related acts did not support a conviction for stalking under **Pen. Code § 646.9**, because a reasonable listener would not have found them a true threat of violence. The conviction was based on odd comments to a politician's wife at an open house event for a school bond issue, a social media re-post of a publicly available photo of the family along with comments mentioning an open house event and the children, and a rambling letter to the wife criticizing local politics and containing a check made payable to "anyone who is not corrupt." Defendant's mere reference to the wife's birthday could not be seen as a serious expression of an intent to commit an act of unlawful violence. References to the children, while discomfiting, did not reflect efforts to learn about, locate, and contact them and did not imply a threat to their safety. (***People v. Peterson*** (2023) 95 Cal.App.5th 1061.) In discussing the reason for the reversal, the Court noted at page 1068:

> "'The **First Amendment** affords protection to symbolic or expressive conduct as well as to actual speech.' (***Virginia v. Black*** (2003) 538 U.S. 343, 358 [155 L. Ed. 2d 535, 123 S. Ct. 1536] . . . .) Yet its protections 'are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution.' (Ibid.) As relevant here, the **First Amendment** 'permits a State to ban a 'true threat.' (***Black***, at p. 359.) '"*True threats*" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.' (***Ibid***.) In ***People v. Lowery*** (2011) 52 Cal.4th 419, 427 . . . , the California Supreme Court followed ***Black*** in construing a statute relating to threats of violence against a crime witness or victim 'as applying only to those threatening statements that a reasonable listener would understand, in light of the context and surrounding circumstances, to constitute a true threat, namely, "a serious expression of an intent to commit an act of unlawful violence" [citation], rather than an expression of jest or frustration.' (***Lowery***, at p. 427.)"

Threatening Texts/Facebook Messages:

> From 2014 to 2016, defendant sent hundreds of Facebook messages to C.W., a local musician. Each time C.W. tried to block him, defendant would create a new Facebook account and resumed contacting C.W. Several of his messages envisaged violent harm. C.W. stopped walking alone, declined social engagements, canceled performances, and eventually contacted the authorities. Defendant was charged under a Colorado statute making it unlawful to repeatedly make any form of communication with another person in a manner that would cause a reasonable person to suffer serious emotional distress, that does cause that person to suffer serious emotional distress. Colorado courts rejected defendant's **First Amendment** argument. The Supreme Court vacated defendant's conviction. In *true-threat* cases, the prosecution must prove that the defendant had some subjective understanding of his statements' threatening nature. The **First Amendment** permits restrictions upon the content of speech in a few areas, including true threats; i.e., serious expressions conveying that a speaker means to commit an act of unlawful violence. The existence of a threat depends on what the statement conveys to the person receiving it. However, the **First Amendment** may demand a subjective mental-state requirement shielding some true threats because bans on speech have the potential to deter speech outside their boundaries. In this context, a *recklessness* standard; i.e., a showing that a person consciously disregarded a substantial and unjustifiable risk that his conduct will cause harm to another, is the appropriate mental state. Requiring purpose or knowledge would make it harder for states to counter true threats with diminished returns for protected expression. (***Counterman v. Colorado*** (June 27, 2023) __ U.S.__ [143 S.Ct. 2106; 216 L.Ed.2nd 775].)

Freedom of Expression:

> A jury could legally find that a school principal retaliated against a teacher for engaging in political speech protected by the **First Amendment** when the principal told the teacher he could not bring his hat with him to teacher-only trainings on threat of disciplinary action. (His hat had printed on it, "MAGA," for "Make America Great Again," a political statement in today's political climate.) At a minimum, there was a genuine issue of fact regarding whether

the teacher reasonably interpreted a statement by the principal as a threat against his employment. Any violation of the teacher's **First Amendment** rights by the principal was clearly established where long-standing precedent held that concern over the reaction to controversial or disfavored speech itself did not justify restricting such speech. However, in that the record failed to establish that an HR officer took any adverse employment action against the teacher, the teacher's **First Amendment** retaliation claim against her failed as a matter of law. (***Dodge v. Evergreen School District #114*** (9th Cir. 2022) 56 F.4th 767.)

The confiscation of a protestor's signs (warning motorists that the "*Police* (were) *Ahead*") and his subsequent arrest violated the protestor's right to freedom of speech because the protestor was speaking on a matter of public concern, and Connecticut had not enacted any law that proscribed the protestor's conduct. (***Friend v. Gasparino*** (2nd Cir. 2023) 61 F.4th 77.)

In ***Novak v. City of Parma*** (6th Cir. 2022) 33 F.4th 296, out of the Sixth Circuit Court of Appeal, Anthony Novak was prosecuted for a violation of an Ohio state law (**Ohio Rev. Code § 2909.04(B)**) that makes it illegal to use a computer to disrupt or impair police functions. His violation involved the creation of a Facebook page mocking the City of Parma's Police Department, doing such things as advertising free abortions in a police van and publicizing a fake "Pedophile Reform event." Posts on the page also included job postings for the police department that discouraged applications by members of minorities and an offer of "free abortions for teenagers provided by police in the Wal-Mart parking lot." Novak was charged criminally and prosecuted in a trial resulting in a not guilty verdict. Upon suing the City of Parma's Police Department for retaliation and a violation of his **First Amendment** freedom of speech, the Sixth Circuit held that the Parma Police Department officers who caused his arrest were entitled to qualified immunity from civil liability because they reasonably found probable cause in an unsettled area of the law that judges could debate. The officers had good reason to believe they had probable cause because both the city's law director and the judges who issued the arrest and search warrants agreed with them.

> The U.S. Supreme Court denied certiorari on February 21, 2022, at 2023 U.S. LEXIS 799.

Plaintiff and her friend, both dressed in "sexy cop" costumes, posed with pedestrians on the Strip and accepted tips in exchange for photos. Defendant police officers, working a plain-clothes Strip enforcement assignment, arrested plaintiff and her friend for doing

business without a license after the officers were asked to pay a tip or delete a photo. The charges against plaintiff were ultimately dropped. The Ninth Circuit Court of Appeal filed (1) an order denying a petition for panel rehearing, denying a petition for rehearing en banc, and amending the opinion filed on May 24, 2017; and (2) an amended opinion reversing in part the district court's summary judgment in favor of Las Vegas Metropolitan Police Department officers and remanding, in an action brought by a street performer who alleged she was unlawfully arrested for conducting business with another performer without a license on the Las Vegas Strip, in violation of her **First Amendment** rights. Viewing the record most favorably to plaintiff, the Court assumed that it was plaintiff's friend who asked that the officers pay a tip or delete the photo. The Court concluded that the **First Amendment** protections accorded to plaintiff's own activities did not lapse because of what her friend said or did without plaintiff's direct participation. There was no evidence at all, for example, of a prior agreement between the women to require a quid-pro-quo payment for posing in photos, nor of a demonstrated pattern of demanding quid-pro-quo payments during performances together. The Court held that plaintiff associated with her friend only for expressive activity protected under ***Berger v. City of Seattle*** (9th Cir 2009) 569 F.3rd 1029, and that the district court erred by deciding that the officers had probable cause to arrest plaintiff despite the **First Amendment** protections afforded to her expressive association. As to the denial of partial summary judgment to plaintiff, the Court remanded for a determination after trial of the disputed factual issues and for consideration in light of the Court's opinion as to whether, on the facts thus determined, plaintiff was validly arrested for her own statements and actions. (***Santopietro v. Howell*** (9th Cir. 2023) 73 F.4th 1016.)

The act of using charcoal and sidewalk chalk to write political messages on a city's sidewalks may have **First Amendment** freedom of speech implications. The Ninth Circuit remanded the plaintiffs' lawsuit back to the district court to consider this issue along with whether the city's ordinance that sought to criminalize the intentional writing, painting, or drawing on property without the express permission of the property's owner or operator was constitutionally overbroad under the **Fourteenth Amendment**. (***Tucson v. City of Seattle*** (9th Cir. 2024) 91 F.4th 1318.)

In Retaliation for Engaging in Protected Speech:

Plaintiff father sufficiently stated a **First Amendment** retaliation claim by alleging that a social worker coerced his former wife to file an ex parte custody application, because his criticism of the

agency was protected activity, the threat of losing custody would chill a person of ordinary firmness from voicing criticism of official conduct, and the social worker allegedly lacked any substantiated concern for the children's safety and treated him differently than his former wife. The social worker was not entitled to qualified immunity because a reasonable official would have known that threatening to terminate a parent's custody of his children, when such step would not have been taken absent retaliatory intent, violated the **First Amendment**. However, the father's **Fourth Amendment** claim failed because he failed to show interviews of the children at their school were seizures. (***Capp v. County of San Diego*** (9th Cir. 2019) 940 F.3rd 1046.)

The Ninth Circuit Court of Appeals affirmed in part and vacated in part a federal district court's order dismissing a complaint on qualified immunity grounds, and remanded, in an action brought pursuant to **42 U.S.C. § 1983** against the Los Angeles County Department of Children and Family Services and four individual employees alleging sexual harassment in violation of the **Equal Protection Clause** of the **Fourteenth Amendment**, retaliation under the **First Amendment**, and related constitutional claims. (***Sampson v. County of Los Angeles*** (9th Cir. 2020) 974 F.3rd 1012.)

> Department of Children and Family Services social workers were *not* entitled to qualified immunity on a guardian's **First Amendment** retaliation claim because it was clearly established at the time of the workers' conduct that the **First Amendment** prohibited them from threatening to remove the child from her custody to chill her protected speech about her having been sexually harassed. However, the Court reluctantly affirmed qualified immunity for the social workers on the guardian's **Fourth Amendment** *equal protection* claim because the right of private individuals to be free from sexual harassment at the hands of social workers was not clearly established at the time of their conduct even though the social workers clearly violated the **Equal Protection Clause** when they sexually harassed plaintiff while providing her with social services. (***Ibid***.)

Where a city police department demoted a SWAT team sniper (transferring him to patrol and thus reducing his pay) after he commented on social media (i.e., "Facebook") that it was a "shame" that a suspect who ambushed and shot a police officer did not have any "holes" in him, and where the officer sued, alleging

retaliation and a violation of his **First Amendment** freedom of speech rights, the federal district court erred in granting summary judgment for the government under ***Pickering*** (below) because there were disputed facts that required resolution by the trier of fact. In particular, there was a factual dispute about the objective meaning of the officer's comment because the officer contended that his comment suggested only that the wounded police officer should have fired defensive shots, while the government construed the statement as advocating unlawful violence. Also, a factual dispute existed over whether the officer's comment would have likely caused disruption in the police department. (***Moser v. City of Las Vegas*** (9th Cir. 2021) 984 F.3rd 900.)

> ***Pickering v. Board of Education*** (1968) 391 U.S. 563 [88 S.Ct. 1731; 20 L.Ed.2nd 811], held that for a public employee in such a case to get judicial relief, he first has to establish that (1) he spoke on a matter of public concern; (2) he spoke as a private citizen rather than a public employee; and (3) the relevant speech was a substantial or motivating factor in the adverse employment action. If the plaintiff is able to establish this prima facie case, the burden then shifts to the government to show that (4) it had an adequate justification for treating its employee differently than other members of the general public; *or* (in the disjunctive) (5) it would have taken the adverse employment action even absent the protected speech. If the government does not meet its burden, then the **First Amendment** protects the plaintiff's speech as a matter of law. (See also ***Barone v. City of Springfield*** (9th Cir. 2018) 902 F.3rd 1091, 1098.)

In ***Connick v. Meyers*** (1983) 461 U.S. 138 [103 S.Ct. 1684; 75 L.Ed.2nd 708] it was held that a disgruntled assistant district attorney's questionnaire passed around the office, resulting in her termination, was not protected by the employee's **First Amendment** freedom of speech rights. Citing the 1968 landmark case decision of ***Pickering v. Board of Education***, *supra*, the Supreme Court held that Myers' firing did not violate her **First Amendment** rights. In so finding, the Court noted that it is an issue of balancing the **First Amendment** rights implicated by Myers' questionnaire with the District Attorney's right to prevent any disruption in the smooth operation of his office. The Court here ruled in favor of the District Attorney, overruling the lower courts' rulings to the contrary.

And see **Garcetti v. Ceballos** (2006) 547 U.S. 410 [126 S.Ct. 1951; 164 L.Ed.2nd 689], where a deputy district attorney was demoted and transferred for writing an internal memo recommending dismissal of a case where the DDA decided that a necessary search warrant was defective, but where his supervisors disagreed. What the Court found to be dispositive was the context in which the DDA's memo and verbal concerns were expressed; i.e., "pursuant to his duties as a calendar deputy." As such, the **First Amendment's** Freedom of Speech rights did not protect him from discipline for writing the memo. Per the Court, the rule to be discerned from this case is that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for **First Amendment** purposes, and the Constitution does not insulate their communications from employer discipline."

The Fifth Circuit rule in a retaliation case that a trio of Wood County, TX, officials must answer charges they conspired to retaliate against a police captain because he exercised his **First Amendment** right to freedom of speech. The police captain plausibly averred deprivation of his **First Amendment** rights by seeking on his own accord to help a friend outside of the workplace, which was protected by his **First Amendment** freedom of speech. Also, the Court held that the **First Amendment** right was clearly established at time it was violated. The employee's **42 U.S.C.S. § 1983** conspiracy claim raised enough facts that discovery would reveal evidence of agreement. (***Bevill v. Fletcher*** (5th Cir. 2022) 26 F.4th 270.)

In a **42 U.S.C. § 1983** suit, arrestees/plaintiffs, who were engaged in protesting police activities by writing messages in chalk on police and other public property, sufficiently showed that their arrests were done in retaliation for their exercise of their **First Amendment** rights because a reasonable factfinder could conclude that the anti-police content of the arrestees' chalk messages was a substantial or motivating factor for their arrests, particularly as the arresting officer knew that the arrestees were activists that were vocally critical of the police. The arresting officer was not entitled to qualified immunity because it was clearly established at the time of the arrests that an arrests, even though supported by probable cause, but made in retaliation for protected speech, violated the **First Amendment**. (***Ballentine v. Tucker*** (9th Cir. 2022) 38 F.4th 54.)

To substantiate such a claim against a government official, a plaintiff must prove (1) he engaged in constitutionally protected

activity; (2) as a result, he was subjected to adverse action by the defendant that would chill a person of ordinary firmness from continuing to engage in the protected activity; and (3) there was a substantial causal relationship between the constitutionally protected activity and the adverse action. (***Wheatcroft v. City of Glendale*** (U.S. Dist. AZ, 2022) 2022 U.S. Dist. LEXIS 57006.)

> In ***Wheatcroft***, plaintiff argued that the officer arrested him in retaliation for his refusing to identify himself as the passenger in a vehicle while being detained at the scene of a traffic stop. Finding that the right to not identify oneself in such a situation is not "clearly established," the Court ruled that the officer is entitled to qualified immunity, thus entitling him to summary judgment on this issue. (***Ibid***.)

Where plaintiff in a civil suit claimed that officers retaliated against him for being verbally uncooperative, he must prove two things: I.e., that (1) the officer's conduct "would chill or silence a person of ordinary firmness from future **First Amendment** activities," and (2) the officer's desire to chill speech was a "but-for cause" of the adverse action. In this case, after plaintiff was arrested (falsely, as it turned out, due to mistaken identity), the evidence showed that he was visibly angry at the deputies, swore at them, and threatened to sue them. In response, a deputy told him: "If you weren't being so argumentative, I'd probably just put you on the curb." The Court concluded that plaintiff suffered unconstitutional (**First Amendment**) retaliation that was clearly proscribed by established law. (***Sharp v. County of Orange*** (9th Cir. 2017) 871 F.3rd 901, 919-920.)

In another case, plaintiff claimed that two police officers retaliated against him for exercising his protected **First Amendment** speech rights when they arrested him for disorderly conduct and resisting arrest during an Alaskan winter sports festival. Defendant law enforcement officers claimed that plaintiff interfered at least twice with the officers' attempts to curb alleged underage drinking. The U.S. Supreme Court ruled that plaintiff's lawsuit could not survive summary judgment. The only evidence of retaliatory animus identified by the court of appeals was plaintiff's affidavit alleging that one of the officers said "bet you wish you would have talked to me now." But that allegation said nothing about what motivated the second officer, who had no knowledge of plaintiff's prior run-in with the first officer. In any event, plaintiff's retaliatory arrest claim against both officers could not succeed because they had probable cause to arrest him. The existence of probable cause to arrest respondent defeated his **First Amendment** claim as a matter

of law. (***Nieves v. Barlett*** (May 28, 2019) __ U.S. __ [139 S.Ct. 1715; 204 L.Ed.2nd 1].)

The rule is that if a plaintiff is able to establish the lack of probable cause "then the Mt. Healthy test governs." (referring to ***Mt. Healthy City Board of Education* v. *Doyle*** (1977) 429 U.S. 274 [97 S.Ct. 568; 50 L.Ed.2nd 471].) "'The plaintiff must show that the retaliation was a substantial or motivating factor behind the [arrest], and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation.'" (***Hill v. City of Fountain Valley*** (9th Cir. 2023) 70 F.4th 507, 518-519; quoting ***Lozman v. City of Riviera Beach*** (June 18, 2018) __ U.S.__ [138 S.Ct. 1945, 1952-1953; 201 L.Ed.2nd 342.)

> "(T)he existence of probable cause defeats a retaliatory arrest claim." (***Id.***, at p. 581; citing ***Nieves v. Bartlett*** (2019) __ U.S.__ [139 S.Ct. 1715, 1725; 204 L.Ed. 2nd 1]; citing in turn ***Hartman v. Moore*** (2006) 547 U.S. 250, 260 [126 S.Ct. 1695, 164 L. Ed.2nd 441].)
>
> In ***Hill***, the Court ruled that plaintiff could not show that "retaliatory animus" was a substantial factor behind his arrest. In so ruling, the Court rejected plaintiff's claim that his comment; "what was really going on" and saying that he wanted to make sure "everything's on the up and up" had "perturbed the officers." Plaintiff was unable to provide any evidence to show that the officers were in fact perturbed, finding that "it seems dubious that the officers would be upset because of benign statements such as 'what was really going on,'" noting that "law enforcement officers are routinely subjected to much more vitriolic rhetoric." The Court further noted that "even if the officers were 'perturbed,' no evidence suggests that they would not have arrested him absent those statements." Rather, "(t)he record suggests the officers arrested (plaintiff) because they believed, though mistakenly, that he was hiding a suspect in a potential kidnapping case." (Pg. 519.)

The Ninth Circuit Court of Appeal reversed the district court's order on summary judgment denying qualified immunity to civil defendant police officers in an action alleging, in part, **First Amendment** retaliation arising from defendants' investigation of two arsons at properties connected to plaintiff Greg Moore. Plaintiffs alleged that in retaliation for Mr. Moore remaining silent during police questioning and plaintiffs' subsequent civil rights lawsuit and request for disclosures of public records, defendants, among other things, opened criminal investigations against them

and attempted to induce the IRS into opening a criminal investigation. The Court first held that it had jurisdiction over the district court's denial of qualified immunity as to plaintiffs' **First Amendment** claims because defendants presented a purely legal issue; i.e., whether, taking as true plaintiffs' version of the facts, it was clearly established that defendants' conduct violated plaintiffs' **First Amendment** rights. The panel next concluded that plaintiffs failed to show that defendants' conduct violated clearly established law. It was not clearly established that Mr. Moore has a **First Amendment** right to remain silent when questioned by the police. Nor was it clearly established that a retaliatory investigation per se violates the **First Amendment**. Defendants were therefore entitled to qualified immunity on the **First Amendment** claims based on Mr. Moore's silence and plaintiffs' lawsuits and requests for public disclosures. (***Moore v. Garnand*** (9th Cir. 2023) 83 F.4th 743.)

The panel addressed plaintiffs' **Fourth Amendment** claims in a concurrently filed unpublished memorandum disposition, at 2023 U.S. App. LEXIS 25824.

See also: "*Arresting/Detaining an Individual for being Verbally Uncooperative*," below.

Compelling Governmental Interests:

The Ninth Circuit Court of Appeal upheld summary judgment for the federal government in a case filed by Twitter over its desire to release its self-described "transparency report" without redactions the government said were necessary to protect national security. Noting that the government's redactions of appellant's report were narrowly tailored in support of the compelling government interest in national security, the Court held that as such, it did not violate the **First Amendment** because, as the Executive Assistant Director of the FBI's National Security Branch concluded, the granularity of the data appellant sought to publish would reveal or tend to reveal information about the extent, scope, and reach of the government's national security collection capabilities and investigative interests, including its limitations and vulnerabilities. The Court held that the specific procedural requirements of ***Freedman v. Maryland*** (1965) 380 U.S. 51 [85 S.Ct. 734; 13 L.Ed.2nd 649], which were designed to curb traditional censorship regimes, were not required in the context of government restrictions on the disclosure of information transmitted confidentially as part of a legitimate government process because such restrictions do not pose the same dangers to speech rights as

do traditional censorship regimes. Even though Freedman**'s** specific procedural framework did not apply, Twitter received considerable process—including some of the process that Freedman envisioned. (***Twitter, Inc. v. Garland*** (9th Cir. 2023) 61 F.4th 686.)

Bullying:

The school district properly disciplined the two high school students for "private" off-campus social media posts that, once they made their way on to campus, amounted to severe bullying or harassment targeting particular classmates. The students' **First Amendment** rights were not violated by the district's disciplinary actions towards them. The students' speech "outside of the campus" was not protected from government restriction by the **First Amendment**. Also, the limitation in **Cal. Educ. Code § 48950(a)** was not violated. The speech constituted harassment that, under the circumstances of the case, was not constitutionally protected. Further, the due process issue that one student sought to raise in federal court was one that he already litigated and lost on the merits in a full and fair de novo review by a California court; the state court decision was entitled to preclusive effect. (***Chen v. Shen*** (9th Cir. 2022) 56 F.4th 708.)

Beauty Pageants:

A federal district court did not err in awarding summary judgment to the beauty pageant because forcing the pageant to accept plaintiff, who identified as "an openly transgender female," would fundamentally alter the pageant's expressive message, in direct violation of the **First Amendment** to the U.S. Constitution. The pageant expressed its message in part through whom it chose as its contestants, and the **First Amendment** afforded it the right to do so. (***Green v. Miss United States of America LLC.*** (9th Cir. 2022) 52 F.4th 773.)

As noted by the Court, the **First Amendment** to the U.S. Constitution ensures that the U.S. Congress shall make no law abridging the freedom of speech. The **Fourteenth Amendment** to the U.S. Constitution extends the principle to the states. **First Amendment** jurisprudence understands speech to extend beyond written or spoken words as mediums of expression, reaching so far as to include various forms of entertainment and visual expression as purely expressive activities. Unsurprisingly, the protections

extend to theatrical productions that frequently mix speech with live action or conduct. (***Id.***, at pp. 780-787.)

Noise Regulation:

The Ninth Circuit Court of Appeal affirmed the district court's conclusion that San Francisco's noise ordinance, **Park Code § 7.03(m)**, constituted a reasonable time, place, and manner restriction. The district court therefor did not abuse its discretion by concluding that appellants were unlikely to succeed on the merits of their claims that the ordinance violated the **First Amendment** and the **Liberty of Speech Clause** of the California Constitution. (***Stewart v. City and County of San Francisco*** (9th Cir. 2023) 2023 U.S.App. LEXIS 3811; unpublished.

Anti-SLAPP:

"***SLAPP*** is the acronym for '*strategic lawsuit against public participation*,'" found at **Code of Civ. Proc. § 425.16**. (***Flickinger v. Finwall*** (2022) 85 Cal.App.5th 822, 827, fn. 1.)

CCP § 425.16: *Legislative Findings*; *Special Motion to Strike Action Arising From* "*Act in Furtherance of Person's Right of Petition Under United States or California Constitution in Connection With a Public Issue*:"

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)

(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special *motion to strike*, unless the court determines that the plaintiff has established that there is a

probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that the plaintiff will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c)

(1) Except as provided in **paragraph (2)**, in any action subject to **subdivision (b)**, a prevailing defendant on a special motion to strike shall be entitled to recover that defendant's attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to **Section 128.5**.

(2) A defendant who prevails on a special motion to strike in an action subject to **paragraph (1)** shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to **Section 11130**, **11130.3**, **54960**, or **54960.1** of the **Government Code**, or pursuant to **Chapter 2** (commencing with **Section 7923.100**) of **Part 4** of **Division 10** of **Title 1** of the **Government Code**. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to **Section 7923.115**, **11130.5**, or **54960.5** of the **Government Code**.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California

by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "*act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue*" includes: **(1)** any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, **(2)** any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, **(3)** any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or **(4)** any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within *60 days* of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than *30 days* after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, *"complaint*" includes "*cross-complaint*" and "*petition*," "*plaintiff*" includes "*cross-complainant*" and "*petitioner*," and "*defendant*" includes "*cross-defendant*" and "*respondent*."

(i) An order granting or denying a special motion to strike shall be appealable under **Section 904.1**.

(j)

> **(1)** Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, *shall*, promptly upon so filing, transmit to the Judicial Council, by email or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.
>
> **(2)** The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least *three years*, and may store the information on microfilm or other appropriate electronic media.

Standard of Review on Appeal: An appellate court is to "review a trial court's order granting an anti-**SLAPP** motion de novo, considering the pleadings and affidavits submitted in support of, or in defense to, the subject claims. (***Flickinger v. Finwall*** (2022) 85 Cal.App.5th 822, 831; citing ***Verceles v. Los Angeles Unified School Dist.*** (2021) 63 Cal.App.5th 776, 785.)

Overview of the Anti-SLAPP Statute, its purpose and procedures (per ***Flickinger v. Finwall***, *supra*, at pp. 831-832.):

> The anti-**SLAPP** statute provides a mechanism for early assessment of claims implicating certain protected speech activities. Qualifying claims found to be without merit must be stricken and costs and expenses awarded to the defendant. (**CCP § 425.16(c)(1)**.) This relieves defendants wrongfully sued for engaging in protected activities of the time and expense of litigation.
>
> The statute imposes on the defendant an initial burden to show the challenged claims qualify for protection under the statute. (**CCP § 425.16(b)(1)**.) If the defendant satisfies this burden, the plaintiff then bears the burden to establish a probability of prevailing on the challenged claims.
>
> The statute applies only to claims "arising from any act of that person in furtherance of the person's right of petition or free speech under the **United States Constitution** or the **California Constitution** in connection with a public

> issue." (**CCP § 425.16(b)(1)**.) Such acts are broken into four illustrative categories of conduct in **CCP § 425.16(e)**.
>
> Due to the important interests it seeks to protect, the Legislature commands the anti-**SLAPP** statute be construed broadly. (**CCP § 425.16(a)** (citing ***Navellier v. Sletten*** (2002) 29 Cal.4th 82, 92.) However, "not all speech or petition activity is protected by **section 425.16**." (***Flatley v. Mauro*** (2006) 39 Cal.4th 299, 313.) Of relevance here, **section 425.16** does not protect "speech or petition activity that [i]s illegal as a matter of law." (***Flatley***, at p. 320.), referred to as the "Flatley exception." The ***Flatley*** exception applies only in "narrow circumstance[s]" where "either the defendant concedes, or the evidence conclusively establishes" illegality as a matter of law. (***Id***., at pp. 316, 320; see below.)

In ***Flickinger v. Finwall***, *supra*, the civil defendant's attorney in a "breach of contract" dispute, wrote a letter to the plaintiff's attorney, suggesting that if plaintiff filed his threatened lawsuit, the matter might result in plaintiff being investigated for "ill-gotten money obtained while in the employ of Apple," this allegation stemming from the plaintiff's alleged oral omission to defendant that "he had taken kickbacks from Apple vendors while on business in China." (pgs. 828 & 829.) The Court found that this was a "prelitigation communication" that "concerned the subject of the dispute" and was "made 'in anticipation of litigation "contemplated in good faith under serious consideration."'" (***Id.***, at pp. 832-833; quoting ***Neville v. Chudacoff*** (2008) 160 Cal.App.4th 1255, 1268.)

The "***Flatley*** *Exception*:" The ***Flickinger*** Court discussed the ***Flatley*** exception, as referenced above, at pp. 833-839, first noting the rule of ***Flatley*** that "not every threat by an attorney to settle or be sued is extortion." (Citing ***Flatley*** at p. 332, fn. 16.) Finding that the ***Flatley*** exception did not apply to the instant case, the ***Flickinger*** Court noted the extreme circumstances of the ***Flatley*** case:

> "First, Mauro's (Mauro being an attorney) letter contained accusations of criminal conduct which he threatened to expose directly 'to the "worldwide" media,' not merely indirectly as a result of commencing litigation. (Citation.) Second, his threat to expose 'criminal activity entirely unrelated to any alleged injury suffered by [his] client "exceeded the limits of [his] representation of his client"

> [which was] itself evidence of extortion.' (Citation.) Third, the Supreme Court found the threat of a rape allegation was extortion based on evidence that Mauro's client's initial police report was devoid of content and merely a sham designed to 'hold a police investigation over Flatley's head.' (Citation.) Fourth, Mauro threatened that Flatley's bad acts referenced in his letter 'were "just the beginning,"' suggesting that 'Flatley would be exposed to various kinds of opprobrium and he would be disgraced thereby unless he met Mauro's demands.' (Citation.) Fifth, and finally, in his followup calls to Flatley's counsel, 'Mauro did not discuss the particulars of the claim or show an interest in negotiations.' (Citation.) Rather, he simply reiterated his demand for payment and beat the drum of the consequences if Flatley refused to capitulate: Mauro would '"go public" and "ruin" Flatley . . . .' (Citation.)" (***Flickinger v. Finwall***, supra, at p. 834.)

The ***Flickinger*** Court also cites ***Malin v. Singer*** (2013) 217 Cal.App.4th 1283, at pp. 835-836, as an example at the other extreme—the ***Flatley*** exception being inapplicable—where "'Singer's demand letter did not expressly threaten to disclose Malin's alleged wrongdoing to a prosecuting agency or the public at large.' (Citation.) The court reasoned that the secret that would 'expose' Malin to 'disgrace' for purposes of the extortion statute was 'inextricably tied to [Singer's client's] pending complaint. The demand letter accused Malin of embezzling money and simply informed [Malin] that [Singer's client] knew how [Malin] had spent those funds.' (Citation.)" The Court saw "a critical distinction between Singer's demand letter, which made no overt threat to report Malin to prosecuting agencies or the Internal Revenue Service, and the letters in ***Flatley*** (as well as in another case,) ***Mendoza* [*v. Hamzeh*** (2013) 215 Cal.App.4th 799 . . . , which contained those express threats and others that had no reasonable connection to the underlying dispute.' (Citation.)"

Ultimately, in ***Flickerger***, the Court determined that the plaintiff could not demonstrate a likelihood of success on the merits, thus requiring a remand for the purpose of striking the plaintiff's lawsuit. (***Flickinger v. Finwall***, *supra*, at pp, 839-841.)

Additional Case Law:

The challenger in an election campaign sued the incumbent, alleging that she defamed him during the campaign when she accused him of a dishonorable discharge from the Navy. The trial

court granted the incumbent's special motion to strike under **Code Civ. Proc. § 425.16**, the **anti-SLAPP** (strategic lawsuit against public participation) statute. The Court of Appeal reversed the order and remanded for further proceedings. The preliminary posture of the case required the court to accept as true the challenger's evidence. His discharge document, produced during the campaign, put the incumbent on notice of a considerable risk that conclusive evidence disproved her accusation that the challenger was dishonorably discharged from the Navy. She failed to check the evidence and kept repeating the accusation, which could support an inference, relevant to actual malice, of willful blindness. (***Collins v. Waters*** (2023) 92 Cal.App.5th 70.)

Freedom of Religion:

"There can be no doubt that the **First Amendment** protects the right to pray. Prayer unquestionably constitutes the 'exercise' of religion. At the same time, there are clearly circumstances in which a police officer may lawfully prevent a person from praying at a particular time and place. For example, if an officer places a suspect under arrest and orders the suspect to enter a police vehicle for transportation to jail, the suspect does not have a right to delay that trip by insisting on first engaging in conduct that, at another time, would be protected by the **First Amendment**. When an officer's order to stop praying is alleged to have occurred during the course of investigative conduct that implicates **Fourth Amendment** rights, the **First** and **Fourth Amendment** issues may be inextricable." (***Sause v. Bauer*** (June 28, 2018) __ U.S. __, __ [138 S.Ct. 2561; 201 L.Ed.2nd 982]; reversing the 10th Circuit's decision to uphold the trial court's dismissal of a pro per defendant's **42 U.S.C. 1983** lawsuit for failure to state a claim, noting that the **Fourth Amendment** issues should not have been ignored.

In a case involving practicing Muslims who sued under **Religious Freedom Restoration Act** (**RFRA**), claiming that federal FBI agents placed them on the "No Fly List" in retaliation for their refusal to act as informants against their religious communities, the Court held that **RFRA's** express remedies provision permits litigants, when appropriate, to obtain money damages against federal officials in their individual capacities. Under **RFRA's** definition, relief that can be executed against an "official of the United States" is relief against a government. Given that **RFRA** reinstated pre-***Smith*** (see below) protections and rights, parties suing under **RFRA** must have at least the same avenues for relief against officials that they would have had before **Smith.** That means **RFRA** provides, as one avenue for relief, a right to seek damages against government employees. (***Tanzin v. Tanvir*** (Dec. 10, 2020) __ U.S. __ [141 S.Ct. 486; 208 L.Ed.2nd 295].)

> "**The Religious Freedom Restoration Act of 1993** (**RFRA**) was enacted in the wake of ***Employment Div., Dept. of Human Resources of Ore. v. Smith*** (1990) 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2nd 876, to provide a remedy to redress Federal Government violations of the right to free exercise under the **First Amendment**." (***Id***., at p. __.)

Where a Muslim inmate contended that he was unable to pray five times a day since he was housed with inmates who harassed him as he prayed, the correctional facility did not violate **RLUIPA** (**Religious Land Use and Institutionalized Persons Act of 2000**, **42 U.S.C. §§ 2000cc et seq**.) by refusing to accommodate this request to be housed exclusively with other Muslims because infringement on the inmate's religious practice was justified as it was narrowly tailored to address the compelling interest of avoiding equal protection liability for classifying other inmates based on their religion. The facility's decision was the least restrictive means of furthering the compelling interest in avoiding equal protection liability as housing inmates based on religion would be constitutionally suspect. In addition, the facility did not violate the inmate's free exercise rights since denying his housing request was reasonably related to a legitimate penological interest. (***Saud v. Days*** (9th Cir. 2022) 36 F.4th 949.)

In a case out of Wisconsin, plaintiff was a Muslim. Strip searches by prison guards of the opposite sex violated the moral tenets of his faith, which prohibit him from exposing his body to a woman who is not his wife. The prison where he was housed required him to submit to a strip search by a guard who is a transgender man; i.e., a woman who identifies as a man. Overruling the trail court, the Seventh Circuit ruled that the trial court's holding that a Muslim inmate was not entitled to summary judgment on his **RLUIPA** (**Religious Land Use and Institutionalized Persons Act of 2000**, **42 U.S.C. §§ 2000cc et seq**.) claim was in error. The prison's strip search rules substantially burdened plaintiff's religious exercise by requiring him to either submit to cross-sex strip searches in violation of his faith or face discipline. Per the Court, this burden was unjustified under **RLUIPA's** strict-scrutiny standard and a violation of plaintiff's **First Amendment** freedom of religion and possibly his **Fourth Amendment** rights against unreasonable searches and seizures. (***West v. Radtke*** (7th Cir. 2022) 48 F.4th 836.)

Plaintiff carried her burden at the motion-to-dismiss stage, showing that the defendant school district's policy prohibiting students from decorating their graduation caps was not generally applicable because it was enforced in a selective manner, plaintiff adequately alleging that the district violated her **First Amendment** right to the free exercise of religion. Plaintiff's complaint plausibly alleged that the district enforced its facially neutral

policy in a selective way. Although plaintiff was prohibited from expressing her religious message on her graduation cap, other students in the school district were not prohibited from adorning their caps with stickers expressing other viewpoints. (***Waln v. Dysart School District*** (2022) 54 F.4th 1152.)

The accommodation clause, **Colo. Rev. Stat. § 24-34-601(2)(a)**, of the **Colorado Anti-Discrimination Act**, has been held by the U.S. Supreme Court to violate a putative wedding website designer's **First Amendment** right to speak freely by demanding that she either speak as the State demanded, i.e., celebrating marriages that she did not endorse, or face sanctions for expressing her own belief that marriage was a union between a man and a woman, and to include compulsory participation in remedial training, filing periodic compliance reports as officials deemed necessary, and paying monetary fines. (***303 Creative LLC v. Elenis*** (June 30, 2023) __ U.S. __ [143 S.Ct. 2298; 216 L.Ed.2nd 1131].)

The Ninth Circuit Court of Appeal affirmed in part, reversed in part, and vacated in part the district court's judgment in favor of prison officials in an action brought pursuant to **42 U.S.C. § 1983** by Hawaii prison inmate DeWitt Lamar Long, a practicing Muslim, alleging that prison officials violated his **First Amendment** right to free exercise of religion and unconstitutionally retaliated against him for engaging in protected **First Amendment** activity. The Court reversed the district court's dismissal, at the screening stage, of Long's claims for injunctive relief. Although Long's pro se complaint alleged only past actions by defendants, his "Request for Relief" asked, among other things, that staff be properly trained and that Ramadan meals be served hot. The district court should have allowed Long to amend his complaint to allege facts showing a need for injunctive relief. The Court vacated the district court's summary judgment in favor of Sergeant Lee, a prison guard, holding that delivery of Long's evening meal at 3:30 p.m. during Ramadan substantially burdened Long's free exercise of religion. The district court should have evaluated the four factors set forth in ***Turner v. Safley*** (1987) 482 U.S. 78 [107 S.Ct. 2254; 96 L.Ed.2nd 64], to determine whether the burden was justified. The Court remanded to allow the district court to conduct that analysis. The Court next affirmed the district court's partial summary judgment in favor of Chief of Security Antonio on Long's claim that he was transferred from a medium-security facility to a high-security facility in retaliation for filing grievances. The panel agreed with the district court that the sequence of events leading to the transfer was insufficient to show retaliatory intent. The Court affirmed the district court's judgment, following a bench trial, in favor of Sergeant Sugai on Long's free exercise of religion and retaliation claims, determining that ample evidence supported the district court's findings. Finally, the Court affirmed the district court's judgment, following a bench trial, in favor of Chief of

Security Antonio on Long's free exercise claim. The district court did not err by concluding that (1) the substantial burden on Long's free exercise rights caused by his transfer to a high-security facility was justified; and (2) Chief of Security Antonio was not authorized to arrange weekly transportation to a medium-security facility for religious services and therefore was not a proper defendant. (***Long v. Sugai*** (9th Cir. 2024) 91 F.4th 1331.)

The Ninth Circuit Court of Appeals in favor of the United States in a dispute over the planned transfer of a site, Oak Flat, of spiritual importance to the Apache tribe to a mining company, Resolution Copper. The nonprofit Apache Stronghold had sought to block the transfer, arguing that it would violate its members' rights under the **First Amendment**, the **Religious Freedom Restoration Act** ("**RFRA**"), **42 U.S.C § 2000bb et seq.**, and an 1852 treaty between the U.S. and the Apaches. The court, however, disagreed. Applying the precedent set in ***Lyng v. Northwest Indian Cemetery Protective Association*** (1988) 485 U.S. 439 [108 S.Ct. 1319; 99 L.Ed.2nd 534].), the court held that while the transfer of Oak Flat would significantly interfere with the Apache tribe's religious practices, it would not coerce them into acting contrary to their religious beliefs, and therefore did not violate the **Free Exercise Clause** of the **First Amendment**. Further, the Court held that **RFRA** did not abrogate the holding in ***Lyng***, and thus the planned land transfer did not "substantially burden" the Apache tribe's exercise of religion under **RFRA**. (***Apache Stronghold v. United States*** (9th Cir. Mar. 1, 2024) __ F.4th __, __ [2024 U.S.App. LEXIS 5007].)

Arresting/Detaining an Individual for being Verbally Uncooperative:

Arresting and booking a person in retaliation for the defendant having made certain statements to the officer accusing the officer of being racially motivated, even where the officer had probable cause to make the arrest (but also had the option of releasing him on a citation), is a **First Amendment** violation of the arrestee's freedom of speech, subjecting the officer to potential civil liability. (***Ford v. City of Yakima*** (9th Cir. 2013) 706 F.3rd 1188, 1192-1196.)

Exhorting a friend not to cooperate with law enforcement that does not cause any violent resistance to officers attempting to detain and question the friend is protected speech under the **First Amendment** (freedom of expression) and does *not* provide the necessary probable cause to arrest the defendant for a violation of **P.C. § 148(a)(1)**; interfering with an officer in the performance of his duties. (***In re* Chase C.** (2015) 243 Cal.App.4th 107, 114-116.)

Where plaintiff in a civil suit claimed that officers retaliated against him for being verbally uncooperative, he must prove two things: I.e., that (1) the officer's conduct "would chill or silence a person of ordinary firmness from future **First Amendment** activities," and (2) the officer's desire to chill speech was a "but-for cause" of the adverse action. In this case, after plaintiff was arrested (falsely, as it turned out, due to mistaken identity), the evidence showed that he was visibly angry at the deputies, swore at them, and threatened to sue them. In response, a deputy told him: "If you weren't being so argumentative, I'd probably just put you on the curb." The Court concluded that plaintiff suffered unconstitutional (**First Amendment**) retaliation that was clearly proscribed by established law. (***Sharp v. County of Orange*** (9th Cir. 2017) 871 F.3rd 901, 919-920.)

Freedom of the Press:

Defendants/Appellants (the "Center for Medical Progress") used fake driver's licenses and a false tissue procurement company as cover to infiltrate conferences that Planned Parenthood hosted or attended. Using the same strategy, appellants also arranged and attended lunch meetings with Planned Parenthood and visited Planned Parenthood health clinics. During these conferences, meetings, and visits, appellants secretly recorded Planned Parenthood staff without their consent. After secretly recording for roughly a year-and-a-half, appellants released on the internet edited videos of the secretly recorded conversations. Planned Parenthood sued, with a jury finding in their favor. Upholding the verdict (at least in part), the Ninth Circuit Court of Appeal held that journalists are required to obey laws of general applicability. Invoking journalism and the **First Amendment** does not shield individuals from liability for violations of laws applicable to all members of society. Appellants had no special license to break laws of general applicability in pursuit of a headline. Regardless of publication, it was probable that appellee would have protected its staff who had been secretly recorded and safeguarded its conferences and clinics from future infiltrations by appellants and third parties. However, the Court also held that appellants' violations of civil **RICO** (the **Racketeer Influenced and Corrupt Organizations Act**) could not have served as the criminal or tortious purpose required by **18 U.S.C.S. § 2511(2)(d)** (**Federal Wiretap Act**) because the criminal or tortious purpose had to be independent of and separate from the purpose of the recording. (***Planned Parenthood Federation of America, Inc. v. Newman*** (9th Cir. 2022) 51 F.4th 1125.)

***Eighth Amendment*:** "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Issues; *Excessive Bail and Fines, and Cruel and Unusual Punishment*: Under the **Eighth Amendment's** "***Cruel and Unusual Punishment Clause***:" "Excessive

bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

In General:

Applicable to the States: The **Eighth Amendment's** "cruel and unusual" "excessive fines" provisions are incorporated within the **Fourteenth Amendment's** Due Process clause, and thus applicable to the states as well as the federal government. (***Timbs v. Indiana*** (Feb. 20, 2019) __ U.S. __ [139 S.Ct. 682; 203 L.Ed.2nd 11].)

But see Justice Clarence Thomas' concurring opinion, at pp. __-__, arguing that the "oxymoronic 'substantive due process' doctrine has no basis in the Constitution," but rather that the "privileges and immunities" clause of the Constitution incorporates the **Bill of Rights** to be applied to the states.

On the Issue of an Escaped Prisoner: "After conviction, 'the **Eighth Amendment**, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners.'" (***Hughes v. Rodriguez*** (9th Cir. 2022) 31 F.4th 1211, 1221; quoting ***Whitley v. Albers*** (1986) 475 U.S. 312, 327 [106 S.Ct. 1078; 89 L.Ed.2nd 251].)

Per ***Hughes v. Rodriguez***, this "applies equally to convicted prisoners inside or outside the walls of the penal institution," including escaped prisoners. (***Id.***, at p. 1222; citing as consistent with the conclusion the Sixth Circuit case of Gravely v. Madden (6th Cir. 1998) 142 F.3rd 345, 346-348.)

Excessive Fines:

An order of forfeiture in the amount of $1,955,521 imposed on defendant by the federal district court as part of his sentence following conviction upon his plea of guilty to one count of structuring currency transactions to evade reporting requirements, in violation of **31 U.S.C. §§ 5324 (a)(3)** and **(d)(2)**, was held *not* to be in violation of the "*excessive fines*" provisions of the **Eighth Amendment**; i.e., that it was not "grossly disproportional" to his offense to which defendant pled guilty. (***United States v. Singh*** (9th Cir. 2019) 783 Fed. Apprx. 765.)

In ***United States v. Bajakajian*** (1998) 524 U.S. 321, 336-337 [118 S.Ct. 2028; 141 L. Ed.2nd 314].), petitioner, the United States, filed a petition for a writ of certiorari that sought review of the judgment of the United States Court of Appeals for the Ninth Circuit, which affirmed a trial court's judgment that the forfeiture of the entire $357,144 that respondent was

carrying when he failed to report currency over $10,000, as required by **31 U.S.C.S. § 5316(a)**, would have violated the **Excessive Fines Clause** of **Eighth Amendment** of U.S. Constitution. Respondent attempted to leave the United States without reporting, as required by **31 U.S.C.S. § 5316(a)**, that he was transporting more than $10,000 in currency. Respondent pleaded guilty to a charge of having failed to report as required by **§ 5316(a)(1)(a)**, and with having done so willfully, in violation of **31 U.S.C.S. § 5322(a)**. The trial court found that respondent had failed to report the money because of fear stemming from cultural differences. Although the trial court found that the entire $357,144 was subject to forfeiture under the authority of **18 U.S.C.S. § 982(a)(1)**, it instead ordered a much smaller forfeiture because it found that a forfeiture of the entire amount would violate the **Eighth Amendment's** Excessive Fines Clause. The United States appealed the trial court's judgment. The Ninth Circuit affirmed the trial court's judgment. The U.S. Supreme Court agreed that the forfeiture of the entire $357,144 that respondent failed to declare would violate the **Eighth Amendment's** Excessive Fines Clause because the full forfeiture of respondent's currency would have been grossly disproportional to the gravity of his offense. In so holding, the Court considered four factors:

(1) The nature and extent of the underlying offense;

(2) Whether the underlying offense related to other illegal activities;

(3) Whether other penalties may be imposed for the offense; *and*

(4) The extent of the harm caused by the offense.

(***Id.***, at pp. 336-337.)

The **Eight Amendment's** "*Excessive Fines Clause*" applies to municipal parking fines. Considering the ***Bajakajian*** factors (see above), the Ninth Circuit Court of Appeals held that the City of Los Angeles' initial parking fine of $63 was not grossly disproportional to the underlying offense of overstaying the time at a parking space. However, should the driver fail to pay that fine within 21 days, the City would levy a late fee of another $63. After 58 days of nonpayment, the City issues a second late-payment penalty of $25. Then after 80 days, the driver is subjected to a $3 Department of Motor Vehicles registration hold fee, as well as a $27 collection fee. In sum, a person who overstays a metered parking spot faces a fine of anywhere from $63 to $181, depending on her promptness of payment. While the appellate court affirmed the district court's grant of summary judgment on the initial parking fine, it could not endorse the trial court's conclusion that the late fee also did not constitute an excessive fine

under the **Eight Amendment**. The district court failed to apply the ***Bajakajian*** factors to the late fee, but instead rejected the challenge to the late fee in a footnote citing two cases that themselves only provided conclusory assertions. (***Pimentel v. City of Los Angeles*** (9th Cir. 2020) 966 F.3rd 934.)

Excessive Bail:

The statutory scheme governing the forfeiture of bail and related proceedings, **Pen. Code §§ 1305-1308**, has been held *not* to be unconstitutional on its face. The Court therefore concluded that the statutory scheme, as applied to the circumstances of this case (i.e., where defendant was charged with possession of a controlled substance for sale and transportation of a controlled substance), did not unconstitutionally (as an alleged **Eighth Amendment** violation) impose an excessive fine (i.e., $50,000) or otherwise violate the constitutional rights of the criminal defendant or the surety. As a separate and independent ground for its decision, the Court held that even if it assumed that a constitutional violation had occurred, it concluded that such a violation of the criminal defendant's constitutional rights does not free the surety from its obligations under the bail bond. The bail bond was enforceable in its full amount and, therefore, the trial court correctly entered summary judgment on the bond. (***People v. Accredited Surety & Casualty Co., Inc.*** (2021) 65 Cal.App.5th 122.)

Excessive Punishment:

In General:

The **Cruel and Unusual Punishments Clause** circumscribes the criminal process in three ways:

(1) It limits the type of punishment the government may impose;

(2) It proscribes punishment "grossly disproportionate" to the severity of the crime; *and*

(3) It places substantive limits on what the government may criminalize.

(***Martin v. City of Boise*** (9th Cir. 2019) 920 F.3rd 584, 613-614 (Rehearing and Review Denied at 2023 U.S.App. LEXIS 16984; July 5, 2023); citing ***Ingraham v. Wright*** (1977) 430 U.S. 651, 664 [97 S.Ct. 1401; 51 L.Ed.2nd 711].)

> *Note*: Certiorari has been granted in ***Martin v. City of Boise*** and is currently pending before the U.S. Supreme Court.

"Both the state and federal Constitutions bar the infliction of punishment that is grossly disproportionate to the offender's individual culpability. (**U.S. Const., 8th Amend.**; (and) **Cal. Const., art. I, § 17**.)" (***In re Palmer*** (2021) 10 Cal.5th 959, 965.)

> An inmate claiming, in ***Palmer***, that his sentence was excessive, arguing that after 10 parole denials by the Board of Parole Hearing, that the 30 years he had already served on a life sentence for an aggravated kidnapping committed when he was a juvenile, was constitutionally excessive. (***Ibid***.)
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> In ***Palmer***, the California Supreme Court ruled that even though the prisoner had finally been released, and while his 30 years of incarceration had in fact been unconstitutionally excessive, he was still subject to the standard parole conditions upon his release, reversing the lower Court of Appeal's ruling to the contrary on this issue. (***Ibid***.)

However, the **Eighth Amendment** does not prohibit a 63-year determinate sentence where the defendant is intellectually disabled. The case law under the **Eighth Amendment** and **Cal. Const.**, **art. I, § 17**, does not support the premise that it is categorically unconstitutional to sentence a developmentally disabled adult recidivist to a 63-year determinate term for multiple armed robberies. The sentence was *not* grossly disproportionate because defendant's offenses were serious and numerous where he and his confederates committed a string of armed robberies and attempted armed robberies over a two-month period and would have continued to do so if not caught. (***People v. Brewer*** (2021) 65 Cal.App.5th 199.)

"(A)cts by which cruel and sadistic purpose to harm another would be manifest" may also be a violation of the **Eighth Amendment's** proscription on "*cruel and unusual*" punishment. (***Watts v. McKinney*** (9th Cir. 2005) 394 F.3rd 170; kicking a prisoner in the genitals.)

Defendant was convicted of attempting to extort and rob street vendors for a gang purpose, during which he would destroy merchandise. The Second District Court of Appeal (Div. 3) struck

the resulting "Three Strikes" indeterminate sentence as an abuse of discretion (per *People v. Superior Court (Romero***)** (1996) 13 Cal.4th 497.) and as a cruel and unusual punishment (**Cal. Const**, **art. I, § 17**). "While we do not make light of this intimidating behavior, it was not violent or brutal by any stretch." Defendant's robbery strikes occurred nearly 30 years ago when he was youthful (under 21) and his intervening crimes were relatively minor and non-violent. The Court also rejected the trial court's insinuation that a long-standing drug problem is necessarily aggravating. Finally, "given his age [47], his three strikes sentence coupled with the determinate term means he will likely die in prison." For similar reasons, the sentence was deemed "cruel and unusual" as assessed under **In re Lynch** (1972) 8 Cal.3rd 410. Attempting to justify its sympathetic decision in this case, made at the expense (and while ignoring) the plight of the defendant's victims over the last four decades, the Court noted: "There comes a time when the people who populate the justice system must take a fresh look at old habits and the profound consequences they have in undermining our institutional credibility and public confidence." (***People v. Avila*** (2020) 57 Cal.App.5th 1134.)

> It is also noted in ***Avila*** (at p. 1145, fn. 13) that this case was decided under California's *"cruel and unusual punishment*" prohibition only (i.e., **Cal. Const, art. I, § 17**), noting that "(t)he distinction in wording between the federal and state constitutions is substantive and not merely semantic," citing People v. Baker (2018) 20 Cal.App.5th 711, 723.
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> Per ***In re Lynch***, *supra* (at pg. 424); "A punishment is cruel or unusual in violation of the California Constitution if 'it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.'"

Defendant's sentence of 85 years in prison upon conviction of ten counts of armed robbery held not to be cruel and unusual. (***United States v. Holiday*** (9th Cir. 2021) 998 F.3rd 888, 985-986, citing ***United States v. Harris*** (9th Cir. 1998) 154 F.3rd 1082, where the defendant received 95 years of imprisonment for five counts of armed robbery.)

In an unpublished decision (i.e., ***People v. Long*** (2021) 2021 Cal.App. Unpub. LEXIS 6427), the Fifth District Court of Appeal upheld a 396 years-to-life sentence for a child molester, noting that the late California Supreme Court Justice Stanley Mosk's ruling in

1998 that a prison term exceeding a human life span is senseless and necessarily violates the **Eighth Amendment** (See ***People v. Deloza*** (1998)18 Cal.4th 585.) was a minority opinion, and thus not controlling, and has been rejected by other courts.

The Ninth Circuit affirmed the district court's denial of habeas relief to petitioner who argued that his 292-year total sentence by an Arizona state court was grossly disproportionate to his crimes and therefore cruel and unusual in violation of the Federal and Arizona Constitutions. In this case, petitioner was convicted of 25 felonies (mostly residential burglaries) committed against multiple victims over a three-month period. The trial court imposed consecutive sentences on all but two of the 25 counts, resulting in an overall sentence of 292 years imprisonment. The Court concluded that the Arizona Court of Appeals (ACA) made a merits determination and that **Anti-Terrorism and Effective Death Penalty Act** deference, **28 U.S.C.S. § 2254(d)**, applied. To grant petitioner's habeas petition, the court have had to conclude that there was no possibility fairminded jurists could disagree that the ACA's decision conflicted with the Supreme Court's clearly established precedents. The Ninth Circuit concluded that it could not do so given the limited Supreme Court precedent regarding the prohibition against disproportionality of a sentence to a term of years. Per the Court, it was noted that the Supreme Court has never required consideration of a cumulative sentence when considering an **Eighth Amendment** proportionality claim. Therefore, the court could not say that the ACA's decision was contrary to or unreasonably applied clearly established Federal law. (***Patsalis v. Shinn*** (9th Cir. 2022) 47 F.4th 1092.)

A prison guard did not violate the inmate's **Eighth Amendment** rights because the guard's decision to shoot the inmate with sponge rounds was not an excessive use of force. Also, the guard used the lowest level of force available to him. The prison nurse did not violate the inmate's constitutional rights because the nurse's actions seemed to reflect the conduct of a medical professional who quickly and successfully ensured that her patient received the appropriate level of care. And lastly, the guard and the nurse were entitled to the protection offered by the qualified immunity doctrine because their actions did not violate some clearly established principle of constitutional law. Indeed, they both took reasonable steps to address urgent situations in short periods of time. (***Simmons v. Arnett*** (9th Cir. 2022) 47 F.4th 927.)

The Ninth Circuit Court of Appeal affirmed in part and reversed in part the district court's dismissal of an action brought pursuant

to 42 U.S.C. § 1983 against the Nevada Department of Corrections and several Department officials alleging that they violated plaintiff's constitutional rights by failing to deduct education-credits he earned from his sentence, and remanded. While incarcerated, plaintiff completed several education courses which entitled him to sentence deductions under Nevada law. After he was released and his parole ended, plaintiff sued, asserting that defendants' failure to apply earned credit-deductions to his sentence deprived him of liberty without due process and denied him equal protection of the law by targeting him for the denial of credits because he is a sex offender. The Court first rejected defendants' argument that plaintiff's claims were barred by ***Heck v. Humphrey*** (1994) 512 U.S. 477 [114 S.Ct. 2364; 129 L.Ed.2nd 383], because they necessarily implied that the duration of his sentence was invalid. The Court held that ***Heck*** did not apply in this case. Plaintiff was no longer in custody and was thus unable to raise claims for credit deductions in a petition for habeas corpus. As such, this case fell within the limited exception to ***Heck*** the Court recognized in ***Nonnette v. Small*** (9th Cir. 2002) 316 F.3rd 872, 875-876. The Court then held that the district court erred by interpreting plaintiff's due process claim as asserting only a deprivation of minimum-sentence deductions affecting his parole eligibility date and ignoring his claim for maximum sentence deductions. Despite being instructed to brief the issue, defendants did not respond to plaintiff's argument that **Nev. Rev. Stat. § 209.4465** contains the mandatory language necessary to create a constitutionally protected liberty interest in maximum-sentence deductions, similar to goodtime statutes this court previously found to create liberty interests. Accordingly, the Court reversed and remanded with respect to plaintiff's due process claim. Lastly, the Court affirmed the dismissal of the equal protection claim because plaintiff had not alleged facts supporting discrimination. (***Galanti v. Nevada Department of Corrections*** (9th Cir. 2023) 65 F.4th 1152.)

> *Note*: For a discussion of ***Heck v. Humphrey*** issues, see "*Effect of a Prior Conviction, Sentence, or Probable Cause Determination*," under "*Procedural Rules*" (Chapter 2), above.

Capital Punishment:

The **Eighth Amendment** prohibits capital punishment for murderers who were under 18 at the time of their crimes. (***Roper v. Simmons*** (2005) 543 U.S. 551 [125 S.Ct. 1183; 161 L.Ed.2nd 1].)

The U.S. Constitution places a substantive restriction on a state's power to take the life of a mentally retarded offender. (***Atkins v. Virginia*** (2002) 536 U.S. 304, 312 [153 L.Ed.2nd 335; 122 S.Ct. 2242].)

However, "there exists no similar evidence that a national consensus has formed against the imposition of the death penalty against the class of persons with mental illness." (***People v. Steskal*** (2021) 11 Cal.5th 332, 374, citing ***People v. Ghobrial*** (2018) 5 Cal.5th 250, 275; ***People v. Mendoza*** (2016) 62 Cal.4th 856, 909; and ***People v. Boyce*** (2014) 59 Cal.4th 672, 722.)

An inmate who was sentenced to death for murder and other crimes failed to establish that the State's lethal injection protocol was unconstitutional under the **Eighth Amendment** as applied to him due to his unusual medical condition of cavernous hemangioma. The "***Baze** and **Glossip***" test (see below) governed facial and as-applied **Eighth Amendment** challenges. This test does not require the avoidance of all risk of pain, and it required the inmate to prove a viable alternative execution method. The inmate did not satisfy the ***Baze*-*Glossip*** test because he did not show that his proposed alternative method of nitrogen hypoxia was feasible and readily implemented, the State had a legitimate reason to reject his proposal as it had never been used for an execution, and the inmate failed to present colorable evidence that his proposal would significantly reduce a substantial risk of severe pain. (***Bucklew v. Precythe*** (Apr. 1, 2019) __ U.S. __ [139 S.Ct. 1112; 203 L.Ed.2nd 521].)

> ***Baze v. Rees*** (2008) 553 U. S. 35 [128 S.Ct. 1520; 170 L. Ed.2nd 420], and ***Glossip v. Gross*** (2015) 576 U.S. 863 [135 S.Ct. 2726; 192 L.Ed.2nd 761], recognized that the **Eighth Amendment** does not demand the avoidance of all risk of pain in carrying out executions. To the contrary, the Constitution affords a measure of deference to a State's choice of execution procedures and does not authorize courts to serve as boards of inquiry charged with determining best practices for executions. The **Eighth Amendment** does not come into play unless the risk of pain associated with the State's method is substantial when compared to a known and available alternative. Nor do ***Baze*** and ***Glossip*** suggest that traditionally accepted methods of execution—such as hanging, the firing squad, electrocution, and lethal injection—are necessarily rendered unconstitutional as soon as an arguably more

> humane method like lethal injection becomes available. There are many legitimate reasons why a State might choose, consistent with the **Eighth Amendment**, not to adopt a prisoner's preferred method of execution. (***Bucklew v. Precythe***, *supra*, 139 S.Ct. at p. 1125.)

Life Without Parole:

> The **Eighth Amendment** also prohibits life without parole for offenders who were under 18 and committed non-homicidal offenses. (***Graham v. Florida*** (2010) 560 U.S. 48 [130 S.Ct. 2011; 176 L.Ed.2nd 825].)
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> > Note ***Jones v. Mississippi*** (Apr. 22, 2021) __ U.S. __ [141 S.Ct. 1307; 209 L.Ed.22nd 390], where it quoted ***Graham v. Florida***, at p. 69, as saying that: "There is a line between homicide and other serious violent offenses against the individual."

Drug Addiction:

> The U.S Supreme Court held in ***Robinson v. California*** (1962) 370 U.S. 660, 667 [82 S.Ct. 1417; 8 L.Ed.2nd 758], that a California statute that "ma[de] the 'status' of narcotic addiction a criminal offense" is invalid under the **Cruel and Unusual Punishments Clause**. (***Id***., at p. 666) The California law at issue in ***Robinson*** was "not one which punishe[d] a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration;" but rather punished addiction itself. Recognizing narcotics addiction as an illness or disease ("apparently an illness which may be contracted innocently or involuntarily") and observing that a "law which made a criminal offense of . . . a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment," ***Robinson*** held the challenged statute to be a violation of the **Eighth Amendment**. (***Id***., at pp. 666-667; see ***Martin v. City of Boise*** (9th Cir. 2019) 920 F.3rd 584, 615-618; Rehearing and Review Denied at 2023 U.S.App. LEXIS 16984; July 5, 2023: Certiorari has been granted in ***Martin v. City of Boise*** and is currently pending before the U.S. Supreme Court.).
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> > "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." (***Robinson v. California***, *supra*, at p. 667.)

Drunk in Public:

> The criminal offense of being "*drunk in public*," punishing an act and not the status of being a chronic drunkard, is *not* cruel and unusual under the **Eighth Amendment**. (***Powell v. Texas*** (1968) 392 U.S. 514 [88 S.Ct. 2145; 20 L.Ed.2nd 1254].)

Homelessness:

> The Ninth Circuit Court of Appeal has held that because the **Eighth Amendment** prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being, it necessarily prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter. Quoting its prior vacated decision in ***Jones v. City of Los Angeles*** (9th Cir. 2006) 444 F.3rd 1118, at pg. 1136 (vacated as moot at 505 F.3rd 1006 (9th Cir. 2007)); "[w]hether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human." Moreover, any "conduct at issue here is involuntary and inseparable from status—they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping." (***Id***.) As a result, just as the state may not criminalize the state of being "homeless in public places," the state may not "criminalize conduct that is an unavoidable consequence of being homeless—namely sitting, lying, or sleeping on the streets. (***Id***., at p. 1137.) " (***Martin v. City of Boise*** (9th Cir. 2019) 920 F.3rd 584, 604-618; Rehearing and Review Denied at 2023 U.S.App. LEXIS 16984; July 5, 2023).
>
> > The Court limited it holding, however, to the following: "(T)hat 'so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],' the jurisdiction cannot prosecute homeless individuals for 'involuntarily sitting, lying, and sleeping in public.' . . . That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter." (***Id***., at p. 617.)
> >
> > "Persons are involuntarily homeless if they do not 'have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free.' . . . (S)omeone who has the

financial means to obtain shelter, or someone who is staying in an emergency shelter is not involuntarily homeless." (***Johnson v. City of Grants Pass*** (9th Cir. 2022) 50 F.4th 787, 792, fn. 2, quoting ***Martin v. City of Boise***, *supra*, at 617 fn. 8.)

Note: Certiorari has been granted in ***Martin v. City of Boise*** and is currently pending before the U.S. Supreme Court.

See also ***Pottinger v. City of Miami*** (S.D. Fla. 1992) 810 F.Supp. 1551, 1565; and ***Johnson v. City of Dallas*** (N.D. Tex. 1994) 860 F.Supp. 344, 350; holding that a "sleeping in public ordinance as applied against the homeless is unconstitutional," rev'd on other grounds at 61 F.3rd 442 (5th Cir. 1995).

A city's argument that the district court lacked jurisdiction was improper, as none of the cases cited by the city credibly supported its argument that the district court injunction overstepped the judiciary's limited authority under the Constitution. There was no abuse of discretion in the certification of a class of involuntarily homeless persons under **Fed. R. Civ. P. 23**, as the class representatives' claims and defenses were typical of the class in that they were homeless persons who claimed that the city could not enforce the challenged ordinances against them when they had no shelter. At least portions of the city's anti-camping ordinance violated the **Eight Amendment's** Cruel and Unusual Punishment Clause under ***Martin v. City of Boise***, as they prohibited plaintiffs from engaging in activity they could not avoid. (***Johnson v. City of Grants Pass*** (9th Cir. 2022) 50 F.4th 787; Rehearing and Review Denied at 2023 U.S.App. LEXIS 16984; July 5, 2023: Certiorari has been granted in ***Martin v. City of Boise*** and is currently pending before the U.S. Supreme Court.)

"A local government cannot avoid this ruling by issuing civil citations that, later, become criminal offenses. A recent decision by the en banc Fourth Circuit illustrates how the Cruel and Unusual Punishment Clause looks to the eventual criminal penalty, even if there are preliminary civil steps." (***Id.***, at p. 807; citing ***Manning v. Caldwell*** (4th Cir. 2019) 930 F.3rd 264.)

Force Used Against a Prison or Jail Inmate:

For purposes of prison cases, the Supreme Court identified five factors to consider in evaluating the lawfulness in the degree of force used by a prison guard against an inmate:

(1) The extent of injury suffered by an inmate;

(2) The need for application of force;

(3) The relationship between that need and the amount of force used;

(4) The threat reasonably perceived by the responsible officials; *and*

(5) Any efforts made to temper the severity of a forceful response.

(***Hudson v. McMillian*** (1992) 503 U.S. 1, 6 [112 S.Ct. 995; 117 L.Ed.2nd 156]; ***Furnace v. Sullivan*** (9th Cir. 2013) 705 F.3rd 1021, 1028; ***Hughes v. Rodriguez*** (9th Cir. 2022) 31 F.4th 1211, 1221.)

The use of excessive force on a prison or jail inmate is an **Eighth Amendment** "*cruel and unusual punishment*" issue. Also, relevant inquiry is *not* the extent of the injury that results, but rather the degree of force used. (***Wilkins v. Gaddy*** (2010) 559 U.S. 34 [175 L.Ed.2nd 995]; citing ***Hudson v. McMillian*** (1992) 503 U.S. 1, 4 [112 S.Ct. 995; 117 L.Ed.2nd 156].)

Officers are not entitled to summary judgment based on qualified immunity as to an inmate's **Eighth Amendment** excessive force claim because, under the ***Hudson*** factors (citing ***Hudson v. McMillian*** (1992) 503 U.S. 1, 4 [112 S.Ct. 995; 117 L.Ed.2nd 156].), a significant amount of force was employed without significant provocation from the inmate or warning from the officers since (1) his injuries caused by the pepper spray were moderate, though relatively enduring, (2) it was not clear that the application of force was required under his version of the facts, and (3) the force used seemed quite extensive and disproportionate relative to the disturbance posed by his fingertips on the food port, and (4) it remained a disputed fact whether he posed a threat to the officers. (***Furnace v. Sullivan*** (9th Cir. 2013) 705 F.3rd 1021, 1026-1030.)

A summary judgment record in defendant prison guards' favor indicated that a genuine dispute of material fact existed regarding whether prison officials' use of force during a cell extraction resulted in the unnecessary and wanton infliction of pain and suffering, requiring reversal for further hearings. Plaintiff inmate alleged that he was punched, kicked, and stomped while he was restrained in handcuffs and leg irons during the cell extraction necessitated by a fight in plaintiff's cell, but that a video of the extraction panned away from plaintiff when the force was allegedly used. The district court, however, correctly entered summary judgment on the inmate's deliberate indifference claim because he failed to exhaust his administrative remedies first, as required by the **Prison Litigation Reform Act** (**PLRA**; **42 U.S.C. § 1997e**) of 1996. (***Manley v. Rowley*** (9th Cir. 2017) 847 F.3rd 705.)

In a case involving Los Angeles County Sheriff's Deputies conducting a number of cell extractions, as a part of quelling a jail riot, the Ninth Circuit Court of Appeal ruled that the district court did not err by denying the defendant sheriff's deputies' motion for **Federal Rule of Civil Procedure 50(b)** relief, based upon qualified immunity, for judgment as a matter of law. The Court held that there was abundant evidence presented to the jury that the deputies inflicted severe injuries on the plaintiff prisoners while they were not resisting, and even while they were unconscious, and that the jury could reasonably reject the deputies' argument that they acted reasonably and instead determine that the force was not a part of a good-faith effort to maintain or restore discipline. The Court further found unpersuasive the deputies' arguments that the law regarding their conduct was not clearly established, holding that no reasonable deputy would have believed that beating a prisoner to the point of serious injury, unconsciousness, or hospitalization, solely to cause him pain, was constitutionally permissible, or that the proper use of Tasers were still unclear as of 2008, noting that once a jury has determined on the basis of sufficient evidence that prison officials maliciously and sadistically used more than *de minimis* force to cause harm, contemporary standards of decency, and thus the **Eighth Amendment**, are always violated. The Court further held that the supervising sergeants who directed the extraction teams and their superiors were not entitled to qualified immunity. Standing by and watching the extractions, but knowingly refusing to terminate the deputies' unconstitutional acts, made them individually liable. (***Rodriguez v. County of Los Angeles*** (9th Cir. 2018) 891 F.3rd 776.)

In a civil case where plaintiff/inmate alleged that during a cell search a prison official repeatedly slammed his head against a steel door and a concrete floor, the Court held that the **Eighth Amendment** does not require proof that an officer enjoyed or otherwise derived pleasure from his or her use of force. The district court, therefore, plainly erred by instructing the jury that "maliciously and sadistically for the very purpose of causing harm" required having or deriving pleasure from extreme cruelty, and the erroneous instructions prejudiced the plaintiff/inmate. (***Hoard v. Hartman*** (9th Cir. 2018) 904 F.3rd 780.)

In a state prisoners' **42 U.S.C. § 1983** suit for damages due to increased risk of exposure to Valley Fever, without deciding whether the prison officials' actions actually violated the **Eighth Amendment's** prohibition on cruel and unusual punishment, the Court held that the prison officials were entitled to qualified immunity because an **Eighth Amendment** right to be free from heightened risk of exposure to fever was not clearly established when the officials acted. Prison officers are entitled to qualified immunity against claims that they racially discriminated against African-American inmates even though African-Americans are more susceptible to Valley Fever. There was no equal protection violation because all inmates were treated the same, regardless of race. State officials could have reasonably believed that their actions were constitutional as they complied with the orders from the court-appointed federal receiver. Also, a reasonable official could have believed that not excluding African-Americans from prisons was consistent with scientific data and expert recommendations. (***Hines v. Youseff*** (9th Cir. 2019) 914 F.3rd 1218.)

Female prison guards subjecting male inmates to periodic body cavity searches was held *not* to be a **Fourteenth Amendment** due process violation, nor an **Eighth Amendment** "*cruel and unusual punishment*," and therefore will not subject the guards to any civil liability. (***Somers v. Thurman*** (9th Cir. 1997) 109 F.3rd 614.)

It is *not* a violation of the constitutional right of association (**First Amendment**), against cruel and unusual punishment (**Eight Amendment**), nor due process (**Fifth** and **Fourteenth Amendments**) to limit the number and relationship of visitors, such regulations being reasonably related to "*legitimate penological interests*." (***Overton v. Bazzetta*** (2003) 539 U.S. 126 [123 S.Ct. 2162; 156 L.Ed.2nd 162].)

California's provisions for extracting DNA samples from convicted felons, even over a prisoner's objection and through the use of reasonable force, does not violate either the **Fourth Amendment** search or seizure rules, the **Eighth Amendment** ("reckless and deliberate indifference"), nor **Fourteen Amendment** due process. (***Hamilton v. Brown*** (9th Cir. 2010) 630 F.3rd 889.)

Reversing the district court's ruling granting the defendant prison officials' summary judgment motion, the Ninth Circuit Court of Appeals ruled, assuming the plaintiff's allegations to be true, that defendants violated an inmate's **Eighth Amendment** rights when they *failed to protect* him from attack by another inmate. According to plaintiff's allegations, prison officials were aware through firsthand information or through representatives that there was a substantial risk of serious harm to the inmate, who had been threatened by another prisoner. A reasonable juror could find that one official's response was not reasonable because she either participated firsthand in a dangerous housing assignment or knew about the assignment and did nothing to alleviate the risk. A second official's response was also not reasonable. Through placement of the inmate, not only did he fail to protect the inmate and undercut the ability of other officers to protect the inmate, but he also actively misled the inmate regarding his safety, reducing the inmate's ability to protect himself. (***Wilk v. Neven*** (9th Cir. 2020) 956 F.3rd 1143.)

Defendant, serving a life term for murder in San Quentin State Prison, filed a writ of habeas corpus petition because he is a 64 year old in poor health, and San Quentin had experienced a severe COVID-19 outbreak. He argued that the refusal to reduce San Quentin's prison population is cruel and unusual punishment. The Appellate Court agreed. "The need remains for petitioner to be immediately removed from San Quentin, by transfer to a CDCR facility that is able to provide the necessary physical distancing and other measures to protect against COVID-19 or to another placement meeting these criteria, and we so order." San Quentin was also ordered to immediately execute measures to reduce the population to 50% of the June 2020 population. (***In re Von Staich*** (2020) 56 Cal.App.5th 53.)

> *Note*: The opinion includes an extensive historical account of how COVID-19 had spread within the CDCR. As noted by the Court: "By all accounts, the COVID-19 outbreak at San Quentin has been the worst epidemiological disaster in California correctional history."

See ***Hoffman v. Preston*** (9th Cir. 2022) 26 F.4th 1059, where, in a split 2-to-1 decision, the Ninth Circuit held that as a potential **Eighth Amendment** cruel and unusual violation, ***Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*** (1971) 403 U.S. 388 [91 S.Ct. 1999; 29 L. Ed.2nd 619] also applied to a federal prisoner's claims that a federal prison guard intentionally targeted him for harm by spreading malicious rumors about and offering bribes to other inmates to attack him, the inmate was attacked because of the officer's conduct, and the officer failed to protect the inmate against the known risk of harm that the officer himself created.

Beating a handcuffed convict (accepting plaintiff's argument that such a beating occurred as true) violated the **Eighth Amendment**, and the police officer was *not* entitled to qualified immunity as to the claimed post-handcuff beating and dog-biting. (***Hughes v. Rodriguez*** (9th Cir. 2022) 31 F.4th 1211.)

> "In excessive force cases brought under the **Eighth Amendment**, the relevant inquiry is 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'" (**Id.**, at p. 1221, quoting ***Hudson v. McMillian*** (1992) 503 U.S. 1, 7 [112 S.Ct. 995; 117 L.Ed.2nd 156].)
>
> *Note*: The "prisoner" in ***Hughes v. Rodriguez*** was an escapee. The Court held, however, that he was still considered to be a prisoner. (***Id.***, at p. 1221.)

Also, "'an officer who failed to intercede when his colleagues were depriving a victim of his **Fourth Amendment** right to be free from unreasonable force in the course of an arrest would, like his colleagues, be responsible for subjecting the victim to a deprivation of his **Fourth Amendment** rights.'" (***United States v. Koon***, 34 F.3d 1416, 1447 n.25 (9th Cir. 1994); see also ***Robins v. Meecham***, 60 F.3rd 1436, 1442 (9th Cir. 1995) holding that 'a prison official can violate a prisoner's **Eighth Amendment** rights by failing to intervene' when another official acts unconstitutionally." (***Tobias v. Arteaga*** (9th Cir. 2021) 996 F.3rd 571, 584.)

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deprivation of his **Fourth Amendment** rights.'" (***United States v. Koon***, 34 F.3d 1416, 1447 n.25 (9th Cir. 1994); see also ***Robins v. Meecham***, 60 F.3rd 1436, 1442 (9th Cir. 1995) holding that 'a prison official can violate a prisoner's **Eighth Amendment** rights by failing to intervene' when another official acts unconstitutionally." (***Tobias v. Arteaga*** (9th Cir. 2021) 996 F.3rd 571, 584.)

Deliberate Indifference, Conditions of Confinement, Excessive Noise, Televisions, and to Protect, in Prisons and Jails, COVID:

"Prisoner **Eighth Amendment** challenges generally fall into three broad categories. One type of claim arises when prison staff exhibit "deliberate indifference to serious medical needs of prisoners." ***Estelle v. Gamble***, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2nd 251 (1976). A closely related type of case addresses prisoners' challenges to their conditions of confinement. See ***Hope v. Pelzer***, 536 U.S. 730, 737-738, 122 S.Ct. 2508, 153 L.Ed.2nd 666 (2002). A third type of claim asserts that prison staff used excessive force against an inmate. See ***Hudson v. McMillian***, 503 U.S. 1, 5-6, 112 S.Ct. 995, 117 L.Ed.2nd 156 (1992). Here, our inquiry focuses on the last category because Bearchild pleaded a sexual assault claim and we have consistently placed prisoner sexual assault claims within the same legal framework as excessive force claims. See ***Wood v. Beauclair***, 692 F.3rd 1041, 1051 (9th Cir. 2012); ***Schwenk v. Hartford***, 204 F.3rd 1187, 1197 (9th Cir. 2000)." (***Bearchild v. Cobban*** (9th Cir. 2020) 947 F.3rd 1130, 1140.)

In ***Bearchild***, plaintiff, a state prison inmate, was held to have presented a viable **Eighth Amendment** claim in a civil lawsuit by proving that a prison staff member, acting under color of law and without legitimate penological justification, touched him in a sexual manner or otherwise engaged in sexual conduct for the staff member's own sexual gratification, or for the purpose of humiliating, degrading, or demeaning the defendant. The given jury instructions constituted plain error as they suggested that the plaintiff prisoner was required to show physical injury and the need to use force, and he had introduced evidence from which a jury could have found that the staff member stroked and fondled the plaintiff for the purpose of causing humiliation or for the staff member's own sexual gratification. (***Id***., at pp. 1139-1149.)

An implied claim was found under the **Eighth Amendment's** cruel and unusual punishment clause for prison officials' failure to

provide *adequate medical care* to a severely asthmatic prisoner, resulting in the prisoner's death. (***Carlson v. Green*** (1980) 446 U.S. 14, 16-18, & fn. 1. [100 S.Ct. 1468; 64 L. Ed.2nd 15].)

Inadequate "*ventilation and air flow*" violates the **Eighth Amendment** if it "undermines the health of inmates and the sanitation of the penitentiary." (***Hoptowit v. Spellman*** (9th Cir. 1984) 753 F.2nd 779, 784.)

> Also, "(*a*)*dequate lighting* is one of the fundamental attributes of 'adequate shelter' required by the **Eighth Amendment**." (***Hoptowit v. Spellman***, *supra*, at 783.) "'Moreover, there is no legitimate penological justification for requiring [inmates] to suffer physical and psychological harm by living in constant illumination. This practice is unconstitutional.' ***LeMaire v. Maass***, 745 F. Supp. 623, 636 (D. Or. 1990), vacated on other grounds, 12 F.3rd 1444, 1458-59 (9th Cir. 1993)." (***Keenan v. Hall*** (9th Cir. Nov. 20, 2020) 83 F.3rd 1083, 1090-1091.)
>
> *Note*: ***Keenan v. Hall*** covers a whole host of prison living "conditions of confinement," at pp. 1089 to 1095.)

The U.S. Supreme Court held in a 7-to-1 decision that Texas prison guards can be sued over claims that they placed a mentally ill inmate in cells covered in feces and raw sewage, reversing a decision from the Fifth Circuit Court of Appeal that shielded the guards under the doctrine of qualified immunity. The case stems from six days that inmate Trent Taylor spent at a psychiatric prison unit in Lubbock, Texas, where guards first placed him in a cell covered in what court documents described as "massive amounts of feces." After days of refusing to eat or drink for fear that his food would be contaminated, Taylor was moved to a separate cell without a bed. There, he was left to sleep in naked in a pool of sewage after a drain in the cell overflowed. The Fifth Circuit had ruled that the guards could not be held responsible because there was no "clearly established law" that prisoners cannot be held in such conditions for the specific time period of six days. The Supreme Court rejected that finding, holding that "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time." Per the Supreme Court, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." (***Taylor v. Riojas*** (Nov. 2, 2020) __ U.S. __ [141 S.Ct. 52; 208

L.Ed.2nd 164; citing ***Hope v. Pelzer*** (2002) 536 U. S. 730, 741 [122 S.Ct. 2508; 153 L.Ed.2nd 666].)

In an **Eighth Amendment** civil rights action over *prison noise*, a district court's denial of qualified immunity to prison officials was reversed in part because no reasonable officer would have understood that the court-ordered actions (see ***Coleman v. Schwarzenegger*** (E.D. & N.D. Cal. 2009) 922 F. Supp.2nd 882) to implement round-the-clock welfare checks to prevent inmate suicides were violating the constitutional rights of the inmates. (***Rico v. Ducart*** (9th Cir. 2020) 980 F.3rd 1292.)

> In so ruling, the Court (at pp. 1298-1299) noted that existing precedent does recognize general rights against excess noise and prison conditions that deprive inmates of "identifiable human need[s]," such as sleep, citing ***Wilson v. Seiter*** (1991) 501 U.S. 294, 304 [111 S.Ct. 2321; 115 L.Ed.2nd 271]; and ***Keenan v. Hall*** (9th Cir. 1996) 83 F.3rd 1083, 1090-1091, amended on denial of rehearing at (9th Cir. 1998) 135 F.3rd 1318, and holding "the **Eighth Amendment** require[s] that [inmates] be housed in an environment . . . reasonably free of excess noise" and denying summary judgment for prison officials on claims related to constant noise from other inmates and constant illumination alleged to be causing sleeping problems. (See also ***Walker v. Schult*** (2nd Cir. 2013) 717 F.3rd 119, 122, 126; finding an inmate plausibly alleged an **Eighth Amendment** violation for sleep deprivation caused by his five cellmates making constant and loud noise inside the cell all night); ***Harper v. Showers*** (5th Cir. 1999) 174 F.3rd 716, 717, 720; finding that "[c]onditions designed to prevent sleep . . . might violate the **Eighth Amendment**" when an inmate alleged sleep deprivation because of noise caused by other inmates); and ***Antonelli v. Sheahan*** (7th Cir. 1996) 81 F.3rd 1422, 1433; not addressing qualified immunity but finding that an inmate stated a cognizable **Eighth Amendment** claim when noise "occurred every night, often all night.")

See also **Keenan v. Hall** (9th Cir. 1996) 82 F.3rd 1083, 1090, where the Court held that while an inmate does *not* have a right to a *quiet environment*, an inmate does have a right to an environment that is "reasonably free" from constant, excessive noise caused by other inmates, finding a right to be free from excessive noise caused "at all times of day and night [by other] inmates . . . screaming, wailing, crying, singing, and yelling, often in groups."

In the jail inmates' action alleging that certain conditions of confinement at the jail violated the **Eighth** and **Fourteenth Amendments**, the district court did not err in denying the inmates' request for a broader preliminary injunction than it had already ordered because they failed to show a likelihood of success on their claims. As to the inmates' theory concerning *outdoor exercise time*, the district court reasonably concluded on the record that inmates were given constitutionally sufficient recreation time, and the inmates failed to identify any risk of harm, substantial or otherwise, from having their exercise time take place indoors as opposed to outdoors. As to the inmates' theory concerning access to direct sunlight, the inmates failed to demonstrate a causal connection between the lack of direct sunlight and their medical problems. (***Norbert v. City and County of San Francisco*** (9th Cir. 2021) 10 F.4th 918.)

A deputy was properly awarded summary judgment in a lawsuit by the administrator of a prisoner's estate because the estate did not carry its burden to show that deputy's failure to check on prisoner during the 7:50 p.m. rounds amounted to *deliberate indifference*. The deputy ten minutes later alerted nurse to the prisoner's "shaking" out of concern that he might be seizing. (***Estate of Beauford v. Mesa County*** (10th Cir. 2022) 35 F.4th 1248.)

In a medical deliberate indifference **42 U.S.C. § 1983** case, defendant prison officials violated the **Eighth Amendment** to the U.S. Constitution when they chose a *medically unacceptable course of treatment* for the circumstances. Despite his numerous complaints over a period of years and a visibly deteriorating condition, they ignored his enlarged prostate. Defendants were therefore properly denied qualified immunity because although plaintiff's condition sharply deteriorated during his last few years at the correctional center, the defendant medical staff never deviated from their wait and see treatment plan. As a result, plaintiff suffered from intractable pain over an approximately three-year period that interfered with his daily activities. (***Stewart v. Aranas*** (9th Cir. 2022) 32 F.4th 1192.)

In a case in which two state prisoners asserted that they had the right to possess a personal *television* in their cells, the appellate court concluded the prisoners did not demonstrate any ministerial duty that civil defendant jail officials failed to fulfill related to inmate television access at the prison. Not one of the constitutional (e.g., due process, cruel and unusual punishment) or statutory provisions identified by the prisoners, or any other constitutional or

statutory provision, specifically required a prison to allow inmates to possess personal televisions at the prison. Also, the appellate court was not persuaded that the prisoners were denied fair hearing of their claims related to television access at the prison, so as to require any remedy to effectuate their right of meaningful access to the courts. There was nothing to suggest that the prisoners' claims were not fully and fairly heard in the trial court or on appeal. (***In re Dohner*** (2022) 79 Cal.App.5th 590.)

On the issue of a prisoner's lack of a constitutional right to a personal television in his cell, the Court cites (at p. 595.) the following out-of-state federal authority: ***Rahman X v. Morgan*** (8th Cir. 2002) 300 F.3rd 970, 973–974 [no denial of due process or cruel and unusual punishment from inmate's lack of access to television in his cell.]; ***Murphy v. Walker*** (7th Cir. 1995) 51 F.3rd 714, 718, fn. 8 [denial of television not a constitutional violation]; ***More v. Farrier*** (8th Cir. 1993) 984 F.2nd 269, 271 ["Despite television's importance in modern society, appellees have no fundamental right to in-cell cable television"]; ***James v. Milwaukee County*** (7th Cir. 1992) 956 F.2nd 696, 699 [denial of television does not constitute a cognizable civil rights claim]; ***Montana v. Commissioners Court*** (5th Cir. 1981) 659 F.2nd 19, 23 [claims relating to usage of radio and television did not pertain to federal constitutional rights and were properly dismissed as frivolous]; ***Kesling v. Tewalt*** (D. Idaho 2020) 476 F.Supp.3rd 1077, 1086 ["[T]here is no constitutional right to watch television in prison"]; ***Rawls v. Sundquist*** (M.D. Tenn. 1996) 929 F.Supp. 284, 288 ["There is no constitutional right to television while incarcerated"].)

The Ninth Circuit Court of Appeal vacated the district court's judgment entered following a jury verdict in favor of prison officials in an action brought pursuant to **42 U.S.C. § 1983** alleging that defendant prison officials failed *to protect plaintiff prisoner from violence* by other prisoners. Between 2011 and 2013, plaintiff made six requests to be placed into protective custody, insisting that he was at risk of harm because he had received threats from the "*Border Brothers*," a gang active throughout Arizona's prisons. All six times, defendants denied plaintiff's requests for protective custody. After his sixth request was denied, plaintiff was physically assaulted in the prison yard by two other prisoners, at least one of whom was a suspected member of the Border Brothers. Plaintiff brought suit and after a four-day trial, the district court instructed the jury to "give deference to prison officials in the adoption and execution of policies and practices that, in their judgment, are needed to preserve discipline and to

maintain internal security in a prison." The Court held on appeal that because the evidence at trial reflected a genuine dispute whether the decisions to deny plaintiff's requests for protective custody were made pursuant to a security-based policy, and, if so, whether the decisions were an unnecessary, unjustified, or exaggerated response to security concerns, the district court's deference instruction was erroneous. That error may have affected the verdict. Accordingly, the panel vacated and remanded for a new trial. (***Fierro v. Smith*** (2022) 39 F.4th 640.)

Note: See "*Pre-Trial Detainee Jail Condition Cases*," under "*Due Process*; ***Fifth*** *and* ***Fourteenth Amendment*** *Issues*," below, for the pre-trial detainee's constitutional protections.

Prisoner Civil Rights/COVID-19: On interlocutory appeal, the Ninth Circuit Court of Appeal (1) affirmed in part and reversed in part the district court's order denying defendants' motion to dismiss on the basis of immunity under the **Public Readiness and Emergency Preparedness Act** ("**PREP Act**") and qualified immunity in an action brought against California prison officials arising from the death of a San Quentin inmate from COVID-19; and (2) dismissed for lack of jurisdiction defendants' claims asserting immunity under state law. On May 30, 2020, defendants transferred 122 inmates from the California Institution for Men, which had suffered a severe COVID-19 outbreak, to San Quentin Prison, where there were no known cases of the virus, resulting in an outbreak that killed one prison guard and over twenty-five inmates, including plaintiff's husband, Michael Hampton. Determining that the denial of **PREP Act** immunity was an appealable collateral order, the Court held that defendants were not, on the face of the complaint, entitled to immunity under the **PREP Act**, which limits legal liability for the administration of medical countermeasures (such as diagnostics, treatments, and vaccines) during times of crisis. The Court held that the **PREP Act** does not provide immunity against claims arising from the failure to administer a covered countermeasure. Here, plaintiff alleged that defendants were aware prior to the inmates' transfer that their COVID-19 test results were so outdated as to be essentially irrelevant. It therefore was plausible to infer that the testing results did not contribute to the decision to transfer the inmates, and, accordingly, did not contribute to Hampton's death. Once post-transfer testing occurred, the damage had been done. Because the allegations did not describe a causal relationship between the administration of testing and Hampton's death, plaintiff's claims were not precluded by the **PREP Act**. The Court further held that defendants were not entitled to qualified immunity on plaintiff's

Eighth Amendment claim, which adequately alleged that defendants acted with deliberate indifference to the health and safety of San Quentin inmates, including Hampton. The right at issue—to be free from exposure to a serious disease—was clearly established since at least 1993, when the Supreme Court decided ***Helling v. McKinney*** (1993) 509 U.S. 25, and under the Ninth Circuit's precedent. All reasonable prison officials would have been on notice in 2020 that they could be held liable for exposing inmates to a serious disease, including a serious communicable disease. Finally, the Court held that it lacked jurisdiction to consider whether officials were entitled to immunity under state law. Because the state law immunities on which defendants relied were immunities from liability, not from suit, defendants could not invoke the collateral order doctrine to immediately appeal the district court's rejection of those state law defenses. In an accompanying memorandum disposition, the Court reversed the district court's denial of qualified immunity on plaintiff's due process claim for violation of her own right to familial association with Hampton. (***Hampton v. California*** (9th Cir. 2023) 83 F.4th 754.)

A Prisoner's Access to the Courts:

Affirming the district court's summary judgment in favor of Nevada prison officials, the Ninth Circuit Court of Appeal held that plaintiff, a Nevada prisoner, lacked standing to pursue a claim that the prison officials denied him meaningful access to the courts under the **First Amendment**. Plaintiff alleged that the practice of requiring lockdown inmates to use a paging system to request law library materials—instead of physically visiting the law library—deprived him of access to the courts because the paging system required inmates to request the specific source by name, and thereby prevented him from discovering a Nevada Supreme Court decision that he alleged supported his claim for post-conviction relief. Specifically, plaintiff, who was convicted by a jury of first-degree murder, argued that the Nevada Supreme Court's decision in ***Nika v. State*** (Nev. 2008) 198 P.3rd 839, resurrected his habeas claim related to a jury instruction on mens rea, but because of the paging system he did not learn of ***Nika*** until seven years after it was decided, at which point he had already filed three unsuccessful habeas petitions. Upon discovering ***Nika***, however, plaintiff filed additional petitions in 2016 and 2019, both of which were denied. The Court held that because plaintiff could not show actual injury—the hindrance of a non-frivolous underlying legal claim—he lacked standing. Plaintiff offered no reason, beyond speculation, to think that the Nevada courts would have reached a different decision had he filed a habeas claim within a year of ***Nika*** instead

of seven years later. The Nevada Court of Appeal rejected plaintiff's 2016 habeas claim for a reason unrelated to the delay, finding that the evidence presented at trial was sufficient to establish beyond a reasonable doubt that he acted with the requisite mens rea. His habeas claim therefore would have failed no matter when it was raised. Because the claim had no chance of success, he did not suffer an actual injury sufficient to confer standing to pursue an access-to-courts claim. (***Nasby v. State of Nevada*** (9th Cir. 2023) 79 F.4th 1052.)

The Newsman's Shield Law:

California's "shield laws protect journalists from disclosing information acquired in the course of making news. (See **Cal. Const.**, **art. I**, **§ 2**, **subd. (b)**; **Evid. Code**, **§ 1070**.) The state's shield law provides, in pertinent part, that a journalist 'shall not be adjudged in contempt by a [court] for refusing to disclose the source of any information procured while so connected or employed [as a news reporter], or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.' (**Cal. Const., art. I**, **§ 2**, **subd. (b)**.) 'Unpublished information' includes recorded footage not shown to the public.' (***Ibid***.; see also **Evid. Code, § 1070** [statutory predecessor to **Cal. Const.**, **art. I**, **§ 2, subd. (b)**].) The shield law applies whether or not the information was provided in confidence. (***Delaney (v. Superior Court*** (199) . . . 50 Cal.3rd (785) at p. 798.)" (**People v. Parker** (2022) 13 Cal.5th 1, 33; upholding the trial court's refusal to allow defendant to view certain videotapes.)

The ***Parker*** Court further noted (at pp. 33-34) that "(i)n ***Delaney***, we explained that the shield law may be overcome only 'on a showing that nondisclosure would deprive the defendant of his federal constitutional right to a fair trial.' (***Delaney***, *supra*, 50 Cal.3d at p. 805.) A defendant must make a threshold showing that there is a reasonable possibility the information sought will materially assist with the defense. (***Id***. at p. 808.) The showing 'need not be detailed or specific, but it must rest on more than mere speculation.' (***Id.*** at p. 809.) If the defendant overcomes this threshold showing, the court then balances four factors to evaluate disclosure, including: (1) whether the unpublished information is confidential or sensitive; (2) whether the interests sought to be protected by the shield law will be thwarted by disclosure; (3) the importance of the information to the defendant; and (4) whether there is an alternative source for the information. (***Id.*** at pp. 810–811.)"

Defendant Hansen promised hundreds of noncitizens a path to U.S. citizenship through "adult adoption," earning nearly $2 million from his fraudulent scheme. The government charged Hansen under **8 U.S.C. 1324(a)(1)(A)(iv)**, which forbids "encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such [activity] is or will be in violation of law." The Ninth Circuit found **Clause (iv)** unconstitutionally overbroad, in violation of the **First Amendment**. (See ***United States v. Hansen*** (9th Cir. 2022) 25 F.4th 1103.) The Supreme Court reversed. Because **1324(a)(1)(A)(iv)** forbids only the purposeful solicitation and facilitation of specific acts known to violate federal law, the clause is not unconstitutionally overbroad. A statute is facially invalid under the overbreadth doctrine only if it "prohibits a substantial amount of protected speech" relative to its "plainly legitimate sweep." Here, Congress used "encourage" and "induce" as terms of art referring to criminal solicitation and facilitation (capturing only a narrow band of speech) not as those terms are used in ordinary conversation. Criminal solicitation is the intentional encouragement of an unlawful act. Facilitation—i.e., aiding and abetting—is the provision of assistance to a wrongdoer with the intent to further an offense's commission. Neither requires lending physical aid. Rather, both require an intent to bring about a particular unlawful act. The context of these words and statutory history indicate that Congress intended to refer to their well-established legal meanings. **Section 1324(a)(1)(A)(iv)** reaches no further than the purposeful solicitation and facilitation of specific acts known to violate federal law and does not "prohibi[t] a substantial amount of protected speech" relative to its "plainly legitimate sweep." (***United States v. Hansen*** (June 23, 2023) __ U.S.__ [143 S.Ct. 1932; 216 L.Ed.2nd 692].)

A newspaper's motion to quash a criminal defendant's subpoena demanding all unpublished material relating to a jailhouse interview of his codefendant by the newspaper's reporter was properly denied because defendant's rights and discovery needs outweighed the protections of the "newsperson's shield law," **Cal. Const., art. I, § 2, subd. (b)**; **Evid. Code, § 1070**. Defendant met his threshold burden to show a reasonable possibility the reporter's notes from her interview with the codefendant contained information materially helpful to his defense, the unpublished information was neither confidential nor sensitive, which gave the court discretion to give less weight to whether there was an alternative source for the unpublished information, and compelled disclosure would not give future criminal defendants a reason to decline to cooperate with journalists. (***The Bakersfield Californian v. Superior Court*** (1923) 96 Cal.App.4th 1228.)

***Fifth** and **Fourteenth Amendment** Due Process Issues*:

In General:

The **Fifth Amendment**—applicable to the federal government—provides that no person shall be "deprived of life, liberty or property without due process of law." The **Fourteenth Amendment**, ratified in 1868, uses the same eleven words, is called the "**Due Process Clause**," and is intended to describe the legal obligation as it applies to the states.

"In a long line of cases, we have held that, in addition to the specific freedoms protected by the **Bill of Rights**, the 'liberty' specially protected by the **Due Process Clause** includes the rights to marry, **Loving v. Virginia**; to have children, ***Skinner v. Oklahoma ex rel. Williamson***, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, ***Meyer v. Nebraska***, 262 U.S. 390 (1923); ***Pierce v. Society* of Sisters**, 268 U.S. 510 (1925); to marital privacy, ***Griswold v. Connecticut***, 381 U.S. 479 (1965); to use contraception, ***Ibid***; ***Eisenstadt v. Baird***, 405 U.S. 438 (1972); to bodily integrity, ***Rochin v. California***, 342 U.S. 165 (1952), and to abortion, (***Planned Parenthood of Southeastern Pa. v.***) ***Casey*** (505 U.S. 833 (1992). We have also assumed, and strongly suggested, that the **Due Process Clause** protects the traditional right to refuse unwanted lifesaving medical treatment. ***Cruzan* (*v. Director, Mo. Dept. of Health***, 497 U.S. 261 497 (at 278-279) (1990)." (Italics added: ***Washington v. Glucksberg*** (1997) 521 U.S. 702, 719-720 [117 S.Ct. 2258; 117 S.Ct. 2302; 138 L.Ed.2nd 772].)

As Applied to Illegal Aliens:

All persons within the territory of the United States are entitled to the protections guaranteed by the amendments, including the **Fifth Amendment's** due process clause. (***Wong Wing v. United States*** (1896) 163 U.S. 288 [16 S.Ct. 977; 41 L.Ed. 140].)

In ***Wing Wong***, certiorari was issued to the Federal District Court of the United States for the Northern District of California to determine whether a statute permitting the imposition on an alien of punishment by imprisonment at hard labor, to have been inflicted by the judgment of any justice, judge, or commissioner of the United States without a trial by jury, was constitutional. The United States Supreme Court reversed the lower court's judgment and held that an alien may *not* be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without *due process* of law. The Court reasoned that the United States could, by Congressional enactment, forbid aliens or classes of aliens from

> coming within their borders, and expel aliens or classes of aliens from their territory. The Court stated, however, that Congress could not further promote such a policy by subjecting persons of such aliens to infamous punishment at hard labor, or by confiscating their property, without providing for a judicial trial to establish the guilt of the accused. The Court applied the rule of the **Fourteenth Amendment** to the **Fifth** and **Sixth Amendments**, stating that the provisions contained therein are universal in their application *to all persons* within the territorial jurisdiction, and that all persons within the territory of the United States were entitled to the protection guaranteed by the amendments.

See also ***Zadvydas v. Davis*** (2001) 533 U.S. 678, at p. 693 [121 S.Ct. 2491; 150 L.Ed.2nd 653]: "(T)he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."

However, a due process entitlement does not mean that different categories of people cannot be treated differently. For instance, see ***Mathews v. Diaz*** (1976) 426 U.S. 67 [96 S.Ct. 1883; 48 L.Ed.2nd 478]. In ***Mathews***, plaintiff Cubans had been lawfully admitted to the United States for less than five years. Plaintiffs were over 65 years old and had been denied enrollment in the Medicare Part B supplemental medical insurance program under **42 U.S.C.S. §§ 1395j et seq.** They attacked the statutory basis for the denial under **42 U.S.C.S. § 1395o(2)**, which granted eligibility to resident citizens who were 65 or older but which denied eligibility to comparable aliens unless they had been admitted for permanent residence and also resided in the United States on a continuous basis for at least five years. The Federal District Court held that the five-year residence requirement violated the Due Process Clause of the **Fifth Amendment** and that the alien-eligibility provisions of **42 U.S.C.S. § 1395o(2)(B)** were unenforceable. On appeal, the Supreme Court reversed, finding that **42 U.S.C.S. § 1395o(2)(B)** had not deprived appellees of liberty or property without due process of law in that aliens were not entitled to enjoy all the advantages of citizenship, and a legitimate distinction between citizens and aliens justified benefits for one class that were not accorded to the other.

Also, one's presence on United States soil does not necessarily provide him with the right to remain in the U.S. For instance, in ***Shaughnessy v. United States*** (1953) 345 U.S. 206 [73 S.Ct. 625; 97 L.Ed.2nd 956], the Supreme Court discussed what is now sometimes called the "entry fiction." The appeal stemmed from respondent having been permanently excluded without a hearing pursuant to **8 C.F.R. § 175.57** for national security reasons. The Second Circuit Court of Appeal granted respondent's writ of habeas corpus. The Supreme Court reversed.

Respondent alien was born abroad and had previously lived in the United States for more than 25 years. He left the United States and spent 19 months in Hungary. Upon his return, he was permanently excluded from the United States on national security grounds, pursuant to **8 C.F.R. § 175.57**. Respondent was stranded on Ellis Island in that no other country would grant him entry. The Supreme Court held that respondent's continued exclusion without a hearing, lasting more than 21 months, did not constitute an unlawful detention and did not violate his due process rights, and that the lower court erred in granting him temporary entry on bond. The Court distinguished respondent's situation from other cases that granted hearings to aliens, noting that respondent was an entrant under the meaning of the regulation, and that he had no rights conferred upon him, and no protections under the Constitution. The Court held that neither respondent's harborage on Ellis Island, nor his previous residence in the United States, changed his status, and that he remained excludable.

It has also been held that neither the U.S. Constitution's "**Suspension Clause**" (grounds for suspending the right to writ of habeas corpus) nor the **Due Process Clause** are violated by an expedited removal of an illegal alien who, found in the United States without documentation, is removed from the country without a hearing. In ***Department of Homeland Security v. Thuraissigiam*** (June 25, 2020) __ U.S. __ [140 S.Ct. 1959; 207 L.Ed.2nd 427], respondent Vijayakumar Thuraissigiam, a Sri Lankan national, was stopped just 25 yards after crossing the southern border without inspection or an entry document. He was detained for expedited removal. An asylum officer rejected his credible-fear claim, a supervising officer agreed, and an Immigration Judge affirmed. Respondent then filed a federal habeas petition, asserting for the first time a fear of persecution based on his Tamil ethnicity and political views and requesting a new opportunity to apply for asylum. The District Court dismissed the petition but the Ninth Circuit Court of Appeal reversed, holding that, as applied here, **8 U.S.C. §1252(e)(2)** (limiting the review an alien in an expedited removal may obtain via a writ of habeas corpus) violates the **Suspension Clause** and the **Due Process Clause**. The U.S. Supreme Court reversed, holding that as applied here, **8 U.S.C. §1252(e)(2)** *does not* violate the **Suspension Clause**. The **Suspension Clause** provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." **Art. I**, **§ 9**, **cl. 2**. The U.S. Supreme Court has held that, at a minimum, the Clause "protects the writ as it existed in 1789" when the Constitution was adopted. Habeas has traditionally provided a means to seek release from unlawful detention. Respondent did not seek release from custody but rather an additional opportunity to obtain asylum. The Court held, therefore, that his claims fell outside the scope of the writ as it existed when the Constitution was adopted. Also, as applied here, **8 U.S.C. § 1252(e)(2)** was held not to violate the **Due Process Clause**. Per the Court,

more than a century of precedent establishes that for aliens seeking initial entry, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." Respondent argued that this rule did not apply to him because he succeeded in making it 25 yards into U. S. territory. The Court ruled, however, that the rule would be meaningless if it became inoperative as soon as an arriving alien set foot on U.S. soil. An alien who is detained shortly after unlawful entry cannot be said to have "effected an entry." An alien in respondent's position, therefore, has only those rights regarding admission that Congress has provided by statute. In respondent's case, Congress provided the right to a "determin[ation]" whether he had "a significant possibility" of "establish[ing] eligibility for asylum." He had been provided with that right upon an asylum officer considering his claim, a review of that decision by a supervising officer agreed, and an Immigration Judge affirming that decision. **8 U.S.C. §§1225(b)(1)(B)(ii)**, **(v)**.) Per the Court, due process requires no more.

Under **8 U.S.C. § 1326(a)**; "any alien who . . . has been denied admission, excluded, deported, or removed . . . and thereafter . . . enters, attempts to enter, or is at any time found in, the United States," without proper authorization, is subject to criminal penalties. **Section 1326(b)** imposes enhanced criminal penalties for aliens who have previously been convicted of specified offenses. In ***United States v. Carrillo-Lopez*** (9th Cir. 2023) 68 F.4th 1133, the Ninth Circuit ruled that the lower district court had clearly erred when it found that Congress's enactment of **8 U.S.C.S. § 1326** was motivated in part by the purpose of discriminating against Mexicans or other Central and South Americans. The district court construed evidence in a light unfavorable to Congress, including finding that evidence unrelated to **§ 1326** indicated that Congress enacted **§ 1326** due to discriminatory animus against Mexicans and other Central and South Americans. In reversing this decision, the Court held that the petitioner did not meet his burden to prove that Congress enacted **§ 1326** because of discriminatory animus against Mexicans or other Central and South Americans, and it rejected his equal protection claim.

As Applied to Prison Inmates:

Where a state prison (Nevada) inmate alleged that correctional facility officials violated his constitutional rights by denying him the ability to examine certain documents that could serve as evidence in a prison disciplinary proceeding pending against him, the officials were properly denied qualified immunity under **§ 1983** because the inmate had a **Fourteenth Amendment Due Process Clause** right to be permitted to examine documentary evidence for use in the prison disciplinary hearing,

and this right was clearly established when the inmate was denied access to the materials. (***Melnik v. Dzurenda*** (9th Cir. 2021) 4 F.4th 981.)

At a parole rescission hearing conducted as a result of a referral from the California Governor, the California Board of Parole Hearings erred in denying the state prison inmate's request for the presence of evidentiary witnesses because the Board violated its own procedural rules as well as the inmate's **due process** rights, as the inmate should have been permitted to call witnesses whose testimony would have been relevant to understanding or interpreting the record before the parole suitability hearing. (***In re Foster*** (2022) 84 Cal.App.5th 987, as modified at (Dec. 1, 2022) 2022 Cal.App. LEXIS 984.)

Use of Force Cases:

Five deputies holding down a resisting criminal defendant for the purpose of obtaining his fingerprints, in a courtroom (but out of the jury's presence), where there were found to be less violent alternatives to obtaining the same evidence, is force that "shocks the conscience" and a violation of the defendant's **Fourteenth Amendment** due process rights. (***People v. Herndon*** (2007) 149 Cal.App.4th 274; held to be "*harmless error*" in light of other evidence and because defendant created the situation causing the force to be used.)

A police officer violates the **Fourteenth Amendment** due process clause if he kills a suspect when acting with the purpose to harm, unrelated to a legitimate law enforcement objective. An officer was properly found to be civilly liable after shooting and killing the decedent (plaintiffs' mother) at the end of a high speed chase, but where the decedent was blocked in without a means of escape, and where no weapons were observed. (***A. D. v. State of California Highway Patrol*** (9th Cir. 2013) 712 F.3rd 446, 452-454, 456-460; the officer held not to be entitled to qualified immunity, ***Id***., at pp. 454-455.)

Where a pretrial detainee alleged that jail officers used excessive force in violation of the **Fourteenth Amendment's Due Process Clause** in tasing him while removing him from his jail cell, the detainee need only show that the force purposely and knowingly used against him was *objectively unreasonable*. Remand was warranted in this case regarding the jury's finding for the officers in a **42 U.S.C. § 1983** excessive force claim because the jury instructions were erroneous, having suggested to the jury that they should weigh the officers' *subjective* reasons (i.e., whether "the officers were *subjectively* aware that their use of force was unreasonable") for using force. (***Kingsley v. Hendrickson*** (2015) 576 U.S. 389 [135 S.Ct. 2466; 192 L.Ed.2nd 416].)

See ***Jones v. Las Vegas Metro. Police Department*** (9th Cir. 2017) 873 F.3rd 1123, 1132-1133: Although continually tasing a subject for over 90 seconds, even after he was on the ground and had gone limp, while being subdued by five officers, actions which contributed to the subject's death, was held to present a triable issue in a subsequent civil suit brought by the decedent's parents, the Court also held that the decedent's parents, in this case, did *not* have a valid **Fourteenth Amendment** due process claim. Citing ***Johnson v. Bay Area Rapid Transit Dist.*** (9th Cir. 2013) 724 F.3rd 1159, 1169, where the Court noted that: "[W]e have recognized a parent's right to a child's companionship without regard to the child's age," citing the case law. However, officers' actions in this regard do not constitute a **Fourteenth Amendment** due process violation unless the "[o]fficial conduct . . . 'shocks the conscience' in depriving parents of that interest . . ." (***Wilkinson v. Torres*** (9th Cir. 2010) 610 F.3rd 546, 554.) In this (the ***Jones***) case, "where officers must react quickly to a rapidly changing situation, the test is whether the officers acted with a purpose of causing harm unconnected to any legitimate law enforcement objective." (*See* also ***Porter v. Osborn*** (9th Cir. 2008) 546 F.3rd 1131, 1137, 1140.) The Court failed to find evidence of such a purpose in this case.

Aside from an **Fourth Amendment** excessive force issues, conduct that "*shocks the conscious*" violates due process. In using force, an officer violates a person's due process rights if he acted with "a purpose to harm without regard to legitimate law enforcement objectives." In this case, it was held that the officer did not violate the plaintiffs' due process rights when he shot their son 18 times in two nine-round volleys. The two volleys came in rapid succession, without time for reflection. Whether excessive or not, the shootings served the legitimate purpose of stopping a dangerous suspect. However, stomping the then comatose decedent in the head three times is different. After the two volleys, a video from a police patrol car shows the deputy walking around in a circle for several seconds before returning for the head strikes. He even took a running start before each strike. A reasonable jury could conclude that the deputy was acting out of anger or emotion rather than any legitimate law enforcement purpose. (**Zion *v. County of Orange*** (9th Cir. 2017) 874 F.3rd 1072, 1076-1077.)

Prolonged Detentions:

A trial court's grant of summary judgment to the operator of private prison was reversed because a reasonable jury could find that the operator caused defendant's prolonged detention by failing to notify the Marshals of his continued detention without a hearing and by discouraging and preventing him from seeking outside help and that the operator's conduct, which resulted in prolonged detention of nearly a year without a court appearance, a "due process" violation, was extreme and outrageous.

(***Rivera v. Corrections Corporation of America*** (9th Cir. 2021) 999 F.3rd 647.)

Speedy Trial Rights:

Although a pre-charging delay does not implicate speedy trial rights, a defendant is not without recourse if the delay is unjustified and prejudicial. The right of *due process* protects a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence. Accordingly, delay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the California and United States Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay. This includes both intentional and negligent delays. (***People v. Bracamontes*** (2022) 12 Cal.5th 977, 987-988; the Court finding no due process violation in a 13-year delay which was due to the time it took to investigate the case and develop the necessary DNA testing.)

The same considerations pertain to the time it takes for judicial review. "This is true even where the process of judicial review results in substantial delays. (Citation) Here, Bloom does not argue that the state unnecessarily delayed retrial after the federal court granted him habeas corpus relief. The great bulk of the delay of which he complains is instead attributable to the process of appeal and post-conviction review. Where, as here, 'defendant has benefitted from the careful and meticulous process of judicial review, he cannot now complain that the process "which exists to protect him has violated other of his rights."'" (***People v. Bloom*** (2022) 12 Cal.5th 1008, 1028, citing and quoting People v. McDowell (2012) 54 Cal.4th 395, 413-416.)

Defendant appealed his convictions for wire fraud, mail fraud, and various tax offenses, arguing that the 21-day period it took the U.S. Marshals Service to transport him from the District of New Jersey, where he was arrested, to the Central District of California, where he was indicted, violated the **Speedy Trial Act** and required the court to overturn his convictions. The argument centered on a provision of the **Speedy Trial Act** that mandates trial commencement within *seventy days* from the date a defendant appears before a judicial officer of the court where the charge is pending. The Ninth Circuit Court of Appeals rejected defendant's argument, affirming his convictions. The court ruled that the 21-day delay between defendant's detention in New Jersey and his first appearance

before a judge in the federal Central District in California was immaterial to the **Speedy Trial Act** analysis. The court held that a plain reading of the relevant section of the **Speedy Trial Act** dictates that the 21-day delay did not trigger a **Speedy Trial Act** violation. The court also rejected defendant's argument that a different provision became relevant because he was detained. The court held that this provision applies to prisoners traveling between jurisdictions for court proceedings once the seventy-day clock has started, not to a pre-indictment or pre-appearance transfer. (***United States v. Layfield*** (9th Cir. Mar. 7, 2024) __ F.4th __, __ [2024 U.S.App. LEXIS 5509].)

Excessive Fines and Driver's License Suspensions:

In an action challenging the constitutionality of Oregon's since-repealed system of suspending the driver's licenses of persons who failed to pay the fines in connection with traffic violations, the district court properly held plaintiff failed to state a claim on which relief could be granted, as the due process and equal protection principles recognized in ***Bearden v. Georgia*** (1983) 461 U.S. 660 [103 S.Ct. 2064; 76 L.Ed.2nd 221, and ***Griffin v. Illinois*** (1956) 351 U.S. 12 [76 S.Ct. 585; 100 L.Ed. 891] did not apply. Plaintiff's cause of action alleging that defendants' suspension of her license rested on a wealth distinction that did not survive rational basis review was properly dismissed, as plaintiff failed to plead facts establishing that her suspension lacked a rational basis. Plaintiff's due process claim also failed, as she failed to establish any basis to conclude that the Constitution required defendants to consider her inability to pay her traffic debt in deciding to suspend her license. (***Mendoza v. Strickler*** (9th Cir. 2022) 51 F.4th 346.)

The Failure to Protect: Special Relationships:

General Rule:

"The **Due Process Clause** is a limitation on state action and is not a 'guarantee of certain minimal levels of safety and security." (***Martinez v. City of Clovis*** (9th Cir. 2019) 943 F.3rd 1260, 1270-1271; quoting ***DeShaney v. Winnebago County Dep't of Soc. Servs.*** (1989) 489 U.S. 189, 194-195 [109 S.Ct. 998; 103 L.Ed.2nd 249].*)*

"Simply failing to prevent acts of a private party is insufficient to establish liability. See ***Patel v. Kent Sch. Dist.***, 648 F.3rd 965, 971 (9th Cir. 2011). 'The general rule is that a state is not liable for its omissions' and the Due Process Clause does not 'impose a duty on the state to protect individuals from third parties.' ***Id***. (alterations

omitted) (first quoting ***Munger v. City of Glasgow Police Dep't***, 227 F.3rd 1082, 1086 (9th Cir. 2000), then quoting ***Morgan v. Gonzales***, 495 F.3rd 1084, 1093 (9th Cir. 2007))" (***Martinez v. City of Clovis***, *supra*.)

"As a general rule, members of the public have no constitutional right to sue state employees who fail to protect them against harm inflicted by third parties." (***L.W. v. Grubbs*** (9th Cir. 1992) 974 F.2nd 119, 121, citing ***DeShaney v. Winnebago County Dep't of Soc. Servs.***, *supra***,** at p. 197.)

Exception; A "*special relationship*" between the plaintiff and the state may give rise to a constitutional duty to protect; a "***due process***" issue.

"The special-relationship exception 'applies when [the] state "takes a person into its custody and holds him there against his will."' **Patel** (**v. Kent School Dist.** (9th Cir. 2011)) 648 F.3rd (965), at 972 (quoting ***DeShaney***, 489 U.S. at 199-200). Examples of custody include 'incarceration, institutionalization, or other similar restraint[s] of personal liberty.' ***DeShaney*** (***v. Winnebago Cty. Department of Soc. Servs.*** (1989)) 489 U.S. (189) at 200. 'When a person is placed in these types of custody, we allow due process claims against the state for a fairly simple reason: a state cannot restrain a person's liberty without also assuming some responsibility for the person's safety and well-being.' ***Patel***, 648 F.3d at 972. 'In the case of a minor child, custody does not exist until the state has so restrained the child's liberty that the parents cannot care for the child's basic needs.' ***Id***. at 974." (***Murguia v. Langdon*** (9th Cir. 2023) 61 F.4th 1096, 1109.)

In ***Murguia***, the Court rejected plaintiffs' argument that two infants were in the "de facto" custody of the police defendants in that the infants' mother (who subsequently drowned the infants in a bathtub) was experiencing an obvious mental breakdown at the time and should not have been left in the custody of their mother. (pgs. 1109-1110)

Per ***Murguia***: "'(C)ustody' for the purposes of the special-relationship exception is a restriction on the plaintiff's liberty that limits the ability of the plaintiff (or the plaintiff's parents) to meet the plaintiff's basic needs (e.g., incarceration, institutionalization, foster care). See Patel, 648 F.3rd at 972-974 (holding that mandatory school attendance did not give rise to the special-relationship exception when the child was at school because the student lived at home with her mother, who was her primary

> caretaker, and 'unlike incarceration or institutionalization, compulsory school attendance does not restrict a student's liberty such that neither the student nor the parents can attend to the student's basic needs.'") (Pg. 1110.)

By arresting the plaintiff's driver, impounding his car, and leaving plaintiff (a female) in a high-crime area at 2:30 a.m., after which plaintiff was picked up by a man who eventually raped her, "triggers a duty" on the officer's part "to afford her some measure of peace and safety." "(T)he inherent danger facing a woman left alone at night in an unsafe area is a matter of common sense." (***Wood v. Ostrander*** (9th Cir. 1989) 879 F.2nd 583, 587-590; qualified immunity denied; pp. 590-596.)

> *Note*: It was not argued that the officer's actions in this case created a "special relationship." This case, therefore, could also be cited as authority under the second exception, below.

"The police owe duties of care only to the public at large and, except where they enter into a 'special relationship,' have no duty to offer affirmative assistance to anyone in particular." The Court ruled that the fact that officers had responded to plaintiffs' home a number of times concerning the same problem; i.e., a boyfriend's abusive actions, did not create a "special relationship" that would have made the officers civilly liable for the injuries the boyfriend caused. (***Benavidez v. San Jose Police Dept.*** (1999) 71 Cal.App.4th 853, 859–860.)

In a wrongful death case, the Appellate Court concluded that an arrestee's negligence in swallowing methamphetamine was not relevant to the CHP officers' response, while his post-ingestion negligence was relevant. The trial court properly excluded evidence of the former and permitted the jury to consider evidence of the latter. The trial court did not err in denying defendants' motion in limine to exclude evidence or argument that the officers attempted to coerce the arrestee's confession to drug possession. It was relevant for the jury to understand that the arrestee had an incentive to lie about what he ingested and decline medical care in order to avoid admitting the crime of possession of a controlled substance, and to assess whether and how a reasonable officer would have taken this into account in responding to the situation. As a rule, one has no duty to come to the aid of another. A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act.

There is a special relationship between a jailer and prisoner. It has been observed that a typical setting for the recognition of a special relationship is where the plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly, has some control over the plaintiff's welfare. Therefore, once in custody, an arrestee is vulnerable, dependent, subject to the control of the officer and unable to attend to his or her own medical needs. Due to this special relationship, the officer owes a duty of reasonable care to the arrestee. (***Frausto v. Department of the California Highway Patrol*** (2020) 53 Cal.App.5th 973.)

The "*Danger Doctrine*:"

General Rule: The state may be constitutionally required to protect a plaintiff that it "affirmatively places . . . in danger by acting with 'deliberate indifference' to a 'known or obvious danger.'" (I.e., the so-called "*Danger Doctrine*.") (***DeShaney v. Winnebago Cty. Department of Soc. Servs.*** (1989) 489 U.S. 189, 198-202 [109 S.Ct. 998; 103 L.Ed.2nd 249].)

In ***DeShaney***, it was held that "social workers and local officials were not liable under (**42 U.S.C.) § 1983** on a failure-to-act theory for injuries inflicted on a child by his father. (pg. 191.) The state actors had received complaints that the child was abused by his father but failed to remove the child from his father's custody. Id. The court reasoned that '[w]hile the State may have been aware of the dangers that [the child] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.' Id. at 201 (emphasis added). The Court acknowledged that the state once took temporary custody of the child and then returned him to his father, but reasoned that the state 'placed [the child] in no worse position than that in which he would have been had it not acted at all[.]' Id. Given that the state actors did not create or enhance any danger to the child, the state did not have a constitutional duty to protect him from the private violence inflicted by his father. Id." (***Murguia v. Langdon*** (9th Cir. 2023) 61 F.4th 1096, 1110-1111.)

The plaintiffs in ***Murguia v. Langdon***, *supra*, at pp. 1106-1108, 1110, urged a third exception to the rule; i.e., based on a state's failure to act—a legal requirement exception. The Court held that no such exception exists.

See also ***Martinez v. City of Clovis*** (9th Cir. 2019) 943 F.3rd 1260, 1271; ***Patel v. Kent School Dist.*** (9th Cir. 2011) 648 F.3rd 965, 971-972; and ***L.W. v. Grubbs*** (9th Cir. 1992) 974 F.2nd 119, 121.

Necessary Elements: There are two over-all elements to the Danger Doctrine:

1. There must be "affirmative conduct on the part of the state in placing the plaintiff in danger."

2. There must be state action with "deliberate indifference" to a "known or obvious danger." (***Murguia v. Langdon***, supra, at p. 1111, citing ***Patel v. Kent School Dist.*** (9th Cir. 2011) 648 F.3rd 965, at 974.)

Note: In rejecting this proposed third exception, the Court discusses the differences between "substantive due process" and "procedural due process," ruling that the ***Murguia*** case deals with the former, while the cases supporting the Plaintiffs' argument deal with the latter. (pgs. 1106-1108.)

Other Court have held that there are *three* necessary elements to establishing a "*danger doctrine*" exception to the general rule of no-liability: A plaintiff must show that:

1. The officers' affirmative actions created or exposed him to an actual, *particularized* danger that he would not otherwise have faced;

"This is 'a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.' ***Patel*** (***v. Kent School District*** (9th Cir. 2011)) 648 F.3rd (965) at 974 (quoting ***Bryan Cty. v. Brown***, 520 U.S. 397, 410, 117 S.Ct. 1382, 137 L.Ed.2nd 626 (1997)). The standard is higher than gross negligence, because it requires a 'culpable mental state.' ***Id***. (citing (***L.W. v.***) ***Grubbs*** ((9th Cir. 1996)) 92 F.3rd (894) at 898-900). 'The state actor must "recognize an unreasonable risk and actually intend to expose the plaintiff to such risks without regard to the consequences to the plaintiff."' ***Id***. (alterations omitted) (quoting ***Grubbs***, 92 F.3d at 899). In other words, the state actor must have known that something was going to happen, but 'ignored the risk and exposed the [plaintiff] to it anyway.' ***Hernandez*** (***v. City of San Jose*** (9th Cir. 2018)) 897 F.3rd (1125) at 1135 (alterations omitted) (quoting

Patel, 648 F.3rd at 974)." (***Martinez v. City of Clovis***, *supra*, at p. 1274.)

To satisfy this first requirement, a plaintiff must show that the officers' affirmative actions created or exposed [him] to an actual, particularized danger that [he] would not otherwise have faced. (**Murguia v. Langdon** (9th Cir. 2023) 61 F.4th 1096, 1111; i.e.; "whether the officers left the person in a situation that was more dangerous than the one in which they found him."

> Also: Whether "the plaintiff's ultimate injury must have been foreseeable to the defendant." (***Ibid***.)

On the issue of "particularity," in ***Sinclair v. City of Seattle*** (9th Cir. 2023) 61 F.4th 674, at pgs. 682-683, the Ninth Circuit cites a number of cases where the danger caused was particular to the plaintiff him- or herself:

> ***L.W. v. Grubbs*** (9th Cir. 1992) 974 F.2nd 119, 121: The state left a nurse alone with a violent offender, who assaulted her.
>
> ***Hernandez v. City of San Jose*** (9th Cir. 2018) 897 F.3d 1125, 1138: Officers "shepherded [plaintiffs] into a violent crowd of protestors and actively prevented them from reaching safety."
>
> ***Munger v. City of Glasgow Police Department*** (9th Cir. 2000) 227 F.3rd 1082, 1086-1087: Officers expelled the inebriated plaintiff from a bar into the freezing night with nowhere to go, and he later succumbed to hypothermia.
>
> ***Wood v. Ostrander*** (9th Cir. 1989) 879 F.2d 583, 590: Troopers stopped a car, arrested the driver, and left the plaintiff passenger stranded in a high crime area in the middle of the night where she was subsequently raped.

Kennedy v. City of Ridgefield (9th Cir. 2006) 439 F.3rd 1055, 1057-1058: The plaintiff and her deceased husband were shot by their neighbor after a police officer notified the neighbor that the plaintiff had reported that the neighbor had molested their nine-year-old daughter.

Maxwell v. County of San Diego (9th Cir. 2013) 708 F.3rd 1075, 1082: A gunshot victim died after police officers prevented the ambulance from leaving for the hospital.

Hunters Capital LLC v. City of Seattle (W.D. Wash. 2020) 499 F. Supp.3rd 888, 895-899, 902, where plaintiffs, who lived or owned businesses within the CHOP zone, had their business and residences vandalized and/or looted, significantly narrowing the class of persons exposed to the alleged state-created danger.

In contrast, the harm was held *not* to be particularized to the plaintiffs in ***Johnson v. City of Seattle*** (9th Cir. 2007) 474 F.3rd 634, where in response to growing violence at a Mardi Gras festival, the City of Seattle altered its crowd control plan for riot officers monitoring the event from one focused on confronting problematic behavior to one in which officers would remain on the periphery of the crowd. The evidence showed that the assistant police chief in charge ordered the change because he "determined that ordering police officers to enter into the crowd, or any attempts by the police to disperse it would incite greater panic and violence, making the situation worse." Members of the crowd who were then assaulted by rogue revelers brought a **42 U.S.C. § 1983** action against the City. The Court held that the City had not engaged in affirmative conduct that "enhanced the dangers the . . . [p]laintiffs exposed themselves to by participating in the Mardi Gras celebration." The City's decision to switch its tactical plan "did not place [the plaintiffs] in any worse position than they would have been in had the police not come up with any operational plan whatsoever." (Pg. 641.)

The ***Sinclair*** Court notes (at pg. 683) that "(o)nly one court, the Seventh Circuit, has held that the state-created danger need not be particular to a known plaintiff. In ***Reed v. Gardner***, officers detained a sober driver, allowing his drunk passenger to take the wheel instead. 986 F.2nd 1122, 1123-1124 (7th Cir. 1993). The drunk driver soon caused an accident farther down the highway. Id. The Seventh Circuit held that the state-created danger doctrine could apply because 'the other motorists' in the area were 'worse off with a drunk driver heading toward them than a sober one.' ***Id***. at 1125, 1127. At the same time, the Reed court reasoned that '[t]he dangers presented by drunk drivers are familiar and specific; in addition, the immediate threat of harm has a limited range and duration." ***Id***. at 1127."

Ultimately, the Ninth Circuit in ***Sinclair*** held "that the alleged dangers in CHOP were of unchecked lawlessness and rampant crime affecting everyone" (pg. 684), and thus were not sufficiently particularized to warrant the application of the Danger Doctrine.

> In ***Sinclair***, the City Seattle, on June 8, 2020, following the murder of George Floyd in Minneapolis, as a confrontation between the police and demonstrators escalated, the City withdrew all police officers from the Seattle Police Department's East Precinct building, which served the Capitol Hill neighborhood. Protesters used barricades left behind by the Seattle Police Department to block traffic and seized a roughly sixteen-block area of Capitol Hill, including Cal Anderson Park. They then declared it to be autonomous from City governance, calling it the "CHOP zone." Plaintiff's son went into this area and was murdered by a protestor as a result. Sinclair sued the City and others pursuant to **42 U.S.C. § 1983**. The Ninth Circuit eventually held that the danger created by the City in allowing the formation of the CHOP zone was not sufficiently particularized as to plaintiff's

son to allow for the use of the Danger Doctrine to establish civil liability.

2. The injury he suffered as a result was foreseeable; *and*

3. The officers were deliberately indifferent to the known danger. (***Martinez v. City of Clovis***, *supra,* at p. 1271; see also ***Hernandez v. City of San Jose*** (9th Cir. 2018) 897 F.3rd 1125, 1133. See also ***Sinclair v. City of Seattle*** (2023) 61 F.4th 674, 680.)

"Deliberate indifference is 'a stringent standard of fault (i.e., 'higher than gross negligence'), requiring proof that a municipal actor disregarded a known or obvious consequence of his action.'" (**Murguia v. Langdon**, supra, quoting ***Patel v. Kent School District***, *supra,* at p. 974, and citing ***Bryan Cnty v. Brown*** (1997) 520 U.S. 397, 410 [117 S.Ct. 1382; 137 L.Ed.2nd 626.)

"'For a defendant to act with deliberate indifference, he must "recognize[] the unreasonable risk and actually intend[] to expose the plaintiff to such risks without regard to the consequences to the plaintiff."'" (**Murguia v. Langdon**, supra, quoting Herrera v. L.A. Unified Sch. Dist. (9th Cir. 2021) 18 F.4th 1156, 1158.)

Additional Case Law:

The plaintiff raised a triable issue of fact as to whether an officer placed the plaintiff in danger by arresting the driver of the car plaintiff was riding in, impounding the car, and leaving her alone in a high-crime area at 2:30 a.m. (***Wood v. Ostrander*** (9th Cir. 1989) 879 F.2nd 583, 589-590.)

Officers were held to have increased the risk of harm to a gravely-ill individual by cancelling a 911 call and locking him in his home where it would be impossible for anyone to provide him with emergency care. (***Penilla v. City of Huntington Park*** (9th Cir. 1997) 115 F.3rd 707, 710.)

Officers increased the risk of harm to a severely intoxicated woman who was struggling to walk home with the assistance of her husband when the officers detained the plaintiff, let her husband leave, then sent the plaintiff to walk home unescorted in

near-freezing conditions that resulted in hypothermia and brain damage. (***Kneipp v. Tedder*** (3rd Cir. 1996) 95 F.3rd 1199, 1208-1209.)

An officer "affirmatively created a danger to [the plaintiff] she otherwise would not have faced" by informing her assailant of the accusations her family had made against him before they "had the opportunity to protect themselves from his violent response to the news . . . [thus] creat[ing] 'an opportunity for [him] to assault [the plaintiff] that otherwise would not have existed'" (***Kennedy v. Ridgefield City*** (9th Cir. 2006) 439 F.3rd 1055, 1063.)

> "(A)lthough the state's failure to protect an individual against private violence does not generally violate the guarantee of due process, it can where the state action 'affirmatively place[s] the plaintiff in a position of danger,' that is, where state action creates or exposes an individual to a danger which he or she would not have otherwise faced." (***Id***., at p. 1061.)

Where plaintiff/nurse was employed at a custodial institution for young male offenders and was raped by an inmate, the Ninth Circuit reversed the trial court's dismissal of plaintiff's **42 U.S.C. § 1983** lawsuit. Plaintiff alleged that defendant correctional officers violated her constitutional rights by intentionally placing her in a position of known danger; i.e., in an unguarded proximity with an inmate whose record defendants' knew included attacks on women. Defendants employed plaintiff in the institution's medical clinic, leading her to believe that she would not be required to work alone with violent sex offenders. The Ninth Circuit reversed the judgment of the district court because plaintiff being in custody (as was argued by the defendants) was not a prerequisite to the "*danger creation*" basis for a **§ 1983** claim. Defendants affirmatively created the dangerous situation. (***L.W. v. Grubbs*** (9th Cir. 1992) 974 F.2nd 119.)

In a **42 U.S.C. § 1983** civil action, political rally attendees sufficiently alleged that police officers were liable for a *due process* violation pursuant to the state-created danger theory of liability because they asserted that the officers placed them in a more dangerous position than the one in which they found themselves when the officers actively prevented them from leaving the rally except from a single exit, which sent them into a crowd of violent protestors. The attendees also sufficiently asserted that the danger from the protestors was actual and particularized since the officers had witnessed violence against attendees during the rally

and there were prior reports of protestors attacking people at the rally, and thus, the attendees also adequately alleged that the officers were not entitled to qualified immunity as they acted with deliberate indifference to a known danger. (***Hernandez v. City of San Jose*** (9th Cir. 2018) 897 F.3rd 1125.)

Under the state-created "*danger doctrine*," it was held that police officers violated the constitutional right to due process of a victim of domestic violence when they remarked positively about the alleged abuser's family while simultaneously ordering other officers not to arrest the abuser despite the presence of probable cause to arrest because they acted with deliberate indifference to the risk of future abuse when they ignored the risk of the abuser's violent tendencies. Nonetheless, the officers were entitled to qualified immunity under **42 U.S.C. § 1983** because at the time of these events, a reasonable officer would not have known that such conduct violated the due process rights of the domestic violence victim. (***Martinez v. City of Clovis*** (9th Cir. 2019) 943 F.3rd 1260, 1271-1277.)

> In a followup to above, another officer; Officer Channon High, who worked in the City of Clovis Police Department's records section, also had a number of contacts with the victim's abuser, Officer Pennington. In so doing, Officer High contradicted the victim's assertions to Officer Pennington that she wasn't reporting the abuse to anyone at the Clovis Police Department, resulting in Pennington inflicting more abuse on the victim. Upon Officer High's assertion that she too was entitled to qualified immunity, the Ninth Circuit Court of Appeal agreed despite the fact that "Officer High's affirmative conduct placed Ms. Martinez in actual, foreseeable danger," and that her actions were "deliberately indifferent to a known or obvious risk," thus triggering the "danger doctrine." (***Martinez v. High*** (2024) 91 F.4th 1022.)

The Court applied the state-created danger exception in situations where an officer abandoned the plaintiff in a dangerous situation, separated the plaintiff from a third-party who may have offered assistance, or prevented other individuals from rendering assistance to the plaintiff. See ***Wood v. Ostrander***, 879 F.2nd 583, 589-90 (9th Cir. 1989) (holding that the plaintiff raised a triable issue of fact as to whether an officer placed the plaintiff in danger by arresting the driver of the car plaintiff was riding in, impounding the car, and leaving her alone in a high-crime area at 2:30 a.m.); ***Penilla*** (***v. City of Huntington Park*** (9th Cir. 1997))

115 F.3rd (707) at 710 (holding that officers increased the risk of harm to a gravely-ill individual by cancelling a 911 call and locking him in his home where it would be impossible for anyone to provide him with emergency care); ***Kneipp v. Tedder***, 95 F.3rd 1199, 1208-09 (3rd Cir. 1996) (holding that officers increased the risk of harm to a severely intoxicated woman who was struggling to walk home with the assistance of her husband when the officers detained the plaintiff, let her husband leave, then sent the plaintiff to walk home unescorted in near-freezing conditions that resulted in hypothermia and brain damage). Under this case law, if (officers) Lewis and Cerda had left the ten-month-old twins alone with (civil defendant) Langdon in her dangerous and unstable condition, such conduct would almost certainly have constituted affirmative action enhancing a risk of physical harm to the twins. (***Murguia v. Langdon*** (9th Cir. 2023) 61 F.4th 1096, 1112-1114.)

The plaintiff, Desiree Martinez, sued Channon High, a City of Clovis police officer, under **42 U.S.C. § 1983**, alleging that Officer High violated her due process rights by disclosing her confidential domestic violence report to her abuser, Kyle Pennington, who was also a Clovis police officer. The Ninth Circuit Court of Appeals affirmed the district court's grant of qualified immunity to Officer High. The Court held that while Officer High did in fact violate Ms. Martinez's due process rights under the state-created danger doctrine by disclosing her confidential domestic violence report to Mr. Pennington, the right was not clearly established at the time of the violation. The Court explained that state actors (e.g., police officers) are generally not liable for failing to prevent the acts of private parties, but an exception applies where the state affirmatively places the plaintiff in danger by acting with deliberate indifference to a known or obvious danger. In this case, Officer High's disclosure of Ms. Martinez's confidential report to Pennington, whom the officer knew was an alleged abuser, placed Ms. Martinez in actual, foreseeable danger. However, it was not clearly established in 2013 that Officer High's actions violated Ms. Martinez's substantive due process rights. The court clarified that going forward, however, an officer would be liable under the state-created danger doctrine when the officer discloses a victim's confidential report to a violent perpetrator in a manner that increases the risk of retaliation against the victim. (***Martinez v. High*** (9th Cir. 2019) 943 F.3rd 1260.)

Cases where Danger Doctrine held not to apply:

In response to growing violence at a Mardi Gras festival, the City of Seattle altered its crowd control plan for riot officers monitoring

the event from one focused on confronting problematic behavior to one in which officers would remain on the periphery of the crowd. The assistant police chief in charge ordered the change because he "determined that ordering police officers to enter into the crowd, or any attempts by the police to disperse it would incite greater panic and violence, making the situation worse." Members of the crowd who were then assaulted by rogue revelers brought a **42 U.S.C. § 1983** action against the City. The Ninth Circuit Court of Appeal held that the City had not engaged in affirmative conduct that "enhanced the dangers the . . . [p]laintiffs exposed themselves to by participating in the Mardi Gras celebration." The City's decision to switch its tactical plan "did not place [the plaintiffs] in any worse position than they would have been in had the police not come up with any operational plan whatsoever." (***Johnson v. City of Seattle*** (9th Cir. 2007) 474 F.3rd 634.)

Deprivation of Liberty Cases:

A detention pursuant to a valid warrant but in the face of repeated protests of innocence, "*after the lapse of a certain amount of time*," was held to have deprived the accused of his liberty without due process of law, a **Fifth** or **Fourteenth Amendment** violation. A wrongful detention can ripen into a due process violation, but it is the plaintiff's burden to show that "it was or should have been known [by the defendant] that the [plaintiff] was entitled to release." (***Gant v. County of Los Angeles*** (9th Cir. 2014) 772 F.3rd 608, 619-623.)

A detainee's habeas petition challenging his detention at Guantanamo Bay, arguing that his "due process" rights were violated by being detained indefinitely, was properly denied because the President has the authority to detain him under **Authorization for Use of Military Force and National Defense Authorization Act for Fiscal Year 2012** in that the government demonstrated that detainee "substantially supported" Al Qaeda and its associated forces. Per the Court: "the **Due Process Clause** may not be invoked by aliens without property or presence in the sovereign territory of the United States." (***Abdulsalam Ali Abdulrahman Al Hela v. Trump*** (D.C. Cir. 2020) 972 F.3rd 120.)

Deprivation of Property Cases:

It is a procedural due process (**Fourteenth Amendment**) requirement that when practical, a pre-seizure court hearing must be provided to the owner of the property. (***Mathews v. Eldridge*** (1979) 424 U.S. 319 [96 S.Ct. 893; 47 L.Ed.2nd 18]; see also ***Yagman v. Garcetti*** (9th Cir. 2017) 852 F.3rd 859, 864; and ***Shinault v. Hawks*** (9th Cir. 2015) 782 F.3rd 1053, 1057; ***Recchia***

v. City of **Los Angeles** ***Department of Animal Services*** (9th Cir. 2018) 889 F.3rd 553, 561-562.)

> However, "where exigent or emergency circumstances justify a warrantless seizure there will be no need to have a hearing before a seizure. See ***United States v. James Daniel Good Real Prop.***, 510 U.S. 43, 62, 114 S.Ct. 492, 126 L.Ed.2nd 490 (1993) ('Unless exigent circumstances are present, the **Due Process Clause** requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.')" (***Recchia v. City of Los Angeles Department of Animal Services***, *supra*, at p. 561, fn. 6.)

The "***Mathews*** *factors*" that must be considered in determining the need for such a pre-seizure hearing are:

> (1) The private interest affected;
>
> (2) The risk of erroneous deprivation through the procedures used, and the value of additional procedural safeguards; *and*
>
> (3) The government's interest, including the burdens of additional procedural requirements.
>
> (***Mathews v. Eldridge***, *supra*, at p. 335; ***Recchia v. City of Los Angeles Department of Animal Services***, *supra*, at pp. 561-562.)

> In ***Recchia***, which involved the seizure of some twenty birds (18 pigeons, a crow and a seagull) under authority of **P.C. § 597.1**, most of which were sick and/or injured, from a homeless person who kept the birds in cardboard boxes while living on the street, the Court ruled that (1) a pet owner's interest in keeping his pets is strong, (2) the risk of an erroneous deprivation by animal welfare officers (trained in making such a decision) is low and there is no real value in imposing additional procedural safeguards, and (3) the governmental interest in seizing such birds without a prior court hearing is strong: "(T)here is a strong general governmental interest in being able to seize animals that may be in imminent danger of harm due to their living conditions, may carry pathogens harmful to humans or other animals, or may otherwise threaten public safety without first needing to have a hearing on the subject." (***Ibid***.)

> As to factor #3, see ***Hodel v. Va. Surface Mining & Reclamation Ass'n*** (1981) 452 U.S. 264, 300 [101 S.Ct. 2352; 69 L.Ed.2nd 1]: "Protection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action."

A continued official retention of property legal to possess with no further criminal action pending violates the owner's due process rights. (***Smith v. Superior Court* (*San Francisco Police Department*)** (2018) 28 Cal.App.5th Supp. 1, 4; citing ***City of Garden Grove v. Superior Court* [*Kha*]** (2007) 157 Cal.App.4th 355, 387.)

Fourteenth Amendment:

Seizure of Property:

Seizures also may also constitute a **Fourteenth Amendment** "*due process*" violation, at least when there is a "significant taking of property by the State." (***Fuentes v. Shevin*** (1972) 407 U.S. 67, 86 [92 S.Ct. 1983; 32 L.Ed.2nd 556]; ***Lavan v. City of Los Angeles***, *supra*, at p. 1031-1033.) To find a due process violation, a court must determine:

(1) Whether the asserted individual interests are encompassed within the **Fourteenth Amendment's** protection of "*life, liberty or property*," and is so;

(2) What procedures constitute "*due process of law*."

(***Lavan v. City of Los Angeles***, *supra*, at p. 1031.)

Parent-Child Relationship Cases:

Rule: A potential civil cause of action might lie where plaintiffs assert a claim for "civil rights violations," alleging a violation of the plaintiff's "constitutionally protected liberty interest under the **Fourteenth Amendment** in the companionship and society of the parent/child relationship without governmental interference;" i.e., a violation of familial rights. (See ***Lee v. County. of Los Angeles*** (9th Cir. 2001) 250 F.3rd 668, 685-686.)

> "For more than a century, the Supreme Court has recognized parental constitutional rights to the care, custody, and control of minor children. See, e.g., ***Meyer v. Nebraska***, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (describing the right to 'establish a home and bring up children' as among the 'privileges long recognized at common law as essential to the orderly pursuit of happiness by free men'); ***Troxel v. Granville***, 530 U.S. 57, 65-

66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (plurality opinion); ***Lassiter v. Dep't of Soc. Servs. of Durham Cnty.***, 452 U.S. 18, 27, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981); see also ***Roberts v. U.S. Jaycees***, 468 U.S. 609, 617-19, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984)." (***Sinclair v. City of Seattle*** (9th Cir. 2023) 61 F.4th 674, 678; noting, however, at pg. 679, "that the Supreme Court has not decided whether parental rights to the companionship of a child retains its constitutional dimension after the child reaches the age of majority."

> The Court further noted, however, that the Ninth Circuit is an "outlier" among the other federal circuits, having "implicitly" recognized a **14th Amendment**, **due process**, right for "parents (to) maintain a constitutionally protected liberty interest in the companionship of their adult children." ***(Ibid***, citing ***Strandberg v. City of Helena*** (9th Cir. 1986) 791 F.2nd 744, 748, fn.1; and ***Moreland v. Las Vegas Metropolitan Police Department*** (9th Cir. 1998) 159 F.3rd 365, 371. See also concurring opinion in ***Sinclair***, at pg. 685.)
>
> Of the circuits that have expressly considered the question, only the Tenth Circuit has held that the right extends to adult children. (***Sinclair v. City of Seattle***, *supra*, at p. 679; citing ***Trujillo v. Board of County Commissioners*** (10th Cir. 1985) 768 F.2nd 1186, 1188-1189; which relied mainly on the **First Amendment** right to intimate association instead of the **Fourteenth Amendment**, to define the scope of that right.)

"[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (***Prince v. Massachusetts*** (1944) 321 U.S. 158, 166 [64 S.Ct. 438; 88 L.Ed. 645].)

"The standard for analyzing a (**42 U.S.C.**) **§ 1983** claim for interference with the right to familial association depends on the context in which the case arises. See Brittain v. Hansen, 451 F.3rd 982, 989-90 (9th Cir. 2006) (distinguishing cases where the state terminated parental rights due to allegations of child abuse from cases where a state actor intervened in a child custody dispute). When the case involves the seizure of children from their parents based on suspicions of danger to the child, '[o]fficials may not remove children from their parents without a court order unless they have "information at the time of the seizure that establishes

reasonable cause to believe that the child is in imminent danger of serious bodily injury."' ***Keates*** (***v. Koile*** (9th Cir. 2018)) 883 F.3rd (1228) at p. 1236. (quoting ***Rogers v. Cnty. of San Joaquin***, 487 F.3rd 1288, 1294 (9th Cir. 2007)). When the case involves the intervention of a state officer in an ongoing custody dispute, the parent 'must show both a deprivation of [his] liberty and conscience shocking behavior by the government.' ***Brittain***, 451 F.3d at 991." (***Murguia v. Langdon*** (9th Cir. 2023) 61 F.4th 1096, 1118.)

The contours of this right are not well-established. (See **Kaur *v. City of Lodi*** (E.D. Cal. 2017) 263 F. Supp. 3rd 947, 973.) However, plaintiffs must show that Defendants' "actions and policies constituted an 'unwarranted interference' with [Plaintiffs'] right to familial association." (***Lee v. County of Los Angeles***, *supra,* at p. 686.)

"'[A] parent has a constitutionally protected liberty interest under the **Fourteenth Amendment** in the companionship and society of his or her child and . . . a "child's interest in her relationship with a parent is sufficiently weighty by itself to constitute a cognizable liberty interest."'" (*Ochoa v. City of Mesa (9th Cir. 2022) 26 F.4th 1050,* 1056, quoting ***Curnow ex rel. Curnow v. Ridgecrest Police*** (9th Cir. 1991) 952 F.2nd 321, 325, which in turn quotes ***Smith v. City of Fontana*** (9th Cir. 1987) 818 F.2nd 1411, 1419.)

Additionally, the Defendant's alleged harmful conduct "must shock the conscience or offend the community's sense of fair play and decency." (***Crosby v. Wellpath, Inc.*** (N.D. Cal. 2021) 2021 U.S. Dist. LEXIS 135260.)

See also *Ochoa v. City of Mesa (9th Cir. 2022) 26 F.4th 1050,* at p. 1056: "A claim asserting that police officers violated these **Fourteenth Amendment** rights during a police shooting must show that the officers' conduct 'shocks the conscience.'" (Quoting ***Porter v. Osborn*** (9th Cir. 2008) 546 F.3rd 1131, 1137.)

"*Shocking the conscience*," by the way, has been defined elsewhere as actions that are those taken with (1) "*deliberate indifference*" or (2) a "*purpose to harm . . . unrelated to legitimate law enforcement objectives*." (See ***A. D. v. State of California Highway Patrol*** (9th Cir. 2013) 712 F.3rd 446, 453.)

> "Police action sufficiently shocks the conscience, and therefore violates substantive due process, if it is taken with either '(1) deliberate indifference or (2) a purpose to

harm[,] unrelated to legitimate law enforcement objectives.'" (***Nehad v. Browder*** (9th Cir. 2019) 929 F.3rd 1125, 1139, quoting ***A.D. v. California Highway Patrol*** (9th Cir. 2013) 712 F.3d 446, 453.)

Note that no court, except the Ninth Circuit, has recognized a substantive due process right to the companionship of an adult child. (See ***Sinclair v. City of Seattle*** (9th Cir. 2023) 61 F.4th 674, 685; concurring opinion.)

Case Law:

In a case where the decedent's children, their mother, and the decedent's mother, sued the defendant law enforcement officers in federal court for (1) violating the **Fourteenth Amendment** under **42 U.S.C. § 1983** by wrongfully depriving the plaintiffs of the decedent's companionship and familial association and (2) violated Arizona law, **A.R.S. § 12-611**, by wrongfully killing the decedent, it was held that the federal district court properly granted summary judgment to the police officers and the municipalities they worked. It was held that the district court correctly chose to apply the "*purpose-to-harm*" test. The record reflected that the officers' actions reflected that in their attempts to satisfy legitimate law enforcement objectives— apprehension of an armed, dangerous suspect and protection of the safety of the officers, the home's inhabitants, and the public—the officers did not have time to deliberate before firing. Therefore, the officers' conduct did not violate the plaintiff relatives' **Fourteenth Amendment** rights. (***Ochoa v. City of Mesa*** (9th Cir. 2022) 26 F.4th 1050.)

"(T)he purpose-to-harm test applies if the situation at issue 'escalate[d] so quickly that the officer [had to] make a snap judgment.' . . . This test requires 'a more demanding showing that [the officers] acted with a purpose to harm [the decedent] for reasons unrelated to legitimate law enforcement objectives.'" (***Id***., at p. 1056; quoting Porter v. Osborn (9th Cir. 2008) 546 F.3rd 1131, 1137.)

"Illegitimate objectives include 'when the officer "had any ulterior motives for using force against" the suspect, such as "to bully a suspect or 'get even,'"' or when an officer uses force against a clearly harmless or subdued suspect.'" (***Ibid***., quoting ***Gonzalez v. City of Anaheim*** (9th Cir. 2014) 747 F.3rd 789, 798.)

> The Court in ***Ochoa*** also recognized, however, that "(w)hether evaluated under the deliberate-indifference test or the purpose-to-harm test, the **Fourteenth Amendment** 'shocks the conscience' standard is not the standard that typically comes to mind in police shooting cases. Another standard—the standard applicable to **Fourth Amendment** excessive-force claims—is more familiar in this context. That standard asks whether the officers' conduct was 'objectively unreasonable.'" (***Ibid.***, citing ***Graham v. Connor*** (1989) 490 U.S. 386, 397 [109 S.Ct. 1865, 104 L.Ed. 2nd 443].)

"But the **Fourteenth Amendment** standard applicable to a claim by a relative demands more of such a plaintiff than a **Fourth Amendment** claim by the victim of an officer's actions. ***Moreland v. Las Vegas Metro. Police Dep't.***, 159 F.3rd 365, 371 n.4 (9th Cir. 1998), as amended (Nov. 24, 1998). The Supreme Court has held that '**Fourth Amendment** rights are personal rights which . . . may not be vicariously asserted.' ***Plumhoff v. Rickard***, 572 U.S. 765, 778, 134 S.Ct. 2012, 188 L.Ed.2nd 1056 (2014) (omission in original) (quoting ***Aldermn v. United States***, 394 U.S. 165, 174, 89 S.Ct. 961, 22 L.Ed.2nd 176 (1969)). The plaintiffs here cannot sidestep this prohibition and assert Ochoa's **Fourth Amendment** rights through a **Fourteenth Amendment** claim. See ***Byrd***, 137 F.3rd at 1134. Instead, they must show more: not just that the officers' actions were objectively unreasonable and thus violated Ochoa's **Fourth Amendment** rights, but that the officers' actions 'shock[ed] the conscience' and thus violated the plaintiff' **Fourteenth Amendment** rights. See ***Porter*** (***v. Osborn*** (9th Cir. 2008)) 546 F.3rd (1131) at 1137." (***Id.***, at pp. 1056-1057.)

The Ninth Circuit affirmed the district court's dismissal for failure to state a claim of an action brought against the City of Seattle pursuant to **42 U.S.C. § 1983** by Donnitta Sinclair, whose nineteen-year-old son was shot to death in 2020 in the Capitol Hill Occupied Protest ("CHOP") zone, an area that the Seattle Police Department and the Mayor of Seattle had surrendered to protestors. Sinclair alleged that the City's actions and failures to act regarding CHOP created a foreseeable danger for her son, that the City was deliberately indifferent to that danger, and that as a result, the City was liable for violating her **Fourteenth Amendment** substantive due process right to the companionship of her adult son. The Court held that, unlike almost every other circuit, this circuit recognized Sinclair's substantive due process right to the companionship of her adult son. And Sinclair properly alleged that the City acted with deliberate indifference to the danger it helped

create, which caused her son's death. It was self-evident that the Seattle Police Department's wholesale abandonment of its East Precinct building, combined with Mayor Durkan's promotion of CHOP's supposedly festival-like atmosphere, would create a toxic brew of criminality that would endanger City residents. But the danger to which the City contributed was not particularized to Sinclair or her son, or differentiated from the generalized dangers posed by crime, as the Ninth Circuit's precedent required. Because the City's actions were not directed toward Sinclair's son and did not otherwise expose him to a specific risk, the connection between Sinclair's alleged injuries and the City's affirmative actions was too remote to support a **§ 1983** claim. One concurring Justice stated that this circuit has created a split with other circuits by recognizing a substantive due process right to the companionship of one's adult children. In establishing the right on which Sinclair's claim depended, this circuit's precedent failed to engage in the proper analysis required by Washington v. Glucksberg (1997) 521 U.S. 702. [117 S.Ct. 2302; 138 L.Ed.2nd 772]. Had the Court done so, it should have reached the conclusion that sister circuits already have; i.e. there being no constitutional right to recover for the loss of Sinclair's companionship with her adult son. (***Sinclair v. City of Seattle*** (9th Cir. 2023) 61 F.4th 674.)

Case law Implicating the Custody of a Child:

"(F)amilies have a 'well-elaborated constitutional right to live together without governmental interference.'" (***Demaree v. Pederson*** (9th Cir. 2018) 887 F.3rd 870, 873; citing ***Wallis v. Spencer*** (9th Cir. 2000) 202 F.3rd 1126, 1136.)

"(U)nder the **Fourth Amendment**, government officials are ordinarily required to obtain prior judicial authorization before removing a child from the custody of her parent." (***Demaree v. Pederson***, *supra*, at p. 878; citing ***Kirkpatrick v. County of Washoe*** (9th Cir. 2016) 843 F.3rd 784, 780.)

However: "In an emergency, government officials may take a child out of her home and away from her parents without a court order 'when officials have reasonable cause to believe that the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant.' ***Kirkpatrick***, 843 F.3rd at 790 (original italics and internal quotation marks omitted). This requirement "balance[s], on the one hand, the need to protect children from abuse and neglect and, on the other, the preservation of the essential privacy and liberty interests that families are

guaranteed under both the Fourth and Fourteenth Amendments of our Constitution.' ***Rogers v. County. of San Joaquin***, 487 F.3rd 1288, 1297 (9th Cir. 2007)." (***Demaree v. Pederson***, supra.)

The state's decision to take custody of a child implicates the constitutional rights of the parent and the child under the **Fourteenth** (**Due Process**) and **Fourth Amendments**, respectively. (***Mabe v. San Bernardino County, Department of Public Social Services*** (9th Cir. 2001) 237 F.3rd 1101, 1106.)

Where doctors recommended immediate medical care (spinal tap and infusion of antibiotics) to determine and treat possible meningitis in a 5-week-old infant, a pre-hearing taking of the child from an uncooperative parent, and temporary detention of that irate parent, is lawful as a "*special needs*" taking. (***Mueller v. Auker*** (9th Cir. 2012) 700 F.3rd 1180, 1185-1190; adopting the factual description as provided at (9th Cir. 2009) 576 F.3rd 979, 982-986; and finding that the officer/civil defendant was entitled to qualified immunity in that the issue is an unsettled one.)

However, separating father and son for a limited amount of time (i.e., 40 minutes), they both being detained, is not sufficient to constitute a **Fourteenth Amendment** due process "*fundamental liberty interest*" violation. (***Sandoval v. Las Vegas Metro. Police Dep't.*** (9th Cir. 2014) 756 F.3rd 1154, 1167.)

> It was also noted that shooting the family dog, "albeit sad and unfortunate, does not fall within the ambit of deprivation of a familial relationship." (***Ibid***.)

Where social workers took a two-day-old child into protective custody from a hospital without prior judicial authorization due to the mother's addiction to methamphetamine, the father's **Fourteenth Amendment** claim failed because he did not have a constitutionally recognized liberty interest in his relationship with the child since, at the time, no one was confident about whether he was the biological father. There was evidence, however, to support a finding that the child's **Fourth Amendment** had in fact been violated. A reasonable juror could have found that the social workers could not have reasonably believed that the child would likely experience bodily harm during the time it would have taken to obtain a warrant since the child would have very likely remained in the hospital. However, because this issue was not well-settled in the law, the social workers were entitled to qualified immunity on that issue. (***Kirkpatrick v. County of Washoe*** (9th Cir. 2016) 843 F.3rd 784, 788-793.)

> While, however, the parents' right to the custody of their children without governmental interference is to be measured under the **Fourteenth Amendment** due process clause, the child's right not to be taken from his or her parents is a **Fourth Amendment** seizure issue. (***Id.***, at pp. 788-789.)

There was a "genuine issue of material fact" regarding whether the County maintained a policy of unconstitutionally seizing children in non-exigent circumstances, and summary judgment on that issue was held to be improperly granted. The case was remanded for consideration of that issue under the principles of ***Monell v. Dep't. of Soc. Servs. of N.Y.*** (1978) 436 U.S. 658, 691 [98 S.Ct. 2018; 56 L.Ed.2nd 611].

The Ninth Circuit Court of Appeal affirmed in part the district court's summary judgment ruling in favor of the parents, finding that a county violated the parents' **Fourteenth Amendment** substantive due process rights when it removed their children from their family home under no more than a "*suspicion*" of child abuse, and subjected the children to invasive medical examinations, including a gynecological and rectal exam, without the parents' knowledge or consent or court order where the examinations were at least partly investigatory and where there was no emergency medical situation or reasonable concern that material physical evidence might dissipate. (***Mann v. County of San Diego*** (9th Cir. 2018) 907 F.3rd 1154, 1160-1164.)

> The county in ***Mann*** also violated the children's **Fourth Amendment** rights by failing to obtain a warrant or to provide constitutional safeguards before subjecting the children to the examinations. (***Id.***, at pp. 1164-1167.)
>
> "The right to family association includes the right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state." (***Id.***, at p. 1161; quoting ***Wallis v. Spencer*** (9th Cir. 2000) 202 F.3rd 1126, 1141; see also ***Parham v. J.R.*** (1979) 442 U.S. 584, 602 [99 S.Ct. 2493; 61 L.Ed.2nd 101].)

See also ***Parkes v. County of San Diego*** (S.D. Cal. 2004) 345 F.Supp. 2nd 1071, 1091-1095, concluding that the County's policy of failing to notify or obtain consent from the children's parents to conduct the Polinsky Medical Center examinations violated the

Fourth and **Fourteenth Amendments**; ***Reynolds v. County of San Diego*** (S.D. Cal. 2016) 224 F.Supp.3rd 1034, 1062-1069, concluding that the County's policy of excluding parents from the Polinsky medical examinations was unconstitutional; and ***Swartwood v. County of San Diego*** (S.D. Cal. 2014) 84 F.Supp.3rd 1093, 1016-1124, where San Diego county adopted revised procedures for notification to parents and guardians of their right to be present at their child's Polinsky Center physical exams, allowing for parental presence at examinations upon request, adopting procedures and modifying the Polinsky Children's Center's facilities to allow for a parent's observations of such exams, and modifying the San Diego County Health and Human Services Agency's requests to the Juvenile Court for child-specific orders authorizing exams and treatment of children in those cases where the parents refuse to consent to the examinations.

Clark County (Nevada) was properly granted summary judgment on plaintiffs' claim alleging that the county violated their **Fourth** and **Fourteenth Amendment** rights when the department of family services seized their children, including a deceased infant, because plaintiffs failed to present a genuine dispute that the infant was wrongfully removed. The county was properly granted summary judgment on plaintiffs' *due process* claim because plaintiff failed to point to any department practice or policy that violated the infant's due process rights and failed to prove that the department acted with deliberate indifference. Neither the special relationship nor the state-created danger exception applied to overcome the hurdle that the **Due Process Clause** did not confer an affirmative right to governmental aid or impose a duty on the state to protect individuals from third parties. (***Momox-Caselis v. Donohue*** (9th Cir. 2021) 987 F.3rd 835.)

Where plaintiff sued under **42 U.S.C. § 1983**, alleging that defendant, a police department employee, deceived the family court when she assisted a non-custodial parent in obtaining a temporary restraining order that prevented plaintiff, the sole custodial parent, from having contact with her daughter for 21 days, dismissal of the suit based on qualified immunity was not warranted. In particular, such dismissal was not warranted because plaintiff's constitutional right to "*familial association*" was clearly established at the time of the underlying actions such that a reasonable official would have understood that defendant's actions violated the U.S. Constitution; i.e., the "**due process**" **clause** of the **Fourteenth Amendment**. (***David v. Kaulukukui*** (9th Cir. 2022) 38 F.4th 792.)

> An officer's interference with a non-custodial parent's visitation rights was held not to have violated the parent's constitutional rights. In the case, the father had sole legal custody of the child, and the mother (plaintiff) had visitation rights governed by a visitation schedule. The father attempted to take the child on vacation at a time when the mother believed she was entitled to a week of visitation. The father arrived at the mother's house with a police officer. The officer believed the father was entitled under the visitation schedule to take the child that week and threatened to arrest the mother if she did not comply. The mother allowed the child to leave with the father, but later brought a **42 U.S.C. § 1983** action against the officer for violating her right to familial association. The Court held that no constitutional violation occurred. (***Brittain v. Hansen*** (9th Cir. 2006) 451 F.3rd 982, 985-987, 989-990, 996.)

Note: See "*Warrantless Seizure of a Child for Protective Custody Purposes*," under "*Warrantless Searches and Seizures*" (Chapter 9), below.

Statutory Vagueness as a Due Process Issue:

"It has been recognized for over 80 years that due process requires inter alia some level of definiteness in criminal statutes. [Citation.] Today it is established that due process requires a statute to be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt. [Citations.]" (***People v. Ballard*** (1988) 203 Cal.App.3rd 311, 315; quoting ***Burg v. Municipal Court*** (1983) 35 Cal.3rd 257, 269; and rejecting the argument that **P.C. § 273.5** (spousal abuse) is void for vagueness.)

> "The fundamental policy behind the constitutional prohibition of vaguely worded criminal statutes was stated in ***Lanzetta v. New Jersey*** (1939) 306 U.S. 451, at page 453 . . .: 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' [The California Supreme] court noted a further purpose of the prohibition in ***People v. McCaughan*** (1957) 49 Cal.2d 409, 414 . . ., where Justice Traynor stated, 'A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as a standard for the ascertainment of guilt by the courts called upon to apply it.' [Italics omitted.] The generally accepted criterion is whether the terms of the challenged statute are 'so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application.' [Citation.] [Citation.]"

(***People v. Ballard***, *supra*, at p. 315; citing ***People v. Smith*** (1984) 35 Cal.3rd 798, 809.)

Predictability of the Consequences of a Charged Offense:

"[A]lthough clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, [citations], due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." (People v. Blakeley (2000) 23 Cal.4th 82, 91.) "Courts violate constitutional due process guarantees (**U.S. Const., 5th** and **14th Amends.**; **Cal. Const., art. I, § 7**) when they impose unexpected criminal penalties by construing existing laws in a manner that the accused could not have foreseen at the time of the alleged criminal conduct." (Citing United States v. Lanier (1997) 520 U.S. 259, 266–267 [137 L.Ed.2nd 432; 117 S.Ct. 1219]. See ***People v. Reyes*** (2020) 56 Cal.App.5th 972, 987, fn. 9.)

Pre-Trial Detainee Jail Condition Cases:

A pretrial detainee's constitutional claims arise from the **Fourteenth Amendment due process clause** of **U.S. Constitution**, and not the **Eighth Amendment's Cruel and Unusual Punishment** protections. Plaintiff in a **42 U.S.C. § 1983** federal lawsuit presented evidence that the County, tasked with supervising high-observation housing for mentally ill women, had a policy of shackling the women to steel tables in the middle of an indoor recreation room as their sole form of recreation, and that jail officials routinely left detainees who resisted body searches naked and chained to their cell doors for hours at a time without access to food, water, or a toilet. The jail's daily logs showed that during plaintiff's pretrial detention, she was deprived of meals, showers, and recreation due, in part, to overcrowding and understaffing at detention facility. Ninth Circuit ruled that a magistrate judge erred in giving a jury instruction requiring deference to prison officials in a pretrial detainee's *conditions of confinement claims* because the deference instruction is to be given only when there was evidence that the treatment to which the detainee objected was provided pursuant to a security-based policy. It was also error to give a jury instructions requiring deference to prison officials on the detainee's *excessive search claim* because there was no justification for the treatment and the search practice was an unnecessary, unjustified, and exaggerated response to jail officials' need for prison security. The prison officials were not entitled to deference for their practice of shackling mentally ill inmates without clothing, food, water, or toilet access because they could offer no justification for the conduct. (***Shorter v. Baca*** (9th Cir. 2018) 895 F.3rd 1176.)

A pretrial detainee is protected by the **Fourteenth Amendment's Due Process Clause**. Under the **Due Process Clause**, detainees have a right against jail conditions or restrictions that amount to punishment. This standard differs significantly from the standard relevant to convicted prisoners, who may be subject to punishment so long as it does not violate the **Eighth Amendment's** bar against cruel and unusual punishment. In an action under **42 U.S.C. § 1983**, defendant sheriff was entitled to summary judgment on a **Fourteenth Amendment** claim alleging that the sheriff failed to provide plaintiff with a bed during a three-and-a-half day jail stay because the lockdown that resulted in plaintiff's delayed transfer to a permanent housing was within the scope of the sheriff department's authority to maintain security of its facilities and there was no basis to conclude that department's response to the inmate disturbances constituted an unnecessary or unjustified response to problems of jail security. Also, defendant sheriff was entitled to qualified immunity because collateral estoppel did not apply since the issue of sleeping on the floor due to exigent circumstances was not addressed in any of the cited cases by plaintiff. (***Olivier v. Baca*** (9th Cir. 2019) 913 F.3rd 852, 857-861.)

A jail nurse acted as gatekeeper by serving as the screening nurse and was therefore responsible for identifying an inmate's urgent medical needs, and whether she failed to do so was properly considered under the first prong of the qualified immunity analysis. Therefore, as to her, summary judgment was not proper because the available law at the time of the incident clearly established Matthew Gordon's constitutional rights to proper medical screening to ensure that a medically appropriate protocol was initiated. Given that the County instituted two screening forms to ensure the initiation of a medically appropriate protocol, the Court remanded the case for a factual analysis of the remaining prong of the qualified immunity test. The deputy sheriff, however, was entitled to qualified immunity because the due process right to an adequate safety check for pretrial detainees was not clearly established at the time of the incident. The Court nevertheless held that pre-trial detainees do have a right to direct-view safety checks sufficient to determine whether their presentation indicates the need for medical treatment. The Court also warned that law enforcement and prison personnel should heed this warning because the recognition of this constitutional due process right will protect future detainees. It was further held that the district court properly granted summary judgment in favor of the county on the Gordon's claim for municipal liability because he did not identify any other instance in which jail personnel used the *Clinical Institute Withdrawal Assessment for Alcohol protocol* (as opposed to the *Clinical Opiate Withdrawal Scale*) for inmates withdrawing on opiate use or a low-visibility safety check resulted in the provision of inadequate medical care, and his ***Monell*** claim therefore failed. (***Gordon v. County of Orange*** (9th Cir. 2021) 6 F.4th 961.)

Use of Coerced Testimony as a Due Process Issue: "***Medina** Error*:"

Defendants were charged with two counts of first-degree murder and were tried and convicted. At the trial, three prosecution witnesses, accessories to the crimes, testified under conditional immunity. Upon conviction, the trial court sentenced defendants to life in prison. Among other arguments, defendants argued that the trial court deprived them of a fair trial by using prosecution witnesses granting conditional immunity and commenting on their failure to testify. The trial Appellate court agreed in part, finding that the orders granting conditional immunity to the three principal prosecution witnesses denied defendants a fair trial. The Court found that each of these witnesses was an accomplice liable to prosecution for the murders of which defendants were convicted, and that the threat of prosecution therefor contained in the conditional immunity orders denied to defendants any effective cross-examination of the witnesses, thereby depriving them of the fundamental due process right to a fair trial. The Court also found that the use of such tainted testimony was a denial of the fundamental right to a fair trial in violation of federal constitutional due process principles and mandated reversal. (***People v. Medina*** (1974) 41 Cal.App.3rd 438.)

> In order to offend due process, "the bargain [must be] expressly contingent on the witness sticking to a particular version [of her story]." (***People v. Reyes*** (2008) 165 Cal.App.4th 426, 434, quoting ***People v. Garrison*** (1989) 47 Cal.3rd 746, 771.)

"'The California Supreme Court has refused to extend **Medina** beyond the instance in which a plea agreement expressly requires consistency between accomplice testimony and a prior statement.' (***People v. Reyes***, supra, 165 Cal.App.4th at p. 434.) In Garrison, the court held that 'unless the bargain is expressly contingent on the witness sticking to a particular version, the principles of Medina . . . are not violated.' (***People v. Garrison***, *supra*, 47 Cal.3rd at p. 771.) 'The court reiterated this language—with emphasis on the words "expressly contingent"—in its most recent decision on the subject. (***People v. Boyer*** (2006) 38 Cal.4th 412, 456 . . . .)' (***Reyes***, at pp. 434–435.)" (***People v. Fultz*** (2021) 69 Cal.App.5th 395, 422.)

> "A witness who testifies pursuant to a plea agreement does not give coerced testimony if the agreement requires only that the witness testify truthfully and completely and does not require that the witness testify in a particular fashion." (***People v. Fultz***, *supra*, at p. 421; no "***Medina*** error" found, pp. 421-424.)

Even where defense counsel elicited from a prosecution witness that her immunity was conditioned on testimony consistent with her prior statement, no ***Medina*** error was found. That is because on redirect, the witness made it clear that her prior statement was the truth, that the prosecutor had asked her to testify to the truth, and that she was never asked to testify to specific facts. The California Supreme Court explained, the record suggested, at most, the witness understood she was obliged to recount her prior statement because it was the truth. The Supreme Court found the evidence insufficient to conclude that the grant of immunity required the witness to testify in accord with a prior statement regardless of its truth. (***People v. Fields*** (1983) 35 Cal.3rd 329, 359-361.)

No ***Medina*** error was found where two witnesses were granted immunity on condition and agreement that they testify truthfully (or be subject to perjury prosecution). The agreements also recited that the witnesses had represented their testimony would be consistent with specific recorded statements made to the police. Rejecting the contention that the witnesses' testimony had been coerced to follow the prior statements, the California Supreme Court stressed that the witnesses were expressly obligated only to testify in accordance with the truth. The portions of the immunity agreements reciting expectations that the witnesses' testimony would be in accord with their prior statements reflected the witnesses' and the prosecution's understanding that those statements had been truthful. But there was no agreement requiring the witnesses to reiterate the statements regardless of their truth, and therefore the testimony had been proper. (**People v. Boyer** (2006) 38 Cal.4th 412, 455-457.)

Due Process in General:

The County of Los Angeles was held not to violate *plaintiff's* ***due process*** and *privacy rights* by retaining in its internal database 2014 allegations against him of child abuse which had been determined by a judge of the Los Angeles Superior Court's Juvenile Court to be unfounded. Per the Ninth Circuit, plaintiff failed to show that his inclusion in a statewide database, the Child Welfare Services Case Management System, implicated his liberty interest so as to require procedural due process where he failed to raise a triable issue of material fact that the records of his unfounded allegations in the database caused him reputational harm or that they were used by the county to alter or extinguish his rights to employment, child placement, or child visitation. Plaintiff also had not shown that the county publicly disseminated or misused his information in a manner that would have violated his constitutional right to privacy as he provided no evidence that his information had been publicly disseminated or disclosed. Finally, the district court held that the County could not be held liable under ***Monell v. Department of Social Services*** (1978) 36 U.S. 658 [98 S.Ct. 2018; 56 L.Ed.2nd 611], reasoning that no County policy or

custom could be blamed for a **§ 1983** constitutional deprivation without a sufficient showing that such a deprivation had occurred. (***Endy v. City of Los Angeles*** (9Th Cir. 2020) 975 F.3rd 757.)

Outrageous Government Misconduct and Due Process:

Rule:

> "A prosecution results from outrageous government conduct when the actions of law enforcement officers or informants are 'so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.' **United States v. Russell**, 411 U.S. 423 431-32, 93 S.Ct. 1637, 36 L.Ed.2nd 366 (1973). A federal court must dismiss a prosecution based on such actions. The standard for dismissal on this ground is 'extremely high.' ***United States v. Smith***, 924 F.2nd 899, 897 (9th Cir 1991). Dismissals are 'limited to extreme cases in which the government's conduct violates fundamental fairness.' ***United States v. Gurolla***, 333 F.3rd 944, 950 (9th Cir. 2003). An indictment can be dismissed only where the government's conduct is 'so grossly shocking and so outrageous as to violate the universal sense of justice.' ***United States v. Stinson***, 647 F.3rd 1196, 1209 (9th Cir. 2011) (quoting ***United States v. Restrepo***, 930 F.2nd 705, 712 (9th Cir 1991))." (***United States v. Pedrin*** (9th Cir. 2015) 797 F.3rd 792, 795-796.)
>
> The outrageous government conduct doctrine is "an 'extremely high standard'" that is "'limited to extreme cases' in which the defendant can demonstrate that the government's conduct 'violates fundamental fairness' and is 'so grossly shocking and so outrageous as to violate the universal sense of justice.'" (***United States v. Black*** (9th Cir. 2013) 733 F.3rd 294, 302; quoting ***United States v. Garza-Juarez*** (9th Cir. 1993) 992 F.2nd 896, 904; see also ***United States v. Stinson*** (9th Cir. 2011) 647 F.3rd 1196, 1209.)

Relevant Factors: In determining whether a defendant has proven that the government's conduct is outrageous, the Ninth Circuit has established six factors courts must consider:

> (1) Known criminal characteristics of the defendants;
>
> (2) Individualized suspicion of the defendants;
>
> (3) The government's role in creating the crime of conviction;

(4) The government's encouragement of the defendants to commit the offense conduct;

(5) The nature of the government's participation in the offense conduct; and

(6) The nature of the crime being pursued and necessity for the actions taken in light of the nature of the criminal enterprise at issue.

(***United States v. Black*** (9th Cir. 2013) 733 F.3rd 294, 303; see also ***United States v. Vortman*** (9th Cir. 2020) 81 Fed. Appx. 470, 473-474, unpublished; and ***United States v. Pedrin*** (9th Cir. 2015) 797 F.3rd 792, 796.)

Case Law:

In ***United States v. Pedrin*** (9th Cir. 2015) 797 F.3rd 792, 795-796, it was held that there was no due process violation where defendant was the target of a "reverse sting operation" pursuant to which an undercover ATF agent suggested that defendant and others rob a drug "stash house" (i.e, a house in which drugs ae "stashed.") Defendant was convicted of conspiracy to possess with intent to distribute 40 to 50 kilograms of cocaine under **21 U.S.C. §§ 841** and **846**. Defendant's motion to dismiss the indictment was properly denied because the prosecution did not result from "outrageous government conduct" since one of the co-conspirators reached out to the government, defendant readily agreed to participate in the supposed stash-house robbery, and defendant supplied plans and materials. This all provided a sufficient basis for the Government to infer that defendant had a predisposition to take part in the planned robbery.

The ***Pedrin*** Court cites a number of other cases involving the same ATF sting operation: ***United States v. Cortes*** (9th Cir. 2014) 757 F.3rd 850; ***United States v. Black*** (9th Cir. 2013) 733 F.3rd 294; ***United States v. Docampo*** (11th Cir. 2009) 573 F.3rd 1091; ***United States v. Paisley*** (11th Cir. 2006) 178 F.App'x. 995; ***United States v. Kindle*** (7th Cir. 2012) 698 F.3rd 401; ***United States v. Mayfield*** (7th Cir. 2014) 771 F.3rd 417.

Pedrin (at p. 797) further notes that "(w)hat the government learns only after the fact cannot supply the individualized suspicion that is necessary to justify the

> sting if the government had little or no basis for such individualized suspicion when it was setting up the sting."

Defendant's motion for dismissal based on a claim of outrageous government misconduct was barred because defendant's actions in using a website to access child pornography were completely voluntary. The government did not threaten, coerce, or prod him to use the website. The Court's consideration of the six ***Black*** factors (see ***United States v. Black*** (9th Cir. 2013) 733 F.3rd 294, 303.) also required a finding that the government's conduct was not outrageous. A "*Network Investigative Technique*" (NIT) warrant obtained by the Government (taking over and operating a child porn site) did not violate the **Fourth Amendment** as it was issued by a neutral magistrate, backed by probable cause, and was sufficiently particular to be constitutional. While the NIT warrant violated **Fed. Rules of Crim. Pro. 41(b)**, suppression was not warranted because the government's violation was technical, the violation did not prejudice defendant, and the government did not deliberately disregard **Rule 41(b)** (limiting the general territorial scope of a warrant). (***United States v. Vortman*** (9th Cir. 2020) 81 Fed. Appx. 470; unpublished.)

***Chapter 8*:**

Searches and Seizures:

***Rule*:**

"A 'search' involves governmental infringement on 'an expectation of privacy that society is prepared to consider reasonable,' while a 'seizure' of property involves 'some meaningful interference [by the government] with an individual's possessory interests in that property.'" (***United States v. Baker*** (9th Cir. 2023) 58 F.4th 1109, 1116; citing ***United States v. Jacobsen*** (1984) 466 U.S. 109, 113 [104 S.Ct. 1652; 80 L.Ed.2nd 85].)

"If an activity is not a search or seizure (assuming the activity does not violate some other constitutional or statutory provision), then the government enjoys a virtual carte blanche to do as it pleases. The activity is 'excluded from judicial control and the command of reasonableness.'" (***Horton v. Goose Creek Independent School District*** (5th Cir. 1982) 693 F.2nd 524, 476; quoting from *Amsterdam, Perspectives on the* ***Fourth Amendment***, 58 Minn.L.Rev. 349, 393 (1974).)

Things Subject to Search and Seizure:

- *Evidence of a crime*.
- *Contraband*.
- *Instrumentalities of a crime*.
- *Fruits of a crime*.
- *Persons* (covered separately; see "*Searches of Persons*" (Chapter 11), below).

(***People v. Thayer*** (1965) 63 Cal.2nd 635; ***Warden, Maryland Penitentiary v. Hayden*** (1967) 387 U.S. 294 [87 S.Ct. 1642; 18 L.Ed.2nd 782]; ***Guidi v. Superior Court*** (1973) 10 Cal.3rd 1.)

See Black's Law Dictionary (9th Ed. 2009) p. 365, defining "*contraband*" as "[g]oods that are unlawful to import, export, produce, or possess."

See also *3 Oxford English Dictionary* (2nd Ed. 1989) p. 833: "*Contraband*" is "[a]nything prohibited to be imported or exported; goods imported or exported contrary to law or proclamation" or something "[f]orbidden, illegitimate, unauthorized."

Note: Not mentioned above, "*persons*" are also subject to "seizure," under the **Fourth Amendment**, when they are detained or arrested. (***Florida v. Bostick*** (1991) 501 U.S. 429, 434 [111 S.Ct. 2382; 115 L.Ed.2nd 389, 398].)

As for "*instrumentalities of a crime*," the U.S. Supreme Court has noted that' "(n)othing in the language of the **Fourth Amendment** supports the distinction between 'mere evidence' and instrumentalities, fruits of crime, or contraband." (***Warden, Maryland Penitentiary v. Hayden*** (1967) 387 U.S. 294, 301 [87 S. Ct. 1642; 18 L.Ed.2nd 782].)

> See also ***Coolidge v. New Hampshire*** (1971) 403 U.S. 443, 464 [91 S.Ct. 2022; 29 L.Ed.2nd 564]: "Of course, the distinction between an 'instrumentality of crime' and 'mere evidence' was done away with by ***Warden* v. *Hayden***, 387 U.S. 294, . . ."

***Protection from Unreasonable Searches and Seizures, and the Right to Privacy*:**

Rule: "The **Fourth Amendment** protects, among other things, a person's right *not* to have their property unreasonably seized by the government." (Italics added; **Recchia *v. City of* Los Angeles *Department of Animal Services*** (9th Cir. 2018) 889 F.3rd 553, 558; citing ***United States v. Place*** (1983) 462 U.S. 696, 700 [103 S.Ct. 2637; 77 L.Ed.2nd 110].)

> Although not mentioned specifically anywhere in the **U.S. Constitution**, one's "*right to privacy*" is inferred from a reading of the Constitution itself, and its amendments, which provide a "*penumbra*" (i.e., "umbrella") effect of privacy. (See ***Griswold v. Connecticut*** (1965) 381 U.S. 479 [85 S.Ct. 1678; 14 L.Ed.2nd 510].)
>
> The California Constitution, on the other hand specifically provides for its citizens a right to privacy: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*." (**Cal. Const., art. I, § 1**; italics added.) (See ***People v. Lyon*** (2021) 61 Cal.App.5th 237, 244-245.)
>
> A juvenile's Juvenile Court records are private. Obtaining access to such records without a court order is a violation of the juvenile's right to privacy. (See ***Gonzalez v. Spencer*** (9th Cir 2003) 336 F.3rd 832.)
>
> > However, the Ninth Circuit also held in a subsequent decision that the rule in ***Gonzalez*** was too "*opaque*" to clearly establish this right, thus resulting in a subsequent decision holding that attorneys for the county who obtained plaintiff's juvenile court records without judicial authorization were entitled to qualified immunity from civil liability. (***Nunes v. Arata, Swingle, Van Egmond & Goodwin*** (9th Cir. 2020) 983 F.3rd 1108.)
>
> Homeless people living on the street also enjoy the same protections under the **Fourth Amendment**. (***Recchia v. City of* Los Angeles *Department of***

Animal Services, *supra*, citing ***Lavan v. City of Los Angeles*** (9th Cir. 2012) 693 F.3rd 1022, 1029.)

The **Fourth Amendment** limits searches and seizures to where a defendant has a reasonable expectation of privacy in the place searched or item seized. (***People v. Caro*** (2019) 7 Cal.5th 463, 496.)

Case Law:

"Few protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures. The Framers made that right explicit in the **Bill of Rights** following their experience with the indignities and invasions of privacy wrought by 'general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence.' ***Chimel v. California***, 395 U. S. 752, 761, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). Ever mindful of the **Fourth Amendment** and its history, the Court has viewed with disfavor practices that permit 'police officers unbridled discretion to rummage at will among a person's private effects.' ***Arizona v. Gant***, 556 U. S. 332, 345, 129 S.Ct. 1710, 173 L.Ed.2nd 485 (2009)." (**Byrd *v.* United States** (2018) 584 U.S. 395, 402-403 [138 S.Ct. 1518; 200 L.Ed.2nd 805].)

"**Article I**, **section 1** of the **California Constitution** guarantees certain inalienable rights. 'Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.' (**Cal. Const., art. I, § 1**.) The electorate added this protection for 'privacy' to the **California Constitution** by a ballot initiative (the **Privacy Initiative**) in 1972. The **Privacy Initiative** addressed the 'accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society.' (***White v. Davis*** (1975) 13 Cal.3rd 757, 774 . . . .) The principal 'mischiefs' that the **Privacy Initiative** addressed were: '(1) "government snooping" and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party; and (4) the lack of a reasonable check on the accuracy of existing records.'" (***Id***., a p. 775.)" (**Lewis *v.* *Superior Court*** [***Medical Board of California***] (2017) 3 Cal.5th 561, 569-578; upholding the state medical board's accessing of patients' medical records in an investigation of a doctor accused of illegally prescribing controlled medications.)

Upon renting an e-scooter, plaintiff plainly understood that the e-scooter company had to collect location data for the scooter through its smartphone applications. Having "voluntarily conveyed" his location to

the operator in the ordinary course of business, the resident could not later assert a reasonable expectation of privacy. The Mobile Data Specification (MDS) location data indicated a diminished expectation of privacy, and the collection of that data by the Los Angeles Department of Transportation was *not a search*. It therefore did not violate the **Fourth Amendment**. **Penal Code § 1546.4(c)** (providing for a **P.C. § 1538.5** motion to suppress remedy) did not authorize the resident to bring an independent action to enforce its provisions. Because plaintiff had no reasonable expectation of privacy over the MDS location data, no additional facts could have cured the deficiency with his constitutional claims. (***Sanchez v. Los Angeles Department of Transportation*** (9th Cir. 2022) 39 F.4th 548.)

***Searches and Seizures*:**

Difference Between "Searches" and "Seizures:*"*

Differentiating a "*search*" from a "*seizure*," the Second Circuit Court of Appeal discussed the difference between conducting a patdown (a search) and positioning the subject in preparation for doing a patdown (a seizure), noting the traditional conditions that must be present for it to be a search, i.e., whether police: (1) "physically intrud[es] on a constitutionally protected area" under ***United States v. Jones*** (2012) 565 U.S. 400, or (2) violate a person's "reasonable expectation of privacy" under ***Katz v. United States*** (1967) 389 U.S. 347. In this case, merely ordering defendant to stand at the rear quarter panel, even when the officers had the subjective intent to position defendant for a frisk, simply was not a search under either ***Jones*** or ***Katz***. Consequently, the Court concluded that no **Fourth Amendment** search occurred until the frisking officer's "hands physically came into contact with Weaver['s]" person. (***United States v. Weaver*** (2nd Cir. NY, 2021) 9 F.4th 129.)

Searches: A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed upon. (***Lavan v. City of Los Angeles*** (9th Cir. 2012) 693 F.3rd 1022, 1027.)

Trespassory Searches; Persons, Houses, Papers, and Effects: The **Fourth Amendment** protects against violations of one's right to privacy, but also *trespassory searches*, albeit only with regard to those items that it enumerates; i.e., "*persons, houses, papers, and effects.*" (***United States v. Jones*** (2012) 565 U.S. 400, 404-413 [132 S.Ct. 945, 949-954; 181 L.Ed.2nd 911]; holding that placing a tracking device on a suspect's vehicle (i.e., the vehicle coming within the category of "*effects*") and then monitoring its movement is legally a "*search*." See also ***United States v. Dixon*** (9th Cir. Dec. 31, 2020) 984 F.3rd 814, 818-823, applying ***Jones***' "property based analysis" to using a key on a vehicle without probable

cause in order to determine whether defendant had control over that vehicle.)

Satellite-Based Monitor (*SBM*): Requiring a recidivist sex offender to wear a *satellite-based monitor*, or "*SBM*," for the rest of his life, done for the purpose of tracking the individual's movements and to "obtain information," constitutes a "*search*" under the **Fourth Amendment**, and under the theory of ***United States v. Jones***, *supra*. The fact that North Carolina's SBM program is civil in nature does make it any less of a **Fourth Amendment** search issue. (***Grady v. North Carolina*** (2015) 575 U.S. 306 [135 S.Ct. 1368; 191 L.Ed.2nd 459]; case remanded for the purpose of determining the reasonableness of the search under the circumstances.)

Taking a DNA sample via a "buccal swab" of the mouth is a search under the **Fourth Amendment**. (***Friedman v. Boucher*** (9th Cir. 2009) 580 F.3rd 847, 852-853; **Bill *v.* Brewer** (9th Cir. 2015) 799 F.3rd 1295, 1299.)

The extraction of blood or other materials from a person's body for purposes of chemical testing is a search and seizure under the **Fourth Amendment**. (**People *v.* Mason** (2016) 8 Cal.App.5th Supp. 11, 19; citing *People v. Robinson* (2010) 47 Cal.4th 1104, 1119; and *Schmerber v. California* (1996) 384 U.S. 757, 770 [86 S.Ct. 1826; 16 L.Ed.2nd 908; 86 S.Ct. 1826]; see also ***Birchfield v. North Dakota*** (2016) 579 U.S. 438 [195 L.Ed.2nd 560, 136 S.Ct. 2160].)

> See also ***People v. Cruz*** (2019) 34 Cal.App.5th 764, 768: "Invasions of the body, including nonconsensual extractions of blood, 'are searches entitled to the protections of the **Fourth Amendment**.'" (quoting ***People v. Robinson***, *supra*, at pp. 1119-1120.)

The "*Chalking*" or "*Tapping*" *of a Vehicle's Tires*:

> The Sixth Circuit has held that when the chalking of a person's tires is done for the purpose of determining how long the vehicle is parked at a specific location, to do so constitutes a "*search*," and illegal absent a search warrant. Neither the automobile nor the community caretaking exceptions to the search warrant requirement applies. (***Taylor v. City Saginaw*** (6th Cir. 2021) 11 F.4th 483.)
>
> > The Court also held that the "administrative-search exception" to the search warrant requirement does *not* justify the city's suspicionless chalking of car tires to enforce its parking regulations. The city's parking officer,

however, was entitled to qualified immunity because every reasonable parking officer would not understand from prior case that suspicionless chalking of car tires violated **Fourth Amendment.** (***Ibid***.)

However, the Ninth Circuit, in a split, 2-to-1 decision, ruled to the contrary, finding that a city's practice of chalking tires as part of enforcing time limits on city parking spots fell within the administrative search exception to the **Fourth Amendment's** warrant requirement because complementing a broader program of traffic control, tire chalking was reasonable in its scope and manner of execution, it was not used for general crime control purposes, and its intrusion on personal liberty was de minimis at most. (***Verdun v. City of San Diego*** (Oct. 26, 2022) 51 Cal.App.5th 1033.)

The Fifth Circuit Court of Appeal has held that an officer *tapping a stopped motorist's tires* out of concern that, having viewed them wobbling, they were a hazard to the motorist and others, is a "*search*," under of ***United States v. Jones*** (2012) 565 U.S. 400 [132 S.Ct. 945; 181 L.Ed.2nd 911], albeit a reasonable one under the circumstances. (***United States v. Richmond*** (5th Cir. Tex. 2019) 915 F.3rd 352.)

Seizure: A seizure of property occurs when there is some meaningful governmental interference with an individual's possessory interest in that property. (***United States v. Jefferson*** (9th Cir. 2009) 566 F.3rd 928, 933, citing ***United States v. Jacobson*** (1984) 466 U.S. 109, 113 [104 S.Ct. 1652; 80 L.Ed.2nd 85]; ***United States v. Karo*** (1984) 468 U.S. 705, 713 [104 S.Ct. 3296; 82 L.Ed.2nd 530]; ***Lavan v. City of Los Angeles*** (9th Cir. 2012) 693 F.3rd 1022, 1027-1031; ***Brewster v. Beck*** (9th Cir. 2017) 859 F.3rd 1194, 1196.)

Rule #1: To be lawful, a "*seizure*" of evidence requires probable cause to believe that the item seized is contraband or evidence of a crime.

"In the ordinary case, the (U.S. Supreme) Court has viewed a seizure of personal property as *per se* unreasonable within the meaning of the **Fourth Amendment** unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized. (fn. 2)" (Italics in original; ***United States v. Place*** (1983) 462 U.S. 696, 701 [103 S.Ct. 2637; 77 L. Ed.2nd 110]; citing ***Marron* v. *United States*** (1927) 275 U.S. 192, 196 [48 S.Ct. 74; 72 L.Ed. 231].)

Footnote 2: "The Warrant Clause of the **Fourth Amendment** provides that 'no Warrants shall issue, but

upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'"

As an example: "Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the (**Fourth**) **Amendment** to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present." (***United States v. Place***, *supra*, at pp. 701-702, citing as examples: ***Arkansas v. Sanders*** (1979) 442 U.S. 753, 761 [99 S.Ct. 2586; 61 L.Ed.2nd 235]; ***United States* v. *Chadwick*** (1977) 433 U.S. 1 [97 S.Ct. 2476; 53 L.Ed.2nd 538]; ***Coolidge* v. *New Hampshire*** (1971) 403 U.S. 443 [91 S.Ct. 2022; 29 L.Ed.2nd 564]; and ***Payton* v. *New York*** (1980) 445 U.S. 573, 587 [100 S.Ct. 1371; 63 L.Ed.2nd 639]: "'(O)bjects such as weapons or contraband found in a public place may be seized by the police without a warrant,' . . . because, under these circumstances, the risk of the item's disappearance or use for its intended purpose before a warrant may be obtained outweighs the interest in possession." See also ***G.M. Leasing Corp*. v. *United State*s** (1977) 429 U.S. 338, 354 [97 S.Ct. 619; 50 L.Ed.2nd 530].)

A warrantless seizure of personal property requires both (1) probable cause and (2) exigent circumstances. (***United States v. Mays*** (8th Cir. 2021) 993 F.3rd 607; seizure of defendant's personal computer, when obtained from defendant's uncle who had possession of it at the time, after which a warrant was obtained to examine the contents of the computer.)

Rule #2: Despite the above, the Supreme Court upheld the *temporary* warrantless seizure of property when necessary to prevent the loss of relevant evidence, giving law enforcement the opportunity to determine whether the seized evidence is in fact seizeable. In such a case, only a "*reasonable suspicion*" (as opposed to "probable cause") to believe the seized property is contraband or evidence of a crime. ***United States v. Place*** (1983) 462 U.S. 696, 702-707 [103 S.Ct. 2637; 77 L. Ed.2nd 110]; upholding "the reasonableness under the **Fourth Amendment** of warrantless seizures of personal luggage from the custody of the owner on the basis of less than probable cause, for the purpose of pursuing a limited course of investigation, short of opening the luggage, that would quickly confirm or dispel the authorities' suspicion."

The Court held here that under these circumstances, the principles of ***Terry* v. *Ohio*** (1968) 392 U.S. 1 [88 S.Ct. 1868; 20 L.Ed.2nd 889], apply to permit such seizures on the basis of reasonable, articulable suspicion, premised on objective facts, that the luggage in issue contains contraband or evidence of a crime. (See "Detentions" (Chapter 4), above. However, in that the luggage seizure in this case before being subjected to the dog-sniff was 90 minutes, the Court held that ***Terry v. Ohio*** did not apply to such an extended time period. (***United States v. Place***, *supra*, at p. 709.)

Case Law:

The Eight Circuit Court of Appeal has held that seizing a firearm observed in plain sight under circumstances where there was no reason to believe anyone was in any danger, or other probable cause to believe that the firearm was associated with any crime, was a **Fourth Amendment** violation. (***United States v. Lewis*** (8th Cir. 2017) 864 F.3rd 937.)

See also ***United States v. Arredondo*** (8th Cir. 2021) 996 F.3rd 903, where officers observed vials on a couch in plain sight, but were unsure of what the substance in it might be, the Court noting that while a deputy sheriff believed that the vials laying on the couch "seem[ed] a little odd," something seeming "a little odd" is usually a hunch and not probable cause.

"A seizure is 'far less intrusive than a search.' (***United States v. Payton*** (9th Cir. 2009) 573 F.3rd 859, 863.) . . . . Whereas a search implicates a person's right to keep the contents of his or her belongings private, a seizure only affects their right to possess the particular item in question. (***Segura v. United States*** (1984) 468 U.S. 796, 806, 104 S. Ct. 3380, 82 L.Ed.2nd 599) . . . . Consequently, the police generally have greater leeway in terms of conducting a warrantless seizure than they do in carrying out a warrantless search. The United States Supreme Court has 'frequently approved warrantless seizures of property . . . for the time necessary to secure a warrant, where a warrantless search was either held to be or likely would have been impermissible.' (***Ibid***.)" (***People v. Tran*** **(**2019) 42 Cal.App.5th 1, 8; ruling legal an officer's immediate seizure of a dashboard camera from defendant's person, pending the obtaining of a search warrant, in a reckless driving with injuries case.)

The **Fourth Amendment** protects possessory and liberty interests even when privacy rights, involving an assessment of one's

expectation of privacy, are not implicated. (***Lavan v. City of Los Angeles***, *supra*, at p. 1028; citing ***Soldal v. Cook County*** (1992) 506 U.S. 56, 63-64 [113 S.Ct. 538; 121 L.Ed.2nd 450].)

Also, "[A] seizure lawful at its inception can nevertheless violate the **Fourth Amendment** because its manner of execution unreasonably infringes possessory interests protected by the **Fourth Amendment's** prohibition on 'unreasonable seizures.'" (***Lavan v. City of Los Angeles***, *supra*, at p. 1030; ***United States v. Jacobsen*** (1984) 466 U.S. 109, 124 [104 S.Ct.1652; 80 L.Ed.2nd 85, & fn. 25; citing ***United States v. Place*** (1983) 462 U.S. 696, 707-710 [103 S.Ct. 2673; 77 L.Ed.2nd 110]; ***United States v. Dass*** (9th Cir. 1988) 849 F.2nd 414, 414-415; ***Brewster v. Beck*** (9th Cir. 2017) 859 F.3rd 1194, 1196.)

"A seizure conducted without a warrant is 'per se unreasonable under the **Fourth Amendment**,' with some limited exceptions." (*Rodriguez v. City of San Jose* (9th Cir. 2019) 930 F.3rd 1123, 1136; citing ***United States v. Hawkins*** (9th Cir. 2001) 249 F.3d 867, 872.)

Seizures also may also constitute a **Fourteenth Amendment** "*due process*" violation, at least when there is a "significant taking of property by the State." (***Fuentes v. Shevin*** (1972) 407 U.S. 67, 86 [92 S.Ct. 1983; 32 L.Ed.2nd 556]; ***Lavan v. City of Los Angeles***, *supra*, at p. 1031-1033.) To find a due process violation, a court must determine:

> (1) Whether the asserted individual interests are encompassed within the **Fourteenth Amendment's** protection of "*life, liberty or property*," and is so;
>
> (2) What procedures constitute "*due process of law*."
>
> (***Lavan v. City of Los Angeles***, *supra*, at p. 1031.)

A DUI vehicle check point, where vehicles are stopped on a random basis, constitutes a **Fourth Amendment** seizure. (***Demarest v. City of Vallejo*** (9th Cir. 2022) 44 F.4th 1209, 1216.)

> See *DUI* (and Other Regulatory "*Special Needs*") *Checkpoints*," Chapter 4, above.

"'The **Fourth Amendment** protects against unreasonable interferences in property interests regardless of whether there is an invasion of privacy.' (**Miranda v. City of Cornelius** (9th Cir. 2005) 429 F.3rd 858, 862 . . . , citing ***Soldal*** (***v. Cook County,***

Illinois (1992) 506 U.S. 56), at p. 62 ([112 S.Ct. 538; 121 L.Ed.2nd 450]); see also ***Soldal***, at p. 62 ['our cases unmistakably hold that the [**Fourth**] **Amendment** protects property as well as privacy']; accord, ***N. Am. Butterfly Ass'n v. Wolf*** (D.C. Cir. 2020) 977 F.3rd 1244, 1264.) A property seizure . . . 'occurs when "there is some meaningful interference with an individual's possessory interests in [his or her] property."' (***Soldal***, at p. 61.)" (***Coalition on Homelessness v. City and County of San Francisco*** (2023) 93 Cal.App.5th 928, 938; noting that "(i)n the present case, it is undisputed that seizures occur when cars are towed under the SFMTA's towing policy. . . . "The impoundment of an automobile is a seizure within the meaning of the Fourth Amendment." (Pgs. 938-939.)

Note: Not mentioned above, "*persons*" are also subject to "*seizure*," under the **Fourth Amendment**, whenever they are detained or arrested. (***Florida v. Bostick*** (1991) 501 U.S. 429, 434 [111 S.Ct. 2382; 115 L.Ed.2nd 389, 398]; ***District of Columbia v. Wesby et al.*** (2018) 583 U.S. 48 [138 S.Ct. 577; 199 L.Ed.2nd 453]; ***Torres v. Madrid*** (Mar. 25, 2021) __ U.S. __, __ [141 S.Ct. 989; 209 L.Ed.2nd 190]; ***Seidner v. De Vries*** (9th Cir. 2022) 39 F.4th 591, 596.)

> "'(W)henever an officer restrains the freedom of a person to walk away, he has seized that person.'" (***Seidner v. De Vries***, *supra*, quoting ***Brower v. County of Inyo*** (1989) 498 U.S. 593, 595 [109 S.Ct. 1378; 103 L.Ed.2nd 628], and "easily" holding that stopping the plaintiff by using his patrol car as a roadblock was a "seizure.")
>
> However, at least until ***Torres v. Madrid***, *supra* and below, was decided, it had consistently been held that no such "*seizure*" occurs until the person is actually taken into physical custody. Officers shooting at a fleeing vehicle does not constitute a "*seizure*." (***Farrell v. Montoya*** (10th Cir. N.M. 2017) 878 F.3rd 933; rejecting the argument of an "*on-going seizure*," where plaintiff had stopped several times, but then fled again at which point officers shot at her fleeing vehicle.)
>
> There is no constitutional violation in a "*threatened unlawful detention*." The **Fourth Amendment** does not apply to such a situation until the person is actually illegally detained; i.e., when the officer actually catches the defendant or the defendant otherwise submits to the officer's authority (i.e.; he gives up). (***California v. Hodari***

D. (1991) 499 U.S. 621 [111 S.Ct. 1547; 113 L.Ed.2nd 690].)

But then the United States Supreme Court in ***Torres v. Madrid***, *supra*, expanded upon the theory concerning when a "seizure" occurs, ruling that "(t)he application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person."

The ***Madrid*** Court overruled a lower court's holding that a suspect's continued flight after being shot by police negates a **Fourth Amendment** excessive-force claim. (See ***Torres v. Madrid*** (10th Cir. 2019) 769 Fed.Appx. 654.)

Search vs. Seizure: A warrantless *seizure* of a container of contraband does not necessarily also allow for a warrantless *search* of that container. (***Robey v. Superior Court*** (2013) 56 Cal.4th 1218, 1223-1243.)

The standards applicable to these two concepts are very similar, if not the same. As the U.S. Supreme Court has noted: "Although the interest protected by the **Fourth Amendment** injunction against unreasonable searches is quite different from that protected by its injunction against unreasonable seizures [citation], neither the one nor the other is of inferior worth or necessarily requires only lesser protection. We have not elsewhere drawn a categorical distinction between the two insofar as concerns the degree of justification needed to establish the reasonableness of police action, and we see no reason for a distinction in the particular circumstances before us here." (***Arizona v. Hicks*** (1987) 480 U.S. 321, 328 [107 S.Ct. 1149; 94 L.Ed.2nd 347].)

See ***People v. Caro*** (2019) 7 Cal.5th 463, 487-489, where the Court upheld the warrantless seizure of defendant's bloody clothing seized in plain sight at a hospital where defendant was taken for emergency treatment, the recovery of scrapings from defendant's hands and feet after bags were placed over her appendages to preserve evidence, photographs taken of defendant during her surgery, and bullet fragments removed from defendant's head during surgery.

For a Search & Seizure to be Lawful*: *General Rule: In order for a search and seizure to be lawful, a *search warrant*, supported by *probable cause*, must first be obtained. (**Fourth Amendment, United States Constitution**; **Art 1, § 13, California Constitution**; (***Riley v. California*** (2014) 573 U.S. 373, 382[134 S.Ct. 2473, 2482; 189 L.Ed.2nd 430].)

Search Warrant Defined: "(A)n order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him or her to search for a person or persons, a thing or things, or personal property, and bring it before the magistrate." (**Pen. Code § 1523**)

See "*Searches With a Search Warrant*" (Chapter 10), below.

Probable Cause: Roughly the same standards apply whether the issue is an arrest or a search. (***Skelton v. Superior Court*** (1969) 1 Cal.3rd 144, 150.)

See "*Arrests*" (Chapter 5), above, and "*Searches With a Search Warrant*" (Chapter 10), below.

Exceptions:

"Warrantless searches and seizures (of persons) are presumed to be unreasonable, 'subject only to a few specifically established and well-delineated exceptions.'" (*People v. Thomas* (2018) 29 Cal.App.5th 1107, 1113; citing ***People v. Diaz*** (2011) 51 Cal.4th 84, 90.)

See "*Unlawfulness*," below, and "*Searches With a Search Warrant*" (Chapter 10), below.

Legal Presumptions:

Unreasonableness: Searches and seizures are presumed, as a general rule, to be *unreasonable* in the absence of sufficient "*individualized suspicion*" of wrongdoing to support a finding of "*probable cause*." (***Chandler v. Miller*** (1997) 520 U.S. 305, 308 [117 S.Ct. 1295; 137 L.Ed.2nd 513, 519].)

See "*The Rule of Reasonableness*" under "*The Constitutional Basis For Searches and Seizures*" (Chapter 1), above.

Note: "*Presumptions*" are generally considered mandatory, absent evidence to the contrary, while "*inferences*" are suggestive. (See ***Francis v. Franklin*** (1985) 471 U.S. 307, 314 [105 S.Ct. 1965; 85 L.Ed.2nd 344]; and ***Sandstrom v. Montana*** (1979) 442 U.S. 510, 523-524 [99 S.Ct. 2450; 61 L.Ed.2nd 39].)

"The **Fourth Amendment** to the United States Constitution protects against unreasonable searches and seizures. (**U.S. Const., 4th Amend.**) It 'protects an individual's reasonable expectation of privacy against unreasonable intrusion on the part of the government.' (***People v. Jenkins*** (2000) 22 Cal.4th 900, 971 . . . .) To successfully claim **Fourth Amendment** protection, 'a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his

> expectation is reasonable.' (***Jenkins***, at p. 972.) 'In other words, the defendant must show that he or she had a subjective expectation of privacy that was objectively reasonable.' (***People v. Ayala*** (2000) 23 Cal.4th 225, 255 . . . .)" (***People v. Cartwright*** (2024) 99 Cal.App.5th 98, 102.)

Unlawfulness: Even with probable cause, searches without a *search warrant* are presumed to be *unlawful*, absent one of the narrowly construed exceptions to the search warrant exception. (***Mincey v. Arizona*** (1978) 437 U.S. 385, 390 [98 S.Ct. 2408; 57 L.Ed.2nd 290, 298-299]; ***In re Tyrell J.*** (1994) 8 Cal.4th 68, 76; reversed on other grounds.)

> The **Fourth Amendment** prohibits all *unreasonable searches and seizures*, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the **Fourth Amendment**—subject only to a few specifically established and well-delineated exceptions." (***Katz v. United States*** (1967) 389 U.S. 347, 357 [88 S.Ct. 507; 19 L.Ed.2nd 576, 585]; ***Mincey v. Arizona*** (1978) 437 U.S. 385, 390 [57 L.Ed.2nd 290, 98 S.Ct. 2408]; **People v. Ovieda** (2019) 7 Cal.5th 1034, 1041; ***People v. Wilson*** (2020) 56 Cal.App.5th 128, 141, discussing the "*Private Search Doctrine*," and quoting ***Robey v. Superior Court*** (2013) 56 Cal.4th 1218, at p. 1224; see also ***Demarest v. City of Vallejo*** (9th Cir. 2022) 44 F.4th 1209, 1216, DUI checkpoint.)

Burden of Proof: The *prosecution* bears the burden of justifying a warrantless search, requiring proof of a recognized exception to the search warrant requirement in addition (usually) to having probable cause. (***Welsh v. Wisconsin*** (1984) 466 U.S. 740, 749-750 [104 S.Ct. 2091; 80 L.Ed.2nd 732, 742-743]; ***People v. James*** (1977) 19 Cal.3rd 99, 106; ***People v. Redd*** (2010) 48 Cal.4th 691, 719; **People *v.* Simon** (2016) 1 Cal.5th 98, 120; **People *v.* Gutierrez** (2018) 21 Cal.App.5th 1146, 1152.)

Remedy for Violations*; *The* "*Exclusionary Rule*:"** Warrantless searches, performed without probable cause and without an exception to the warrant requirement (or even when a warrant is used, but where the warrant is later determined to be legally defective), subjects any recovered evidence to *exclusion from being used as evidence* in court. (Weeks v. United States*** (1914) 232 U.S. 383 [34 S.Ct. 341; 58 L.Ed. 652].)

> *The **Fourth Amendment** Applicable to the States*: Although the **Fourth Amendment** was originally intended to restrict the actions of the federal government only, the same exclusionary rule, as a violation of the ***Fourteenth Amendment*** "*due process*" clause, has been held to be applicable to the states (which includes counties and municipalities) as well. (***Mapp v. Ohio*** (1961) 367 U.S. 643 [81 S.Ct. 1684; 6 L.Ed.2nd 1081]; ***People v. Parrott*** (2017) 10 Cal.App.5th 485, 492.)

Reasoning: Violating one's **Fourth Amendment** rights is such a fundamental, important, issue that to do so is automatically a violation of the **Fourteenth Amendment** due process rights of the person subjected to the illegal search or seizure. (***Mapp v. Ohio***, *supra*.)

See "*The Exclusionary Rule; Overview*" under "*The Constitutional Basis For Searches and Seizures*" (Chapter 1), above.

Procedural Remedy*: *Motion to Suppress, per P.C. § 1538.5: California tests the constitutionality of a search or seizure (i.e., **Fourth Amendment** issues) via the procedures as spelled out in **Pen. Code § 1538.5**.

Procedure:

"**Section 1538.5** affords criminal defendants a procedure by which they may seek suppression of illegally seized evidence. (**§ 1538.5, subds. (a)(1)**, **(d)**, **(f)(1)**, **(i)**, **(m)**.) Our high court has said that **section 1538.5** 'provides a comprehensive and exclusive procedure for the final determination of search and seizure issues prior to trial.'" (***People v. Romeo*** (2015) 240 Cal.App.4th 931, 940, quoting ***People v. Brooks*** (1980) 26 Cal.3rd 471, 475.)

> "A defendant may move to suppress evidence on the ground that '[t]he search or seizure without a warrant was unreasonable.' (**§ 1538.5**, **subd. (a)(1)(A)**.) When a defendant files a motion to suppress, the People have 'the burden of proving that the warrantless search or seizure was reasonable' (***People v. Williams*** (1999) 20 Cal.4th 119, 130 . . . , and alternatively, 'the burden . . . to prove that exclusion of the evidence is not necessary because of [the good faith] exception.' (***People v. Willis*** (2002) 28 Cal.4th 22, 36 . . . .) The prosecution must establish by a preponderance of the evidence the facts justifying a warrantless search. (***People v. Johnson*** (2006) 38 Cal.4th 717, 729 . . . .]" (***People v. Smith*** (2020) 46 Cal.App.5th 375, 382-383; see also ***People v. Holiman*** (2022) 76 Cal.App.5th 825, 830-831.)

Pen. Code § 1538.5, subd. (b): When consistent with the procedures set forth in this section and subject to the provisions of **Sections 170** to **170.6**, inclusive, of the **Code of Civil Procedure**, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant, and if he or she is available.

Pen. Code § 1538.5 does not require the trial court to hold an evidentiary hearing when the defendant's stated issue to be decided is not relevant to the motion to suppress. **Section 1538.5(c)(1)** requires the trial court to receive evidence on any issue of fact necessary to determine the motion.

The lawfulness of the initial contact was not an issue of fact necessary for a determination of the motion in this case. The trial court properly rejected defendant's argument that he was entitled to an evidentiary hearing on any issue. The language of **§ 1538.5** limits the scope of such a hearing. In this case (a violation of **P.C. § 148(a)(1)**), "the lawfulness of the initial [police] contact is irrelevant to the suppression of evidence" because defendant's new criminal behavior broke any causal link to an underlying illegality. (***People v. Chavez*** (2020) 54 Cal.App.5th 477.)

"A defendant may file a motion to suppress at the preliminary hearing based on the evidence introduced at that hearing. (**Pen. Code § 1538.5, subd. (f)(1)**.) If the magistrate denies the motion, the defendant may either renew the motion before the trial court or file a motion to dismiss under **Penal Code section 995** raising the suppression issue. (***People v. Superior Court* (*Cooper*)** 114 Cal.App.4th 713, 717 . . . ; see **Pen. Code § 1538.5, subds. (i) & (m)**.) When the defendant files a renewed motion to suppress, the trial court independently reviews the magistrate's legal conclusion and evaluates any new evidence presented, and we review the court's determination. (***Cooper***, at p. 717.) In contrast, when the defendant raises the suppression issue in a **Penal Code section 995** motion, the trial court reviews the magistrate's determination for substantial evidence, and we review the magistrate's determination, not the court's. (***Cooper***, at p. 717.)" (***People v. Turner*** (2017) 13 Cal.App.5th 397, 404; see also **People *v.* Fews** (2018) 27 Cal.App.5th 553, 556; and ***People v. Tacardon*** (2020) 53 Cal.App.5th 89, 96 (petition granted), and ***Price v. Superior Court*** (2023) 93 Cal.App.5th 13, 34.)

"In ruling on a motion to suppress, the trial court is charged with:

> (1) Finding the historical facts;
> (2) Selecting the applicable rule of law; *and*
> (3) Applying the former to determine whether or not the rule of law as applied to the established facts has been violated."
>
> (***People v. Parson*** (2008) 44 Cal.4th 332, 345; citing ***People v. Ayala*** (2000) 24 Cal.4th 243, 279; ***People v. Turner***, *supra*.)

"The initial burden is on the defendant to establish that the government conducted a search without a warrant. The burden then shifts to the prosecution to justify the warrantless search." (***People v. Marquez*** (2019) 31 Cal.App.5th 402, 409; citing ***People v. Williams*** (1999) 20 Cal.4th 119, 127.)

> "The prosecution must then prove by a preponderance of the evidence that the search falls within an exception to the **Fourth**

> **Amendment** warrant requirement." (***Ibid***, citing ***People v. Torres*** (1992) 6 Cal.App.4th 1324, 1334–1335.)

"This requires that the 'defendant[] must do more than merely assert that the search or seizure was without a warrant. The search or seizure must also be unreasonable; that is, it must not fall within any exception to the warrant requirement.' (Citation) A three-step allocation of the burden of producing evidence governs, with the ultimate burden of persuasion always remaining on the People. '[W]hen defendants move to suppress evidence, they must set forth the factual and legal bases for the motion, but they satisfy that obligation, at least in the first instance, by making a prima facie showing that the police acted without a warrant. The prosecution then has the burden of proving some justification for the warrantless search or seizure, after which, defendants can respond by pointing out any inadequacies in that justification.' (Citation) The prosecution retains the ultimate burden of 'proving that the warrantless search or seizure was reasonable under the circumstances.' (Citation)" (***People v. Romeo*** (2015) 240 Cal.App.4th 931, 940-941; quoting ***People v. Williams*** (1999) 20 Cal.4th 119, 129-130.)

A defendant seeking to suppress evidence pursuant to **P.C. § 1538.5**, although not required to state the basis for his or her challenge to a warrantless search or seizure, must identify the government conduct being questioned. Defendant's motion to suppress in this case failed to identify which of several searches and seizures he was challenging. By failing to identify the government conduct being challenged, defendant's motion to suppress lacked the specificity required by **P.C. § 1538.5**. Therefore, defendant's motion to suppress was properly denied. (**Davis *v. Appellate Division of* Superior Court** (2018) 23 Cal.App.5th 387.)

Despite having had heard a motion to suppress during the defendant's preliminary hearing and a reconsideration of that motion to suppress under **subdivision (i)** of **Pen. Code § 1538.5** in the trial court, a defendant also has the right to re-raise the constitutionality of his detention in a motion to set aside the information under **Pen. Code § 995**. (***People v. Kidd*** (2019) 36 Cal.App.5th 12.)

> In fact, "(u)nder the statutory scheme of . . . **sections 995, 999a**, and **1538.5**, an accused may have up to *seven* (Italics added) opportunities to challenge the validity of a temporary detention, arrest, or search and seizure:
>
> > (1) The accused can move to suppress the evidence obtained at the preliminary hearing (**Pen. Code § 1538.5, subd. (f)**);

(2) If the motion is denied and the accused is held to answer, a motion may be made in the superior court to set aside the information for lack of probable cause on the ground that the evidence is the product of an illegal search (**Pen. Code § 995**);

(3) Upon the denial of a motion under **Penal Code section 995**, a defendant may file a petition for a writ of prohibition to stay the trial on the ground that the evidence is the product of an illegal search (**Pen. Code, § 999a**);

(4) A special hearing de novo in the superior court on the validity of the search is proper (**Pen. Code § 1538.5, subd. (i)**);

(5) An adverse determination may be reviewed by means of a petition for a writ of prohibition or mandate in the appellate court (**Pen. Code § 1538.5, subd. (i)**);

(6) If prior to trial the opportunity for a **section 1538.5** motion did not exist or the accused was not aware of the grounds for the motion, the issue may be raised at trial. (**Pen. Code § 1538.5**, **subds. (h)** and **(m)**; and

(7) Finally, the matter may be considered on appeal after the denial of the motion under **Penal Code section 1538.5**, even though the accused enters a plea of guilty after the denial (**Pen. Code § 1538.5, subd. (m)**)." (***People v. Gephart*** (93 Cal.App.3rd 989, 995-996; ***People v. Kidd***, *supra*, at p. 19.)

In a non-jury trial on an infraction offense, it has been held that "in the ordinary infraction case, the prosecution is not required to oppose a motion to suppress by filing an opposition brief or appearing at the suppression hearing. Instead, it may meet its burden to provide justification for a warrantless search by subpoenaing relevant law enforcement witnesses, who may in turn provide narrative testimony to the court in the same manner as would be permitted in the prosecution's absence at an infraction trial. So long as the court's conduct in calling and questioning witnesses is fair and properly limited in scope, such a procedure provides a fair hearing, does not lessen the prosecution's burden of proof. . . ." (***People v. Cotsirilos*** (2020) 50 Cal.App.5th 1023, 1026.)

Defendant could not challenge on appeal an order denying a motion to suppress evidence under **Pen. Code § 1538.5**, because a certificate of probable cause under **Pen. Code § 1237.5**, **subd. (m)**, and **Cal. Rules of**

Court, **rule 8.304(b)(4)(A)**, specified only the denial of the suppression motion without addressing the validity of defendant's waiver of the right to appeal, which was a required issue. (***People v. Codinha*** (2021) 71 Cal.App.5th 1047, 1073-1079.)

People's Motions to Continue:

On the date scheduled for a hearing on a defense motion to suppress evidence, the County of Mendocino Superior Court denied the People's motion to continue the hearing. Because the People were unable to proceed, the trial court ordered the evidence suppressed. Lacking the suppressed evidence, the People announced they could no longer successfully prosecute the case, and the trial court dismissed the action. The People appealed. The Fifth District Court of Appeal (Div. 5) held that the trial court erred in refusing to continue the hearing. Per the Court, **Pen. Code §§ 1050** and **1050.5** prohibited the dismissal of an action due to the absence of good cause for a continuance or for the prosecutor's failure to provide proper notice of a request for a continuance. Although the trial court did not dismiss the action as an express sanction for the failure to show good cause, dismissal was the reasonably foreseeable result of denial of the motion to continue. Cases involving requests for continuances in the preliminary hearing and trial contexts supported a conclusion that the legislature did not intend to permit denial of a motion for a continuance in the present circumstances, where an information supported by probable cause was dismissed on a procedural ground not implicating defendant's speedy trial rights. (***People v. Ferrer*** (2010) 184 Cal.App.4th 873.)

Disagreeing with ***People v. Ferrer***, *supra*, the Sixth District Court of Appeal held that even if it is reasonably foreseeable that denial of a prosecutor's request to continue under **Penal Code § 1050** will result in dismissal a trial court *may* deny a request to continue a motion to suppress under **Penal Code § 1538.5**. Here, on the prosecutor's own initiative, he released the subpoenaed officer so the officer could interview a witness in an unrelated investigation, and then requested a continuance of the hearing on the motion to suppress. The trial court rejected the continuance request on the grounds the unforeseen circumstances of the other investigation did not constitute good cause as it was not "workable" for parties to excuse necessary witnesses on their own and it didn't believe another investigator couldn't conduct the interview or that the officer was indispensable to the interview. The trial court then granted the suppression motion. The prosecutor moved for reconsideration citing ***Ferrer*** for the proposition the trial court didn't have authority to refuse to grant a continuance—even in the absence of good cause—when the foreseeable result would be dismissal of the case. The trial court vacated its order granting the suppression motion, confirming it still found no good cause but agreeing it did not have authority to deny the continuance under ***Ferrer***. The trial

court later conducted the suppression motion and denied it. The defendant then pled guilty and appealed. The Court of Appeal, in reversing, held "that if the trial court finds that the request for a continuance of a motion to suppress lacks good cause, the court has the authority to deny the requested continuance for lack of good cause under **section 1050**, **subdivision (e)**, even if this decision may foreseeably result in a dismissal of the matter for lack of evidence." The decision as to any continuance is left to the discretion of the trial court. (***People v. Brown*** (2021) 69 Cal.App.5th 15.)

Pre-Trial Review of the Magistrate's Ruling:

Pen. Code § 1510: The denial of a motion made pursuant to **Section 995** or **1538.5** may be reviewed prior to trial only if the motion was made by the defendant in the trial court not later than 45 days following defendant's arraignment on the complaint if a misdemeanor, or *60 days* following defendant's arraignment on the information or indictment if a felony, unless within these time limits the defendant was unaware of the issue or had no opportunity to raise the issue.

The defendant's failure to file a timely motion to suppress is waived by the People's failure to challenge this procedural error. (*People v. Harris* (2015) 234 Cal.App.4th 671, 677, fn. 1; *People v. Ling* (2017) 15 Cal.App.5th Supp. 1, 5, fn. 1.)

"If the magistrate (at the preliminary examination) denies the motion and holds the defendant to answer, the defendant must, as a prerequisite to appellate review, renew his challenge before the trial court by motion to dismiss under (**P.C.**) **section 995** or in a special hearing. (Citation; **P.C. § 1538.5, subds. (i), (m)**) At that stage, the evidence is generally limited to the transcript of the preliminary hearing, testimony by witnesses who testified at the preliminary hearing (who may be recalled by the prosecution), and evidence that could not reasonably have been presented at the preliminary hearing. (**§ 1538.5, subd. (i)**.) The factual findings of the magistrate are binding on the court, except as affected by any additional evidence presented at the special hearing." (***People v. Romeo***, *supra*, at p. 941; citing ***People v. Lilienthal*** (1978) 22 Cal.3rd 891, 896.)

Appellate Review:

"Where . . . a motion to suppress evidence is submitted to the superior court on the preliminary hearing transcript (see **§ 1538.5, subd. (i)**), '"the appellate court disregards the findings of the superior court and reviews the determination of the magistrate who ruled on the motion to suppress, drawing all presumptions in favor of the factual determinations of the magistrate, upholding the magistrate's express or implied findings if they

are supported by substantial evidence, and measuring the facts as found by the trier against the constitutional standard of reasonableness." [Citation.]'" (***People v. Hua*** (2008) 158 Cal.App.4th 1027, 1033 . . . .) 'In determining whether, on the facts so found, the search or seizure was reasonable under the **Fourth Amendment**, we exercise our independent judgment. [Citations.]'" (***People v. Glaser*** (1995) 11 Cal.4th 354, 362 . . . .) We affirm the lower court's ruling if correct under any legal theory. (***People v. Hua***, supra, at p. 1033.)" (***People v. Cruz*** (2019) 34 Cal.App.5th 764, 769; see also ***People v. Johnson*** (2020) 50 Cal.App.5th 620; ***People v. Suff*** (2014) 58 Cal.4th 1013, 1053; and ***People v. Holiman*** (2022) 76 Cal.App.5th 825, 830-831.)

> "'In cases where the facts are essentially undisputed, we independently determine the constitutionality of the challenged search or seizure.'" (***People v. Holiman***, *supra*, at p. 831; quoting ***People v. Durant*** (2012) 205 Cal.App.4th 57, 62.)

An appellate court then "review(s) the trial court's resolution of the first inquiry (above), which involves questions of fact, under the deferential substantial-evidence standard, but subject(s) the second and third inquires to independent review." (***People v. Parson*** (2008) 44 Cal.4th 332, 345, citing ***People v. Ayala*** (2000) 24 Cal.4th 243, 279, and ***People v. Weaver*** (2001) 26 Cal.4th 76, 924.)

An appeal of the denial of a motion to suppress evidence following a plea of guilty or no contest is authorized by **Pen. Code § 1538.5(m)** and **California Rules of Court, rule 8.304(b)(4)(A)**. A failure to renew the motion to suppress following the filing of the information ordinarily forfeits the issue for appellate review. (***People v. Johnson*** (2018) 21 Cal.App.5th 1026, 1031, fn. 5, citing ***People v. Lilienthal*** (1978) 22 Cal.3rd 891, 896.)

"'[F]or a suppression ruling to be reviewable, the underlying objection, contention or theory must have been urged and determined in the trial court.' (***People v. Manning*** (1973) 33 Cal.App.3rd 586, 600 . . . .) '[T]he scope of issues upon review must be limited to those raised during argument, whether that argument has been oral or in writing. This is an elemental matter of fairness in giving each of the parties an opportunity adequately to litigate the facts and inferences relating to the adverse party's contentions.' (***Manning***, at p. 601.)" (***People v. Thomas*** (2018) 29 Cal.App.5th 1107, 1113-1114; failure to raise the issue of "equitable estoppel" at the trial-court level waived the issue.)

In reviewing a trial court's denial a defendant's motion to suppress, the appellate court defers to the trial court's factual findings where they are supported by substantial evidence, but, but then exercises its own

independent judgment in determining the legality of a search on the facts so found. (**People *v.* Meza** (2018) 23 Cal.App.5th 604, 609; citing ***People v. Tully*** (2012) 54 Cal.4th 952, 979.)

"The appellate court (then) views the record in the light most favorable to the ruling and defers to the trial court's factual findings, express or implied, when supported by substantial evidence. But in determining whether, on the facts so found, the search or seizure was reasonable under the **Fourth Amendment**, the appellate court exercises its independent judgment. [Citations.] Appellate review is confined to the correctness or incorrectness of the trial court's ruling, not the reasons for its ruling. [Citation.]" (***People v. Mason*** (2016) 8 Cal.App.5th Supp. 11, 19; citing ***People v. Superior Court* (*Chapman*)** (2012) 204 Cal.App.4th 1004, 1011; ***People v. Bryant, Smith and Wheeler*** (2014) 60 Cal.4th 335, 364-365.)

The appellate court will affirm the magistrate's ruling if correct on *any* theory of the applicable law, even if the ruling was for an incorrect reason. (***People v. Fews*** (2018) 27 Cal.App.5th 553, 559; citing ***People v. Zapien*** (1993) 4 Cal.4th 929, 976.)

> "Although it is a settled principle of appellate review that a correct decision of the trial court will be affirmed even if based on erroneous reasons, the Supreme Court has cautioned that 'appellate courts should not consider a **Fourth Amendment** theory for the first time on appeal when "the People's new theory was not supported by the record made at the first hearing and would have necessitated the taking of considerably more evidence . . ." or when "the defendant had no notice of the new theory and thus no opportunity to present evidence in opposition."'" (Citation omitted) However, when 'the record fully establishes another basis for affirming the trial court's ruling and there does not appear to be any further evidence that could have been introduced to defeat the theory,' a ruling denying a motion to suppress will be upheld on appeal." (***People v. Johnson*** (2018) 21 Cal.App.5th 1026, 1032; citing ***Green v. Superior Court*** (1985) 40 Cal.3rd 126, 138–139; ***People v. Walker*** (2012) 210 Cal.App.4th 1372, 1383, and ***People v. Loudermilk*** (1987) 195 Cal.App.3rd 996, 1004–1005.)

"On appeal from a superior court's grant of a **section 995** motion based on the conclusion a search or seizure was unreasonable, we 'must draw all presumptions in favor of the magistrate's factual determinations, and we must uphold the magistrate's express or implied findings if they are supported by substantial evidence. [Citations.]' [Citation.] 'We judge the legality of the search by "'measur[ing] the facts, as found by the [magistrate], against the constitutional standard of reasonableness." [Citation.] Thus, in determining whether the search or seizure was

reasonable on the facts found by the magistrate, we exercise our independent judgment. [Citation.]" [Citation.]' (***People v. Magee*** (2011) 194 Cal.App.4th 178, 182–183 . . . .)" (***People v. Tacardon*** (2020) 53 Cal.App.5th 89, 96; petition granted.)

"'A perfunctory request, buried amongst the footnotes, does not preserve an argument on appeal.' ***Coalition for a Healthy Cal. v. FCC***, 87 F.3d 383, 384 n.2 (9th Cir. 1996). Thus, had the government argued that the issue was forfeited, we would have been compelled to agree. In that case, we could have considered (the defendant's) argument only if he could show good cause for not properly raising it in his motion to suppress. ***United States v. Guerrero***, 921 F.3d 895, 897-98 (9th Cir. 2019) (per curiam) see **Fed. R. Crim. P. 12(c)(3)**." (***United States and Ngumezi*** (9th Cir. 2020) 980 F.3rd 1285, 1287-1288; noting that because the government failed to argue that the defendant had waived a search issue, and then addressing it on its merits, it was the government that waived making a forfeiture argument on appeal.

But the government has not made a forfeiture argument. Instead, it has addressed the issue on the merits and invited us to do so as well. We conclude that the government has forfeited any claim of forfeiture, so we proceed to consider the merits. (***United States v. Doe*** (9th Cir. 1995) 53 F.3rd 1081, 1083.)

In federal court, **18 U.S.C. § 3731** authorizes an interlocutory appeal "from a decision or order of a district court suppressing or excluding evidence . . . in a criminal proceeding." The section specifically states that an appeal must be filed "within thirty days after the decision, judgment or order. . . ." Under authority of this section, the Supreme Court has held that an order appealable by the United States in a criminal case is not final until a pending rehearing petition is resolved. (***United States v. Healy*** (1964) 376 U.S. 75, 78 [84 S.Ct. 553; 11 L.Ed.2nd 527].) This includes a "motion for reconsideration." (***United States v. Mora-Alcaraz*** (9th Cir. 2021) 986 F.3rd 1151, 1155.)

Juvenile Proceedings: The Juvenile Court equivalent of a motion to suppress is contained in Wel. & Inst. Code **§ 700.1**:

Any motion to suppress as evidence any tangible or intangible thing obtained as a result of an unlawful search or seizure shall be heard prior to the attachment of jeopardy and shall be heard at least five judicial days after receipt of notice by the people unless the people are willing to waive a portion of this time.

If the court grants a motion to suppress prior to the attachment of jeopardy over the objection of the people, the court shall enter a judgment of

dismissal as to all counts of the petition except those counts on which the prosecuting attorney elects to proceed pursuant to **W&I Code § 701**.

If, prior to the attachment of jeopardy, opportunity for this motion did not exist or the person alleged to come within the provisions of the juvenile court law was not aware of the grounds for the motion, that person shall have the right to make this motion during the course of the proceeding under **W&I Code § 701**.

Misdemeanors: A magistrate is not empowered to dismiss a misdemeanor charge (carrying a dirk or dagger, in this case) following a hearing under **P.C. § 991** because **section 991** does not vest the trial court with the discretion to consider, as part of its determination of probable cause, whether the misdemeanant defendant's detention prior to arrest complied with the **Fourth Amendment's** requirement that the detention be based on reasonable suspicion. **P.C. § 1538.5** is the exclusive pretrial vehicle to test the unreasonableness of a search or seizure. (***People v. Barajas*** (2018) 30 Cal.App.5th Supp. 1.)

One-Hearing Rule:

General Rule: "As a general rule, a defendant is allowed only one pretrial suppression motion under **section 1538.5** in the superior court, and that court is without jurisdiction to hear a second motion." (**People *v.* Arebalos-Cabrera** (2018) 27 Cal.App.5th 179, 191; quoting **People v. Nelson** (1981) 126 Cal.App.3rd 978, 981.)

Note: This rule does not take into account a suppression motion made during the preliminary examination; see above.

Exceptions:

An exception to this rule occurs, however, when a defendant has not had a full and fair opportunity to litigate his motion to suppress. (**People *v.* Arebalos-Cabrera**, supra., at pp. 191-194; the Court finding that defendant failed to show any newly discovered evidence or raise any new issues upon his attempt to relitigate a previously denied motion to suppress.)

The trial court initially granted defendant's motion to suppress based on one ground and did not consider an alternate ground. When that ruling was later reversed, the trial court considered the alternate ground in a renewed suppression hearing and granted the motion again. The Supreme Court held that the trial court correctly considered the alternate ground on remand: "[D]efendant was deprived of an opportunity for a full hearing on the merits of his entire motion to suppress as initially made. Consequently the

renewed hearing amounted to neither consideration of a second **section 1538.5** motion nor a relitigation of his original motion, but rather a completion of the full hearing to which he was entitled." (***People v. Brooks*** (1980) 26 Cal.3rd 471.)

The trial court limited the issues in a motion to suppress based on a local procedural rule. When the defendant attempted to supplement his motion to raise the excluded issues, the trial court denied defendant's request for lack of jurisdiction. On appeal, the Court held that the trial court erred by limiting the issues in the first motion to suppress. The Court also held that the trial court erred by refusing the defendant's effort to supplement his motion: "Like the defendant in ***Brooks***, Smith 'was deprived of an opportunity for a full hearing on the merits of his entire motion to suppress.' [Citation.] . . . Because Smith was entitled to fully litigate the adequacy of the prosecution's inventory search justification, the trial court erred by denying Smith's supplemental **section 1538.5** motion that specifically set forth this infringement of his right to a full hearing." **(*People v. Smith*** (2002) 95 Cal.App.4th 283.)

Fruit of the Poisonous Tree: The evidence that is suppressed is extended to the "*indirect*" as well as the "*direct products*" of the constitutional violation; i.e., the "*fruit of the poisonous tree*." (***Wong Sun v. United States*** (1963) 371 U.S. 471, 484 [83 S.Ct. 407; 9 L.Ed.2nd 441].) (See "*Fruit of the Poisonous Tree*," under "*The Constitutional Basis For Searches and Seizures*" (Chapter 1), above.)

Rule: "Evidence obtained by such illegal action of the police is '*fruit of the poisonous tree*,' warranting application of the exclusionary rule if, 'granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" (Emphasis added; ***United States v. Crawford*** (9th Cir. 2004) 372 F.3rd 1048, 1054, quoting ***Brown v. Illinois*** (1975) 422 U.S. 590, at p. 599 [95 S.Ct. 2254; 45 L.Ed.2nd 416].)

Not all courts are in agreement that such a remedy is reserved exclusively for constitutional violations. (See discussion in ***United States v. Lombera-Camorlinga*** (9th Cir. 2000) 206 F.3rd 882, 886-887, and in the dissenting opinion, p. 893.)

"To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in [the Supreme Court's] cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." (***United States v. Jobe*** (9th Cir. 2019) 933 F.3rd 1074, 1077.)

Examples:

Observations made after an unlawful, warrantless entry into a structure cannot be used to establish probable cause for later obtaining a search warrant. (***Murray v. United States*** (1988) 487 U.S. 533, 540 [108 S.Ct. 2529; 101 L.Ed.2nd 472, 482]; ***Burrows v. Superior Court*** (1974) 13 Cal.3rd 238, 251.)

A consent to search given "immediately following an illegal entry or search" is invalid because it "is inseparable from the unlawful conduct." (***People v. Roberts*** (1956) 47 Cal.2nd 374, 377.)

Officers suspected that illegal activity was taking place at a small airstrip near Tucson, Arizona. After receiving a tip, officers stopped a truck leaving the airstrip and searched it without a warrant. The government conceded that this stop was illegal. As a result of the stop, however, the officers learned the identity of the driver and passenger, and began to surveil them, which led to the discovery and seizure of marijuana. The Court held that the marijuana evidence must be suppressed because the illegally obtained identification significantly directed the investigation which led to the marijuana. (***United States v. Johns*** (9th Cir. 1989) 891 F.2nd 243, 245.)

> *Note*: This case is of questionable continuing validity in that it has subsequently been held that *evidence of identity*, as with defendant's person itself, is not subject to suppression, "regardless of the nature of the violation leading to his identity." (***United States v. Gudino*** (9th Cir. 2004) 376 F.3rd 997; see also ***Immigration and Naturalization Service v. Lopez-Mendoza*** (1984) 468 U.S. 1032, 1039-1040 [104 S.Ct. 3479; 82 L.Ed.2nd 778].)

A consent to enter a residence, obtained immediately after a co-resident's arrest on the front porch and a contemporaneous illegal protective sweep of the residence, held to be invalid as the fruit of the illegal protective sweep. Plain sight observations made inside the residence during the allegedly consensual entry were held to be illegal. (***People v. Werner*** (2012) 207 Cal.App.4th 1195, 1210-1212.)

Where defendant is arrested at some point following an arguably illegal search, and he discards an illegal firearm during that arrest, the fact that defendant attempted to walk away from the officers after the initial illegal search but before discarding the illegal firearm, such fleeing was held to be an intervening factor that dissipates the taint of the illegal search. (***United States v. McClendon*** (9th Cir. 2013) 713 F.3rd 1211, 1217-1218.)

Where defendant was unlawfully arrested, evidence recovered from his person, incriminating statements, and the products of a search warrant that used all the above as part of its probable cause, were subject to being suppressed. (***United States v. Nora*** (9th Cir. 2014) 765 F.3rd 1049, 1052-1060.)

In ***People v. McCurdy*** (2014) 59 Cal.4th 1063, at pp. 1092-1093, the Court ruled that nothing in the record suggested that any assumed illegality concerning defendant's arrest, which resulted in defendant's picture in the news media, influenced a witness's willingness to identify defendant as the man he saw with an 8-year-old abduction and murder victim outside a grocery store on the day she disappeared. Law enforcement did not generate the publicity over this case. And the witness came forward on his own, testifying voluntarily. As such, this testimony was too attenuated from any perceived illegality in defendant's arrest and was not subject to suppression.

In an asset forfeiture proceeding dealing with $167,070 seized from defendant's motorhome, it was held that the search of defendant's vehicle following the second half of a "coordinated traffic stop" (i.e., a first stop which itself lasted nearly half an hour, but didn't reveal any legal cause to search defendant's motorhome, followed by a second traffic stop set up with a drug-sniffing dog available to conduct a sniff around the exterior of the motorhome) violated the **Fourth Amendment**. Because the dog sniff, which gave the officer in the second stop the necessary probable cause to obtain a search warrant to search defendant's motorhome followed directly in an unbroken chain from the first prolonged traffic stop, the seized currency was held to be the "fruit of the poisonous tree" and was properly suppressed by the trial court. (***United States v. Gorman*** (9th Cir. 2017) 859 F.3rd 706, 714-719; as amended at 2017 U.S. App. LEXIS 18610.)

Exceptions: Three of the recognized exceptions to the use of the "Fruit of the Poisonous Tree Doctrine," as discussed in ***Utah v. Strieff*** (2016) 579 U.S. 232 [136 S.Ct. 2056; 195 L.Ed.2nd 400], ***United States v. Gorman*** (9th Cir. 2017) 859 F.3rd 706, 718; as amended at 2017 U.S. App. LEXIS 18610, and ***People v. Marquez*** (2019) 31 Cal.App.5th 402, 412-414, involve the causal relationship between the unconstitutional act and the discovery of evidence:

1. *The Independent Source Doctrine*: The independent source doctrine asks the question whether despite an initial illegality on the part of searching law enforcement officers, the evidence *actually* was "obtained independently from activities untainted by the initial illegality." If so, then the evidence is admissible. (See ***Murray v. United States*** (1988) 487 U. S. 533, 537, [108 S.Ct. 2529; 101 L.

Ed.2nd 472]; see "*Independent Source Doctrine*," under "*Searches With a Search Warrant*" (Chapter 10), below.)

2. *The Inevitable Discovery Doctrine*: Evidence that would have been discovered even without the unconstitutional source. (See ***Nix v. Williams*** (1984) 467 U. S. 431, 443-444 [104 S.Ct. 2501; 81 L.Ed.2nd 377]; see "*Doctrine of Inevitable Discovery*," below.)

3. *The Attenuation Doctrine*: When the connection between unconstitutional police conduct and the eventual discovery of the evidence in issue is so remote, or has been interrupted by some intervening circumstance, that "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." (See ***Hudson v. Michigan*** (2006) 547 U.S. 586, 593 [126 S.Ct. 2159; 165 L.Ed.2nd 56]; ***Utah v. Strieff***, *supra*.)

   "(E)ven when there is a **Fourth Amendment** violation, (the) exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits. In some cases, for example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression." (***Utah v. Strieff***, supra; existence of an arrest warrant "attenuated the taint" between an unlawful detention and the discovery of evidence incident to the arrest on the warrant, at least where the police misconduct was not flagrant.)

   In ***Strieff***, the Utah Supreme Court declined to apply the attenuation doctrine because it read the U.S. Supreme Court's precedents as applying the doctrine only "to circumstances involving an independent act of a defendant's 'free will' (such as) in confessing to a crime or consenting to a search." (2015 UT 2, 357 P. 3rd 532 at p. 544.) The ***Strieff*** Court specifically disagreed with this interpretation. "The attenuation doctrine evaluates the causal link between the government's unlawful act and the discovery of evidence, which often has nothing to do with a defendant's actions. Per the Supreme Court; "the logic of (its) prior attenuation cases is not limited to independent acts by the defendant." (***Id***. at p. 238.)

   See also ***People v. Brendlin*** (2008) 45 Cal.4th 262, where an illegal traffic stop did not require the suppression of evidence where the defendant had an outstanding arrest warrant. The discovery of an arrest warrant may, depending upon the circumstances, be sufficient of an intervening circumstance to allow for the

admissibility of the evidence seized incident to arrest despite the fact that the original detention was illegal.

Defendant, the passenger in a motor vehicle stopped for illegally tinted windows (**V.C. § 26708(a)**), was arrested on an outstanding arrest warrant. Even had the traffic stop had been illegal, the discovery of the arrest warrant was sufficient to attenuate any possible taint of an illegal traffic stop. (***People v. Carter*** (2010) 182 Cal.App.4th 522, 529-530.)

See also ***People v. Durant*** (2012) 205 Cal.App.4th 57, finding that a suspect's **Fourth** waiver (subjecting him to warrantless search and seizures) attenuated the taint of an illegal traffic stop, and ***People v. Bates*** (2013) 222 Cal.App.4th 60, 69-71, and ***People v. Kidd*** (2019) 36 Cal.App.5th 12, 23, both ruling to the contrary.

> The ***Bates*** Court both declined to adopt the ***Durant*** Court's reasoning, and differentiated the cases on their respective facts. (***Ibid***.)

A second traffic stop which resulted in a search of a vehicle, even if the stop is based upon an observed traffic violation, is not attenuated from an earlier illegally prolonged detention when the search was conducted pursuant to information obtained during the prior stop and illegally prolonged detention. (***United States v. Gorman*** (9th Cir. 2017) 859 F.3rd 706, 714-719; as amended at 2017 U.S. App. LEXIS 18610.)

Also, when information is contained in the affidavit which is the product of a prior illegal search, that information may be excised and the remainder retested for probable cause. "A search warrant is not 'rendered invalid merely because some of the evidence included in the affidavit is tainted.' (Citation) The warrant remains valid if, after excising the tainted evidence, the affidavit's 'remaining untainted evidence would provide a neutral magistrate with probable cause to issue a warrant.'" (***United States v. Job*** (9th Cir. 2017) 871 F.3rd 852, 863-864; citing ***United States v. Nora*** (9th Cir. 2014) 765 F.3rd 1049, 1058; and quoting ***United States v. Reed*** (9th Cir. 1994) 15 F.3rd 928, 933.)

What was determined to be the illegal collection of DNA from defendant in 2006 was held to be sufficiently attenuated from a "cold hit" in 2008 with DNA left at the scene of a robbery and a subsequent consensual collection of DNA from defendant himself. (***People v. Marquez*** (2019) 31 Cal.App.5th 402, 412-414; specifically:

- Two years between the two independent collections.

- Three intervening arrests and a probation order, after each of which defendant was ordered by a court to provide DNA samples (which did not get collected, but only because it was believed by law enforcement that his DNA was already on record).

- No improper motive on the part of law enforcement in the collection of the original (inadmissible) DNA sample.

However, the Ninth Circuit Court of Appeal has held that a mere passage of time, even a significant amount, does not necessarily attenuate the taint of an earlier illegal detention. For instance, after someone at the defendant's address pointed a laser at a police aircraft in flight, officers went to the defendant's home, illegally detained him, interrogated him without ***Miranda*** warnings, and after the defendant confessed, seized the laser. *Eight months later*, an FBI agent approached the defendant outside his home and stated he was there to ask "follow-up" questions about the incident. The defendant repeated his earlier confession. Charged with aiming a laser at an aircraft in violation of **18 U.S.C. § 39A**, defendant moved to suppress the inculpatory statements he made to the FBI agent, arguing that the illegality of the first encounter tainted the second. The government did not dispute that the initial encounter violated at least the **Fourth Amendment**. Agreeing with the defendant, the Ninth Circuit explained that when a confession results from certain types of **Fourth Amendment** violations, the government must go beyond proving that the later confession was voluntary. It must also show a sufficient break in events to undermine the inference that the confession was caused by the **Fourth Amendment** violation. After considering together the relevant factors as set forth in ***Brown v. Illinois*** (1975) 422 U.S. 590 [95 S.Ct. 2254; 45 L.Ed.2nd 416 (1975), the panel was persuaded that the second encounter, introduced as a "follow up" to the first, was directly linked to the original illegalities. Per the Court, although significant time had passed, and the record does not show that the officers' conduct was purposeful or flagrant, the eight-month time period was collapsed by the agent opening the conversation by stating that he was following up on the original investigation. Without other intervening circumstances that act to separate the incidents, the Court concluded that the government failed to carry its burden of proving that the defendant's statements were sufficiently attenuated from the illegal detention and seizure

eight months prior. (***United States v. Bocharnikov*** (9th Cir. 2020) 966 F.3rd 1000.)

After chasing a wanted suspect to defendant's home, and arresting him when he tried to escape via a back window, officers entered defendant's home without a warrant and without consent for the stated purposes of checking the welfare of anyone inside (i.e., the "emergency aid exception") and/or as a "protective sweep" for other suspects. While inside, officers contacted defendant, held him at gunpoint, handcuffed him, and took him outside. Once outside, it was discovered that defendant was subject to probationary **Fourth** waiver, and subject to warrantless searches. Officers then reentered his home and conducted a full search, discovering methamphetamine and other incriminating evidence. In a previous appeal, both reasons for entering defendant's home were held to have been in violation of the **Fourth Amendment**, as was defendant's arrest, in an unpublished decision. (See ***United States v. Garcia*** (9th Cir. 2018) 749 F. App'x 516.) Upon returning the case to the trial court for a determination of whether the "attenuation doctrine" applied; i.e., whether the discovery of the suspicionless search condition was an intervening circumstance that broke the causal chain between the initial unlawful entry and the discovery of the evidence supporting defendant's conviction, the trial court held that it did. In a second appeal, the Ninth Circuit disagreed and ruled that the evidence should have been suppressed after finding that all three of the factors as discussed in ***Utah v. Strieff***, *supra*, favored suppression. (***United States v. Garcia*** **(**9th Cir. 2020) 974 F.3rd 1071.)

After an officer initiated a traffic stop of Defendant and recovered approximately six pounds of methamphetamine from the vehicle Defendant was driving, he was charged with one count of possession with intent to distribute 500 grams or more of methamphetamine. Denial of defendant's motion to suppress, pursuant to the **Fourth Amendment**, was held to be proper because although the deputy did not have reasonable suspicion or probable cause to initiate the traffic stop, the unlawful stop was sufficiently attenuated by the discovery of defendant's expired license and lack of insurance. (***United States v. Forjan*** (8th Cir. 2023) 66 F.4th 739.)

See "*Factors*," under "*The Taint has been Attenuated*," below, for the "*relevant factors*" as set out in ***Brown*** and other cases.

See also "*Intervening* (or *Superseding*) *Circumstances*," under "*Use of Force*" (Chapter 6), above.

And see "*Fruit of the Poisonous Tree*," under "*The Constitutional Basis For Searches and Seizures*" (Chapter 1), above.

Problem: *The* "*Coordinated Traffic Stop*:"

In an asset forfeiture proceeding dealing with $167,070 seized from defendant's motorhome, it was held that the search of defendant's vehicle following the second half of a "coordinated traffic stop" (i.e., a first stop which itself lasted nearly half an hour, but didn't reveal any legal cause to search defendant's motorhome, followed by a second traffic stop set up with a drug-sniffing dog available to conduct a sniff around the exterior of the motorhome) violated the **Fourth Amendment**. Because the dog sniff, which gave the officer in the second stop the necessary probable cause to obtain a search warrant to search defendant's motorhome followed directly in an unbroken chain from the first prolonged traffic stop, the seized currency was held to be the "fruit of the poisonous tree" and was properly suppressed by the trial court. (***United States v. Gorman*** (9th Cir. 2017) 859 F.3rd 706, 714-719; as amended at 2017 U.S. App. LEXIS 18610.)

The ***Gorman*** Court noted at p. 719: "Here, the officers' impermissible gamesmanship is precisely what the Constitution proscribes. . . . The coordinated action at issue in Gorman's case offers a prime illustration of the value of the 'fruit of the poisonous tree' analysis. The analysis allows us to see the officers' conduct in Gorman's case as what it is: a single integrated effort by police to circumvent the Constitution by making two coordinated stops. When the result of one stop is communicated and, on that basis, another stop is planned and implemented, the coordinated stops become, in effect, one integrated stop that must as a whole satisfy the Constitution's requirements. An illegal police venture cannot be made legal simply by dividing it into two coordinated stops. (Citations omitted.) The Constitution guards against this kind of gamesmanship because the **Fourth Amendment's** protections extend beyond the margins of one particular police stop and can extend to the integrated and purposeful conduct of the state."

Problem: *The Naked Body and Privacy Rights*:

Plaintiff had alleged sufficient facts to state an invasion of bodily privacy claim under **42 U.S.C. § 1983** when she alleged that three police officers took and distributed nude photos of her when she came to the station to report that she had been assaulted. According to the allegations in the complaint, the officers had insisted that it was necessary to take photos of the plaintiff for her case, and directed her to undress in a room of the

police station despite the plaintiff's objections and insistence that she did not have bruises that required her to be photographed in the nude. Recognizing that the "naked body" is the most "basic subject of privacy," the Court concluded that the woman had alleged a valid claim that the officers' actions violated her privacy rights under the **Fourteenth Amendment** due process clause. (***York v. Story*** (9th Cir. 1963) 324 F.2nd 450, 452, 455-456.)

Male inmates sued the department of corrections for allowing female guards to observe them in the showers and while using the restroom, claiming a violation of their right to privacy. The Court held that there was no violation of the right to bodily privacy because the inmates had a reduced privacy interest, the female guards observed the inmates naked only from a distance, and the department's policies were, on the whole, reasonable. (***Grummett v. Rushen*** (9th Cir. 1985) 779 F.2nd 491, 494-496.)

A male probation officer violated a female probationer's right to bodily privacy when the male probation officer observed the female probationer urinating in a bathroom stall during a uranalysis test. (***Sepulveda v. Ramirez*** (9th Cir. 1992) 967 F.2nd 1413, 1416.)

Qualified immunity for an Internal Revenue Service Agent was properly denied in an action alleging that the agent violated plaintiff's **Fourth Amendment** right to bodily privacy when, during the lawful execution of a search warrant at plaintiff's home, the agent (a female) escorted plaintiff (also a female) to the bathroom and monitored her while she relieved herself. Given the scope, manner, justification, and place of the search, a reasonable jury could conclude that the agent's actions were unreasonable and violated plaintiff's **Fourth Amendment** rights. The agent's general interests in preventing destruction of evidence and promoting officer safety did not justify the scope or manner of the intrusion into plaintiff's most basic subject of privacy; her naked body. A reasonable officer in the agent's position would have known that such a significant intrusion into bodily privacy, in the absence of legitimate government justification, was unlawful. (***Ioane v. Hodges*** (9th Cir. 2019) 939 F.3rd 945, 956-957.)

A pretrial detainee stated a **42 U.S.C.S. § 1983** claim for a **Fourteenth Amendment** due process violation, stemming from the deputies' act of walking him through public areas of a hospital completely unclothed except for an orange pair of mittens, where plaintiff alleged facts supporting the inference that the public exposure of his naked body was wholly unjustifiable, and the court could reasonably infer from the long (2 hour) delay in transporting him that the deputies' actions were not based on a medical need so pressing that they could not spare a little time to obtain a dignified covering. The deputies were held *not* to be entitled to

qualified immunity. (***Colbruno v. Kessler*** (10th Cir. CO. 2019) 928 F.3rd 1156.)

Defendants, a juvenile correctional officer and his supervisor, were improperly granted summary judgment by the trial court on a juvenile detainee's **42 U.S.C § 1983 Fourteenth Amendment** claims because the officer violated the detainee's right to privacy when he allegedly watched her shower multiple times. A jury could find that the officer's alleged conduct in touching her without consent and making sexual comments to her violated her right to bodily integrity. The detainee asserted facts from which a jury could find that the officer violated the detainee's right to be free from punishment. The officer was not entitled to qualified immunity. A jury could also find that the officer's supervisor knew or reasonably should have known of the violations and failed to act to prevent them. (***Vasquez v. County of Kern*** (9th Cir. 2020) 949 F.3rd 1153.)

Problem: *Key in a Lock*: Whether or not police using a key in a lock, where the lock is otherwise exposed to public view (e.g., the front door to a suspect's house), is a search has been the subject of a difference of opinion. (See ***People v. Robinson*** (2012) 208 Cal.App.4th 232, 242-255; discussing the conflicting cases, but noting that it need not be decided in this case because even if it was a search, the search was not unreasonable because when balanced with the governmental interest it served, the intrusion was minimal.

Held to be a Search:

United States v. Concepcion (7th Cir. 1991) 942 F.2nd 1170, 1172.: Concluding that testing a key in an apartment door lock was a search. "A keyhole contains *information*—information about who has access to the space beyond. As the **[F]ourth [A]mendment** protects private information rather than formal definitions of property, [citations], the lock is a potentially protected zone. And as the tumbler of a lock is not accessible to strangers . . . , the use of an instrument to examine its workings (that is, a key) looks a lot like a search. . . . [¶] Because the agents obtain information from the inside of the lock, which is both used frequently by the owner and not open to public view, it seems irresistible that inserting and turning the key is a 'search.'"

However, the Court held that the **Fourth Amendment** was not violated in that the insertion of the key into the door lock was such a "*minimal intrusion*." (***Id***., at p. 1173.) (See "*Minimal Intrusion Exception*," below.)

Portillo-Reyes (9th Cir. 1975) 529 F.2d 844, 848: Putting a key into the door lock of a Volkswagen automobile held to be "the

beginning of the search" and thus the "reasonable expectancy of privacy" doctrine of ***Katz v. United States*** (1967) 389 U.S. 347 [88 S.Ct. 507; 19 L.Ed.2nd 576] applies.

The Ninth Circuit Court of Appeal had previously found that the warrantless use of a key to ascertain ownership or control over a motor vehicle was not unreasonable. "Fitting the key into the car door lock did not give police any knowledge about the contents inside the vehicle, but revealed only that (defendant) Maggio had access to that car. Given the strong governmental interests in investigating drug crimes, and Maggio's minimal privacy expectation in the lock on a car door, the police conduct here was reasonable under the circumstances. (fn. omitted) Therefore, inserting the key into the car door lock for the purpose of identifying Maggio was not an unreasonable search prohibited by the **Fourth Amendment**. (fn. omitted)" Thus, although the warrantless use of a key in a lock is in fact a search, it is generally held not to be unreasonable, and thus lawful. (***United States v. $109,179 in United States Currency*** (2000) 228 F.3rd 1080, 1087-1088.)

But see ***United States v. Dixon*** (9th Cir. 2020) 984 F.3rd 814, below.

See also ***United States v. Baker*** (9th Cir. 2023) 58 F.4th 1109, where the seizure of the key, before using its electronics to beep defendant's nearby vehicle, may itself be illegal.

Held Not to be a Search:

United States v. Salgado (6th Cir. 2001) 250 F.3rd 438, 456: "(T)he mere insertion of a key into a(n apartment door) lock, by an officer who lawfully possesses the key and is in a location where he has a right to be, to determine whether the key operates the lock, is not a search."

United States v. Hawkins (1st Cir. 1998) 139 F.3rd 29, 33, fn. 1: "(I)nsertion of a key into the lock of a storage compartment for the purpose of identifying ownership does not constitute a search."

United States v. Lyons (1st Cir. 1990) 898 F.2nd 210, 212-213: Insertion of a key into padlock of storage unit for purpose of identifying ownership did not infringe on any reasonable expectation of privacy.

United States v. DeBardeleben (6th Cir. 1948) 740 F.2nd 440, 444: The defendant had no "reasonable expectation of privacy in the identity of his vehicle." A set of car keys lawfully found in defendant's possession after his arrest were found to fit the door and trunk locks of a car found in a parking lot and suspected to belong to defendant.

Mathis v. State (Alaska 1989) 778 P.2nd 1161, 1165: "Insertion of the key did not constitute a search of the locker, but merely an identification of it as belonging to the [defendants]."

People v. Carroll (1973) 12 Ill.App.3rd 869, 875-876: Insertion and turning of a key in the front door of defendant's apartment held not to be a search.

See also ***United States v. Correa*** (7th Cir. IL 2018) 908 F.3rd 208, where the Seventh Circuit Court of Appeal ruled that using a lawfully seized garage door opener, randomly, while looking for an arrestee's residence, was held *not* to be a search at all, and thus *not* a violation of the **Fourth Amendment**.

Possible Resolution of the Issue:

It is arguable that the recent United States Supreme Court case of ***United States v. Jones*** (2012) 565 U.S. 400 [132 S.Ct. 945; 181 L.Ed.2nd 911], reemphasizing the Common Law theory that a trespassory intrusion, where the government physically intrudes into a constitutionally protected area, is a search, and subject to the restrictions of the **Fourth Amendment**, arguably tips the scale towards finding that any use of a key in a lock belonging to a defendant is in fact a search. (See ***People v. Robinson*** (2012) 208 Cal.App.4th 232, 243, fn. 11, & 244.)

See ***United States v. Dixon*** (9th Cir. 2020) 984 F.3rd 814, 820-821, where this is exactly what the Ninth Circuit Court of Appeal did; applying ***Jones***' "*property based analysis*" to using a key on a vehicle without probable cause for the purpose of determining whether defendant had control over that vehicle, thus reversing its own prior decision of ***United States v. $109,179 in United States Currency*** (2000) 228 F.3rd 1080, above.

However, in another post-***Jones*** case, the Eight Circuit Court of Appeal concluded that a police detective *did not* commit a trespass when he located a suspect's car in a parking lot by using the suspect's key fob to trigger the car's alarm. The court reasoned that the detective had lawfully seized the key fob and the "mere

transmission of electric signals alone" through the key fob was *not* a trespass on the car. (***United States v. Cowan*** (8th Cir. 2012) 674 F.3rd 947, 956.)

Problem: Street Light Cameras:

The City of San Diego has installed what the City refers to as its "City IQ Streetlight Camera" system. The cameras are situated so they cannot peer into businesses or residences, thus capturing only the "public right of way." They are fixed position and located throughout downtown San Diego and other parts of the city. The devices capture "environmental data, like temperature, humidity, pressure, … traffic data, like car speeds, car counts, pedestrian data, bicycle data, and even video data." The video feature creates high quality wide lens footage, but the devices do not record sound and do not act as gunshot detectors because the City did not "enable the microphones." Footage is stored on each camera's hard drive for five days; if it is not retrieved within five days, the camera records over the footage. Defendant Kevin Eugene Cartwright was convicted of first-degree murder with special circumstances, and other offense. On appeal, defendant contended that the trial court erred by denying his motion to suppress video footage from the City of San Diego's "City IQ" streetlight camera program and evidence derived from that footage. The Fourth Appellate District affirmed the trial court's decision. The court held that defendant did not have an objectively reasonable expectation of privacy when he traversed a public right of way in downtown San Diego in the middle of a business day. The court found that accessing the recordings from the City's streetlight cameras did not amount to a search within the meaning of the **Fourth Amendment** and, consequently, did not require a warrant. The court distinguished the cameras in this case from the aerial surveillance images and integrated police department systems addressed in other precedents, stating that the City's camera program stands alone and does not reveal the transit patterns of people throughout the county. The court concluded that the police did not conduct a "search" when they accessed footage from the City's streetlight cameras and, accordingly, there was no violation of the **Fourth Amendment**. (***People v. Cartwright*** (2024) 99 Cal.App.5th 98.)

Exceptions to the Exclusionary Rule:

Private persons:

Rule: A private person, not associated or working with law enforcement, may violate a subject's constitutional rights without threat of suppression in that the constitutional protections apply to *government searches* only. (***People v. Johnson*** (1947) 153 Cal.App.2nd 873.)

"Historically, courts have consistently held that the **Fourth Amendment's** prohibition against unreasonable search and seizure does not apply to searches by private citizens." (***People v. North*** (1981) 29 Cal.3rd 509, 514.) Additionally, if a government search is preceded by a private search, the government search does not implicate the **Fourth Amendment** as long as it does not exceed the scope of the initial private search. (***United States v. Jacobsen*** (1984) 466 U.S. 109, 115–117 [80 L.Ed.2nd 85; 104 S. Ct. 1652]; see also ***Walter v. United States*** (1980) 447 U.S. 649, 657 [65 L.Ed.2nd 410; 100 S.Ct. 2395]; and ***People v. Wilson*** (2020) 56 Cal.App.5th 128, 141-142.)

Examples:

A *licensed private investigator* who is acting in furtherance of a private interest, rather than for a law enforcement or government purpose, is *not* subject to the restrictions of the **Fourth Amendment**. (***People v. Mangiefico*** (1972) 25 Cal.App.3rd 1041, 1046-1047; ***People v. De Juan*** (1985) 171 Cal.App.3rd 1110, 1119.)

*Bail bondsperson*s and "*Bounty Hunters*," although allowed to take a defendant into custody (**P.C. §§ 847.5**, **1300**, **1301)**, they are acting as private citizens and are not subject to the Exclusionary Rule. (***People v. Houle*** (1970) 13 Cal.App.3rd 892, 895; ***Landry v. A-Able Bonding, Inc.*** (1996) 75 F.3rd 200, 203-205.)

Even an *off-duty police officer* "*may*" not be acting as a law enforcement officer in conducting a search, when he acts in his capacity as a private citizen, and through mere curiosity. (***People v. Wachter*** (1976) 58 Cal.App.3rd 311, 920-923; see also ***People v. Peterson*** (1972) 23 Cal.App.3rd 883, 893; off-duty police trainee acting out of concern for his own safety.)

Exception to Private Persons Exception: "*Agents of Law Enforcement*:"

"Private action may be attributed to the state . . . if 'there is such a "close nexus between the State and the challenged action" that seemingly private behavior "may be fairly treated as that of the State itself."' . . . Such a nexus may exist when, for instance, private action 'results from the

State's exercise of "coercive power,"' or 'when the State provides "significant encouragement, either overt or covert,"' to the private actor." (***George v. Edholm*** (9th Cir. 2014) 752 F.3rd 1206, 1215-1217; quoting ***Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n.*** (2001) 531 U.S. 288, 295-296 [148 L.Ed.2nd 807]; officers held responsible for E.R. doctor's warrantless removal of a bindle of cocaine from the plaintiff's rectum.)

Anyone acting at the request of, or under the direction of, a law enforcement officer, is an agent of the police and is held to the same standards as the police. (***People v. Fierro*** (1965) 236 Cal.App.2nd 344, 347.)

Seizure of blood by a state hospital, working with law enforcement (i.e., an "agent" of law enforcement), taking and testing blood from expectant mothers and testing for drugs, held to be an illegal governmental search. (***Ferguson v. City of Charleston*** (2001) 532 U.S. 67 [121 S.Ct. 1281; 149 L.Ed.2nd 205].)

In determining whether a person is acting as a police agent, two factors must be considered: (1) Whether the government knew of and acquiesced in the private search; and (2) whether the private individual intended to assist law enforcement or, instead, had some other independent motivation. The first factor requires evidence of more than mere knowledge and passive acquiescence by a police officer before finding an agency relationship. It takes some evidence of a police officer's control or encouragement. As for the second factor, a dual purpose (e.g., to help the police *and* himself) is not enough. (***People v. Wilkinson*** (2008) 163 Cal.App.4th 1554, 1564-1569; also rejecting California's pre-**Proposition 8** stricter standards.)

A civil rights action pursuant to **42 U.S.C. § 1983** was held to be proper against non-law enforcement employees of a private corporation that operated a federal prison under contract. (***Pollard v. GEO Group, Inc.*** (9th Cir. 2010) 607 F.3rd 583.)

An employee of the defendant who assisted the government by collecting fraudulent documents belonging to the defendant may have violated the **Fourth Amendment** as a government agent even though her motive may have been simply to "do the right thing." (***United States v.***

Mazzarella (9th Cir. 2015) 784 F.3rd 53; evidentiary hearing on the issue required.)

While acknowledging that **Title 18 U.S.C. § 2258A(a)** requires an electronic communication service provider (ESP) to report to the National Center for Missing and Exploited Children (NCMEC) any apparent violation of child pornography law it discovers, the Eighth Circuit Court of Appeals held that despite this reporting requirement, **Section 2258A** does not require ESP's to seek out and discover violations. Accordingly, the court held that Google did not act as an agent of the government simply because it chose to scan its users' emails voluntarily, out of its own private business interest of eradicating child pornography from its platform. Passing this information along to law enforcement held to be lawful. (***United States v. Ringland*** (8th Cir. 2020) 966 F.3rd 731.)

Federal law did not transform an electronic communication service providers' (ESPs; Yahoo and Facebook) private searches into governmental action because the **Stored Communications Act and the Protect Our Children Act of 2008** did not have the clear indices of the Government's encouragement, endorsement, and participation sufficient to implicate the **Fourth Amendment**. There was insufficient governmental involvement in the ESPs' private searches of defendant's accounts to trigger **Fourth Amendment** protection because there was no evidence law enforcement was involved in or participated in the investigations, and the ESPs investigated the accounts to further their own legitimate, independent motivations. Defendant did not have a legitimate expectation of privacy in the limited digital data sought in the government's subpoenas. They did not request any communication content from his accounts. (***United States v. Rosenow*** (2022) 33 F.4th 529.)

Fire Department Officials:

Fire department officials, while performing their duties in investigating the cause, or looking for the source, of a fire, are held to the same standards as law enforcment officials. (***Michigan v. Tyler*** (1978) 436 U.S. 499, 503 [98 S.Ct. 1942; 56 L.Ed.2nd 486]; "(A)ny entry onto fire-damaged private property *by fire or police officials* is subject to the

warrant requirements of the **Fourth** and **Fourteenth Amendments**." (Italics added.)

Although not raised as an issue in the case, it is noted that in ***People v. Nunes*** (2021) 64 Cal.App.5th 1, the Court applied that standard exclusionary rules to a search by a fire department caption.

The "*Good Faith*" *Exception*: In those cases where enforcing the "*Exclusionary Rule*" would not advance its remedial purposes, evidence seized unlawfully will not be suppressed. (***Illinois v. Krull*** (1987) 480 U.S. 340, 347 [94 L.Ed.2nd 364, 373]; ***United States v. Leon*** (1984) 468 U.S. 897, 920-921 [104 S.Ct. 3405; 82 L.Ed.2nd 677, 697]; ***Herring v. United States*** (2009) 555 U.S. 135 [129 S.Ct. 695; 172 L.Ed.2nd 496]; ***United States v. Needham*** (9th Cir. 2013) 718 F.3rd 1190; 1194; ***People v. Lazarus*** (2015) 238 Cal.App.4th 734, 766-767.)

"As with any remedial device, the (exclusionary) rule's application has been restricted to those instances where its remedial objectives are thought most efficaciously served." (***Arizona v. Evans*** (1995) 514 U.S. 1, 11 [131 L.Ed.2nd 34; 115 S. Ct. 1185].)

See ***People v. Lepere*** (2023) 91 Cal.App.5th 727, 735, where the Court notes that an officer's good faith reliance upon the validity of a search warrant will excuse a warrant that later shown to be thin in its probable cause.

Also see "*Good Faith*," below, and "*Mistaken Belief in Existence of Probable Cause to Arrest or Search, an Arrest Warrant, or that a* ***Fourth*** *Waiver Exists, Based upon Erroneous Information Received from Various Sources*," under "*Arrests*" (Chapter 5), above.

The Taint has been Attenuated: "(G)ranting establishment of the primary illegality," whether or not the resulting evidence is subject to suppression is a question of whether "the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." (***Wong Sun v. United States*** (1963) 371 U.S. 471, 487-488 [83 S.Ct. 407; 9 L.Ed.2nd 441, 455].)

Factors: In determining whether the "*primary taint*" (i.e., an illegal search, detention or arrest) has been sufficiently "*purged*" requires consideration of three factors:

- *The* "*Temporal Proximity*" between the illegal act and the resulting evidence.

"*Substantial time*" must have elapsed between an unlawful act and when the evidence is obtained. (***Kaupp v. Texas*** (2003) 538 U.S. 626, 633 [123 S.Ct. 1843; 155 L.Ed.2nd 814, 822].)

Less than two hours between an unconstitutional arrest and defendant's confession held not to be sufficient time to attenuate the taint. (***Brown v. Illinois*** (1975) 422 U.S. 590, 604 [95 S.Ct. 2254; 45 L.Ed.2nd 416].)

- The presence of any "*Intervening Circumstances*" (e.g., an outstanding arrest warrant; see ***Utah v. Strieff*** (2016) 579 U.S. 232, 238-242 [136 S.Ct. 2056, 2060-2064; 195 L.Ed.2nd 400].); *and*

- The "*Purpose and Flagrancy*" of the official misconduct.

"For the violation to be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure." (***Utah v. Strieff***, *supra*, at pp. 241-243.)

See, e.g., ***Kaupp v. Texas*** (2003) 538 U.S. 626, 633 [123 S.Ct. 1843; 155 L.Ed.2nd 814, 822]; finding flagrant violation where a warrantless arrest was made in the arrestee's home after police were denied a warrant and at least some officers knew they lacked probable cause: See also ***Taylor v. Alabama*** (1982) 457 U.S. 687, 690 [102 S.Ct. 2664; 73 L.Ed.2nd 314, 319]; ***United States v. Crawford*** (9th Cir. 2003) 323 F.3rd 700, 719-722; ***Brown v. Illinois*** (1975) 422 U.S. 590, 600-605 [95 S.Ct. 2254; 45 L.Ed.2nd 416, 425-428]; **Utah *v.* Strieff**, supra, **People v. Marquez** (2019) 31 Cal.App.5th 402, 412-413; ***United States v. Bocharnikov*** (9th Cir. 2020) 966 F.3rd 1000; and ***United States v. Garcia*** **(**9th Cir. 2020) 974 F.3rd 1071, 1076.)

Miranda: A ***Miranda*** admonishment and waiver, alone, is legally *insufficient* to attenuate the taint of an illegal arrest. (***Brown v. Illinois*** (1975) 422 U.S. 590, 600-605 [95 S.Ct. 2254; 45 L.Ed.2nd 416, 425-428]; ***Kaupp v. Texas*** (2003) 538 U.S. 626, 633 [123 S.Ct. 1843; 155 L.Ed.2nd 814, 822].)

*Outstanding Arrest Warrant or **Fourth** Waiver*:

> The fact that the defendant had an outstanding arrest warrant, depending upon the circumstances, may be sufficient of an intervening circumstance to allow for the admissibility of the evidence seized incident to arrest despite the fact that the original detention was illegal. (***People v. Brendlin*** (2008) 45 Cal.4th 262; an illegal traffic stop; ***Utah v. Strieff*** (2016) 579 U.S. 232, 238-242 [136 S.Ct. 2056; 195 L.Ed.2nd 400]; or a **Fourth** waiver; ***People v. Bower*** (1979) 24 Cal.3rd 638; no.), depending upon the circumstances.)
>
> Defendant, the passenger in a motor vehicle stopped for illegally tinted windows (**V.C. § 26708(a)**), was arrested on an outstanding arrest warrant. Even had the traffic stop had been illegal, the discovery of the arrest warrant was sufficient to attenuate any possible taint of an illegal traffic stop. **(*People v. Carter*** (2010) 182 Cal.App.4th 522, 529-530.)
>
> See ***People v. Durant*** (2012) 205 Cal.App.4th 57, finding that a suspect's **Fourth** waiver (subjecting him to warrantless search and seizures) attenuated the taint of an illegal traffic stop. But see ***People v. Bates*** (2013) 222 Cal.App.4th 60, 69-71, and ***People v. Kidd*** (2019) 36 Cal.App.5th 12, 23, both ruling to the contrary.
>
> > The ***Bates*** Court both declined to adopt the ***Durant*** Court's reasoning, and differentiated the cases on their respective facts. (***Ibid***.)

When the Purposes of the Exclusionary Rule are Not Served:

> The Exclusionary Rule is not intended to prevent all police misconduct or as a remedy for all police errors. "The use of the exclusionary rule is an exceptional remedy typically reserved for violations of constitutional rights." (***United States v. Smith*** (9th Cir. 1999) 196 F.3rd 1034, 1040.)
>
> "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." (***Herring v. United States*** (2009) 555 U.S. 135 [129 S.Ct. 695; 172 L.Ed.2nd 496]; see also ***People v. Leal*** (2009) 178 Cal.App.4th 1051, 1064-1065.)

> The exclusionary rule should only be used when necessary to deter "deliberate, reckless, or grossly negligent conduct, or in some circumstances, recurring or systematic negligence." (***Herring v. United States***, at p. 144.)

The seizure of defendant's vehicle based upon it having been reported, and in the computer system, as "stolen," even though the defendant's acquisition of the vehicle did not fit "neatly" into the elements of **V.C. § 10851** (i.e., the vehicle was purchased from a dealership, albeit with defendant providing the dealer with fraudulent information in his application for credit, after which defendant ceased making payments), did not make the seizure "*unreasonable*." There was no bad faith on the part of the detective who entered the vehicle into the computer system as stolen. The seizing officers were entitled to rely upon the information as contained in the computer system. (***United States v. Noster*** (9th Cir. 2009) 590 F.3rd 624, 629-633.)

But note that according to the Ninth Circuit Court of Appeal, a search incident to arrest that was lawful prior to the decision in ***Arizona v. Gant*** (2009) 556 U.S. 332 [173 L.Ed.2nd 485; 129 S.Ct. 1710], is still subject to the new rule in ***Gant***, applying the rule retroactively, in any case that was not yet final as of the date of the decision in ***Gant*** (April 21, 2009). The officer's good faith in applying the prior rule is irrelevant. (***United States v. Gonzalez*** (9th Cir. 2009) 578 F.3rd 1130.)

> ***Arizona v. Gant***, supra, held that once defendant is arrested and secured, a "search incident to arrest" of the subject's vehicle is not lawful unless there is some reason to believe that evidence relevant to the cause of arrest may be found. (See "*Searches of Vehicles*" (Chapter 12), below.)

"(E)ven when there is a **Fourth Amendment** violation, (the) exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits. In some cases, for example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression." (***Utah v. Strieff*** (2016) 579 U.S. 232, 235 [136 S.Ct. 2056; 195 L.Ed.2nd 400]; existence of an arrest warrant "attenuated the taint" between an unlawful detention and the discovery of evidence incident to the arrest on the warrant, at least where the police misconduct was not flagrant.

See "*The Exclusionary Rule; Overview*" under "*The Constitutional Basis For Searches and Seizures*" (Chapter 1), above.

The Minimal Intrusion Exception:

After stopping defendant's vehicle for speeding, an officer opened the car's door for the purpose of moving papers on the dash board that were covering the vehicle's VIN number. The U.S. Supreme Court held that this intrusion into the vehicle was in fact a **Fourth Amendment** search. However, taking into consideration that "the government interest in highway safety (is) served by obtaining the VIN," and that the VIN's location on the dashboard is "ordinarily in plain view of someone outside the automobile," the officer's intrusion involved in conducting such a search it was so "minimal" that it did not require the suppression of the resulting evidence. (***New York v. Class*** (1986) 475 U.S. 106 [106 S.Ct. 960; 89 L.Ed.2nd 81]; noting that had the VIN not been covered by papers, and in plain view from outside the car, there would not have been any legal justification for the intrusion of opening the door and looking inside; at p. 119.)

The United States Supreme Court has recognized that in those instances where there is a "*minimal intrusion*" into a defendant's privacy rights, suppression of the resulting evidence may not be required. "When faced with special law enforcement needs, diminished expectations of privacy, *minimal intrusions*, or the like, [it] has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." (Italics added; ***Illinois v. McArthur*** (2001) 531 U.S. 326, 330 [121 S.Ct. 946; 148 L.Ed.2nd 838].)

"(A)lthough a warrant may be an essential ingredient of reasonableness much of the time, for less intrusive searches it is not" (***United States v. Concepcion*** (7th Cir. 1991) 942 F.2nd 1170, 1172; the issue being whether turning a key in a door lock was a search, but such a minimal intrusion that a search warrant was not necessary.)

Without obtaining a warrant, the police searched the defendant's cellphone for its phone number. The police later used the number to subpoena the phone's call history from the telephone company. Even though there was no urgent need to search the cellphone for its phone number, the Seventh Circuit pointed out "that bit of information might be so trivial that its seizure would not infringe **the Fourth Amendment**." (***United States v. Flores-Lopez*** (7th Cir. 2012) 670 F.3rd 803, 806-807.)

California's First District Court of Appeal (Div. 5) has found this theory to be a whole separate exception to the search warrant requirement, calling it the "*Minimal Intrusion Exception*." (***People v. Robinson*** (2012) 208 Cal.App.4th 232, 246-255; "The minimal intrusion exception to the warrant requirement rests on the conclusion that in a very narrow class of 'searches' the privacy interests implicated are 'so small that the officers do not need probable cause; for the search to be reasonable.'" (***Id.***, at p. 247; the use of a key in a lock belonging to a defendant being the issue.)

> Noting that searches of the person, at least absent an officer-safety issue, and searches of a residence, may be outside the scope of the minimal intrusion theory. (***Id.***, at p. 249.)
>
> Also, the fact that the defendant's front door was within the curtilage of his home, which also enjoys **Fourth Amendment** protection, does not alter the result. With the front door being an area open to the general public, there was no violation in approaching the door and inserting the key. (***Id.***, at p. 253, fn. 23.)
>
> "Although the United States Supreme Court has not clearly articulated the parameters of the exception, federal authorities provide sufficient support for concluding that in appropriate circumstances, the minimal intrusion exception to the warrant requirement may be applied to uphold warrantless searches based on less than probable cause. Moreover, although the high court's decisions in the area have primarily been justified by officer safety concerns (Citations), nothing in the high court's jurisprudence appears to preclude the possibility that a justification less than officer safety could be sufficient to justify an intrusion as minimal as that involved in the present case." (***Id.***, at pp. 249-250; citing, in particular, the Seventh Circuit's decision in ***United States v. Concepcion*** (7th Cir. 1991) 942 F.2nd 1170, 1172.)

See also ***United States v. Thompson*** (7th Cir. 2016) 842 F.3rd 1002: While recognizing that placing a key found on the detained defendant into the lock of an apartment constituted a **Fourth Amendment** search, the Court held that because the privacy interest in the information held by the lock (*i.e.* verification of the key holder's address) is so small, officers did not need a warrant or probable cause to perform such a search.

The Ninth Circuit Court of Appeal had previously found that the warrantless use of a key to ascertain ownership or control over a motor vehicle was not unreasonable. "Fitting the key into the car door lock did not give police any knowledge about the contents inside the vehicle, but revealed only that (defendant) Maggio had access to that car. Given the strong governmental interests in investigating drug crimes, and Maggio's minimal privacy expectation in the lock on a car door, the police conduct here was reasonable under the circumstances. (Fn. omitted) Therefore, inserting the key into the car door lock for the purpose of identifying Maggio was not an unreasonable search prohibited by the **Fourth Amendment**. (fn. omitted)" (***United States v. $109,179 in United States Currency*** (2000) 228 F.3rd 1080, 1087-1088.)

However, since the Ninth Circuit's decision in ***United States v. $109,179 in United States Currency***, *supra*, the U.S. Supreme Court decided the case of ***United States v. Jones*** (2012) 565 U.S. 400 [132 S.Ct. 945; 181 L.Ed.2nd 911], where it was held that the **Fourth Amendment** protects not only against violations of one's right to privacy, but also against *trespassory searches*. In light of ***Jones***, the Ninth Circuit overruled its decision in ***$109,179 in United States Currency*** and held that using a key in the door lock of a vehicle without prior probable cause, for the purpose of determining whether defendant had control over that vehicle, was a "*trespassory search*," and a violation of the **Fourth Amendment**. (***United States v. Dixon*** (9th Cir. 2020) 984 F.3rd 814.)

But note that the seizure of the key, before using its electronics to beep defendant's nearby vehicle, may itself be illegal. (See ***United States v. Baker*** (9th Cir. 2023) 58 F.4th 1109.)

See "*Problem*: *Key in a Lock*," above.

Statutory-Only Violations:

Rule: Relevant evidence will not be suppressed unless suppression is required by the **Fourth Amendment** to the **United States Constitution**, *or* when *a statute* violated by law enforcement commands suppression by its terms. (**Cal. Const.**, **Art. 1**, **§ 28(d)** (subsequently redesignated as **section 28(f)(2)**); ***In re Lance W.*** (1985) 37 Cal.3rd 873, 886-887; ***People v. Tillery*** (1989) 211 Cal.App.3rd 1569, 1579; ***People v. Lepeibet*** (1992) 4 Cal.App.4th 1208, 1212-1213.)

E.g., see **P.C. § 632**, which makes it a felony for a person to eavesdrop on, and/or record, a "*confidential communication*," *and* that the result of any such eavesdropping will *not* be admissible in court. (**Subds. (a)** & **(d)**)

> However, see ***People v. Guzman*** (2019) 8 Cal.5th 673, where in a child sexual abuse case, the California Supreme Court held that the state constitutional right to truth in evidence under **Cal. Const.**, **art. I, § 28**, **subd. (f)(2)**, abrogated the prohibition in **Pen. Code, § 632(d)**, against the admission of secretly recorded conversations in criminal proceedings. The statute did not fit within any express exception and the right to privacy under **Cal. Const., art. I, § 1**, was not affected. The exclusionary remedy was not revived just because of reenactments and amendments to **§ 632(d)**. Such changes did not address the exclusionary remedy. Also, **Gov't. Code § 9605** (Effect of Amendment on Time of Enactment; Presumption that Statute Enacted Last Prevails) provides that reenactment under **Cal. Const., art. IV, § 9**, has no effect on the unchanged portions of an amended statute. Because the exclusionary provision remained abrogated in criminal proceedings, a surreptitious recording was properly admitted into evidence in defendant's trial for committing a lewd and lascivious act upon a child.
>
> In a disciplinary proceeding of two police officers, the admission of a recording from the digital in-car video system (DICVS) that captured the officers' act of failing to assist a commanding officer's response to a robbery in progress and playing a mobile phone game, "the Pokémon Go video game" was not precluded by **Pen. Code § 632**, as there was no evidence to show who activated the system and thus that a person intentionally recorded a confidential communication. (***Lozano v. City of Los Angeles*** (2022) 73 Cal.App.5th 711.)

E.g., see **Pen. Code § 1546.4(a)**, providing for the suppression of any evidence obtained in violation of the **Electronic Communications Privacy Act**, **Pen. Code §§ 1546 et seq.**

Note: Not all courts are in agreement that such a remedy is reserved exclusively for constitutional violations. (See discussion in ***United States v. Lombera-Camorlinga*** (9th Cir. 2000) 206 F.3rd 882, 886-887, and in the dissenting opinion, p. 893.)

Examples:

It is not unconstitutional to make a custodial arrest (i.e., transporting to jail or court) of a person arrested for a minor misdemeanor (***Atwater v. City of Lago Vista*** (2001) 532 U.S. 318 [121 S.Ct. 1536; 149 L.Ed.2nd 549].), or even for a fine-only, infraction. (***People v. McKay*** (2002) 27 Cal.4th 601, 607; see also ***United States v. McFadden*** (2nd Cir. 2001) 238 F.3rd 198, 204.)

California's statutory provisions require the release of misdemeanor arrestees in most circumstances. (E.g., see **Pen. Code §§ 853.5**, **853.6**, **Veh. Code §§ 40303**, **40500**) However, violation of these statutory requirements is not a constitutional violation and, therefore, *should not* result in suppression of any evidence recovered as a result of such an arrest. (***People v. McKay***, *supra*, at pp. 607-619, a violation of **Veh. Code § 21650.1** (riding a bicycle in the wrong direction); ***People v. Gomez*** (2004) 117 Cal.App.4th 531, 539, seat belt violation (**Veh. Code § 27315(d)(1)**), citing ***Atwater v. City of Lago Vista***, *supra*; ***People v. Bennett*** (2011) 197 Cal.App.4th 907, 918.)

See also ***Virginia v. Moore*** (2008) 553 U.S. 164 [128 S.Ct. 1598; 170 L.Ed.2nd 559], driving on a suspended license.

Custodial arrest for a misdemeanor that did not occur in the officer's presence, in violation of **Pen. Code § 836(a)(1)**. (***People v. Donaldson*** (1995) 36 Cal.App.4th 532, 539; ***People v. Trapane*** (1991) 1 Cal.App.4th Supp. 10, 12-14.)

A "*knock and notice*" violation:

Violating the terms of **Pen. Code §§ 844** and/or **1531** (California's statutory "knock and notice" requirements) does not necessarily also violate the **Fourth Amendment**. (***Wilson v. Arkansas*** (1995) 513 U.S. 927 [115 S.Ct. 1914; 131 L.Ed.2nd 976];

People v. Zabelle (1996) 50 Cal.App.4th 1282.) Whether or not it does depends upon the circumstances. (See "*Knock and Notice*," below.)

But even when such a violation is determined to have been done contrary to the dictates of the **Fourth Amendment**, the Exclusionary Rule has recently been held to be an inappropriate remedy, at least in most cases. (***Hudson v. Michigan*** (2006) 547 U.S. 586 [126 S.Ct. 2159; 165 L.Ed.2nd 56].)

> Per ***Hudson***, the suppression of evidence is only necessary where the interests protected by the constitutional guarantee that has been violated would be served by suppressing the evidence thus obtained. The interests protected by the knock and notice rules include human life, because "an unannounced entry may provoke violence in supposed self-defense by the surprised resident." Property rights are also protected by providing residents an opportunity to prevent a forcible entry. And, "privacy and dignity" are protected by giving the occupants an opportunity to collect themselves before answering the door. (***Ibid***.)
>
> The Court also ruled in ***Hudson*** that because civil suits are more readily available than in 1914 when the exclusionary rule was first announced, and because law enforcement officers, being better educated, trained and supervised, can be subjected to departmental discipline, suppressing the product of a knock and notice violation is no longer a necessary remedy. (***Ibid***.)

The rule as dictated by ***Hudson*** (a search warrant case) is applicable as well as in a warrantless, yet lawful, arrest case, pursuant to **P.C. § 844**. (***In re Frank S.*** (2006) 142 Cal.App.4th 145.)

However, ***Hudson*** is not to be interpreted to mean that the Exclusionary Rule is to be scraped. Intentionally unlawful law enforcement actions will

still be subject to the Exclusionary Rule where necessary to discourage future illegal police activities. (***People v. Rodriguez*** (2006) 143 Cal.App.4th 1137; case remanded for a determination whether police fabricated probable cause for a traffic stop, which led to the discovery of an outstanding arrest warrant, the search incident thereto resulting in recovery of controlled substances.)

But see ***United States v. Weaver*** (D.C. Cir. 2015) 808 F.3rd 26, where the D.C. Court of Appeal rejected the applicability of ***Hudson v. Michigan***, *supra*, in an arrest warrant service situation, and held that federal agents violated the knock-and-announce rule by failing to announce their purpose before entering defendant's apartment. By knocking but failing to announce their purpose, the agents gave defendant no opportunity to protect the privacy of his home. The exclusionary rule was the appropriate remedy for knock-and-announce violations in the execution of arrest warrants at a person's home.

See "*Knock and Notice*," under "*Searches with a Search Warrant*" (Chapter 10), below.

Violation of a *government agency regulation* (i.e., not a statute or a constitutional principle) also does not necessitate suppression of the resulting evidence. (***United States v. Ani*** (9th Cir. 1998) 138 F.3rd 390.)

Possible violation of an Indian Reservation statute or rule, not involving a constitutional principle, will not result in the suppression of any evidence. (***United States v. Becerra-Garcia*** (9th Cir. 2005) 397 F.3rd 1167, 1173.)

Mistakenly collecting blood samples for inclusion into California's DNA data base (See **P.C. § 296**), when the defendant did not actually have a qualifying prior conviction, is *not* a **Fourth Amendment** violation, but even if it were, it does not require the suppression of the mistakenly collected blood samples, nor is it grounds to suppress the resulting match of the defendant's DNA with that left at a crime scene. (***People v. Robinson*** (2010) 47 Cal.4th 1104, 1116-1129.)

Doctrine of Inevitable Discovery:

Rule: Evidence seized unlawfully will be held to be admissible in those instances where, but for the illegal search, there is a "*reasonable possibility*" that the evidence would have been lawfully found by other means. (***Murray v. United States*** (1988) 487 U.S. 533, 539 [108 S.Ct. 2529; 101 L.Ed.2nd 472]; ***Nix v. Williams*** (1984) 467 U.S. 432 [104 S.Ct. 2501; 81 L.Ed.2nd 377], violation of defendant's **Sixth Amendment** right to counsel; ***People v. Superior Court* [*Walker*]** (2006) 143 Cal.App.4th 1183, 1214-1217; ***People v. Redd*** (2010) 48 Cal.4th 691, 721.)

> "The inevitable discovery doctrine, recognized by the Supreme Court in ***Nix***, *supra*, 467 U.S. 431, is 'closely related' to the independent source doctrine. (***Id.***, at p. 443.) It is 'in reality an extrapolation from the independent source doctrine: Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.'" (***People v. Superior Court* [*Corbett*]** (2017) 8 Cal.App.5th 670, 682; quoting ***Murray v. United States***, *supra*.)
>
> The First Federal Circuit in ***United States v. Clark*** (1st Cir. ME 2018) 879 F.3rd 1, lists the requirements for the inevitable discovery doctrine to apply:
>
> > (1) The legal means by which the evidence would have been discovered was truly independent,
> >
> > (2) The use of the legal means would have inevitably led to the discovery of the evidence, and
> >
> > (3) Applying the inevitable discovery rule would not provide an incentive for police misconduct or significantly weaken constitutional protections.
>
> "The inevitable discovery doctrine acts as an exception to the exclusionary rule, and permits the admission of otherwise excluded evidence 'if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police.' (***Nix v. Williams*** (1984) 467 U.S. 431, 447 [81 L.Ed.2nd 377, 104 S.Ct. 2501], . . .) The purpose of the exception is 'to prevent the setting aside of

convictions that would have been obtained without police misconduct.' (***People v. Robles*** (2000) 23 Cal.4th 789, 800 . . . .) It is the prosecution's burden to 'establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means.' (***Nix***, at p. 444; see ***People v. Coffman and Marlow*** (2004) 34 Cal.4th 1, 62 . . . .) (***People v. Hughston*** (2008) 168 Cal.App.4th 1062, 1071–1072 . . . .)" (***People v. Shumake*** (2019) 45 Cal.App.5th Supp. 1.)

The prosecution has the burden of proving facts and circumstances justifying the inevitable discovery doctrine by a preponderance of the evidence. Failing to do so, the rule will not be used by a court to allow the admission of evidence otherwise discovered illegally. (***People v. Evans*** (2011) 200 Cal.App.4th 735, 755-756; ***People v. Superior Court* [*Chapman*]** (2012) 204 Cal.App.4th 1004, 1021-1022; ***United States v. Camou***, *supra*.; ***People v. Cervantes*** (2017) 11 Cal.App.5th 860, 872; (***United States v. Ngumezi*** (9th Cir. 2020) 980 F.3rd 1285, 1291.)

Case Law:

"'The purpose of the inevitable discovery rule is to prevent the setting aside of convictions that would have been obtained without police misconduct.' (Citation.) 'Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place. However, if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a worse position than it would have occupied without any police misconduct." (***People v. Cervantes*** (2017) 11 Cal.App.5th 860, 872; quoting ***Nix v. Williams***, *supra*, at p. 447.)

Stopped and physically arrested for driving on a suspended license (with a prior conviction for the same), defendant was secured in the back seat of a patrol car. The subsequent search of his vehicle, resulting in the recovery

of cocaine and an illegal firearm (defendant being a convicted felon) was found to be in violation of the rule of ***Arizona v. Gant*** (2009) 556 U.S. 332 [129 S.Ct. 1710; 173 L.Ed.2nd 485], where it was held that once defendant is arrested and secured, a "search incident to arrest" of the subject's vehicle is not lawful unless there is some reason to believe that evidence relevant to the cause of arrest may be found. (See "*Searches of Vehicles*" (Chapter 12), below.) However, the evidence was held to be admissible anyway under the "*inevitable discovery rule*" in that the vehicle was to be impounded and subjected to an inventory search. (***United States v. Ruckes*** (9th Cir. 2009) 586 F.3rd 713, 716-719.)

Evidence lying under the deceased would have inevitably been found and given to the police when the Coroner's investigator took charge of the body and moved it. (***People v. Superior Court* [*Chapman*]** (2012) 204 Cal.App.4th 1004, 1021-1022; The Coroner may deliver any property or evidence related to the investigation or prosecution of a crime to the law enforcement agency or district attorney. (**Gov't. Code § 27491.3(b)**)

Upon discovering that defendant's passenger was on probation with **Fourth** waiver search and seizure conditions, the Court declined to rule on whether a police officer could legally search two bags on the back seat under the theory of ***People v. Schmitz*** (2012) 55 Cal.4th 909, holding instead that methamphetamine later found in the center console of defendant's car was clearly lawful under ***Schmitz***, and had the officer searched there first, the drugs in the backseat bags would have inevitably been found anyway. (***People v. Cervantes*** (2017) 11 Cal.App.5th 860, 871-874.)

> See "*Containers in the Vehicle*," under "*Searches of Vehicles*" (Chapter 12), below.

The 2006 collection of defendant's DNA sample was unlawful under the **Fourth Amendment** because the prosecution failed to prove that defendant was validly arrested or that his DNA was collected as part of a routine booking procedure. However, the trial court properly admitted the DNA evidence lawfully collected from defendant in 2008 because it was sufficiently attenuated from the unlawful 2006 collection of defendant's DNA

sample, given that there was a substantial time break, as well as intervening circumstances and a lack of evidence concerning flagrant official misconduct. (***People v. Marquez*** (2019) 31 Cal.App.5th 402, 408-414.)

Conceding that a warrantless search of defendant's cellphone incident to his arrest, recovering only his cellphone number, was illegal under ***Riley v. California*** (2014) 573 U.S. 373, 403 [134 S.Ct. 2473 189 L.Ed.2nd 430, 452], but where the same number had also been lawfully recovered from his wife's (the murder victim) phone and from several other sources, it was held that the "inevitable discovery" rule applied. (***People v. Fayed*** (2020) 9 Cal.5th 147, 182-184.)

Officers lawfully found a firearm in the defendant's vehicle during a lawful detention for possible DUI. The Court held that even if it was not discovered that defendant was a felon during a criminal history check until they would have released him (and thus in illegal possession of the firearm), the officers discovered this fact within two minutes of having had to release him and could have easily stopped him again and arrested him. (***United States v. Hylton*** (9th Cir. Apr. 5, 2022) 30 F.4th 842, 848.)

Exceptions:

The inevitable discovery doctrine *does not* apply, however, where the officers had probable cause and *could* have gotten a search or arrest warrant. (***Hudson v. Michigan*** (2006) 547 U.S. 586 [126 S.Ct. 2159; 165 L.Ed.2nd 56]; ***People v. Robles*** (2000) 23 Cal.4th 789; ***People v. Superior Court* [*Walker*]**, *supra*, at p. 1215; ***United States v. Camou*** (9th Cir. 2014) 773 F.3rd 932, 943-944; ***United States v. Lundin*** (9th Cir. 2016) 817 F.3rd 1151; ***United States v. Mejia*** (9th Cir. 1995) 69 F.3rd 309, 320; ***United States v. Echegoyen*** (9th Cir. 1986) 799 F.2nd 1271, 1280, fn. 7; ***People v. Superior Court* [*Corbett*]** (2017) 8 Cal.App.5th 670, 681-688.)

This is because "[i]f evidence were admitted notwithstanding the officers' unexcused failure to obtain a warrant, simply because probable cause existed, then there would never be *any* reason for officers to seek a warrant." (***United States v. Lundin*** (9th Cir. 2016) 817 F.3rd 1151, 1161-1162;

quoting ***United States v. Mejia*** (9th Cir. 1995) 69 F.3rd 309, 320.)

A court cannot base an "*inevitable discovery*" conclusion on a speculative inference. Where an inventory search of a vehicle was the issue, and where there was no evidence that the arresting officers actually intended to impound the defendant's vehicle or that it was actually impounded (i.e., speculative inference on top of a speculative inference), it was held that discovery of an illegal baton in the defendant's car could not be based upon an inevitable discovery theory; i.e., that had the vehicle been impounded, the baton would have been lawfully discovered. (***People v. Wallace*** (2017) 15 Cal.App.5th 82, 93-94.)

The inevitable discovery doctrine was held to be inapplicable where there was no evidence that the defendant's vehicle was going to be subjected to an inventory search beyond that which was already done, and where the tow yard employees testified to inventorying items in plain sight only. (***People v. Evans*** (2011) 200 Cal.App.4th 735, 755-756; cocaine hidden in the vehicle's air vents.)

The fact that a search warrant *could have* been obtained before illegally searching defendant's home, and was in fact obtained prior to a second search, does not excuse the earlier illegal warrantless search of his residence. (***People v. Superior Court* [*Corbett*]** (2017) 8 Cal.App.5th 670, 681-685.)

Law enforcement searched defendant-appellant Tyrell Braxton's backpack after arresting him and found a gun. Braxton moved to suppress the gun. The government conceded that the warrantless search was not a valid search incident to arrest, but invoked the inevitable-discovery doctrine to avoid suppression of the illegally obtained evidence. The district court agreed with the government and denied the motion to suppress. Reversing the district court, the Tenth Circuit determined the government's stated community-caretaking interest in safeguarding Braxton's personal property by impounding it was significantly undercut by the presence of an individual who arrived on the scene at Braxton's request and repeatedly asked to take possession of the backpack throughout the arrest process. "The government's explanation for why the officers could

have properly refused this individual's requests is not persuasive. Nor is it dispositive, on these facts, that Braxton himself did not ask the officers to turn the backpack over." Thus, the Court ruled the government failed to meet its burden to show that law enforcement would have validly retained the backpack, and the inevitable-discovery doctrine did not apply to excuse application of the exclusionary rule to suppress evidence discovered during the illegal search. Accordingly, the district court's order refusing to suppress the gun was reversed and the case remanded for further proceedings. (***United States v. Braxton*** (10th Cir. 2023) 61 F.4th 830.)

Searches Based Upon Existing Precedent; *The "Faith In Case Law" or* "*Statute*" *Exception*:

Searches conducted in objectively reasonable reliance on binding appellate precedent in effect at the time of the search, despite a later decision changing the rules, are not subject to the Exclusionary Rule. **(*Davis v. United States*** (2011) 564 U.S. 229, 236-239 [131 S.Ct. 2419; 180 L.Ed.2nd 285.)

See ***United States v. Sparks*** (1st Cir. 2013) 711 F.3rd 58; holding that the use of a GPS prior to the U.S. Supreme Court's decision in ***United States v. Jones*** (2012) 565 U.S. 400 [132 S.Ct. 945; 181 L.Ed.2nd 911], even if done in violation of the **Fourth Amendment**, does not require the suppression of the resulting evidence due to the officer's good faith reliance in earlier binding precedence.

Also, whether or not the theory of ***Florida v. Jardines*** (2013) 569 U.S. 1 [133 S.Ct. 1409; 185 L.Ed.2nd 495], involving the illegality of using drug-sniffing dogs within the curtilage of a person's home, is applicable to a drug-sniffing dog used around the outside, and leaning up against, the open bed and tool box in a suspect's truck (which would overrule prior case law), was left open by the Ninth Circuit Court of Appeal, holding that the pursuant to the "*faith-in-case law*" rule of ***Davis v. United States*** (2011) 564 U.S. 229, 236-239 [131 S.Ct. 2419; 180 L.Ed.2nd 285], it was unnecessary to decide the issue. (***United States v. Thomas*** (9th Cir. 2013) 726 F.3rd 1086, 1092-1095.)

As a result, a search of a defendant's vehicle following his custodial arrest, done in violation of ***Arizona v. Gant*** (2009) 556 U.S. 332 [129 S.Ct. 1710; 173 L.Ed.2nd 485], did not require the suppression of two firearms found in the car in that this search

occurred prior to the ***Gant*** decision. (***United States v. Tschacher*** (9th Cir. 2012) 687 F.3rd 923, 932-933.)

When reconsidered in light of ***United States v. Jones*** (2012) 565 U.S. 400 [132 S.Ct. 945; 181 L.Ed.2nd 911] (the GPS case), the 9th Circuit reversed itself in ***United States v. Pineda-Moreno*** (9th Cir. 2012) 688 F.3rd 1087, finding it to be a **Fourth Amendment** violation to attach a GPS tracking device, without a warrant, to the undercarriage of defendant's car while located in his own driveway. The Court, however, affirmed defendant's conviction. While noting that under ***Jones***, the attaching of a GPS onto defendant's vehicle while in parked within the curtilage of his residence was indeed illegal, the officers, in good faith, were merely following existing precedent. As such, defendant was not entitled to the suppression of the resulting evidence per the U.S. Supreme Court's rule that the Exclusionary Rule does not apply under such circumstances. (Citing ***Davis v. United States***, *supra*. See also **United States *v. Brooks*** (9th Cir. 2014) 772 F.3rd 1161, 1173.)

Because California case law allowed for the warrantless placement of a GPS device by law enforcement at the time such a device was placed on the co-defendant's car in this case (i.e., 2007), the fact that the United States Supreme Court has since held that such conduct required a warrant did not dictate exclusion of the tracking device evidence. (***People v. Mackey*** (2015) 233 Cal.App.4th 32, 93-97.)

Good faith reliance upon the validity of the implied consent provisions of **Veh Code § 23612(a)(5)**, for an unconscious or deceased DUI suspect to provide a blood sample, makes admissible defendant's blood/alcohol test results in this case although a search warrant should have been obtained under the **Fourth Amendment**. (***People v. Arredondo*** (2016) 245 Cal.App.4th 186, 206-210.)

> Note: Petition for Review was dismissed and the case remanded in light of the decision in ***Mitchell v. Wisconsin*** (June 27, 2019) __ U.S.__, __ [139 S.Ct. 2525; 204 L.Ed.2nd 1040], where the U.S. Supreme Court held that when a DUI arrestee is unconscious, this fact alone will "almost always" constitute an exigency, allowing for a warrantless blood draw.

The legality of obtaining of defendant's resulting "CSLI" (cell site location information) via a court order, pursuant to the "**Stored**

Communications Act" (**18 U.S.C. § 2703(d)**), instead of a search warrant (now required pursuant to ***Carpenter v. United States*** (June 22, 2018) 585 U.S. __, __ [138 S.Ct. 2206; 201 L.Ed.2nd 507], was not decided, upholding the use of the court order instead of a search warrant under the good faith exception, relying on prior authority for using a federal court order only. (***United States v. Korte*** (9th Cir. 2019) 918 F.3rd 750. 757-759.)

An injured person may be searched without a warrant or probable cause. It is reasonable for a police officer to attempt to identify an injured person. In fact, he has a duty to do so. Anything the officer sees in the process is admissible in court. (***People v. Gonzales*** (1960) 182 Cal.App.2nd 276.)

Evidence of identity, such as defendant's person itself, is not subject to suppression, "regardless of the nature of the violation leading to his identity." (***United States v. Gudino*** (9th Cir. 2004) 376 F.3rd 997.)

For purposes of this rule, it makes no difference that the illegal arrest, search or interrogation was "*egregious*" in nature; e.g., the result of "*racial profiling*." (***United States v. Gudino***, *supra*.)

See also ***United States v. Garcia-Beltran*** (9th Cir. 2004) 389 F.3rd 864; fingerprints used for identity purposes only are not subject to suppression for a **Fourth Amendment** violation (i.e., illegal arrest here). Case remanded, however, for a determination whether defendant's fingerprints were seized for "*investigatory purposes*" as opposed to establish identity, in which case they *are* subject to suppression.

It is a rule of law that neither a person's *body* nor his or her *identity* is subject to suppression, "even if it is conceded that an unlawful arrest, search, or interrogation occurred." (***Immigration and Naturalization Service v. Lopez-Mendoza*** (1984) 468 U.S. 1032, 1039-1040 [104 S.Ct. 3479; 82 L.Ed.2nd 778].)

Impeachment Evidence:

Evidence illegally seized may be introduced for the *purpose of impeaching* the defendant's testimony given in both direct examination (***Walder v. United States*** (1954) 347 U.S 62 [74 S.Ct. 354; 98 L.Ed. 503].) and cross-examination, so long as the cross-examination questions are otherwise proper. (***United States v. Havens*** (1980) 446 U.S. 620 [100 S.Ct. 1912; 64 L.Ed.2nd 559].)

California authority prior to passage of **Proposition 8** (The "*Truth in Evidence Initiative*"), to the effect that evidence suppressed

pursuant to a motion brought under authority of **P.C. § 1538.5** is suppressed for all purposes (i.e., ***People v. Belleci*** (1979) 24 Cal.3rd 879, 887-888.), was abrogated by **Proposition 8**. Now, it is clear that suppressed evidence may be used for purposes of impeachment should the defendant testify and lie. (***People v. Moore*** (1988) 201 Cal.App.3rd 877, 883-886.)

Also, suppressed evidence pursuant to **P.C. § 1538.5(d)** is admissible at the defendant's probation revocation hearing unless the officer's actions were egregious. "(T)he exclusionary rule does not apply in probation revocation hearings, unless the police conduct at issue shocks the conscience." (Citations omitted; ***People v. Lazlo*** (2012) 206 Cal.App.4th 1063, 1068-1072.)

Asset Forfeiture Proceedings:

Evidence seized illegally may still be subject to asset forfeiture proceedings so long as there is admissible probable cause supporting the conclusion that the evidence is the product of the defendant's illegal activity. (***United States v. $186,416.00 in U.S. Currency*** (9th Cir. 2010) 590 F.3rd 942, 948-949.)

But see ***United States v. Gorman*** (9th Cir. 2017) 859 F.3rd 706, 714; as amended at 2017 U.S. App. LEXIS 18610, where the Court, without discussing the issue, assumed that cash discovered in violation of the **Fourth Amendment** was not subject to asset forfeiture.

Parole and Probation Revocation Hearings:

Parole Hearings: Evidence recovered in an illegal parole search *is* admissible in a parole revocation proceeding, held pursuant to the relatively informal procedures used pursuant to ***Morrissey v. Brewer*** (1972) 408 U.S. 471 [92 S.Ct. 2593; 33 L.Ed.2nd 484]. (***Pennsylvania Board of Probation and Parole v. Scott*** (1998) 524 U.S. 357 [118 S.Ct. 2014; 141 L.Ed.2nd 344].)

The need to use illegally seized evidence, from both **Fourth** and **Fifth Amendment** violations, in parole revocation hearings, outweighs the policy considerations underlying the Exclusionary Rule (i.e., deterring illegal police conduct.), and therefore is admissible in such circumstances. (***In re Martinez*** (1970) 1 Cal.3rd 641, 648-650.)

Also, while "(**Gov't. Code § 71622.5**) authorizes (court) commissioners to conduct parole revocation hearings as a necessary part of the implementation of the **Criminal Justice Realignment Act of 2011**. However, **article VI, sections 21** and **22** of the **California Constitution** limit commissioners to the performance of 'subordinate judicial duties' in the absence of a stipulation by the parties," but "revoking parole and committing a defendant to jail for violation of parole are not subordinate judicial duties that may be performed by a commissioner in the absence of a stipulation by the parties." (***People v. Berch*** (2018) 29 Cal.App.5th 966.)

Probation Hearings:

The same theory used in ***Martinez*** has been used to allow the admission of illegally seized evidence in probation revocation hearings. (***People v. Hayko*** (1970) 7 Cal.App.3rd 604.)

In ***People v. Vickers*** (1972) 8 Cal.3rd 451, 461, the ***Morrissey*** due process protections were extended to probation revocations.

Defendant, under **PRCS** ("**Post-Release Community Supervision Act of 2011**") supervision, claimed that her due process rights were violated because she was not arraigned within 10 days of her arrest and provided a ***Morrissey***-compliant probable cause hearing. The court of appeal disagreed and affirmed: "The trial court correctly ruled that the procedural differences between parole revocation and revocation of **PRCS** do not violate [defendant's] due process rights" and "[t]he requirement for a formal arraignment in the superior court within 10 days of arrest, as discussed in ***Williams*** (***v. Superior Court*** (2014) 230 Cal.App.4th 636), does not apply to **PRCS** revocations." (***People v. Byron*** (2016) 246 Cal.App.4th 1009, 1013-1018.)

Incarcerated parolees facing revocation under **P.C. § 1203.2** are entitled to a timely preliminary hearing. (***People v. DeLeon*** (2017) 2017 Cal. LEXIS 5853; appeal ordered dismissed as moot in that defendant had completed his parole.)

Per ***Williams v. Superior Court*** (2014) 230 Cal.App.4th 636, a parolee is entitled to arraignment within 10 days of an arrest for a parole violation, a probable cause hearing within 15 days of the arrest, and a final hearing within 45 days of the arrest. A parolee must be brought before the court for arraignment no later than the Board of Parole Hearings is currently authorized by statute to hold the parolee without court intervention.

Defendant on **PRCS** supervision cannot be held responsible for not reporting his residence when he was homeless both before and after being paroled in that the **PRCS** statutes don't defined what constitutes a residence. (***People v. Gonzalez*** (2017) 7 Cal.App.5th 370, 381-383.)

The Court rejected defendant's argument that excess custody credits reduce or shorten his **PRCS** supervision period. Defendant's argument was that the **PRCS** statute collectively shortens the **PRCS** supervision period with each flash incarceration or jail sanction. The Court held that such an argument subverts the entire concept of **PRCS** supervision. In defendant's case. he was in need of supervision, guidance, and help in that he had a long history of mental illness, substance abuse, and criminal behavior. (***People v. Shelp*** (2020) 57 Cal.App.5th 644.)

The Appellate Court exercised its discretion to resolve defendant's appeal even though it was moot because conduct credits and how they affect the three-year post release community supervision (**PRCS**) supervision period is an issue that is likely to recur and is of continuing public interest.

***Undercover Operations*:**

Rule: "'The **(F)ourth (A)mendment** does not afford protection to wrongdoers' misplaced confidences' in undercover agents." (***United States v. Ramirez*** (9th Cir. 2020) 976 F.3rd 946, 953, quoting ***United States v. Little*** (9th Cir. 1984) 753 F.2nd 1420, 1435.)

The Court in ***Ramirez*** also cited ***Sorrells v. United States*** (1932) 287 U.S. 435, 441 [53 S.Ct. 210; 77 L.Ed. 413], where no **Fourth Amendment** violation was found by an undercover agent posing as a tourist to ferret out a violation of the prohibition laws; ***Lewis v. United States*** (1966) 385 U.S. 206, 209 [87 S.Ct. 424; 17 L.Ed.2nd 312], finding no **Fourth**

Amendment violation where defendant invited an undercover agent into his home to buy narcotics; and ***United States v. Garcia*** (9th Cir. 1993) 997 F.2nd 1273, 1280, finding no **Fourth** Amendment violation when police officers posed as apartment hunters and, while speaking with occupants of an apartment, saw defendant in plain sight, holding cocaine through screen door.

The **Fourth Amendment's** protections do not extend to information that a person voluntarily exposes to a government agent, including an undercover agent. A defendant generally has no privacy interest in that which he voluntarily reveals to a government agent. Therefore, a government agent may make a secret audio-video recording of a suspect's statements even in the suspect's own home, and those audio-video recordings, made with the consent of the government agent, do not require a warrant. (***United States v. Wahchumwah*** (9th Cir. 2013) 710 F.3rd 862, 866-868; an investigation involving the illegal sale of eagle feathers under the **Bald and Golden Eagle Protection Act** (**16 U.S.C § 668(a)** and the **Lacey Act** (**16 U.S.C. §§ 2271(a)(1)** & **3373(d)(1)(B)**.)

> The Court further noted in ***Wahchumwah*** that the fact that the technology used is not generally available to the public, and is more intrusive than mere audio surveillance, is irrelevant to the **Fourth Amendment** analysis. (***Id***., at p. 868.)

Undercover Residential Entries: Consent obtained by officers working undercover, for the purpose of continuing an investigation, is valid. It is the "*intrusion into*," not the arrest while inside, which offends the constitutional standards under ***Ramey***. Arresting the defendant after having gained lawful entry is not a ***Ramey*** violation. (***People v. Evans*** (1980) 108 Cal.App.3rd 193, 196.)

> "The **Fourth Amendment** does not protect 'a wrongdoer's misplaced belief that a person whom he voluntarily confides his wrongdoing will not reveal it.'" (***Toubus v. Superior Court*** (1981) 114 Cal.App.3rd 378, 383.)
>
> And just because the undercover officer has momentarily left the residence, such action followed immediately by the reentry of the arresting officers, does not violate ***Ramey*** or ***Payton***. (***People v. Cespedes*** (1987) 191 Cal.App.3rd 768.)
>
> But the reentry must be simultaneous with, or immediately after, the undercover officer's exit. (***People v. Ellers*** (1980) 108 Cal.App.3rd 943; arrest unlawful when after the "*buy*," during an undercover narcotics investigation, the police drove to a parking lot one mile away, spent ten to twenty minutes formulating a plan to arrest the defendant, and then returned and reentered the house to make the arrest.)

It is not illegal to use an undercover agent during a criminal investigation who makes entry upon the occupant's invitation, despite the lack of probable cause. Such a situation does not involve a need to avoid a violent confrontation. (***Hoffa v. United States*** (1966) 385 U.S. 293 [87 S.Ct. 408; 17 L.Ed.2nd 374].)

In the situation where an undercover police officer, or even a paid informant, has already been invited into a criminal suspect's home where, through observations while there, probable cause is established resulting in the undercover officer or informant signaling other officers, the backup officers may then lawfully make a warrantless entry. (***United States v Bramble*** (9th Cir. 1966) 103 F.3rd 1475, 1478-1479; ***United States v. Yoon*** (6th Cir. 2005) 398 F.3rd 802.)

> "Once consent has been obtained from one with authority to give it, any expectation of privacy has been lost. We seriously doubt that the entry of additional officers would further diminish the consenter's expectation of privacy, and, in the instant case, any remaining expectation of privacy was outweighed by the legitimate concern for the safety of [the officers inside]. (Citations omitted.)" **(*United States v Bramble*, *supra*,** at p. 1478.)

Additional Case Law:

"The use of undercover officers is essential to the enforcement of vice laws. (Citation) An undercover officer does not violate the **Fourth Amendment** merely by accepting an offer to do business that is freely made to the public. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant." (***Maryland v. Macon*** (1985) 472 U.S. 463, 470-471 [105 S.Ct. 2778; l86 L.Ed.2nd 370].)

> *However*, the warrantless installation of a hidden video camera in a suspect's home, leaving it operating after the informant leaves the premises, is a **Fourth Amendment** violation. (***United States v. Nerber*** (9th Cir. 2000) 222 F.3rd 597, 604, fn. 5; ***United States v. Wahchumwah*** (9th Cir. 2013) 710 F.3rd 862, 867.)

An undercover narcotics agent, misrepresenting his identity by claiming to be a potential buyer of narcotics, acts lawfully when invited into the defendant's home for the purpose of purchasing narcotics despite the lack of a warrant. (***Lewis v. United States*** (1966) 385 U.S. 206, 208-209 [87 S.Ct. 424; 17 L.Ed.2nd 312].)

No **Fourth Amendment** violation was found where FBI agents persuaded the subject of a valid arrest warrant to open her hotel door by claiming to be the hotel's assistant manager and falsely stating that her boyfriend was sick and in need of assistance. The FBI had full authority to arrest the defendant pursuant to their valid arrest warrant before they implemented their ruse even though the agents' ruse concealed their identities as law enforcement. (***United States v. Michaud*** (9th Cir. 2001) 268 F.3rd 728, 733.)

The Supreme Court found no **Fourth Amendment** violation where law enforcement entered property covertly and installed electronic bugging devices to effect a valid search warrant. The Supreme Court reasoned that the electronic surveillance itself was authorized by the search warrant, and there was a need for covert entry' i.e., it was the "safest and most successful method" of conducting the authorized surveillance. (***Dalia v. United States*** (1979) 441 U.S. 238, 248, & fn. 8 [99 S.Ct. 1682; 60 L.Ed.2nd 177].)

A suspect who posts information on social media does not have a reasonable expectation of privacy in the contents of what is posted, even when the defendant limits access to the posting to his "friends," and where one such "friend" who monitors the defendant's account is an undercover police officer, and thus a "false friend." Defendant risks the possibility that one such "friend" may relay such information to law enforcement or be an undercover police officer. (***People v. Pride*** (2019) 31 Cal.App.5th 133, 141; noting also that **P.C. § 1546.1(c)(4)** of ***The California Electronic Communications Privacy Act*** states that a government entity may access electronic device information by communicating with the device with "the specific consent of the authorized possessor of the device.")

Standing:

Defined: The legal right of an individual to contest the illegality of a search and seizure. Only the person *whose rights are being violated* has "*standing*" to challenge an alleged governmental constitutional violation. (***Rakas v. Illinois*** (1978) 439 U.S. 128, 138-139 [99 S.Ct. 421; 58 L.Ed.2nd 387, 397-398]; ***Minnesota v. Carter*** (1998) 525 U.S. 83 [119 S.Ct. 469; 142 L.Ed.2nd 373]; ***People v. Casares*** (2016) 62 Cal.4th 808, 835.)

"**Fourth Amendment** rights are personal rights that 'may not be vicariously asserted.' ***Alderman v. United States***, 394 U.S. 165, 174, 89 S. Ct. 961, 22 L. Ed. 2nd 176 (1969). To establish standing to challenge governmental intrusions under the **Fourth Amendment**, an individual must demonstrate their reasonable expectation of privacy in a place searched, or meaningful interference with their possessory interest in

property seized." (***United States v. Baker*** (9th Cir. 2023) 58 F.4th 1109, 1116.)

"'[A] criminal defendant may invoke the protections of the **Fourth Amendment** only if he can show that he had a *legitimate* expectation of privacy in the place searched or the item seized.' ***United States v. Ziegler***, 474 F.3rd 1184, 1189 (9th Cir. 2007). 'This expectation is established where the claimant can show: (1) a subjective expectation of privacy; and (2) an objectively reasonable expectation of privacy.' ***Id.*** 'An expectation of privacy is legitimate if it is one which society accepts as objectively reasonable.' ***United States v. Thomas***, 447 F.3rd 1191, 1196 (9th Cir. 2006)." (***United States v. Motley*** (9th Cir. 2023) 89 F.4th 777, 784; the court holding that the defendant did not have a reasonable expectation of privacy (or at least that such an expectation of privacy was not "objectively reasonable) in opioid prescription records in the PMP database ("PMP" refers to Nevada's electronic database that tracks filled prescriptions for controlled substances. **Nev. Rev. Stat. § 453.162 (2023)**.), and that law enforcement could use this database in its warrant affidavit for a tracking warrant. See below.)

> Whether or not a person has "*standing*" to challenge the legality of a search or seizure is a mixed question of fact (i.e., determining the circumstances) and law (i.e., determining whether the facts justify a finding that the defendant has a legitimate expectation of privacy under the law). (***United States v. Singleton*** (9th Cir. 1993) 987 F.2nd 1444, 1447; ***United States v. $40,955 in United States Currency*** (9th Cir. 2009) 554 F.3rd 752, 755-756.)
>
> One must have a legitimate possessory interest in the property seized, or a legitimate privacy interest in the area searched, or a personal liberty interest that was infringed. (See ***People v. Roybal*** (1998) 19 Cal.4th 481, 507-508.)
>
> Claiming ownership of the property being seized does not establish that the defendant had a reasonable expectation of privacy in that property. The "*possessory interest*" must be a "*legitimate*" one; i.e., excluding contraband and other items not lawfully in the subject's possession. (See ***Rawlings v. Kentucky*** (1980) 448 U.S. 98, 105-106 [100 S.Ct. 2556; 65 L.Ed.2nd 633]; ***United States v. Pulliam*** (9th Cir. 2005) 405 F.3rd 782, 786; see also ***United States v. $40,955 in United States Currency***, *supra*., at p. 756.)
>
> See also ***People v. Warren*** (1990) 219 Cal.App.3d 619, 624: "(N)o privacy right guaranteed by the **Fourth Amendment** is infringed by the search and seizure of a known illicit substance." E.g.: While the search of a thing or place over which a defendant has a legitimate expectation of privacy is subject to being tested, the searching of an illegal item (e.g.,

contraband) itself does not provide the defendant with the right to raise the search issue.

Defendant must show that he personally had a "*property interest*" that is protected by the **Fourth Amendment** and that was interfered with, and a "reasonable expectation of privacy" that was invaded by the search. (***United States v. Lopez-Cruz*** (9th Cir. 2013) 730 F.3rd 803, 807.)

Standing in Civil Cases: Showing "*standing*" in a civil case (i.e., showing that the plaintiff has the right to bring a civil suit in the first place) is a different concept altogether.

"'To establish (**U.S. Constitution**) **Article III** (prospective) standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.' ***Clapper v. Amnesty Int'l USA***, 568 U.S. 398, 133 S.Ct. 1138, 1147, 185 L.Ed.2nd 264 (2013) (citation omitted). 'Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for **Article III** purposes — that the injury is certainly impending.' ***Id***. (citation omitted). A plaintiff need not, however, await an arrest or prosecution to have standing to challenge the constitutionality of a criminal statute. 'When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.' ***Babbitt v. United Farm Workers Nat'l Union***, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2nd 895 (1979) (citation and internal quotation marks omitted). To defeat a motion for summary judgment premised on an alleged lack of standing, plaintiffs 'need not establish that they in fact have standing, but only that there is a genuine question of material fact as to the standing elements.' ***Cent. Delta Water Agency v. United States***, 306 F.3rd 938, 947 (9th Cir. 2002)." (***Martin v. City of Boise*** (9th Cir. 2019) 920 F.3rd 584, 609.)

Reasonable Expectation of Privacy: The question really is whether the defendant, as opposed to someone else, had a "*reasonable* (or *'legitimate*') *expectation of privacy*" in the place being searched or the items being seized. (***Byrd v. United States*** (2018) 584 U.S. 395 [138 S.Ct. 1518; 200 L.Ed.2nd 805].)

The federal cases have gotten away from using the term "*standing*" while moving towards a discussion of one's "*reasonable*" or "*legitimate expectation of privacy*." (***Rakas v. Illinois*** (1978) 439 U.S. 128, 143 [99 S.Ct. 421; 58 L.Ed.2nd 387]; ***United States v. Davis*** (9th Cir. 2003) 332 F.3rd 1163, 1167; ***United States v. Caymen*** (9th Cir. 2005) 404 F.3rd 1196, 1199-1200.) California courts have been encouraged to do the same. (See

People v. Ayala (2000) 23 Cal.4th 225, 254, fn. 3; ***People v. Magee*** (2011) 194 Cal.App.4th 178, 183, fn. 4.)

"The touchstone of **Fourth Amendment** analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" (***California v. Ciraolo*** (1986) 476 U.S. 207, 211 [106 S.Ct. 1809; 90 L.Ed.2nd 210, 215].)

"(T)o say that a party lacks (**F**)**ourth** (**A**)**mendment** standing is to say that *his* reasonable expectation of privacy has not been infringed." (Italics in original; ***United States v. SDI Future Health, Inc.*** (9th Cir. 2009) 568 F.3rd 684, 695; citing ***United States v. Taketa*** (9th Cir. 1991) 923 F.2nd 665, 669.)

See also **article I**, **section 1** of the California Constitution: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy*." (Italics added)

See ***In re*** **M.H.** (2016) 1 Cal.App.5th 699; right to privacy in a high school bathroom toilet stall.

Test: Whether or not a person has "*standing*" to challenge the constitutionality of a search has been described by the United States Supreme Court in ***Rakas v. Illinois*** (1978) 439 U.S. 128 [99 S.Ct. 421; 58 L.Ed.2nd 387], as follows: "(W)hether the challenged search and seizure violated the **Fourth Amendment** rights of a criminal defendant who seeks to exclude the evidence obtained during it" (***Id***., at p. 140.), "whether the disputed search and seizure has infringed an interest of the defendant which the **Fourth Amendment** was designed to protect" (***Ibid***.), or "whether the person who claims the protection of the (**Fourth) Amendment** has a legitimate expectation of privacy in the invaded place" (***Id.*** at p. 143.). (***People v. Stewart*** (2003) 113 Cal.App.4th 242, 249.)

Burden of Proof: The *defendant* bears the burden of showing he or she had a *reasonable expectation of privacy* in the place searched or the thing seized. (***Rakas v. Illinois*** (1978) 439 U.S. 128, 141, fn. 9 [99 S.Ct. 421; 58 L.Ed.2nd 387, 399-400]; ***People v. McPeters*** (1992) 2 Cal.4th 1148, 1171; ***People v. Shepherd*** (1994) 23 Cal.App.4th 825, 828; ***People v. Cowan*** (1994) 31 Cal.App.4th 795, 798; ***United States v. Caymen*** (9th Cir. 2005) 404 F.3rd 1196, 1199-1200; ***United States v. $40,955 in United States Currency*** (9th Cir. 2009) 554 F.3rd 752, 756; ***People v. Magee*** (2011) 194 Cal.App.4th 178, 183; ***People v. Diaz*** (2013) 213 Cal.App.4th 743, 753.)

However, the court has the discretion to order the prosecution to present its evidence before the defendant proves his standing. (***People v. Contreras*** (1989) 210 Cal.App.3rd 450.)

Although the prosecution may not take "contradictory positions in order to defeat an asserted expectation of privacy," the defendant is "not 'entitled to rely on the government's allegations in the pleadings, or positions the government has taken in the case, to establish standing.'" (***United States v. Long*** (9th Cir. 2002) 301 F.3rd 1095, at p. 1100, citing ***United States v. Zermeno*** (9th Cir. 1995) 66 F.3rd 1058, 1062.)

Factors to Consider:

- Whether the defendant had a property or possessory interest in the thing seized or the place searched;

- Whether he had a right to exclude others from that place [or the thing seized];

- Whether he exhibited a subjective expectation of privacy that it would remain free from governmental intrusion;

- Whether he took normal precautions to maintain privacy; and

- Whether he was legitimately on the premises or legitimately in possession of the thing seized.

- Whether the defendant was present at the place searched "*for a commercial purpose*" (no standing) or was there as an "*overnight guest*" (standing) with the knowledge and permission of an identifiable host.

(***People v. Shepherd*** (1994) 23 Cal.App.4th 825, 828; ***United States v. Silva et al.*** (9th Cir. 2001) 247 F.3rd 1051; ***People v. Stewart*** (2003) 113 Cal.App.4th 242, 250; ***In re Rudy F.*** (2004) 117 Cal.App.4th 1124, 1132; ***People v. Bryant, Smith and Wheeler*** (2014) 60 Cal.4th 335, 364-370; ***United States v. Lopez-Cruz*** (9th Cir. 2013) 730 F.3rd 893, 807-809; citing ***United States v. Finley*** (5th Cir. 2007) 477 F.3rd 250, 258–259, recognizing this to be a non-exhaustive list.)

General Principles:

"[S]ubjective expectations of privacy that society is not prepared to recognize as legitimate have no [**Fourth Amendment**] protection." (***People v. Leon*** (2005) 131 Cal.App.4th 966, 974.)

"The absence of a right to exclude others from access to a situs is an important factor militating against a legitimate expectation of privacy." (***United States v. Bautista*** (9th Cir. 2004) 362 F.3rd 584, 589; citing ***Rawlings v. Kentucky*** (1980) 448 U.S. 98, 105 [100 S.Ct. 2556; 65 L.Ed.2nd 633, 642].)

See also ***United States v. King*** (2010) 693 F.Supp.2nd 1200: A justified eviction from a hotel room ends any expectation of privacy defendant may have had in the room, or in any of the contents of that room, justifying a warrantless entry and search of the room by FBI agents.

The existence of a "*reasonable expectation of privacy*" must be determined by an analysis of the "*totality of the circumstances*." (***People v. Koury*** (1989) 214 Cal.App.3rd 676, 686 ***In re Rudy F.*** (2004) 117 Cal.App.4th 1124, 1132.)

> The practice by some attorneys to analyze a search and seizure issue by considering each factor individually, ignoring the effect of all such factors in the "totality of the circumstances," is constantly criticized by the courts. (E.g., see ***People v. Tousant*** (2021) 64 Cal.App.5th 804, 815; "The relevant inquiry is whether the *totality of the circumstances* would lead a person of 'ordinary caution or prudence to believe, and conscientiously to entertain, a strong suspicion that the object of the search is in the particular place to be searched;'" quoting ***People v. Dumas*** (1973) 9 Cal.3rd 871, 885.)

A defendant has the burden of proving that he had standing to contest a warrantless search. In other words, he must first prove that he had a reasonable expectation of privacy in the areas searched. A person seeking to invoke the protection of the **Fourth Amendment** must demonstrate both that he harbored a subjective (i.e., in his own mind) expectation of privacy and that the expectation was objectively reasonable. An objectively reasonable expectation of privacy is one that society is willing to recognize as reasonable. Among the factors considered in making this determination are whether a defendant has a possessory interest in the thing seized or place searched; whether he has the right to exclude others from that place; whether he has exhibited a subjective expectation that it would remain free from governmental invasion; whether he took normal precautions to maintain his privacy; and whether he was legitimately on the premises. (***People v. Nishi*** (2012) 207 Cal.App.4th 954, 959-963; defendant held to not have an expectation of privacy in his tent on public land without a permit, nor the area around his tent.)

Merely declining ownership of the items searched (e.g., cellphones) by itself, while a factor to consider, is not enough by itself to show that the

defendant did not have standing, at least where there is nothing to indicate that he wasn't in permissive possession of the item searched. (***United States v. Lopez-Cruz*** (9th Cir. 2013) 730 F.3rd 803, 808-809.)

However, even though a person may not have a reasonable expectation of privacy in a vehicle, he may still challenge a search of that vehicle where it is the product of the person's unlawful detention as a passenger in the vehicle. (**Brewer *v. Superior Court*** (2017) 16 Cal.App.5th 1019, 1023-1025.)

"One who owns and possesses a car, like one who owns and possesses a house, almost always has a reasonable expectation of privacy in it." (***Byrd v. United States*** (2018) 584 U.S. 395, 404 [138 S.Ct. 1518; 200 L.Ed.2nd 805]; determining that the possessor of a rented car, even though not listed on the rental agreement, has a reasonable expectation of privacy in that vehicle.)

No violation of the **Fourth Amendment** resulted when a gang police detective portrayed himself as a friend to gain access to defendant's social media account and viewed and saved a copy of a video that defendant posted and that was later admitted into evidence. In the posted video, defendant wore and discussed a chain resembling one taken in a strong-arm robbery. Although defendant chose a social media platform where posts disappeared after a period of time, he assumed the risk that the account for one of his "friends" could be an undercover profile for a police detective or that any other "friend" could save and share the information with government officials. No expectation of privacy. California's **Electronic Communications Privacy Act** ("**CalECPA**") had no application because defendant voluntarily granted access to his social media account to a "friend" and voluntarily then posted a video of himself with incriminating evidence. (***People v. Pride*** (2019) 31 Cal.App.5th 133, 137-141.)

Where defendant had arranged to have delivered packages of cocaine to a friend's residence, the packages listing as the recipient the friend's deceased brother, with an address and phone number not otherwise associated with the defendant, defendant lacked the necessary expectation of privacy needed to challenge law enforcement's opening of those packages before they were delivered (in a controlled delivery) to the address listed on the packages. (***United States v. Rose*** (4th Cir. 2021) 3 F.4th 722.)

Commercial Enterprises:

"As we have recognized, determining *who* may assert a reasonable expectation of privacy with respect to specific *commercial* spaces

'requires analysis of reasonable expectations "on a case-by-case basis."' (***United States v.***) ***SDI Future Health*** (9th Cir. 2009) 568 F.3d (684) at 695 (quoting ***O'Connor v. Ortega***, 480 U.S. 709, 718, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987) (plurality)). The need for such a case-by-case inquiry arises from two considerations. First, because 'the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home,' ***Donovan v. Dewey***, 452 U.S. 594, 598-99, 101 S. Ct. 2534, 69 L. Ed. 2d 262 (1981), the 'expectation of privacy in commercial premises' is 'less than[] a similar expectation in an individual's home.' ***New York v. Burger***, 482 U.S. 691, 700, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987); *see also* ***Minnesota v. Carter***, 525 U.S. 83, 90, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998) ('Property used for commercial purposes' is thus 'treated differently for **Fourth Amendment** purposes from residential property.'). Second, in light of the 'great variety of work environments,' any given company officer, manager, or owner may not have the same personal reasonable expectation of privacy in *all* of the commercial spaces of the organization. ***SDI Future Health***, 568 F.3d at 695." (***United States v. Galecki*** (9th Cir. Dec. 27, 2023) 89 F.4th 713, __.)

Considerations taken into account in determining whether a person has standing to challenge the legality of a search in commercial places include:

> "First, . . . the joint owners and managers of a 'small business,' particularly one that is 'family-run,' may exercise such complete 'day-to-day' personal control over, and 'full access' to, the company's facilities that those owner/managers would have a reasonable expectation of privacy over the relevant spaces. ***SDI Future Health***, 568 F.3d at 696 (citing (***United States v.***) ***Gonzalez, Inc.,*** (9th Cir. 2005) 412 F.3d (1102) at 1116-17); *see also* ***Gonzalez, Inc.***, 412 F.3d at 1117 (noting, by contrast, that 'the hands-off executives of a major corporate conglomerate might lack standing to challenge all intercepted conversations at a commercial property that they owned, but rarely visited').
>
> Second, we stated in ***SDI Future Health*** that a further 'crucial' threshold factor is whether the particular place searched in the commercial facility was 'given over to the *defendant's* exclusive use,' 568 F.3d at 695-96 (emphasis added) (simplified), because a showing of such exclusivity would indicate that, absent countervailing considerations, the person's expectation of privacy was reasonable.
>
> Third, ***SDI Future Health*** held that, outside 'the case of a small business over which an individual exercises daily management and control, an individual challenging a search of workplace areas beyond his own internal office must generally show some *personal*

> *connection* to the places searched and the materials seized.' 568 F.3d at 698 (emphasis added). We further stated that whether the requisite personal connection has been shown should be assessed 'with reference to the following factors,' which we said are not exclusive, *id.* at 698 & n.8: (1) whether the item seized is personal property or otherwise kept in a private place separate from other work-related material; (2) whether the defendant had custody or immediate control of the item when officers seized it; and (3) whether the defendant took precautions on his own behalf to secure the place searched or things seized from any interference without his authorization. ***Id.*** at 698 (footnotes omitted). 'Absent such a personal connection or exclusive use, a defendant cannot establish standing for Fourth Amendment purposes to challenge the search of a workplace beyond his internal office.' ***Id.***" (***United States v. Galecki***, *supra*, at pp. __-__.)
>
> In ***Galecki***, the defendant's failed to show standing in the search of a warehouse in that it was held that: "First, this case does not fall within the distinctive scenario, typified by ***Gonzalez, Inc.***, in which the defendants personally exercise day-to-day physical access to and control over the facilities as part of their daily management of a closely held small business. Indeed, the record does not affirmatively indicate that Galecki and Ritchie had ever actually visited the Nevada warehouse, much less exercised personal day-to-day control over the physical plant. Second, the Nevada warehouse is not the personal office of either Defendant." Lastly, it was not shown that the defendants "had the requisite 'personal connection to the places searched and the materials seized.'" (***Id***, at p. __; citing ***SDI Future Health***, *supra*, 568 F.3d at 698.)

Prior California Rule; "*Vicarious Standing*:" Everyone charged with a criminal offense resulting from a search or seizure could challenge the constitutionality of that search or seizure, without the necessity of showing "*standing*." (E.g., ***People v. Martin*** (1955) 45 Cal.2nd 755, 761.)

> This theory, long since rejected by the United States Supreme Court (see ***United States v. Salvucci*** (1980) 448 U.S. 83, 92 [100 S.Ct. 2547; 65 L.Ed.2nd 619].), was abrogated by passage of **Proposition 8** (**Cal. Const., Art. 1, § 28(d)** (subsequently redesignated as **section 28(f)(2)**), (subsequently redesignated as **section 28(f)(2)**, in June, 1982. California now follows the federal rule. (***In re Lance W.*** (1985) 37 Cal.3rd 873, 886-887; ***People v. Nelson*** (1985) 166 Cal.App.3rd 1209, 1213.)

Application of the Standing Rules:

Vehicles:

The *owner*, or a *borrower* of vehicle with the owner's permission (i.e., a person in lawful possession), *has standing* to challenge the search of the vehicle. (***People v. Leonard*** (1987) 197 Cal.App.3rd 235, 238; ***People v. Nelson*** (1985) 166 Cal.App.3rd 1209; ***United States v. Kovac*** (9th Cir. 1986) 795 F.2nd 1509, 1510-1511, owner; ***United States v. Portillo*** (9th Cir. 1980) 633 F.2nd 1313, 1317, borrower; ***People v. Casares*** (2016) 62 Cal.4th 808, 835-836; borrower.)

A *passenger* in a vehicle that neither owns nor leases that vehicle *lacks standing* to object to *a search* of areas within the vehicle, such as the glove compartment, the trunk, or underneath the seat. (***Rakas v. Illinois*** (1978) 439 U.S. 128 [99 S.Ct. 421; 58 L.Ed.2nd 387]; ***United States v. Portillo*** (9th Cir. 1980) 633 F.2nd 1313, 1317; ***United States v Pulliam*** (9th Cir. 2005) 405 F.3rd 782, 785-786.)

But, the *passenger* as well as the *driver* has standing to object to the basis for a vehicle's initial stop or detention. (***Brendlin v. California*** (2007) 551 U.S. 249 [127 S.Ct. 2400; 168 L.Ed.2nd 132]; see below.); see also ***People v. Lionberger*** (1986) 185 Cal.App.3rd Supp. 1; ***United States v. Twilley*** (9th Cir. 2000) 222 F.3rd 1092, 1095; ***United States v. Colin*** (9th Cir. 2002) 314 F.3rd 439, 442-443; ***People v. Lamont*** (2004) 125 Cal.App.4th 404.)

One who steals a car (***People v. Shepherd*** (1994) 23 Cal.App.4th 825.), or who is simply an occupant of a stolen car (***People v. Catuto*** (1990) 217 Cal.App.3rd 714; ***People v. Melnyk*** (1992) 4 Cal.App.4th 1532, 1533.), or is caught driving a stolen vehicle (***People v. Carter*** (2005) 36 Cal.4th 1114, 1139-1142.) that is later searched, has no standing to challenge the later search of that car.

Defendant had no standing to challenge the illegal search of another person's vehicle which resulted in recovery of information used to obtain a search warrant for defendant's home. (***People v. Madrid*** (1992) 7 Cal.App.4th 1888, 1896.)

A person driving a rental vehicle, when the person is neither an authorized driver under the rental contract nor driving the vehicle with the renter's permission, does *not* have standing to challenge the search of a vehicle. (***United States v. Thomas*** (9th Cir. 2006)

447 F.3rd 1191; noting that merely being an unauthorized driver, per the terms of the rental agreement, will not deprive a person of standing. In this case, it was the defendant's failure to present any evidence that he was driving the car with the permission of the person who rented it that deprived him of standing to contest the search of the car.)

The United States Supreme Court reversed the California Supreme Court on the issue of whether the passenger is detained by virtue of being in the car when it is initially stopped, and held that at least in a private motor vehicle (as opposed to a taxi, bus, or other common carrier), the passenger in a vehicle stopped for a possible traffic infraction is in fact detained, giving him the right (i.e., standing) to challenge the legality of the traffic stop. (***Brendlin v. California*** (2007) 551 U.S. 249 [127 S.Ct. 2400; 168 L.Ed.2nd 132].)

The owner of a vehicle, but who takes steps to disassociate himself from the vehicle by having someone else pay cash for the car and then putting the car and other documentation in the other person's name (done because the defendant knew the car would be used to transport controlled substances), does not have standing to challenge an illegal entry into the car for the purpose of installing a GPS to track the vehicle. (***People v. Tolliver et al.*** (2008) 160 Cal.App.4th 1231, 1236-1241.)

Being "the exclusive driver" of defendant's wife's car gives the defendant standing to challenge the legality of the installation of a GPS (i.e., a search) on that vehicle. (E.g., see ***United States v. Jones*** (2012) 565 U.S. 400, 404, fn. 2 [132 S.Ct. 945, 949; 181 L.Ed.2nd 911].)

However, there is no reasonable expectation of privacy in the conversations between prisoners in the back seat of a patrol car, making it lawful to secretly record such conversations. (***People v. Crowson*** (1983) 33 Cal.3rd 623, 628.)

See also, ***United States v. Webster*** (7th Cir 2015) 775 F.3rd 897, where it was held that a prisoner being detained in the backseat of a patrol car has no expectation of privacy as to his conversations. Recording the defendant's conversation with another detainee and cellphone calls he made while seated in the patrol car is not a violation of the **Fourth Amendment**.

However, even though a person may not have a reasonable expectation of privacy in a vehicle, he may still challenge a search of that vehicle where it is the product of the person's unlawful

detention as a passenger in the vehicle. (***Brewer v. Superior Court*** (2017) 16 Cal.App.5th 1019, 1023-1025.)

A person in otherwise lawful possession and control of a rented vehicle has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver, at least as a general rule. (***Byrd v. United States*** (2018) 584 U.S. 395 [138 S.Ct. 1518; 200 L.Ed.2nd 805].)

> Left undecided, and remanded to the lower appellate court for decision, were the issues of (1) whether a person who intentionally uses a third party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is no better situated than a car thief, and (2) the officers had probable cause to search the vehicle in any event.
>
> Taking ***Byrd*** one step further, the Second Circuit Court of Appeal held that defendant's motion to suppress methamphetamine and cash found in a rental car was properly denied because he was both an unauthorized driver of the rental car, *plus* his driver's license was expired, making him an unlicensed driver. This, per the Court, and even though he had the permission of the person to whom the car was rented, was sufficient to negate any reasonable expectation of privacy in that car. But even assuming defendant had a legitimate privacy interest, the search and seizure did not violate the **Fourth Amendment**. (***United States v. Lyle*** (2nd Cir. 2019) 919 F.3rd 716.)
>
> See, however, ***United States v. Best*** (8th Cir. 1998) 135 F.3rd 1233, and ***United States v. Thomas*** (9th Cir. 2006) 447 F.3rd 1191, which have held that a defendant *may* have standing to challenge a search of a rental car despite lacking a valid license and authorization under the rental agreement, provided that he had permission from the authorized driver.
>
> Despite not being on the rental agreement, evidence that the renter of a vehicle gave permission to the driver to be in possession of a rented car provided the driver with the necessary standing to challenge the search of that vehicle. (***United States v. Bettis*** (8th Cir. 2020) 946 F.3rd 1024.)

Residential Occupants and Visitors:

An *overnight guest* in a residence *does* have standing to contest an unlawful search. (***Minnesota v. Olson*** (1990) 495 U.S. 91 [109 L.Ed.2nd 85]; ***People v. Hamilton*** (1985) 168 Cal.App.3rd 1058; ***Espinosa v. City and County of San Francisco*** (9th Cir. 2010) 598 F.3rd 528, 533-534.)

The fact that the defendant is a parolee, subject to **Fourth Amendment** search and seizure conditions, does not mean that he doesn't have the right to challenge law enforcement's warrantless entry into a third party's residence. (***United States v. Grandberry*** (9th Cir. 2013) 730 F.3rd 968, 973-975.)

As an "*occasional*" *guest* at his girlfriend's apartment, defendant had standing to challenge the entry of his girlfriend's bedroom where the two of them stayed together, along with the search of his gym bag he kept under the bed. (***United States v. Davis*** (9th Cir. 2003) 332 F.3rd 1163, 1167-1168.)

When an *overnight guest* in a residence has standing to contest an unlawful search (***Minnesota v. Olson***, *supra*.), it is irrelevant that the guest is a drug smuggler. (***United States v. Gamez-Orduno*** (9th Cir. 2000) 235 F.3rd 453.)

However, a visitor who is there for a limited time (e.g., 2½ hours), for an unlawful purpose (e.g., to package contraband), without any prior relationship with the lawful occupant, does *not* have standing. (***Minnesota v. Carter*** (1998) 525 U.S. 83 [119 S.Ct. 469; 142 L.Ed.2nd 373].)

However, the defendant failed to meet his burden of showing standing in a hotel room where he was not registered as a guest, he did not have a key to the room, and he did not have any possessions in the room besides the sneakers and t-shirt he was trying to put on when the officers entered. Based on these facts, the court could not determine what purpose defendant had in the room, how long he stayed there, how long he slept there, if at all, and how well he knew the other occupants. (***United States v. Aiken*** (1st Cir. ME 2017) 877 F.3rd 451.)

The *estranged husband*, when he regularly visited overnight with his children, had a key and unrestricted access, kept personal

papers and clothing in a bedroom, and was present at the time of the search, has standing. (***People v. Koury*** (1989) 214 Cal.App.3rd 676, 688.)

A Babysitter during the time he or she is engaged in babysitting activities has standing. (***People v. Moreno*** (1992) 2 Cal.App.4th 577, 579, 587.)

Simple, *casual visitors* in a place being searched *do not* normally have standing. (***People v. Nelson*** (1985) 166 Cal.App.3rd 1209; ***People v. Ooley*** (1985) 169 Cal.App.3rd 197; ***People v. Cowan*** (1995) 31 Cal.App.4th 795, 798, 800; ***People v. Dimitrox*** (1995) 33 Cal.App.4th 18; ***People v. Rios*** (2011) 193 Cal.App.4th 584, 591-592.)

> Being a family member but not living there does not change the result. (***People v. Rios***, *supra*, at 592, fn. 4; citing ***In re Rudy F.*** (2004) 117 Cal.App.4th 1124, 1135.)

The *temporary occupant* of a house does *not* have standing to challenge the search of a bedroom he did not occupy, never entered, and had no permission to enter. (***People v. Hernandez*** (1988) 199 Cal.App.3rd 1182, 1188.)

A person who does not stay overnight, but who has a key and free reign of the house, coming and going as he pleases, doing his laundry, cooking, and watching the T.V. in the house, and taking showers, etc., was held to have standing. (***People v. Stewart*** (2003) 113 Cal.App.4th 242.)

Defendant's parents, where defendant conducted his marijuana dealings from his own room, maintained standing to challenge the search of defendant's bedroom where they maintained the rights of access, possession, and exclusion of others. (***United States v. $40,955 in United States Currency*** (9th Cir. 2009) 554 F.3rd 752, 756-757.)

> However, the daughter (defendant's sister?), who no longer lived in the house, did not have standing despite the fact that she had a key to the house and stored items there. (***Id***., at pp. 757-758.)

Merely claiming to be an overnight guest, or to otherwise having standing to contest the entry and/or search of a residence, is insufficient. There must be some evidence to the effect that the person did in fact have a reasonable expectation of privacy in the

residence. (***United States v. Reyes-Bosque*** (9th Cir. 2010) 596 F.3rd 1017, 1026-1029.)

Whether or not a visitor has standing to challenge law enforcement's warrantless entrance into a residence depends upon that visitor's purpose for being there. For instance, if visiting the legal residents, at least when the visitor does so on a regular basis and is free to come and go as he wishes without knocking, he likely has standing. But when that same person enters the residence for the purpose of destroying evidence while being chased by police, he does not. (***People v. Magee*** (2011) 194 Cal.App.4th 178.)

The **Fourth Amendment** rights of homeowners are implicated by the use of a surreptitiously planted listening device to monitor third-party conversations that occurred within their home. (***Alderman v. United States*** (1969) 394 U.S. 165 [89 S.Ct. 961; 22 L.Ed.2nd 176].)

Defendant held to not have an expectation of privacy in his tent on public land without a permit, nor the area around his tent. (***People v. Nishi*** (2012) 207 Cal.App.4th 954, 959-963.)

In a capital murder case, the trial court did not err in denying the lead defendant's motion to suppress evidence seized during a warrantless search of a drug house, defendant having failed to provide any competent evidence that he had a legitimate expectation of privacy in the house when it was searched. (***People v. Bryant, Smith and Wheeler*** (2014) 60 Cal.4th 335, 364-370.)

Neither an evicted former tenant, nor her "overnight house guest," have standing to contest the warrantless entry of law enforcement officers who were there checking on a report of trespassers in the vacant apartment. (***Woodward v. City of Tucson*** (9th Cir. 2017) 870 F.3rd 1154, 1159-1161.)

Defendant held to be without standing to challenge the warrantless entry into his girlfriend's home when there was a "no contact" order barring him from entering that house. A person does not have an reasonable expectation of privacy in a home which he himself is barred from entering. (***United States v. Schram*** (9th Cir. 2018) 901 F.3rd 1042, 1044-1046.)

Using a lawfully seized garage door opener, randomly, while looking for an arrestee's residence, was held *not* to be a search at

all, thus *not* a violation of the **Fourth Amendment**. In addition, even if the agents had committed a trespass by using the opener, the trespass would have been against the building's owner, not against the defendants, who were individual tenants. Also, the court held that neither defendant had a reasonable expectation of privacy in the shared parking garage. And while pushing the button on the garage door opener was a search of the opener itself under the **Fourth Amendment**, the court held that the search was reasonable because it only identified the location of the defendants' building and did not disclose any private information about the interior or the contents of the garage. Lastly, while using keys seized from the defendants to enter the locked building lobby and testing the mailbox key were searches under **the Fourth Amendment**, these searches were reasonable because the defendants had no reasonable expectation of privacy in the lobby as it was a common area and that the defendants had no right to exclude anyone from this area. (***United States v. Correa*** (7th Cir. IL 2018) 908 F.3rd 208.)

Note: Use of the mailbox key was merely held to be "reasonable," although a **Fourth Amendment** search, without discussing why, except to note that the agents had consent to search the apartment, apparently making the use of the mailbox key irrelevant.

See "*Problem*: *Key in a Lock*," above.

Personal Property:

There is no expectation of privacy in a gun given to another person (***People v. McPeters*** (1992) 2 Cal.4th 1148, 1171.), or an opaque bag left, unsealed, in another person's car (***People v. Root*** (1985) 172 Cal.App.3rd 774, 778.), or a purse left in another's vehicle. (***People v Shepherd*** (1994) 23 Cal.App.4th 825, 827, 829.)

There is no expectation of privacy in a stolen computer (***United States v. Wong*** (9th Cir. 2003) 334 F.3rd 831), or one that was obtained by fraud. (***United States v. Caymen*** (9th Cir. 2005) 404 F.3rd 1196, 1200.)

There is no expectation of privacy in a duffle bag left in an apartment laundry room open to anyone, even though placed out of the way on a high shelf. (***United States v. Fay*** (9th Cir. 2005) 410 F.3rd 589.)

> But defendant, as the owner of a gym bag he kept under his girlfriend's bed in her apartment, had standing to challenge the search of that gym bag. (***United States v. Davis*** (9th Cir. 2003) 332 F.3rd 1163, 1167-1168.)

Defendant had standing to challenge a wiretap order on his cellular telephone purchased by the defendant while using a fictitious name in that there is nothing illegal in the attempt to remain anonymous. (***People v. Leon*** (2005) 131 Cal.App.4th 966, 974-977.)

A business that owns the company's computers may consent to the search of a computer used by an employee, at least when the employee is on notice that he has no reasonable expectation of privacy in the contents of the computer he is using. (***United States v. Ziegler*** (9th Cir. 2006) 456 F.3rd 1138.)

Denying possession or ownership in a briefcase found in a vehicle defendant was driving will deprive that defendant of the right to later challenge the legality of the warrantless search of that briefcase. (***United States v. Decoud*** (9th Cir. 2006) 456 F.3rd 996.)

> See "*Disclaiming Standing*," below.

There is no expectation of privacy in the outside of a piece of mail sent to the defendant. "(B)ecause the information is foreseeably visible to countless people in the course of a letter reaching its destination, 'an addressee or addressor generally has no expectation of privacy as to the outside of mail.'" (***People v. Reyes*** (2009) 178 Cal.App.4th 1183, 1189-1192; quoting ***United States v. Osunegbu*** (1987 5th Cir.) 822 F.2nd 472, 380, fn. 3.)

> In ***Reyes***, an employee of a private postbox company spontaneously handed officers defendant's mail when the officers inquired as to whether defendant had rented a box at that facility even though the employees didn't "normally" hand over a client's mail absent a court order. The fact that defendant was never told that his mail would be kept private was also a factor to consider.

A jail inmate talking over a jail telephone, where he is warned that his conversations were subject to monitoring, asking a friend to retrieve what officers understood to be a gun (although defendant only referred to it as "*the thing*") from a container (also described in vague, generic terms) in the closet of his girlfriend's home, did *not* waive any expectation of privacy defendant had in the container that was later retrieved by law enforcement and illegally

searched without a search warrant. (***United States v. Monghur*** (9th Cir. 2009) 588 F.3rd 975, 978-981.)

> ***Monghur*** differentiated these facts from a similar circumstance where defendant told law enforcement officers, clearly and unequivocally, that a particular container contained contraband. The Court in the case found that such a concession waived any expectation of privacy defendant might have had in the container, thus allowing for a warrantless search of that container. (***United States v. Cardona-Rivera*** (7th Cir. 1990) 904 F.2nd 1149.)

An Internet subscriber has no expectation of privacy in the subscriber information he supplies to his Internet provider. (***People v. Stipo*** (2011) 195 Cal.App.4th 664, 668-669.)

Allowing another person unrestricted access to a mutually owned computer negates any expectation of privacy the first person might have had. A co-owner has actual authority to give consent to the police to search. And if it turns out that the person is not actually a co-owner, the doctrine of apparent authority may justify the search. (***United States v. Stanley*** (9th Cir. 2011) 653 F.3rd 946, 950-952.)

There is no privacy right in the mouthpiece of the PAS device, which was provided by the police and where defendant abandoned any expectation of privacy in the saliva he deposited on the device when he failed to wipe it off. Whether defendant subjectively expected that the genetic material contained in his saliva would become known to the police was irrelevant because he deposited it on a police device and thus made it accessible to the police. The officer who administered the PAS (Preliminary Alcohol Screening) test testified that used mouthpieces were normally discarded in the trash. Thus, any subjective expectation defendant may have had that his right to privacy would be preserved was unreasonable. (***People v. Thomas*** (2011) 200 Cal.App.4th 338.)

Merely declining ownership of the items searched (e.g., cellphones) by itself, while a factor to consider, is not enough by itself to show that the defendant did not have standing. (***United States v. Lopez-Cruz*** (9th Cir. 2013) 730 F.3rd 803, 808-809.)

See "*Disclaiming Standing*," below.

Pinging a victim's cellphone, using its GPS capabilities to track defendant who had just stolen it in a robbery, was not a **Fourth Amendment** violation. (***People v. Barnes*** (2013) 216 Cal.App.4th

1508, 1517-1519; the case involved no trespassory placing of the GPS into the defendant's property, and no expectation of privacy violated.

See also ***People v. Zichwic*** (2001) 94 Cal.App.4th 944, an earlier case of questionable continued validity, which held that putting a pinging device on defendant's vehicle was lawful, and that monitoring the device was not unlawful whether or not doing so constituted a "search," despite the lack of a search warrant.

> See, however, **Pen. Code §§ 1546** et seq., the "**Electronic Communications Privacy Act**," which, by statute, greatly restricts law enforcement's access to electronic communication information from a service provider in California.
>
> And see "*Electronic Tracking Devices* (*Transmitters*) *and* '*Pinging*' *a Cellphone*," under "*New and Developing Law Enforcement Tools and Technology*" (Chapter 14), below.

The **Fourth Amendment** does not require suppression of evidence developed through use of software targeting peer-to-peer file-sharing networks to identify IP addresses associated with known digital files of child pornography. Defendant had no reasonable expectation of privacy in his shared folder, despite his measures to keep contents of computer private. **(*People v. Evensen*** (2016) 4 Cal.App.5th 1020.)

A police officer's use of a software program called "Torrential Downpour," which is a law enforcement proprietary software program configured to search the BitTorrent peer-to-peer file sharing network for Internet Protocol (IP) addresses associated with individuals offering to share or possess files known to law enforcement to contain images or videos of child pornography, and which cannot access non-public areas or unshared portions of an investigated computer, nor can it override settings on a suspect's computer, was upheld where defendant was found to have some 7,365 image files and 460 video files of child pornography on his computer. The Court held that defendant did not have any legitimate expectation of privacy in files made available to the public through peer-to-peer file-sharing networks. The Court also rejected attempt to distinguish BitTorrent software from other peer-to-peer programs due to the fact that he allowed public access to the files on his computer. Consequently, the court held that the district court properly denied defendant's motion to suppress. (***United States v. Hoeffener*** (8th Cir. 2020) 950 F.3rd 1037.)

Officers had probable cause to believe defendant would be transporting drugs from Texas to Louisiana based upon reliable information from a confidential informant. The officers therefore obtained a state-authorized search warrant to obtain the GPS coordinates of defendant's girlfriend's cell phone from Verizon over a sixteen-hour period, thus allowing the officers to track the girlfriend's movements, and, because the two were traveling together, those of defendant as well. After having done so, defendant's vehicle was stopped and searched, resulting in the recovery of methamphetamine. The Fifth Circuit Court of Appeal held that defendant did not have standing to challenge the use of the **Stored Communications Act** to trace his girlfriend's cellphone despite defendant's claims that that he had a reasonable expectation of privacy in her cellphone based on the following facts: 1) he purchased the phone and gave it to her; 2) he had permission to use the phone; 3) he has password access to the phone; 4) he accessed his Facebook account from the phone; and, 5) he used the phone to capture intimate videos of him and his girlfriend. The Court ruled that defendant's first fact was irrelevant, as a person does not have standing to challenge a search or seizure of property that was voluntarily abandoned or conveyed to another person. Next, the Court found that the third fact was not supported by any evidence presented in the district court. Finally, the court determined that facts two, four, and five were, in essence, a claim that defendant sometimes used his girlfriend's phone for personal activities. However, there was no proof that defendant ever used or possessed the phone outside of the girlfriend's presence or how often he accessed Facebook or captured intimate videos. Instead, the court noted that: 1) the girlfriend was the primary user of the phone; 2) she had the phone number long before she met defendant; 3) she maintained possession of the phone throughout the day of the arrest; and, 4) her parents paid the phone bill. Based on these facts, the court concluded that while defendant might have subjectively expected privacy in his girlfriend's phone, this expectation of privacy was not reasonable. As a result, the court found that defendant did not have **Fourth Amendment** standing to challenge the search of his girlfriend's phone. (***United States v. Beaudion*** (5th Cir. 2020) 979 F.3rd1092.)

Abandoned Property:

Rule: Abandoning property will generally forestall any later claim of a reasonable expectation of privacy in the item abandoned. (Below)

"Because warrantless searches or seizures of abandoned property do not violate the (**F**)**ourth** (**A**)**mendment**, persons who voluntarily abandon property lack standing to complain of its search or seizure." (***United States v. Baker*** (9th Cir. 2023) 58 F.4th 1109, 1116-1117; quoting ***United States v. Nordling*** (9th Cir. 1986) 804 F.2nd 1466, 1469.)

Case Law:

Leaving a cellphone at the scene of a crime negates the suspect's expectation of privacy in the contents of that phone, and is therefore abandoned property despite the suspect's subjective wish to retrieve it, which he fails to act on. "Abandonment . . . is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search." (***People v. Daggs*** (2005) 133 Cal.App.4th 361.)

Similarly, abandoning one's cellphone (apparently for the purpose of avoiding the possibility that officers might "ping" it and determined his location) during a high speed (and foot) chase negated any need for officers to obtain a search warrant before opening the cellphone and using it to call defendant's wife. (***United States v. Small*** (4th Cir. 2019) 944 F.3rd 490.)

See also ***People v. Juan*** (1985) 175 Cal.App.3rd 1064, 1069; defendant had "no reasonable expectation of privacy with regard to his jacket left draped over a chair at an empty table in a restaurant open to the public. . . . Indeed, an individual who leaves behind an article of clothing at a public place most likely hopes that some Good Samaritan will pick up the garment and search for identification in order to return it to the rightful owner. By leaving his jacket unattended in the restaurant, [the defendant] exposed it to the public and he cannot assert that he possessed a reasonable expectation of privacy in the pockets of the jacket."

And see ***United States v. Nowak*** (8th Cir. 2016) 825 F.3rd 946; defendant abandoned his backpack when he fled from police and left it in another's vehicle. The firearm found in the backpack was properly admitted into evidence.

Abandoning a cigarette butt onto a public street constitutes a loss of one's right to privacy in that butt, making it available to law enforcement to recover and test for DNA without a search warrant. (***People v. Gallego*** (2010) 190 Cal.App.4th 388, 394-398.)

> However, *tricking* a suspect out of an item of personal property and then testing it for DNA can raise other issues, such as whether the abandonment was coerced. But, as noted in ***Gallego***, at p. 396, several courts from other jurisdictions have found such a tactic to be lawful. (See ***Commonwealth v. Perkins*** (Mass. 2008) 883 N.E.2nd 230; and ***Commonwealth v. Bly*** (Mass. 2007) 862 N.E.2nd 341; testing cigarette butts and a soda can left behind after an interview with police. ***Commonwealth v. Ewing*** (Mass 2006) 67 Mass.App.Ct. 531 [854 N.E.2nd 993, 1001; offering defendant cigarettes and a straw during an interrogation. ***People v. LaGuerre*** (2006) 29 A.D.3rd 822 [815 N.Y.S.2nd 211]; obtaining a DNA sample from a piece of chewing gum defendant voluntarily discarded during a contrived soda tasting test. ***State v. Athan*** (Wash. 2007) 158 P.3rd 27; DNA obtained from defendant's saliva from licking an envelope he mailed to detectives in a police ruse.)

See also ***People v. Thomas*** (2011) 200 Cal.App.4th 338: There is no privacy right in the mouthpiece of the PAS device, which was provided by the police and where defendant abandoned any expectation of privacy in the saliva he deposited on the device when he failed to wipe it off. Whether defendant subjectively expected that the genetic material contained in his saliva would become known to the police was irrelevant because he deposited it on a police device and thus made it accessible to the police. The officer who administered the PAS (Preliminary Alcohol Screening) test testified that used mouthpieces were normally discarded in the trash. Thus, any subjective expectation defendant may have had that his right to privacy would be preserved was unreasonable.

> The ***Thomas*** court further held that using defendant's DNA taken from the PAS device mouthpiece to legitimately test defendant's

> blood/alcohol level, with his consent, was not a coercive ruse, and therefore lawful. (***Id.***, at p. 344.)

Leaving all his belongings in a motel room, disappearing in the middle of the night and without making arrangements to extend his stay, it was held that defendant abandoned the motel room, his personal belongings in the room, and his vehicle in the parking lot. There being no reasonable expectation of privacy in these items due to this abandonment, defendant lost his standing to challenge the warrantless entry. The defendant's actual intent is irrelevant. (***People v. Parson*** (2008) 44 Cal.4th 332, 342-348.)

> The issue is "whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search." (***Id.***, at p. 346.)

No standing to challenge the search of containers left by defendant at an auto body shop where defendant was a "mere guest or invitee." (***People v. Ayala*** (2000) 23 Cal.4th 225, 253.)

By throwing his backpack onto the roof of a house upon the approach of police officers, defendant abandoned any expectation of privacy in that backpack that he might have previously had. (***United States v. Juszczyk*** (10th Cir. Kan. 2017) 844 F.3rd 1213.)

Leaving one's backpack in a residence in which defendant had been trespassing (i.e., an unoccupied rental), precluded defendant from later claiming any expectation of privacy in that backpack. (***United States v. Sawyer*** (7th Cir. IL. 2019) 929 F.3rd 497.)

Defendant's denial that he had a vehicle did not negate the unlawfulness of officers seizing a key with attached fob from his belt. Considering the "totality of the circumstances," the Government's theory that defendant abandoned the vehicle that the fob helped to locate was not accepted by the Court as sufficient to allow for the warrantless search of the car in which a firearm was found. Per the Court: "'[N]one of our "abandonment" cases has held that mere disavowal of ownership, without more, constitutes abandonment of a person's reasonable

expectation of privacy in that property.'". (***United States v. Baker*** (9th Cir. 2023) 58 F.4th 1109, 1118; quoting ***United States v. Lopez-Cruz*** (9th Cir. 2013) 730 F.3rd 803, 809.)

The defendants argued that the district court erred in denying their second motion to suppress evidence derived from a 2018 search. The district court did not reach the merits because it determined that the defendants lacked standing to challenge the search of certain devices recovered from the attic crawlspace of the residence after it was sold to new owners. The Ninth Circuit Court of Appeal held that the district court did not clearly err by finding that the defendants abandoned the devices. The Court wrote that the defendants' failure to ensure that their brother recovered the devices before the home was sold, and their subsequent failure to take any additional action to recover that property, is sufficient to support a finding of abandonment, even if the defendants ceased their efforts only because they feared detection by law enforcement. The Court concluded that the defendants therefore lost any reasonable expectation of privacy in the devices, and lacked standing to seek suppression of their contents. (***United States v. Fisher*** (9th Cir. 2022) 56 F.4th 673, 685-688.)

See "*Abandoned Property*," under "*Searches of Containers*" (Chapter 16), below.

Abandonment Caused by a "*Threatened Illegal Detention*:" What happens when the property is abandoned as a direct result of a police officer's attempt to illegally stop and detain a suspect?

The United States Supreme Court resolved a previous three-way split of authority: There is no constitutional violation in a "*threatened unlawful detention*." The **Fourth Amendment** does not apply to such a situation until the person is actually illegal detained; i.e., when the officer actually catches the defendant or the defendant otherwise submits to the officer's authority (i.e.; he gives up). (***California v. Hodari D.*** (1991) 499 U.S. 621 [111 S.Ct. 1547; 113 L.Ed.2nd 690].)

Result: Any evidence abandoned (e.g., tossed or dropped) *during* a foot pursuit of a fleeing suspect, even without any reasonable suspicion justifying a detention (i.e., a "*threatened unlawful detention*"),

is admissible as abandoned property (as well as supplying the necessary "*reasonable suspicion*" to justify the suspect's detention upon being caught).

But, if the suspect does not abandon the contraband until *after* he has been caught, and thus illegally detained, then it *is* subject to suppression as "*fruit of the poisonous tree*;" i.e., the unlawful detention.

Defendant discarding a firearm as officers were attempting to (arguably) illegally arrest him, did not require the suppression of the firearm in that when the gun was discarded, defendant had not yet been "touched," nor had he "submitted" to the officers. Thus, the **Fourth Amendment** was not yet implicated. (***United States v. McClendon*** (9th Cir. 2013) 713 F.3rd 1211, 1214-1217.)

The Court noted that neither a temporary hesitation, nor the officer's use of a firearm while telling him he was under arrest, alters the rule of ***Hodari D.*** (***Id***., at pp. 1216-1217.)

The definition of a "seizure" was expanded a bit by the United States Supreme Court in the case of ***Torres v. Madrid*** (Mar. 25, 2021) __ U.S. __, __ [141 S.Ct. 989; 209 L.Ed.2nd 190], where the Court ruled that a "seizure" occurs when "(t)he application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person."

The ***Madrid*** Court overruled a lower court's holding that a suspect's continued flight after being shot by police negates a **Fourth Amendment** excessive-force claim.

Outside, Common Areas:

Defendant, observed by police officers retrieving contraband from a hole in the ground in the common area behind an apartment complex, did not have any reasonable expectation of privacy in that hole. (***People v. Shaw*** (2002) 97 Cal.App.4th 833.)

Observation by police of defendant's growing marijuana plants from a neighbor's property, even without the neighbor's knowledge or permission, by looking into defendant's adjacent backyard, was held to be lawful. Defendant did not have standing

to challenge the trespass into the neighbor's yard, and did not have a reasonable expectation of privacy in what was growing in his own yard in that his marijuana plants were plainly visible. (***People v. Claeys*** (2002) 97 Cal.App.4th 55.)

Indoor, Common Areas:

Bypassing an apartment's security system by entering the locked common hallways and allowing a drug-sniffing dog to locate the source of an odor of burning marijuana was not illegal. The defendant tenant had no expectation of privacy in the hallways that were accessible to other tenants and their guests. (***State v. Nguyen*** (2013) ND 252, 841 N.W.2nd 676; citing, among other cases, ***United States v. Nohara*** (9th Cir. 1993) 3 F.3rd 1239, 1241-1242; holding the defendant had no legitimate expectation of privacy in hallway of secured apartment building even though the officers may have been trespassing.)

Note also ***United States v. Diaz*** (2nd Cir. 2017) 854 F.3rd 197, holding that an officer's conclusion that a "common-area stairwell" in an apartment building was a "public place" was reasonable.

Businesses: In evaluating a business, the Supreme Court has held that: "Property used for commercial purposes is treated differently for **Fourth Amendment** purposes from residential property." (***Minnesota v. Carter*** (1998) 525 U.S. 83, 90 [119 S.Ct. 469; 142 L.Ed.2nd 373].)

"In the employment context, we have found a reasonable expectation of privacy to exist in an area 'given over to [an employee's] exclusive use." (***Schowengerdt v. General Dynamics*** (9th Cir. 1987) 823 F.2nd 1328, 1335.) O'Brien's office was given over to O'Brien's exclusive use and contained his personal desk and files; . . ." (***United States v. Taketa*** (9th Cir. 1991) 923 F.2nd 665, 671.)

However; "An expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual's home." (***United States v. SDI Future Health, Inc.*** (9th Cir. 2009) 568 F.3rd 684, 695; citing ***New York v. Burger*** (1987) 482 U.S. 691, 700 [107 S.Ct. 2636; 96 L.Ed.2nd 601].)

The employee of a liquor store had no standing to challenge the search of the counter area where she had no expectation of privacy. (***People v. Thompson*** (1988) 205 Cal.App.3rd 1503.)

No expectation of privacy in documents seized from another's business premises where the defendant had no control over the business and no possessory interest in the documents at the time of seizure. (***People v. Workman*** (1989) 209 Cal.App.3rd 687, 696.)

No standing to challenge the search of containers left by defendant at an auto body shop where defendant was a "mere guest or invitee." (***People v. Ayala*** (2000) 23 Cal.4th 225, 253.)

A hospital employee has no reasonable expectation of privacy in the hospital's mailroom. (***United States v. Gonzalez*** (9th Cir. 2003) 328 F.3rd 543.)

A business that owns the company's computers may consent to the search of a computer used by an employee, at least when the employee is on notice that he has no reasonable expectation of privacy in the contents of the computer he is using. (***United States v. Ziegler*** (9th Cir. 2006) 456 F.3rd 1138.)

Contrary to a small, family-owned business over which an individual exercises daily management and control (E.g., see ***United States v. Gonzalez*** (9th Cir. 2005) 412 F.3rd 1102.), challenging the legality of a search in a large business is much more complicated. Being the owner or manager of a business, alone, is not enough. The defendant must generally show some personal connection to the places being searched and the materials seized. Factors to consider in evaluating this personal connection include, but are not necessarily limited to:

- Whether the item seized is personal property or otherwise kept in a private place separate from other work-related material.
- Whether the defendant had custody or immediate control of the item when officers seized it.
- Whether the defendant took precautions on his own behalf to secure the place searched or things seized from any interference without authorization.

(***United States v. SDI Future Health, Inc.*** (9th Cir. 2009) 568 F.3rd 684, 698.)

Social Media Accounts:

No violation of the **Fourth Amendment** resulted when a gang police detective portrayed himself as a friend to gain access to defendant's social media account and viewed and saved a copy of

a video that defendant posted that was later admitted into evidence. In the posted video, defendant wore and discussed a chain resembling one taken in a strong-arm robbery. Although defendant chose a social media platform where posts disappeared after a period of time, he assumed the risk that the account for one of his "friends" could be an undercover profile for a police detective or that any other "friend" could save and share the information with government officials. No expectation of privacy. California's **Electronic Communications Privacy Act** ("**CalECPA**") had no application because defendant voluntarily granted access to his social media account to a "friend" and voluntarily then posted a video of himself with incriminating evidence. (***People v. Pride*** (2019) 31 Cal.App.5th 133, 137-141.)

See *supra*, at pp. 139-140, for case law from other jurisdictions uniformly holding that there is no expectation of privacy in what one posts on various forms of social media.

An Internet subscriber has no expectation of privacy in the subscriber information he supplies to his Internet provider. (***People v. Stipo*** (2011) 195 Cal.App.4th 664, 668-669.)

Renting with a Stolen Credit Card: Under California law, one who rents a hotel room with a stolen credit card does not have standing to challenge an otherwise unlawful entry of the room by law enforcement. (***People v. Satz*** (1998) 61 Cal.App.4th 322.)

However, the Ninth Circuit has developed its own rule that use of a stolen credit card alone is insufficient to negate the person's expectation of privacy in his room. There has to be evidence that the management has, or was at least intending to, evict the tenant for that reason before the tenant's expectation of privacy in is room becomes unreasonable. (See ***United States v. Dorais*** (9th Cir. 2001) 241 F.3rd 1124, 1127-1128.)

Despite renting a motel room with a stolen credit card, the defendant did not lose his standing to challenge an unlawful entry until the motel's manager took some affirmative steps to repossess the room. (***United States v. Bautista*** (9th Cir. 2004) 362 F.3rd 584.)

Also, a defendant has not lost his expectation of privacy in his hotel room (which was later, after the fact, discovered to have been rented with a stolen credit card) by the hotel locking him out when he was locked out pursuant to a policy to do so after a dangerous weapon (a firearm) was found in the room by hotel employees.

Locking him out, in this case, was not done with the intent to evict him. The fact that he was arrested before his room was searched also does not diminish his expectation of privacy in the room. Lastly, use of the stolen credit card did not negate the defendant's expectation of privacy when its use was not known at the time, and therefore did not cause an intent to evict him because of its use. (***United States v. Young*** (9th Cir. 2009) 573 F.3rd 711, 715-720.)

Another panel of the Ninth Circuit Court of Appeal reached the opposite result under similar circumstances, finding that a person *does not* have standing in a hotel room rented with a fraudulent credit card and other fraudulent documents. (***United States v. Cunag*** (9th Cir. 2004) 386 F.3rd 888.)

> *Note*: This case may perhaps be differentiated from ***Bautista*** and ***Young*** because in ***Bautista***, the hotel manager was still trying to work out some method of payment. And in ***Young***, there was no attempt by the hotel manager, who at the time was unaware that the credit card used to rent the room was stolen, to evict defendant.

See also ***United States v. King*** (2010) 693 F.Supp.2nd 1200: A justified eviction from a hotel room ended any expectation of privacy defendant may have had in the room, or in any of the contents of that room, justifying a warrantless entry and search of the room by FBI agents.

However, using counterfeit money to rent a motel room does not deprive the defendant of standing to challenge the warrantless entry of her motel room unless there is some proof that the defendant knew that the money she used was counterfeit (i.e., no intent to defraud) and that the motel manager has already attempted to evict the defendant or seek the help of law enforcement in such an eviction. (***People v. Munoz*** (2008) 167 Cal.App.4th 126.)

Disclaiming Standing:

Rule: Generally, anyone who disclaims ownership of the place or item being searched will normally be held to have disclaimed standing in the process. (***People v. Mendoza*** (1986) 176 Cal.App.3rd 1127; and ***People v. Dasilva*** (1989) 207 Cal.App.3rd 43; ***People v. Scott*** (1993) 17 Cal.App.4th 405.)

> Denying possession or ownership in a briefcase found in a vehicle defendant was driving deprived that defendant of

the right to later challenge the legality of the warrantless search of that briefcase. (***United States v. Decoud*** (9th Cir. 2006) 456 F.3rd 996.)

Exceptions: In cases that almost eat up the rule, disclaiming standing is generally held to be but one factor to consider and not necessarily dispositive.

Disclaimer is but one factor to consider when determining whether defendant had standing. (***People v. Allen*** (1993) 17 Cal.App.3rd 1214.)

United States v. Hawkins (11th Cir. 1982) 681 F.2nd 1343, at p. 1346, has been used in both published and unreported California cases: "[A] disclaimer of ownership, while indeed strong indication that a defendant does not expect the article to be free from government intrusion, is not necessarily the hallmark for deciding the substance of a (**F**)**ourth** (**A**)**mendment** claim."

After the defendant was stopped by border agents, he told the agents that the car he was driving belonged to a friend. There were two cell phones in the center console. In response to questioning by the agents, the defendant said the phones also belonged to a friend. After being given permission to search the phones, the agents then answered incoming calls and pretended to be the defendant. Defendant filed a motion to suppress the evidence obtained when the agents answered the phone. The Court of Appeal agreed with the trial court that the location of the phones in the car suggested that the defendant was in possession of them and were being used by him at the time of the encounter. The agents apparently thought likewise since they asked defendant for consent before seizing the phone. The Court of Appeal noted that defendant had made no effort to get rid of the phones when he was stopped. Nothing suggested that defendant did not legitimately possess the phones. The Court of Appeal concluded the defendant had a reasonable expectation of privacy in the phones. (***United States v. Lopez-Cruz*** (9th Cir. 2003) 730 F.3rd 803, 807-808.)

And see ***United States v. Stephens*** (9th Cir. 2000) 206 F.3rd 914, where the Ninth Circuit Court of Appeal has held that even denial of standing (i.e.; "*That ain't mine*.") concerning seized property during an illegal detention will not keep

that property from being suppressed as the product of the unlawful detention.

Also, denial by a defendant that he possessed a gun, allegedly recovered by police from his waistband, did not defeat defendant's claim of standing when he later challenged the search of his person. (***People v. Dachino*** (2003) 111 Cal.App.4th 1429.)

Merely declining ownership of the items searched (e.g., cellphones) by itself, while a factor to consider, is not enough by itself to show that the defendant did not have standing, at least where there is nothing to indicate that he wasn't in permissive possession of the item searched. (***United States v. Lopez-Cruz*** (9th Cir. 2013) 730 F.3rd 803, 808-809.)

Denying owning any vehicles and telling officers that the vehicle in issue did not belong to him did not prevent him from claiming standing to contest the warrantless search of that vehicle. That's because there was no proof that he hadn't borrowed the car, or was otherwise in lawful possession of it. (***People v. Casares*** (2016) 62 Cal.4th 808, 835-836.)

On Appeal: Whether or not an individual's expectation of privacy was objectively reasonable is reviewed by an appellate court "*de novo*." (***United States v. Bautista*** (9th Cir. 2004) 362 F.3rd 584, 588-589.)

Mandatory Drug Dispensing Records and Prescription Monitoring Programs:

> See "*Mandatory Drug Dispensing Records*," under "*Warrantless Searches and Seizures*" (Chapter 9), below.

***Reasonableness; Evaluated for Purposes of Search & Seizure*:**

Rule: As the U.S. Supreme Court has reiterated many times: "The touchstone of the **Fourth Amendment** is reasonableness. [Citation] The **Fourth Amendment** does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." (***Florida v. Jimeno*** (1991) 500 U.S. 248, 250 [111 S.Ct. 1801; 114 L.Ed.2nd 297]; see also ***Brigham City v. Stuart*** (2006) 547 U.S. 398, 403 [126 S.Ct. 1943; 164 L.Ed.2nd 650]; ***Michigan v. Fisher*** (2009) 558 U.S. 45, 47 [130 S.Ct. 546, 548; 175 L.Ed.2nd 410]; ***County of Los Angeles v. Mendez*** (2017) 581 U.S. 420, 427 [137 S.Ct. 1539; 198 L.Ed.2nd 52]; see also ***People v. Robinson*** (2010) 47 Cal.4th 1104, 1119-1120; ***People v. Robinson*** (2012) 208 Cal.App.4th 232, 246; ***People v. Ovieda*** (2019) 7 Cal.5th 1034, 1041;

People v. Cruz (2019) 34 Cal.App.5th 764, 769; ***People v. Smith*** (2020) 46 Cal.App.5th 375, 382.)

Determining Reasonableness: The reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. (***United States v. Knights*** (2001) 534 U.S. 112, 118-119 [122 S.Ct. 587; 151 L.Ed.2nd 497]; ***People v. Robinson*** (2012) 208 Cal.App.4th 232, 246; **Ioane *v. Hodges*** (9th Cir. 2019) 939 F.3rd 945, 952-953; ***People v. Cruz***, *supra*.)

> *Factors*: "'Reasonableness … is measured in objective terms by examining the totality of the circumstances' [citation], and 'whether a particular search meets the reasonableness standard ""'is judged by balancing its intrusion on the individual's **Fourth Amendment** interests against its promotion of legitimate governmental interests.'"" [Citations.]" (***People v. Robinson*** (2010) 47 Cal.4th 1104, 1120 [104 Cal. Rptr. 3d 727, 224 P.3d 55]; see ***Bell v. Wolfish*** (1979), 441 U.S. 520 at p. 559 ["Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."]'.)" (***People v. Boulter*** (2011) 199 Cal.App.4th 761; see also **Ioane *v. Hodges*** (9th Cir. 2019) 939 F.3rd 945, 952-953.)

Case Law:

> See ***People v. Smith*** (2009) 172 Cal.App.4th 1354, where it was held that a public strip search of a probationer or parolee may in fact be unreasonable. But lowering a parolee's pants and pulling back the elastic ban of his underwear only to the extent necessary to see the crotch area, while shielding the suspect from public view, is neither a strip search nor unreasonable.
>
> Taking blood samples from a convicted person in the mistaken belief that the **DNA and Forensic Identification Data Base and Data Bank Act of 1998** authorizes it, when the defendant is in fact a prisoner with a reduced expectation of privacy, is not unreasonable and does not require suppression of the result. (***People v. Robinson*** (2010) 47 Cal.4th 1104, 1119-1120.)
>
> The standard to be applied when evaluating the legality of the length of time a suspect is deprived of his property pending a search is one of "reasonableness," taking into account the "totality of the circumstances," and not necessarily requiring that the Government pursue the least intrusive course of action. Determining reasonableness requires a "balancing test," balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the

governmental interests alleged to justify the intrusion." (Citations omitted; ***United States v. Sullivan*** (9th Cir. 2015) 797 F.3rd 623, 633; finding 21 days to be reasonable during which time the defendant's laptop was in law enforcement custody, in that defendant was in custody at the time so he couldn't use it anyway, was subject to a **Fourth** waiver, gave consent, and where the computer had to be transferred to a different agency to conduct the necessary forensic search.)

See also ***United States v. Johnson*** (9th Cir. 2017) 875 F.3rd 1265, 1276; finding a 3-day delay to be reasonable, as well as a one-year delay in obtaining a search warrant for a more thorough forensic search of defendant's cellphone.

And see ***County of Los Angeles v. Mendez*** (2017) 581 U.S. 420 [137 S.Ct. 1539; 198 L.Ed.2nd 52], where the Supreme Court rejected as "unreasonable" the Ninth Circuit Court of Appeals' rule that police officers may be held liable for injuries caused by a seizure on the ground that the officers committed a separate Fourth Amendment violation that contributed to their need to use force; i.e., the so-called "provocation rule." Specifically, the Court held that the **Fourth Amendment** provides no basis for such a rule. A different **Fourth Amendment** violation cannot transform a later, reasonable use of force into an unreasonable seizure.

The Officer's Intentions:

Old Rule: Evaluating any **Fourth Amendment** search and seizure issue involved analyzing the law enforcement officer's actions *both* from an "*objective*" (as viewed by a reasonable person) and a "*subjective*" (i.e., in the officer's own mind) viewpoint. If a contested search or seizure was not both *subjectively* held and *objectively* reasonable, the search or seizure would be found to be illegal. (See ***Katz v. United States*** (1967) 389 U.S. 347, 361-362 [88 S.Ct. 507; 19 L.Ed.2nd 576, 588].)

New Rule; *Subjective Motivations are Irrelevant*: A police officer's *subjective* motivations (or even his ignorance of the legality of the reasons) for conducting a search or seizure are irrelevant. The only issue is whether the **Fourth Amendment** was in fact violated. In other words, was a search or arrest lawful according to some statute or constitutional principle, even though the officer was not aware of it, or even thought, in his own mind, he believed he was in violation of the applicable law or principle? If the answer is "*yes*," then (with limited exceptions, see below), the search or arrest is lawful. (***Whren v. United States*** (1996) 517 U.S. 806 [116 S.Ct. 1769; 135 L.Ed.2nd 89].)

> "'Reasonableness … is measured in objective terms by examining the totality of the circumstances' [citation], and 'whether a

particular search meets the reasonableness standard ‘“‘is judged by balancing its intrusion on the individual's **Fourth Amendment** interests against its promotion of legitimate governmental interests.’”’ [Citations.]” (***People v. Robinson*** (2010) 47 Cal.4th 1104, 1120 . . . ; see ***Bell v. Wolfish*** (1979), 441 U.S. 520 at p. 559 [“Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.”]’.)” (***People v. Boulter*** (2011) 199 Cal.App.4th 761; see also ***Ioane v. Hodges*** (9th Cir. 2019) 939 F.3rd 945, 952-953.)

“(I)n determining whether the officer acted reasonably, due weight must be given not to his unparticularized suspicions or ‘hunches,’ but to the reasonable inferences which he is entitled to draw from the facts in the light of his experience; in other words, he must be able to point to specific and articulable facts from which he concluded that his action was necessary.” (***People v. Ovieda*** (2019) 7 Cal.5th 1034, 1049; noting (at p. 1052) that: “The officers here may well have acted with the very best of intentions. But just as an officer’s venial motives will generally not undermine an otherwise valid search, a benign intent cannot save an invalid one.”

Pretext Stops: ***Whren v. United States***, *supra*, involved the use of a “*pretext*” to make a traffic stop (i.e., using a traffic infraction when the officers’ real motivation involved an issue not supported by the necessary reasonable suspicion), the U.S. Supreme Court deciding such a tactic was lawful so long as there was some lawful reason justifying the stop.

See “*Pretext Stops*,” under “*Detentions*” (Chapter 4), above.

“*Posse Comitatus*;” *Use of the Military by Civilian Law Enforcement*:

The Posse Comitatus Act: The so-called “**Posse Comitatus Act**” (“**PCA**”) provides, in part; “[w]hoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.” (**18 U.S.C. § 1385**; see **United States *v.* Dreyer** (9th Cir. 2015) 804 F.3rd 1266, 1272.)

See also **10 U.S.C. § 375**: “The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) . . . does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such

member is otherwise authorized by law." (***United States v. Dreyer***, *supra*.)

"'Although the **PCA** does not directly reference the Navy or Marine Corps,' Congress prohibits 'Navy involvement in enforcing civilian laws.'" (***United States v. Dreyer***, supra, quoting ***United States v. Chon*** (9th Cir. 2000) 210 F.3rd 990, at 993; see also ***United States v. Hitchcock*** (9th Cir. 2002) 286 F.3rd 1064, 1069-1070; the Navy and Naval Criminal Investigative Service (NCIS) is bound by the **PCA**-like restrictions mandated by **§ 375**.)

> A civilian special agent of the Naval Criminal Investigative Service (NCIS) is also bound by the **PCA**-like restrictions. (***United States v. Dreyer***, *supra*, at p. 1274.)

"*Posse*" means "*to be able*," or "*to have power*." "*Comitatus*" means "*county*." At common law, "*Posse Comitatus*" referred to the power of the sheriff to summon aid from every male in the county over 15 years of age and not infirm to assist in preserving the peace. (See ***People v. Bautista*** (2004) 115 Cal.App.4th 229, 233, fn. 2.)

> *Note*: The federal Ninth Circuit Court of Appeal interprets "*Posse Comitatus*" as meaning "*power of the country*," as opposed to "*county*." (***United States v. Dreyer***, *supra*.)

Some states, including California, retained for years one form or another of this power. (See **P.C. §§ 150** & **1550**; making it an infraction for any able-bodied person over the age of 18 to fail to assist a law enforcement officer requesting such assistance, both sections repealed as of *January 1, 2020*. (**SB 920**)

Prohibited Activity:

DoDD 5525.5 § E4.1.3.4: Restrictions on direct assistance by military personnel in local criminal investigations: The use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators.

Activities which constitute an active role in direct law enforcement include the investigation of a crime. (***United States v. Red Feather*** (D.S.D. 1975) 932 F.Supp. 916, 925.)

Exceptions:

Four categories of people are exempt from the **PCA**-like restrictions:

(1) Members of reserve components when not on active duty;

(2) Members of the National Guard when not in the Federal Service;

(3) Civilian employees of Department of Defense (DoD) unless under the direct command and control of a military officer; *and*

(4) Military service members when off duty and in a private capacity. (***United States v. Dreyer*** (9th Cir. 2015) 804 F.3rd 1266, 1273-1274; citing ***United States v. Chon*** (9th Cir. 2000) 210 F.3rd 990.)

But see **32 C.F.R. §§ 182.3** and **182.6(a)(1)(iii)(A)**, defining "*DoD personnel*" as "Federal military officers and enlisted personnel and civilian employees of the Department of Defense." These regulations state that "DoD personnel are prohibited from providing [specified] forms of direct civilian law enforcement assistance," including "search or seizure"; "[e]vidence collection"; "[s]urveillance . . . of individuals [or] items, . . . or acting as undercover agents, informants, [or] investigators"; and "[f]orensic investigations or other testing of evidence obtained from a suspect for use in a civilian law enforcement investigation in the United States unless there is a DoD nexus.". The new regulations expressly "[a]ppl[y] to civilian employees of the DoD Components," and "to all actions of DoD personnel worldwide." (**32 C.F.R. §§ 182.2(e), 182.4(c)**). The Secretary of Defense instituted these regulations under express congressional delegation (see **10 U.S.C. § 375**), and they unambiguously interpret **PCA**-like restrictions to apply to civilian employees of DoD. (***United States v. Dreyer***, supra, at p. 1274.)

See statutory exceptions at **10 U.S.C. §§ 372-374**, **379-382**.

There is no violation where the military merely supplies equipment, logistical support, and backup security. (***United States v. Klimavicius-Viloria*** (9th Cir. 1998) 144 F.3rd 1249, 1259; ***United States v. Khan*** (9th Cir. 1994) 35 F.3rd 426, 431-432.)

"**PCA**-like restrictions prohibit direct military involvement in civilian law enforcement activities, but they permit some indirect assistance, such as involvement that arises 'during the normal course of military operations or other actions that 'do not subject civilians to the use of military power that is regulatory, prescriptive, or compulsory.'" (***United States v. Dreyer***,

supra, at p. 1274; quoting ***United States v. Hitchcock*** (9th Cir. 2002) 286 F.3rd 1064, 1069.)

A Marine Corps unit using a scope truck equipped with infrared night vision spotted defendant after he illegally snuck across the U.S.-Mexico border. The Marines alerted nearby Border Patrol agents that an individual was 10-15 feet north of the border fence near an area known as Mercado Rock. When later prosecuted for illegally entering the United States, defendant argued that the Marine Corps surveillance violated the **Posse Comitatus Act**, which codified the longstanding prohibition against military enforcement of civilian law. The Ninth Circuit ruled that the military may still assist civilian law enforcement agencies if Congress expressly authorizes it. The ***2016 National Defense Authorization Act*** directed the U.S. Secretary of Defense to offer military assistance to Border Patrol in hopes of securing the southern land border. The district court was therefore held to have properly denied defendant's suppression motion based on the alleged violation of the **Posse Comitatus Act**. (***United States v. Hernandez-Garcia*** (9th Cir. 2022) 32 F.4th 1207, 1213-1215.)

> The Court held that **Section 1059** of the **National Defense Authorization Act for Fiscal Year 2016**, **Pub. L. No. 114-92**, **129 Stat. 726** (2015), is in fact more specific than **10 U.S.C.S. § 274** as applied, so **§ 1059** takes precedence over **§ 274**. As such, **§ 1059** authorized the Marine Corps' surveillance of defendant at the southern border. The district court, therefore, rightly denied defendant's suppression motion based on an alleged violation of **Posse Comitatus Act**. (***Ibid***.)
>
> *Notes*:
>
> > "**Section 1059** of the **National Defense Authorization Act for Fiscal Year 2016**, **Pub. L. No. 114-92**, **129 Stat. 726** (2015)" refers to an Act to authorize appropriations for fiscal year 2016 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.
> >
> > **10 U.S.C.S. § 274** refers to the authority of the Secretary of Defense to make Department of Defense personnel available for the maintenance of equipment for Federal, State, and local civilian law enforcement officials.

Purpose: The federal Act was enacted to prevent the use of federal military personnel to help enforce civilian law, thus preventing the U.S. Government from becoming "*a government of force*," i.e., run by the military. (***People v. Bautista*** (2004) 115 Cal.App.4th 229, 233, fn. 2.)

> "The statute 'eliminate[s] the direct active use of Federal troops by civil law authorities,' ***United States v. Banks***, 539 F.2nd 14, 16 (9th Cir. 1976), and 'prohibits Army and Air Force military personnel from participating in civilian law enforcement activities,' (***United States v.*) *Chon*** ((9th Cir. 2000)) 210 F.3rd (990) at 993." (***United States v. Dreyer*** (9th Cir. 2015) 804 F.3rd 1266, 1272-1281.)
>
> In 1981, Congress amended the ***Posse Comitatus Act*** to allow for certain military assistance in fighting the war on drugs. (See **18 U.S.C. §§ 371-378**) However, these statutes were specifically "not [to] include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law." (**18 U.S.C. § 375**)
>
> > "[R]egular and systematic assistance by military investigative agents to civilian law enforcement in the investigation of local drug traffic" raises issues as to whether the "*Posse Comitatus Act*" has been violated. (***People v. Blend*** (1981) 121 Cal.App.3rd 215, 228.)

Case Law:

> In ***People v. Blend*** (1981) 121 Cal.App.3rd 215, 225-228, it was held that the ***Posse Comitatus Act*** was *not* violated when an active duty WAVE assisted local law enforcement with arranging the purchase of cocaine from the defendant, despite the cooperation of the Naval Investigative Service (NIS) which permitted the investigation to proceed on the base, provided the investigator with passes, and assisted in appellant's arrest.
>
> > Per the Court, the WAVE acted on her own initiative as a private citizen. Moreover, she was not regularly involved in law enforcement activities with the military, and her usefulness to civil law enforcement was unrelated to the fact that she was a WAVE.
> >
> > The court also found that the cooperation by the NIS in permitting the investigation of appellant to continue on the base did not demonstrate a violation of the act, and there was no evidence that the NIS arranged or participated in a program to detect violation of the civil narcotics laws.

In ***People v. Bautista*** (2004) 115 Cal.App.4th 229, 232-237, use of an Army sergeant and his drug-sniffing dog that alerted on the defendant's storage locker in which 100 pounds of marijuana was later found, did not constitute a violation of the "***Posse Comitatus Act***" because the sergeant did not participate in any stage of the investigation and search other than to point out the location of the defendant's hidden drugs by smelling odors in a public place.

An agent of the Naval Criminal Investigative Service (NCIS) launched an investigation for online criminal activity by anyone in the State of Washington, whether connected with the military or not, and found evidence that defendant was trafficking in child pornography but was not a member of the military. The agent passed along the information to local law enforcement which obtained a search warrant for defendant's computer and, when child pornography was found on his computer, indicted him in federal court. The Ninth Circuit ruled that NCIS and its civilian agents are subject to **Posse Comitatus Act** (**PCA**)-like restrictions under **10 U.S.C. § 375**, proscribing direct assistance to civilian law enforcement. The NCIS agent's investigation in this case violated these **PCA**-like restrictions in that it was not limited to members of the military, but monitored all computers in a geographical area. Application of the exclusionary rule to suppress child pornography evidence found on defendant's computer, however, was not warranted in that it was not shown that suppression was necessary to prevent future violations. The military was best suited to correct the violation and had initiated steps to do so. (***United States v. Dreyer*** (9th Cir. 2015) 804 F.3rd 1266, 1272-1281.)

Sanctions for Violations: It is questionable whether the use of the *Exclusionary Rule* is a proper sanction for a violation of the "**Posse Comitatus Act**:"

The federal Fourth Circuit in ***United States v. Walden*** (4th Cir. 1974) 490 F.2nd 372, 376-377, found no indication of widespread violation of the **Act** or its policy and declined to adopt an exclusionary rule. The court stated that the statute was previously little known, that there was no evidence that the violation in this case was deliberate or intentional, that the policy expressed in the ***Posse Comitatus Act*** is for the benefit of the nation as a whole, and not designed to protect the personal rights of individual defendants. Noting that a rationale for adopting an exclusionary rule for **Fourth Amendment** violations is that available alternative remedies have proved ineffectual, the court expressed confidence that the military would take steps to ensure enforcement of the **Act**.

> However, the Court noted at page 377; "Should there be evidence of widespread or repeated violations in any future case, or ineffectiveness of enforcement by the military, we will consider

> ourselves free to consider whether adoption of an exclusionary rule is required as a future deterrent." (See also ***United States v. Wolffs*** (5th Cir. 1979) 594 F.2nd 77, 84-85.)

Application of the exclusionary rule to suppress child pornography evidence found on the non-military defendant's computer by an NCIS agent was not warranted in that it was not shown that suppression was necessary to prevent future violations of the "**Posse Comitatus Act**." The military was best suited to correct the violation and had initiated steps to do so. (***United States v. Dreyer*** (9th Cir. 2015) 804 F.3rd 1266, 1277-1281.)

***Chapter 9*:**

***Warrantless Searches and Seizures*:**

General Rule:

> "The **Fourth Amendment** to the Constitution of the United States protects against unreasonable searches and seizures of private property. (**U.S. Const.**, **art. IV**.) 'In general, a law enforcement officer is required to obtain a warrant before conducting a search.' (***People v. Lopez*** (2019) 8 Cal.5th 353, 359 . . . .) Warrantless searches 'are per se unreasonable under the **Fourth Amendment**—subject only to a few specifically established and well-delineated exceptions.' (***Katz v. U.S.*** (1967) 389 U.S. 347, 357 [19 L.Ed.2nd 576; 88 S.Ct. 507], fns. omitted.) 'The prosecution bears the burden of establishing an exception applies.' (***People v. Hall*** (2020) 57 Cal.App.5th 946, 951. . . .)" (***People v. Castro*** (2022) 86 Cal.App.5th 314, 319.)
>
> "In general, evidence that the government obtains in violation of a criminal defendant's **Fourth Amendment** rights must be excluded from that defendant's trial. ***Weeks v. United States***, 232 U.S. 383, 398, 34 S.Ct. 341, 58 L.Ed. 652, T.D. 1964 (1914). Whether the exclusionary rule applies to a given case is reviewed de novo, and factual findings are reviewed for clear error. ***United States v. Lundin***, 817 F.3d 1151, 1157 (9th Cir. 2016)." (***United States v. Esqueda*** (9th Cir. 2023) 88 F.4th 818, 823.)

Search vs. Seizure:

> There is a difference between a "*search*" and a "*seizure*," necessitating somewhat different standards for each. E.g.:
>
> > Differentiating a "*search*" from a "*seizure*," the Second Circuit Court of Appeal discussed the difference between conducting a patdown (a search) and positioning him in preparation for doing a patdown (a seizure), noting the traditional conditions that must be present for it to be a search, i.e., whether police: (1) "physically intrud[es] on a constitutionally protected area" under ***United States v. Jones*** (2012) 565 U.S. 400 [132 S. Ct. 945, 181 L.Ed.2nd 911], or (2) violate a person's "reasonable expectation of privacy" under ***Katz v. United States*** (1967) 389 U.S. 347 [88 S.Ct. 507, 19 L.Ed.2nd 576]. In this case, merely ordering defendant to stand at the rear quarter panel, even when the officers had the subjective intent to position defendant for a frisk, simply was not a search under either ***Jones*** or ***Katz***. Consequently, the Court concluded that no **Fourth Amendment** search occurred until the frisking officer's "hands physically came into contact with Weaver['s]" person. (***United States v. Weaver*** (2nd Cir. NY, 2021) 9 F.4th 129.)

"A *seizure* conducted without a warrant is *per se* unreasonable under the **Fourth Amendment**—subject only to a few specifically established and well delineated exceptions." (***United States v. Hawkins*** (9th Cir. 2001) 249 F.3rd 867, 872; ***Brewster v. Beck*** (9th Cir. 2017) 859 F.3rd 1194, 1196; ***People v. McGee*** (2020) 53 Cal.App.5th 796, 800-801; ***People v. Tousant*** (2021) 64 Cal.App.5th 804, 812.)

> Also, it is well established that "a seizure lawful at its inception can nevertheless violate the **Fourth Amendment** because its manner of execution unreasonably infringes possessory interests." (***United States v. Jacobsen*** (1984) 466 U.S. 109, 124 [104 S.Ct.1652; 80 L.Ed.2nd 85, & fn. 25; citing ***United States v. Place*** (1983) 462 U.S. 696, 707-710 [103 S.Ct. 2673; 77 L.Ed.2nd 110]; ***United States v. Dass*** (9th Cir. 1988) 849 F.2nd 414, 414-415; ***Lavan v. City of Los Angeles*** (9th Cir. 2012) 693 F.3rd 1030; ***Brewster v. Beck***, *supra*, at p. 1196.)
>
> Parole and Fourth waiver probation searches are among those "well delineated exceptions." (***United States v. Estrella*** (9th Cir. 2023) 69 F.4th 958, 864.)

Although the use of a *search* warrant when conducting any search is the general rule (see below, and "*Searches With a Search Warrant*" (Chapter 10), below), under the terms of the **Fourth Amendment**, the search of a *person*, *vehicle* and (possibly) *container* without a warrant may often be justified under one or more of *three* legal theories:

- *Incident to Arrest*
- *With Probable Cause plus Exigent Circumstances*
- *With Consent*

> *Note*: Each of these theories is separately discussed in the following chapters.

Searches of a *house* (or *residence*) pose different problems relating to the necessity of a warrant. (See "*Searches of Residences and Other Buildings*" (Chapter 13), below.

Note: And note that in addition to the "*seizure*" of evidence, etc., a person is also subject to being seized; i.e., arrested. (See "Arrests" Chapter 5, above.)

***Two Types of Searches*:**

"The Supreme Court has held that a **Fourth Amendment** search can occur in one of two ways. First, under the ***Katz*** test, a search occurs when the 'government violates a subjective expectation of privacy that society recognizes as

reasonable.' ***Kyllo v. United States***, 533 U.S. 27, 33, 121 S.Ct. 2038, 150 L.Ed.2nd 94 (2001) (citing ***Katz v. United States***, 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2nd 576 (1967) . . . . Second, under the 'unlicensed physical intrusion' test, a search occurs when the government 'physically occupie[s] private property for the purpose of obtaining information,' ***Jones***, 565 U.S. at 404, 'to engage in conduct not explicitly or implicitly permitted' by the property owner, ***Jardines***, 569 U.S. at 6. (fn. omitted; see below.) Each test is independently sufficient to determine whether government conduct amounts to a **Fourth Amendment** search: a search occurs if police conduct satisfies either the *Katz* test or the unlicensed physical intrusion test, even if that conduct does not amount to a search under the other test. *See* ***Jones***, 565 U.S. at 406 ('**Fourth Amendment** rights do not rise or fall with the ***Katz*** formulation.')." (***United States v. Esqueda*** (9th Cir. 2023) 88 F.4th 818, 823; citing ***United States v. Jones*** (2012) 565 U.S. 400 [132 S. Ct. 945, 181 L.Ed.2nd 911]; and ***Florida v. Jardines*** (2013) 569 U.S. 1 [133 S.Ct. 1409; 185 L.Ed.2nd 495].)

> At page 823, fn. 3, the ***Esqueda*** Court also commented: "The Supreme Court has also referred to this test as the 'common-law trespassory test' because the **Fourth Amendment** 'embod[ies] a particular concern for government trespass; on constitutionally protected areas. ***Jones***, 565 U.S. at 406."

***Exceptions to the Search Warrant Requirement*:**

Aside from the three legal theories noted above, there are at least nine other justifications for the search and/or seizure of evidence without the need for a search warrant, as discussed individually below:

- *Plain Sight Observations*
- *Plain Hearing*
- *Plain Smell*
- *Exigent Circumstances*
- *Special Needs Searches and Seizures*
- *Closely Regulated Businesses or Activities*
- *School Searches*
- *Airport Searches*
- *Inventory Searches*
- *Minimal Intrusion*
- *Private Search Doctrine*
- *Prescription Monitoring Programs*

Plain Sight Observations: A "*plain sight*" (or "*plain view*") observation (or "*plain smell*" or "*plain hearing*") is (are) *not a search*, and thus *does* (*do*) *not* implicate the **Fourth Amendment**. (See below.)

Rule:

> A plain sight observation of contraband or other evidence made *while the officer is in a place or a position he or she has a lawful right to be* does *not* involve any constitutional issues. (***People v. Block*** (1971) 6 Cal.3rd 239, 243; ***North v. Superior Court*** (1972) 8 Cal.3rd 301, 306.)
>
> > This includes when the officer is in one's residence, assuming the officer is lawfully in that residence in the first place. (See **People v. Ovieda** (2019) 7 Cal.5th 1034, 1042.)
> >
> > It also includes within a person's vehicle. (***People v. Tousant*** (2021) 64 Cal.App.5th 804, 816.)

No Search: There is *no search* when an officer "observe(s) criminal activity with the naked eye from a vantage point accessible to the general public." (***United States v. Garcia*** (9th Cir. 1993) 997 F.2nd 1273, 1279; ***People v. Ortiz*** (1994) 32 Cal.App.4th 286, 291.)

> "Under the plain view doctrine, an officer may seize an item without a warrant if (1) the officer was lawfully in a place where the object could be viewed; (2) the officer had a lawful right of access to the seized item; and (3) the item's evidentiary value was immediately apparent. (Citations): (***People v. Caro*** (2019) 7 Cal.5th 463, 487-489; upholding the seizure by a police officer of defendant's clothing, observed in plain sight at the hospital, with visible blood stains, after hospital personnel had cut them off of defendant and left them on a backboard used to carry defendant to the hospital.)
>
> See "*Plain Sight Observations*," under "*Searches of Residences*" (Chapter 13), below.

Justification for a Seizure: When a peace officer lawfully discovers an item he reasonably believes is potential evidence (i.e., a "*reasonable possibility*") of a particular crime, observed in "*plain sight*," and its seizure appears necessary for its preservation, he may seize the item without a warrant. (***People v. Curley*** (1970) 12 Cal.App.3rd 732.) Five requirements are listed by the court (at p. 747) for this rule to apply:

- The officer must have "*reasonable cause*" (i.e., "*probable cause*") to believe a particular crime has been committed. This requirement is

compelled by the Constitution in order to avoid the danger of exploratory searches and seizures.

- The evidence must *not* have been discovered as the result of any invasion, intrusion, or illegal entry other than purely formal trespass.

- The evidence must be in plain sight or readily accessible to routine inspection without rummage or pry. If the evidence is discoverable only as a result of inquisitive or exploratory action then what is involved is a search, and the rules for search apply.

- The officer must have reasonable cause to believe the evidence tends to show the commission of the crime or tends to show that a particular person committed the crime.

- The seizure must be necessary to preserve potential evidence, and the degree of invasion of other interests affected by the seizure must be in proportion to the seriousness of the crime.

No Expectation of Privacy: There is *no expectation of privacy* in anything voluntarily exposed to public view. (See ***People v. Benedict*** (1969) 2 Cal.App.4th 400, 403-404; defendant's physical characteristics observed in plain sight by a police officer, leading to his arrest for being under the influence of a controlled substance.)

> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of **Fourth Amendment** protection." (***Katz v. United States*** (1967) 389 U.S. 347, 351 [88 S.Ct. 507; 19 L.Ed.2nd 576, 582.)
>
> > "Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. . . . (C)onversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable." (***Id.***, at p. 361 [19 L.Ed.2nd at p. 588]; concurring opinion.)

Examples:

> An officer standing in the common areas of an apartment complex, observing contraband though a person's uncovered windows, is *not* illegal. (***People v. Superior Court* [*Reilly*]** (1975) 53 Cal.App.3rd 40, 50.)

But, trespassing at the side of a house where the public is *not* impliedly invited, at least when investigating a minor offense (i.e., loud music) and no attempt is first made to contact the resident by knocking at the front door, makes the officers' observations into the defendant's uncovered windows illegal. (***People v. Camacho*** (2000) 23 Cal.4th 824.)

> But see the dissent in ***Camacho***, at pp. 843-844, listing a considerable number of federal circuit court decisions [*not* binding upon the state courts] which have ruled to the contrary in similar circumstances.

Walking around to the back of the defendant's house to knock, while looking for an armed parolee-at-large, was held to be lawful, differentiating the rule of ***Camacho*** on the facts and the relative seriousness of the crimes involved. The fact that the officer was "trespassing" held not to be significant when considering the "*reasonableness*" of the officer's actions. (***People v. Manderscheid*** (2002) 99 Cal.App.4th 355.)

Walking all the way around a house in an attempt to locate an occupant was lawful, and the plain sight observations made while doing so were therefore admissible. (***United States v. Hammett*** (9th Cir. 2001) 236 F.3rd 1054.)

Use of night vision goggles to observe areas within the curtilage of defendants' residence was irrelevant. (***People v. Lieng*** (2010) 190 Cal.App.4th 1213, 1227-1228.)

The use of a flashlight to look into a structure, when the officers are in a place they have a lawful right to be, is not a search. (***United States v. Dunn*** (1987) 480 U.S. 294, 298, 304 [107 S.Ct. 1134; 94 L.Ed.2nd 326, 333]; (***People v. Chavez*** (2008) 161 Cal.App.4th 1493, 1501; ***United States v. Barajas-Avalos*** (9th Cir. 2004) 359 F.3rd 1204, 1214, but see dissenting opinion, at pp. 1220-1221.)

Observing defendant retrieving contraband from a hole in the ground behind an apartment complex, this observation being made from another person's private property with that person's permission, is a lawful plain sight observation. (***People v. Shaw*** (2002) 97 Cal.App.4th 833.)

The use of binoculars to enhance what the officer can already see, depending upon the degree of expectation of privacy involved under the circumstances, is normally lawful. (***People v. Arno*** (1979) 90 Cal.App.3rd 505.)

Similarly, observation of a marijuana patch while flying at an altitude of some 1,500 to 2,000 feet, visible to the naked eye (and then enhanced through the use of binoculars), did not violate the defendant's privacy rights. (***Burkholder v. Superior Court*** (1979) 96 Cal.App.3rd 421; see also ***People v. St Amour*** (1980) 104 Cal.App.3rd 886, observations made from 1,000 to 1,500 feet, again enhanced through the use of binoculars, held to be lawful.)

Ordering a person to lift his sunglasses exposing his eyes is *not* a search. (***People v. Weekly*** (1995) 37 Cal.App.4th 1264; dilated pupils observed.)

The surveillance and photographing of defendant in public was not a **Fourth Amendment** violation despite the fact that defendant's identity and location where he was expected to appear were determined through the use of a witness telephone hotline program which guaranteed anonymity to its callers. (***People v. Maury*** (2003) 30 Cal.4th 342, 382-403.)

Observation of child pornography on the defendant's computer, being lawfully searched as authorized by a homicide warrant, was in "*plain sight*," and admissible in a later pornography prosecution. (***United States v. Wong*** (9th Cir. 2003) 334 F.3rd 831.)

A person who exposes his facial features, and/or body in general, to the public, in a public place, has no reasonable expectation of privacy in his appearance. (See ***People v. Benedict*** (1969) 2 Cal.App.3rd 400, 403-404; "The latter phenomenon (defendant's physical characteristics) was in plain sight of the officer and observed by him without any semblance of a search or seizure; his use of a flashlight to observe the pupillary reaction was not improper. The utilization of the light from a flashlight directed to that which is in plain sight ordinarily does not render observation thereof a search;" citing ***People v. Cacioppo*** (1968) 264 Cal.App.2nd 392, 397.)

18 U.S.C.S. § 1030(e)(6) of the **Computer Fraud and Abuse Act of 1986** covers those who obtain information from particular areas in the computer, such as files, folders, or databases, to which their computer access does not extend. It does not cover those who have improper motives for obtaining information that was otherwise available to them. Since the parties agreed that a police officer was allowed to use a computerized system at issue here to retrieve license-plate information, he did not exceed authorized access to the database, as the **Computer Fraud and Abuse Act of 1986** defined that phrase, even though he had obtained information from the database for an improper purpose. (***Van Buren v. United States*** (June 3, 2021) __ U.S. __ [141 S.Ct. 1648; 210 L.Ed.2nd 26].)

A city's use of cameras on its streetlights, recording and temporarily preserving the movements of persons and vehicles in public places, is lawful, with the resulting pictures not subject to suppression in that a person caught on such a camera has no reasonable expectation of privacy in what he exposes to public view. (***People v. Cartwright*** (2024) 99 Cal.App.5th 98, 102.)

Hospital Emergency Room Cases:

"Under the plain view doctrine, an officer may seize an item without a warrant if (1) the officer was lawfully in a place where the object could be viewed; (2) the officer had a lawful right of access to the seized item; and (3) the item's evidentiary value was immediately apparent. (Citations)" (***People v. Caro*** (2019) 7 Cal.5th 463, 487-489; upholding the seizure by a police officer of defendant's clothing, observed in plain sight at the hospital, with visible blood stains, after hospital personnel had cut them off of defendant and left them on a backboard used to carry defendant to the hospital.)

Officers responding to a 911 call about gunfire at an apartment complex, and finding a blood trail leading to a bloody pistol on the ground, they then went to a local hospital where it was reported a gunshot victim had been taken. In the emergency room, they found defendant being treated and his bloody clothes on the floor. At the officer's request, a nurse retrieved defendant's identification from his clothes. A search warrant for a DNA swab was executed on defendant the next day, resulting in a match to the blood at the scene and on the abandoned pistol. Video surveillance footage showed defendant meeting two people in the apartment complex parking lot, drawing a gun on them, but getting shot himself. Charged with being a felon in possession of a firearm, defendant's motion to suppress the blood evidence was denied. On appeal, the Eighth Circuit Court of Appeal affirmed. Defendant's sole argument was that the officer violated his **Fourth Amendment** rights by entering his hospital room which allowed the officer to see his clothes on the floor, violating his "reasonable expectation of privacy," such as that enjoyed by overnight guests in homes and hotel rooms. The Court rejected this argument, ruling that being admitted to the hospital for a gunshot wound does not serve the same valuable societal function. Second, the court recognized that police in Minnesota (as in most states) are expected to show up to hospitals to investigate a gunshot-wound victim such as defendant because Minnesota law requires hospitals to report gunshot wounds to the police, and that an officer is fulfilling his "lawful duty" in interviewing victims in gunshot cases. Finally, the court found that, unlike in a hotel room and residential guest rooms, in a hospital room people are constantly coming and going from the room to provide medical services. Although there is a significant

privacy interest in medical care, the court commented that this interest is diminished in Minnesota for patients with gunshot wounds because the law requires the reporting of gunshot wounds. As a result, the court held that defendant did not have an objectively reasonable expectation of privacy in his hospital room, negating any argument that the officer violated his Fourth Amendment rights by entering the room and seizing his clothes. (***United States v. Mattox*** (8th Cir. 2022) 27 F.4th 668.)

Exceptions:

The Eight Circuit Court of Appeal has held that seizing a firearm observed in plain sight under circumstances where there was no reason to believe anyone was in any danger, or other probable cause to believe that the firearm was associated with any crime, was held to be a **Fourth Amendment** violation. (***United States v. Lewis*** (8th Cir. 2017) 864 F.3rd 937.)

See also ***United States v. Arredondo*** (8th Cir. 2021) 996 F.3rd 903, where officers observed vials on a couch in plain sight, but were unsure of what the substance in it might be, the Court noting that while a deputy sheriff believed that the vials laying on the couch "seem[ed] a little odd," something seeming "a little odd" is usually no more than a hunch and not probable cause.

Where an unlawful order to exit a car leads to the observation of contraband on the driver's person, the police may not rely on the plain view doctrine to justify a warrantless seizure. (***United States v. Davis*** (10th Cir. 1996) 94 F.3rd 1465, 1470: The "first and most fundamental prerequisite to reliance upon plain view as a basis for a warrantless seizure . . . is that 'the initial intrusion which brings the police within plain view of such an article' is itself lawful." "The [plain view] doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused."

The "*Plain Sight Observation*" *vs. the Right to Enter a Residence*: When observing contraband within a residence *from the outside*, even when the observation would be lawful, a warrantless entry into those premises to seize the contraband would *not* be justified absent exigent circumstances. (***Horton v. California*** (1990 496 U.S. 128, 137 [110 S.Ct. 2301; 110 L.Ed.2nd 112, 123]; ***United States v. Murphy*** (9th Cir. 2008) 516 F.3rd 1117, 1121.) A search warrant authorizing the entry of the residence must first be obtained.

"The (plain view) doctrine does not amount to a full exception to the warrant requirement, but merely allows a warrantless seizure where an

officer lawfully views, and can lawfully access, contraband or incriminating evidence. (Citations)" (***People v. Caro*** (2019) 7 Cal.5th 463, 495-489.)

However, exigent circumstances would be present if the officer reasonably believes that the occupants of the residence have discovered that the police are aware of contraband in the residence. (***Horton v. California***, *supra*.)

"The (***Horton***) opinion 'described the two limitations on the [plain view] doctrine . . . implicit in its rationale: First, that "plain view alone is never enough to justify the warrantless seizure of evidence," [citation]; and second, that "the discovery of evidence in plain view must be inadvertent." [Citation.]'" (***People v. Rorabaugh*** (2022) 74 Cal.App.5th 296 309; quoting ***Horton v. California***, *supra*, at p. 136, and ruling that the warrantless seizure of defendant's vehicle from the yard of a third party was illegal.)

"'It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the **Fourth Amendment** in arriving at the place from which the evidence could be plainly viewed. There are, moreover, two additional conditions that must be satisfied to justify the warrantless seizure. First, not only must the item be in plain view; its incriminating character must also be "immediately apparent." [Citations.] Thus, in ***Coolidge*** (***v. New Hampshire*** *(*1971) 403 U.S. 443 [29 L.Ed.2nd 564; 91 S.Ct. 2022].), the cars were obviously in plain view, but their probative value remained uncertain until after the interiors were swept and examined microscopically. Second, not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she *must also have a lawful right of access to the object itself*.'" (***People v. Rorabaugh***, *supra*, at pp. 309-310; quoting ***Horton v. California***, *supra*, at pp. 136–137, fn. omitted, italics added.)

(E)ven though 'no invasion of personal privacy has occurred' if police 'lawfully enter a house,' and 'come across some item in plain view and seize it,' further 'scrupulous[] … inquiry' is necessary to vindicate the **Fourth Amendment**. (Citation.) '[I]n the absence of consent or a warrant permitting the seizure of the items in question, such seizures can be justified only if they meet the probable-cause standard, [citation], *and if they are unaccompanied by unlawful trespass*, ***Horton***, 496 U.S., at [pp.] 136–137. That is because, the absence of a privacy interest notwithstanding, "[a] seizure of the article . . . would obviously invade the owner's possessory interest."' (***People v. Rorabaugh***, *supra*, at p. 310; quoting ***Soldal v. Cook County*** (1992) 506 U.S. 56, 65-66 [121 L.Ed. 2nd 450; 113 S.Ct. 538].

"***Plain Hearing***:" It has also been held that an offense occurring within a police officer's *sense of hearing* is within his presence, and can supply probable cause. (***People v. Bradley*** (1957) 152 Cal.App.2nd 527.)

> The crime of making annoying or harassing telephone calls, per **Pen. Code § 653x**, is done in the listener's presence. (***People v. Bloom*** (2010) 185 Cal.App.4th 1496; harassing phone calls to a police dispatcher.)
>
> Evidence obtained in "*plain hearing*," when overhearing speakers unrelated to the target conspiracy while listening pursuant to a valid wiretap, is admissible. (***United States v. Carey*** (9th Cir. 2016) 836 F.3rd 1092.)
>
> See "*Applicability of the* '*plain view*' (*or* '*plain hearing*' *doctrine to wiretaps*," under "*Searches With a Search Warrant*" (Chapter 10), below.

"***Plain Smell***:" It has been argued that there should be no logical distinction between something apparent to the *senses of sight and hearing* and the same thing apparent to the *sense of smell*. (***People v. Bock Leung Chew*** (1956) 142 Cal.App.2nd 400.)

> *General Rule*: "If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed, it might very well be found to be evidence of most persuasive character." (***Johnson v. United States*** (1948) 333 U.S. 10, 13 [68 S.Ct. 367; 92 L.Ed. 436, 440]; see also ***District of Columbia v. Wesby et al.*** (2018) 583 U.S. 48, 58, fn. 5 [138 S.Ct. 577; 199 L.Ed.2nd 453], noting that "a reasonable officer could infer, based on the smell, that marijuana had been used in the house (occupied by trespassers.)"
>
> > This, however, does not relieve the officer of the legal duty to obtain a search warrant before opening an already seized package which is the source of the odor, absent exigent circumstances excusing the lack of a warrant. (***Johnson v. United States***, *supra*, at p. 14.)
> >
> > While the odor of marijuana coming from a mailed package will justify the seizure of such package, it does not excuse the lack of a search warrant when law enforcement opens the package without exigent circumstances. (***Robey v. Superior Court*** (2013) 56 Cal.4th 1218, 1223-1243; overruling ***People v. McKinnon*** (1972) 7 Cal.3rd 899, 909; which had held to the contrary.
> >
> > > See particularly the concurring opinion in ***Robey v. Superior Court***, *supra*, at pp. 1243-1254.)

Odors in a Residence:

The odor of opium coming from an apartment supplied sufficient probable cause to justify an entry, arrest and search of the apartment. (***People v. Bock Leung Chew*** (1956) 142 Cal.App.2nd 400.)

However, entering a residence with probable cause to believe only that the non-bookable offense of possession of less than an ounce of marijuana is occurring (**H&S § 11357(b)**), is closer to the ***Welsh v. Wisconsin*** (1984) 466 U.S. 740 [104 S.Ct. 2091; 80 L.Ed.2nd 732] situation (a civil offense only), and a violation of the **Fourth Amendment** when entry is made without consent or a search warrant. (***People v. Hua*** (2008) 158 Cal.App.4th 1027; ***People v. Torres et al.*** (2012) 205 Cal.App.4th 989, 993-998.)

> The ***Torres*** Court also rejected as "speculation" the People's argument that there being four people in the defendants' hotel room indicted that a "marijuana-smoking party" was occurring, which "probably" involved a bookable amount of marijuana. (***People v. Torres et al.***, *supra*, at p. 996.)

The odor of burning marijuana coming from a residence, noticed by officers conducting a "knock and talk" at the front door, and the plain sight observation of a burning marijuana cigarette in the kitchen, supplied the necessary probable cause to believe that more marijuana might be located elsewhere in the house. The odor and observation supplied the necessary probable cause justifying the obtaining of a search warrant for the entire house, including "any safes or locked boxes." Discovery of an illegal firearm in a safe (defendant being a felon), along with cocaine, during the execution of the search warrant, was held to be lawful. (***United States v. Jones*** (4th Cir. 2020) 952 F.3rd 153.)

See "*Odor of Ether in a Residence*," below.

Odors on the Person:

The "strong odor of fresh marijuana" on defendant's person was held to be sufficient probable cause to believe defendant was in possession of the marijuana. (***People v. Gale*** (1973) 9 Cal.3rd 788, 793, fn. 4; a pre-legalization (i.e., January 1, 2018; see **H&S §§ 11362.1 et seq.**) of marijuana case.

Odors in Vehicles:

Pre-Legalization (i.e., before January 1, 2018):

Odor of marijuana smoke during a traffic stop justified the search of a vehicle. (***People v. Lovejoy*** (1970) 12 Cal.App.3rd 883, 887.)

The odor of marijuana emanating from two trucks at a private airstrip, under circumstances consistent with smuggling operations, was found to constitute probable cause to believe the trucks contained marijuana. (***United States v. Johns*** (1985) 469 U.S. 478 [105 S.Ct. 881; 83 L.Ed.2nd 890].)

The odor of beer noted during a traffic stop supplied probable cause to search the car for alcohol. (***People v. Molina*** (1994) 25 Cal.App.4th 1038.)

The odor of burnt marijuana *plus* the plain sight observation of a pipe containing what appeared to be marijuana residue in defendant's vehicle was sufficient to justify the warrantless search of the vehicle. (***People v. Waxler*** (2014) 224 Cal. App. 4th 712.)

The combined odor of burnt and fresh marijuana coming from defendant's motor vehicle supplied the necessary probable cause to search defendant's vehicle without a search warrant, under the "automobile exception" to the search warrant requirement. (***United States v. Johnson*** (9th Cir. 2019) 913 F.3rd 793, 801; citing ***United States v. Barron*** (9th Cir. 1972) 472 F.2nd 1215, 1217.)

Other Jurisdictions:

The courts in some jurisdictions feel that the odor alone, without other suspicious circumstances, *may not* be sufficient to establish probable cause. (See ***People v. Taylor*** (Mich. 1997) 564 N.W.2nd 24; odor of marijuana did not justify the warrantless search of a vehicle.)

It has also been held elsewhere that there must be probable cause to believe that there is a *criminal amount* of marijuana in a vehicle in order to justify a warrantless search. (See ***Commonwealth v. Cruz*** (2011) 459 Mass. 459 [945 N.E.2d 899].)

However, it was *not* error for the federal district court to deny defendant's motion to suppress evidence retrieved from his car because the prolonged stop following a routine traffic stop was justified by the smell of marijuana along with the credible

testimony by the police officer. The odor alone was sufficient to establish probable cause to search the automobile and its contents. (***United States v. Smith***) (8th Cir. 2015) 789 F.3rd 923.)

"(T)he smell of burnt marijuana alone establishes probable cause to search a vehicle for the illegal substance." (***United States v. Snyder*** (10th Cir. 2015) 793 F.3rd 1241; see also ***United States v. Walker*** (8th Cir. 2016) 840 F.3rd 477; odor of unburned marijuana alone supplied sufficieint probable cause to search defendant's vehicle.)

The odor of marijuana emanating from defendant's vehicle held to be sufficient, by itself, to establish probable cause for the search of his vehicle (marijuana being illegal in Iowa), the Court noting: "(W)e have repeatedly held that the odor of marijuana provides probable cause for a warrantless search of a vehicle under the automobile exception." (***United States v. Williams*** (8th Cir. 2020) 955 F.3rd 734; 400 grams recovered.)

The Ninth Circuit Court of Appeal reversed the federal district (trial) court's order suppressing 135 pounds of cocaine and 114 pounds of methamphetamine discovered during a Nevada Highway Patrol trooper's search of the cab of a tractor-trailer pulled over for speeding. The district court had found that the trooper, who smelled marijuana in the cab as he approached the tractor-trailer, lacked probable cause to search the cab and containers therein. The Ninth Circuit, however, held that the district court's failure to include the driver's contradictory statements about when he had smoked a marijuana cigarette in its totality of the circumstances analysis was error, and that the district court's failure to analyze the totality of the circumstances known to the trooper was part and parcel of its broader error; i.e., its focus on the trooper's subjective motivations for performing the search. The Court explained that because the trooper stopped the tractor-trailer as part of a criminal investigation supported by reasonable suspicion, his subjective motivations were not relevant. The Court concluded that the trooper had probable cause to search the cab and containers for evidence of violations of Nevada state law based on the driver's admission that he had smoked a marijuana cigarette earlier in the day and his shifting story regarding how many hours earlier he had done so. (***United States v. Malik*** (9th Cir. 2020) 963 F.3rd 1014.)

The odor of marijuana, apparently escaping through a vehicle's open sunroof, plus the occupant's furtive movements (reaching down under his seat), provided the necessary probable cause to

search the vehicle. (***United States v. Freeman*** (8th Cir. 2020) 964 F.3rd 774.)

The odor of burnt marijuana emanating from defendant's vehicle supplied the necessary probable cause to search the vehicle for marijuana, including the trunk. The Seventh Circuit Court of Appeals disagreed with defendant's contention that the smell of burnt marijuana suggested personal use only, thus limiting the scope of the officer's search to the passenger compartment. The search of defendant's entire car resulting in the discovery of bulk marijuana (and methamphetamine) in a backpack in the trunk of defendant's car, therefore, was lawful. (***United States v. Kizart*** (7th Cir. 2020) 967 F.3rd 693.)

Post-Legalization (i.e., after January 1, 2018):

Issue: Since California legalized the possession of recreational use of marijuana by adults (January 1, 2018, see **H&S §§ 11362.1 et seq.**, now referred to as "*cannabis*"), whether or not the odor of marijuana (or burning marijuana) in a vehicle alone, typically observed during a traffic stop, establishes probable cause to believe a crime is being committed in the officer's presence, thus justifying an immediate warrantless search for contraband, is an issue.

Case Law:

In ***People v. Fews*** (2018) 27 Cal.App.5th 553, at pp. 561-562, the search of defendant's vehicle was upheld, noting the following:

> "[A] warrantless search of an automobile is permissible so long as the police have probable cause to believe the car contains evidence or contraband." (***Robey v. Superior Court*** (2013) 56 Cal.4th 1218, 1225.) The issue is whether the officers' knowledge that a suspect possesses what, on its face, appears to be a lawful amount of recreational marijuana (i.e., now referred to as "cannabis") justifies a search of the vehicle for possible violations of the statutes regulating such possession. **Proposition 64**, effective as of November 8, 2016, made lawful the possession of limited amounts of cannabis. It is argued that since passage of **Proposition 64**, with its enactment of **H&S § 113621**, marijuana is no longer

"*contraband*." **Subdivision (c)** of **Section 113621** does in fact provide that "[c]annabis and cannabis products involved in any way with conduct *deemed lawful by this section* are not contraband nor subject to seizure, and no conduct *deemed lawful by this section* shall constitute the basis for detention, search, or arrest." (Italics added) However, it remains unlawful to possess, transport, or give away cannabis in excess of the statutorily permitted limits, to cultivate cannabis plants in excess of statutory limits and in violation of local ordinances, to engage in unlicensed "commercial cannabis activity," and to possess, smoke or ingest cannabis in various designated places, including in a motor vehicle while driving. (See **B&P Code §§ 26001(k)**, **26037**, and **26038(c)**; and **H&S Code §§ 11362.1(a)**, **11362.2(a)**, **11362.3(a)**, and **11362.45(a)**.) Driving a motor vehicle on public highways under the influence of any drug (**V.C. § 23152(f)**) or while in possession of an open container of marijuana (**V.C. § 23222(b)(1)**), are not acts "deemed lawful" by **H&S § 11362.1**. On the contrary, **Section 11362.1** does not permit any person to possess an open container or open package of cannabis or cannabis products while driving, operating, or riding in the passenger seat or compartment of a motor vehicle or to smoke or ingest cannabis or cannabis products while driving a motor vehicle. (**H&S § 11362.3(a)(4)**) "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." (***Illinois v. Gates*** (1983) 462 U.S. 213, 243, fn. 13 [103 S.Ct. 2317; 76 L.Ed.2nd 527].) The fact that there may also be an innocent explanation does not detract from the finding of probable cause. It has previously been held that a police officer has probable cause to search a vehicle based on the odor of marijuana despite the defendant's presentation of a medical marijuana prescription. (***People v. Strasburg*** (2007) 148 Cal.App.4th 105.) It has also been held that a police officer is entitled to investigate to determine whether a person possesses marijuana for personal medical needs and to determine whether he adhered to the **Compassionate Use Act of 1996's** limits on possession. "It is well settled that even if a

> defendant makes only personal use of marijuana found in the passenger compartment of a car, a police officer may reasonably suspect additional quantities of marijuana might be found in the car." (***People v. Waxler*** (2014) 224 Cal.App.4th 712, 723-724.) Other states where marijuana use has been legalized are in accord, finding that "the odor of marijuana is still suggestive of criminal activity."
>
> The Court in ***Fews***, therefore, held that "(d)ue to the odor of marijuana emanating from the (Saturn) SUV and Mims, as well as Mims's admission that there was marijuana in his half-burnt cigar, there was a fair probability that a search of the SUV might yield additional contraband or evidence." The search of defendant's vehicle, therefore, was held to be lawful. (***Id***., at p. 563.)
>
> Also cited in ***Fews*** (at pp. 563-564) as support for the Court's conclusions was ***People v. Zuniga*** (Colo. 2016) 372 P.3rd 1052, 1059 [2016 CO 52], holding that despite Colorado's legalization of marijuana, "a substantial number of other marijuana-related activities remain unlawful under Colorado law. Given that state of affairs, the odor of marijuana is still suggestive of criminal activity." Also cited in support of this theory was ***Robinson v. State*** (Md. Ct. App. 2017) 451 Md. 94 [152 A.3rd 661, 664–665].)

However, a driver of a motor vehicle having on his person a small, legal amount of marijuana (i.e., with no odor emanating from the vehicle) was held to be of "fairly minimal significance" in determining whether there is probable cause to believe the vehicle contains an illegal amount. (***People v. Lee*** (2019) 40 Cal.App.5th 853. 861-867; where it was held that a warrantless search of a motor vehicle requires probable cause to believe it contains contraband or other evidence of a crime. A motor vehicle driver's possession of a lawful amount of marijuana, absent some other evidence that the vehicle contains more marijuana or that the driver is under the influence, is not sufficient to establish the necessary probable cause to search the vehicle.)

Carrying cannabis in the form of what is known as "*bud*," or "*dried flower*," in a plastic tube, whether or not the tube is in a sealed condition, is *not* a violation of **V.C. § 23222(b)(1)** (See **subd. (b)(2)**), and is not otherwise illegal, and therefore, pursuant to the search restrictions of **H&S Code § 11362.1**, nor does it, by itself, provide the necessary probable cause to search a vehicle for more marijuana. (***People v. Shumake*** (2019) 45 Cal.App.5th Supp. 1.)

In ***People v. Johnson*** (2020) 50 Cal.App.5th 620, where the Court held to be *illegal* a search of a vehicle based upon the odor of marijuana and the observation of a small knotted baggie of marijuana in the center console, differentiated both ***People v. Strasburg*** (2007) 148 Cal.App.4th 105, and ***People v. Waxler*** as being pre-**Proposition 64** cases (with its enactment of **H&S Code § 11362.1(c)**), at a time when *nonmedical* marijuana was still illegal and the medical marijuana law did not affect probable cause; thus, the odor of marijuana would always provide probable cause to search a car. (***Id***., at pp. 634-635.)

Odor of Ether in a Residence: The courts have uniformly held that the *odor of ether* (a byproduct of the manufacturing process for some dangerous drugs), emanating from a particular location (e.g., a house or garage), is *not* probable cause to search for drugs.

However it *is* an exigent circumstance, given the potential volatility of ether, to justify an immediate warrantless entry while escorting the fire department to "*neutralize*" the dangerous situation. (***People v. Messina*** (1985) 165 Cal.App.3rd 931; ***People v. Osuna*** (1987) 187 Cal.App.3rd 845.)

So long as (1) the police have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property, (2) their assistance is not primarily motivated by the intent to arrest a person or seize evidence, and (3) there is some reasonable basis, "*approximating probable cause*," to associate the emergency with the area or place to be entered, then the "*emergency doctrine*" will allow for a warrantless entry to neutralize the emergency. (***United States v. Cervantes*** (9th Cir. 2000) 219 F.3rd 882.)

And then, any plain sight observations made while lawfully in the house neutralizing the danger can provide the necessary probable cause to secure the house, arrest the occupants, and obtain a search

warrant for the rest of the house. (***People v. Hill*** (1974) 12 Cal.3rd 731.)

The odor of ether plus other circumstances which corroborate the suspected presence of an illicit substance *will* normally establish probable cause. (***People v. Stegman*** (1985) 164 Cal.App.3rd 936; ***People v. Patterson*** (1979) 94 Cal.App.3rd 456; ***People v. Torres*** (1981) 121 Cal.App.3rd Supp. 9.)

The California Supreme Court upheld a warrantless search of a residence where a police officer (1) had been specifically informed that an illicit drug laboratory was operating on the premises; (2) upon arrival smelled a chemical (i.e., ether) he knew to be associated with illicit drug manufacture; (3) knew that the volatile nature of the chemicals involved in the production of drugs posed a high danger of explosion; and (4) identified the chemical odor as coming from inside the residence. (***People v. Duncan*** (1986) 42 Cal.3rd 91, 104-105.)

Once the house was secured and the exigency neutralized, officers held back pending the obtaining of a search warrant.

Odor From a Container:

While a distinctive odor may provide probable cause to believe that contraband is contained inside a package or bag, justifying the seizure of that container, a warrantless opening of that bag (i.e., a search), absent exigent circumstances (see ***Guidi v. Superior Court*** (1973) 10 Cal.3rd 1.), would not be justified. (***People v. Marshall*** (1968) 69 Cal.2nd 51; see also concurring opinion in ***Robey v. Superior Court*** (2013) 56 Cal.4th 1218, 1243-1254.)

The California Supreme Court, in its majority opinion, discussed the theory that a distinctive odor (of marijuana) might fit within the category of "*Single Purpose Containers*," allowing for warrantless searches of a container, it declined to decide the issue because the record was not sufficiently developed at the trial court level. (***Robey v. Superior Court***, *supra*., at pp. 1241-1243, and concurring opinion at 1247-1254; see also "*The Single Purpose Container Theory*," under "*Searches of Containers and Electronic Devices*," below.)

Exigent Circumstances: The presence of *exigent circumstances* (when combined with probable cause) will excuse the lack of a warrant, at least so long as the exigency exists. (***People v. Panah*** (2005) 35 Cal.4th 395, 465; **People v. Ovieda** (2019) 7 Cal.5th 1034, 1041-1043.)

Defined: "An exigent circumstance is 'an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence.'" (***People v. Superior Court* [*Chapman*]** (2012) 204 Cal.App.4th 1004, 1012; quoting ***People v. Ramey*** (1976) 16 Cal.3rd 263, 276.)

> "The term 'exigent circumstances' describes 'an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence.'" (***People v. Ovieda*** (2019) 7 Cal.5th 1034, 1041; quoting ***People v. Panah*** (2005) 35 Cal.4th 395, 465.)
>
> "The exigent circumstances exception allows warrantless searches and seizures when an emergency leaves police insufficient time to seek a warrant." (**Recchia *v. City of* Los Angeles *Department of Animal Services*** (9th Cir. 2018) 889 F.3rd 553, 558; citing ***Birchfield v. North Dakota*** (2016) 579 U.S. 438 [136 S.Ct. 2160 2173; 195 L.Ed.2nd 560]; **People v. Ovieda**, supra.)
>
> > In ***Recchia***, the Court ultimately held: "Whenever government officials have grounds to think that an animal may transmit a dangerous disease in the time it might take to get a warrant, the **Fourth Amendment** will not block an immediate seizure of that animal. Nor will officers violate an animal or pet owner's constitutional rights where the officers take animals to protect them from some immediate danger in their living situation." (***Id.***, at p. 564.)

Rule: "[E]xigent circumstances are present when a reasonable person [would] believe that entry . . . was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." (***United States v. Alaimalo*** (9th Cir, 2002) 313 F.3rd 1188, 1192-1193, quoting ***Bailey v. Newland*** (9th Cir. 2001) 263 F.3rd 1022, 1033; ***United States v. Brooks*** (9th Cir. 2004) 367 F.3rd 1128, 1133, fn. 5, & 1135; ***United States v. Camou***, *supra*, at p. 940, quoting ***United States v. McConney*** (9th Cir. 1984) 728 F.2nd 1195, 1199.)

> "*Exigent Circumstances*" are present, as a general rule, whenever there is no reasonable opportunity for the police officers to stop and take the time to get a search warrant. (See ***United States v. Ventresca*** (1965) 380 U.S. 102, 107 [85 S.Ct. 741; 13 L.Ed.2nd 684, 688]; ***United States v. Camou*** (9th Cir. 2014) 773 F.3rd 932, 940-941.)
>
> *Per the California Supreme Court*: "We have defined 'exigent circumstances' to include 'an emergency situation requiring swift action to

prevent imminent danger to life or serious damage to property . . . .' (***People v. Ramey*** (1976) 16 Cal.3rd 263, 276 . . .) The action must be 'prompted by the motive of preserving life or property and [must] reasonably appear to the actor to be necessary for that purpose.' (***People v. Roberts*** (1956) 47 Cal.2nd 374, 377 . . .)" (***People v. Duncan*** (1986) 42 Cal.3rd 91, 97.)

"'[E]xigent circumstances' means an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence." (***People v. Panah*** (2005) 35 Cal.4th 395, 465.)

The United States Supreme Court, in ***Riley v. California*** (2014) 573 U.S. 373, at pages 383-385 [134 S.Ct. 2473; 189 L.Ed.2nd 430], described "*exigent circumstances*," excusing the lack of a search warrant when searching a cellphone discovered incident to arrest, to include:

- The need to prevent the imminent destruction of evidence;
- To pursue a fleeing suspect; *and*
- To assist persons who are seriously injured or are threatened with imminent injury.

Examples:

- *To prevent the destruction of evidence*. (***People v. Huber*** (1965) 232 Cal.App.2nd 663; ***People v. Bennett*** (1998) 17 Cal.4th 373, 384-385; ***People v. Seaton*** (2001) 26 Cal.4th 598; ***United States v. Ojeda*** (9th Cir. 2002) 276, 486, 488; (***People v. Superior Court* [*Chapman*]** (2012) 204 Cal.App.4th 1004, 1011.)

  "A person detained for investigation has no constitutional right to dispose of evidence." (***People v. Quick*** (2016) 5 Cal.App.5th 1006, 1008; citing ***People v. Bracamonte*** (1975) 15 Cal.3rd 394, 405, fn. 6; and ***People v. Maddox*** (1956) 46 Cal.2nd 301, 306.)

  The warrantless entry and temporary seizure of a home while police obtain a search warrant is reasonable where there exists; (a) probable cause to believe the home contains evidence, (b) good cause to believe the occupants unless restrained will destroy the evidence, (c) the method used is less restrictive to the occupants than detaining them, and (d) a reasonable period of time is used to obtain a warrant. (***In re Elizabeth G.*** (2001) 88 Cal.App.4th 496.)

  With "*probable cause*" *to* believe that contraband is contained in a particular residence, and a "*reasonable belief*" that if the house is not immediately secured the evidence will be destroyed, officers

may enter to secure the house pending the obtaining of a search warrant or a consent to do a complete search. (***United States v. Alaimalo*** (9th Cir, 2002) 313 F.3rd 1188; see also ***Sandoval v. Las Vegas Metro. Police Dep't.*** (9th Cir. 2014) 756 F.3rd 1154, 1161; ***Sialoi v. City of San Diego*** (9th Cir. 2016) 823 F.3rd 1238.)

An intercepted telephone call indicating the occupants' intent to secret or destroy evidence was held to be sufficient to justify a warrantless entry of a residence in order to secure the residence pending the obtaining of a search warrant. The trial court did not err in denying defendant's motion to suppress 2.6 ounces of cocaine seized from his apartment based upon the officers' reasonable belief that the entry was necessary to prevent the destruction of contraband. (***United States v. Fowlkes*** (9th Cir. 2015) 804 F.3rd 954, 969-971.)

> The fact that it took about an hour to coordinate the officers necessary to make the warrantless entry and the securing of defendant's apartment was irrelevant; the exigency still existed. (***Id.***, at p. 971.)
>
> See also ***United States v. Dent*** (1st Cir. Me. 2017) 867 F.3rd 37, where the court held that pending the obtaining of a search warrant, the securing of the residence, including doing a protective sweep during which illegal contraband was observed, did not affect the legality of the search warrant where there was no evidence that either the warrant or the decision to seek the warrant was based on anything the officers discovered during their warrantless entry. The court found that the process of applying for the search warrant had already been initiated based on other independent sources of information and that drugs observed under an air mattress were not included in the search warrant affidavit.
>
> Such a "securing" of a house, however, is in fact a **Fourth Amendment** seizure. (***United States v. Shrum*** (10th Cir. KS 2018) 908 F.3rd 1219.)

Searching an arrestee's cellphone after its seizure and removal from defendant's control was held to be unlawful in that the possibility that he might delete incriminating data had been eliminated. Also, there was nothing to indicate that his phone was vulnerable to "remote wiping." If remote wiping was suspected, the possibility that such a tactic might be employed could have been eliminated by merely disconnecting the phone from the

network. Lastly, the agent's search went beyond the scope of any probable cause that might have existed, searching not only the phone's call logs but videos and photographs as well. (***United States v. Camou*** (9th Cir. 2014) 773 F.3rd 932, 940-941.)

"A person detained for investigation has no constitutional right to dispose of evidence." (***People v. Quick*** (2016) 5 Cal.App.5th 1006, 1008; citing ***People v. Bracamonte*** (1975) 15 Cal.3rd 394, 405, fn. 6; and ***People v. Maddox*** (1956) 46 Cal.2nd 301, 306.)

In a drug trafficking case that arose from a controlled delivery of methamphetamine to defendant's residence, where the agents secured a court order authorizing insertion of a tracking device to conduct the controlled delivery, but where their subsequent entry into defendant's condominium to secure the package was warrantless, suppression of the evidence was *not* warranted under the **Fourth Amendment** because exigent circumstances existed to justify the agents' entry. In particular, the agents believed that the destruction of incriminating evidence was occurring, justifying their immediate entry, because the beeper thereafter signaled that the package had been opened, the agents knew that drugs are easily destroyed or disposed of, upon knocking on the door an agent saw a shadowy figure approach the door and then retreat, and the agent then heard a suspicious rustling noise. (***United States v. Iwai*** (9th Cir. 2019) 930 F.3rd 1141.)

Note: See "*Securing the Premises Pending the Obtaining of a Search Warrant*," under "*Searches of Residences and Other Buildings*" (Chapter 13). Below.

- *Officers' Safety*. (***United States v. Ojeda*** (9th Cir. 2002) 276, 486, 488; ***People v. Superior Court* [*Chapman*]** (2012) 204 Cal.App.4th 1004, 1011.)

  See "*Protective Sweeps*," under "*Searches of Residences and Other Buildings*" (Chapter 13), below.

- *Fresh or Hot Pursuit* of a criminal suspect. (***Warden, Maryland Penitentiary v. Hayden*** (1967) 387 U.S. 294 [87 S.Ct. 1642; 18 L.Ed.2nd 782]; ***United States v. Santana*** (1976) 427 U.S. 38 [96 S.Ct. 2406; 49 L.Ed.2nd 300]; ***People v. Escudero*** (1979) 23 Cal.3rd 800, 808-811; ***People v. Spain*** (1984) 154 Cal.App.4th 845.)

  See ***Stanton v. Sims*** (2013) 571 U.S. 3 [134 S.Ct. 3; 187 L.Ed.2nd 341], noting that the seriousness of the offense as a factor in

justifying a warrantless entry in a hot pursuit situation is an open question.

The issue of the legality of an officer following defendant into his garage, after defendant failed to yield to the officer's use of his emergency lights while attempting to stop defendant after observing him honking his horn excessively (a violation of **Veh. Code § 27007**), was discussed in ***Lange v. California*** (June 23, 2021) __ U.S.__ [141 S.Ct. 2011; 210 L.Ed.2nd 486]. In ***Lange***, the Supreme Court held that whether or not an officer can make a warrantless entry into a fleeing misdemeanant's home depends upon the circumstances, rejecting the argument that an officer may do so as a "categorical" rule. The People must first show that an exigent circumstance allowed for such an entry. Per the Court: "A great many misdemeanor pursuits involve exigencies allowing warrantless entry. But whether a given one does so turns on the particular facts of the case." (***Id.***, at p. __.)

See "*Warrantless Entry into the Curtilage*," under "*Searches of Residences and Other Buildings*" (Chapter 13), below.

- *Fighting a Fire*. (***Michigan v. Tyler*** (1978) 436 U.S. 499, 509 [56 L.Ed.2nd 486; 98 S.Ct. 1942].)

- *Search for additional suspects*. (***People v. Block*** (1971) 6 Cal.3rd 239.)

- *Protection of life and property*. (***People v. Ammons*** (1980) 103 Cal.App.3rd 20.)

  A reasonable belief in the existence of an *imminent threat to life* or the *welfare of a person* within the home, probable cause to believe a *person reported missing is therein*, or a reasonable belief a person within is in *need of aid*, are all well recognized as exigent circumstances which justify an immediate, warrantless entry. (***People v. Coddington*** (2000) 23 Cal.4th 529; ***Welsh v. Wisconsin*** (1984) 466 U.S. 740, 750 [104 S.Ct. 2091; 80 L.Ed.2nd 732, 743].)

  The presence of a drug lab, as evidence by the odor of ether, given the explosive nature of the chemicals used, justifies an immediate warrantless entry to neutralize the danger. (***People v. Duncan*** (1986) 42 Ca.3rd 91; ***People v. Stegman*** (1985) 164 Cal.App.3rd 936, 943; ***People v. Messina*** (1985) 165 Cal.App.3rd 937.)

  See "*Plain Smell*," above.

> *Note*: The Ninth Circuit Court of Appeal considers the warrantless entry of a residence in such drug lab cases as justified by the so-called "*emergency doctrine*," which, per the court, is something different than "*exigent circumstances*." (***United States v. Cervantes*** (9th Cir. 2000) 219 F.3rd 882.)

Based upon probable cause to believe a domestic violence incident had occurred and that the female victim, known to be in a hotel room, might need the officer's assistance; a warrantless entry was upheld. (***United States v. Brooks*** (9th Cir. 2004) 367 F.3rd 1128.)

A warrantless entry into a residence when necessary to "*preserve the peace*" in the execution of a restraining order, allowing the defendant's daughter to retrieve certain property, was held to be lawful. Reasonable force was also properly used when necessary to effectively preserve the peace. (***Henderson v. City of Simi Valley*** (9th Cir. 2002) 305 F.3rd 1052.)

To check on the welfare of persons reasonably believed to need law enforcement's assistance. (***Martin v. City of Oceanside*** (9th Cir. 2004) 360 F.3rd 1078.)

To check for a missing eight-year-old girl where there was cause to believe that a male resident in the apartment searched had had contact with her earlier in the day and was now hiding, refusing to open the door. (***People v. Panah*** (2005) 35 Cal.4th 395, 464-466. The fact that later evidence indicated that the victim might no longer be alive did not negate the exigency justifying a second warrantless entry upon discovery of evidence implicating defendant and indicating that the victim, who might still be alive despite defendant's statements to the contrary, had been in his apartment. (***Id.***, at pp. 467-468.)

"The exigent circumstances exception is properly invoked when 'an officer reasonably believes *an animal* on the property is in immediate need of aid due to injury or mistreatment.'" (Italics added; ***People v. Williams*** (2017) 15 Cal.App.5th 111, 122; quoting ***People v. Chung*** (2010) 195 Cal.App.4th 721, 732; and citing ***Broden v. Marin Humane Society*** (1999) 70 Cal.App.4th 1212, 1222.)

> "There is no question about whether the emergency exception can be applied to animal workers who seize an animal in a true emergency setting. For example, if animal workers in an urban setting confront an obviously diseased

or ill animal living in foul conditions that may be causing or compounding the animal's suffering, whether a bird or a dog or a cat, those workers have the right to seize the animal without getting a warrant." (***Recchia v. City of Los Angeles Department of Animal Services*** (9th Cir. 2018) 889 F.3rd 553, 558; citing ***United Pet Supply, Inc. v. City of Chattanooga*** (6th Cir. 2014) 768 F.3rd 464.)

While recognizing that "domestic violence"-related incidents tend to be very volatile, the courts have refused to recognize such incidents as a "per se emergency" justifying a warrantless entry into a residence. (***Bonivert v. City of Clarkston*** (9th Cir. 2018) 883 F.3rd 865, 877.)

An exigency exists allowing for the warrantless entry of a home when an entry or search appears reasonably necessary to render emergency aid, whether or not a crime might be involved. The police have the right to respond to emergency situations. Numerous state and federal cases have recognized that the **Fourth Amendment** does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. (***People v. Ovieda*** (2019) 7 Cal.5th 1034, 1041-1043.)

- *To prevent the escape of suspects*, or when *suspects arm themselves*. (See ***People v. Miller*** (1999) 69 Cal.App.4th 190, 200.)

  E.g.: A possible trafficker in narcotics, ducking back into his residence upon the approach of peace officers, while attempting to shut the door and close the blinds, is an exigent circumstance justifying an immediate, warrantless entry. ***United States v. Arellano-Ochoa*** (9th Cir. 2006) 461 F.3rd 1142; gun found on the floor next to the front door, after the fact.)

  Officers stopping a vehicle in which defendant was found, and then conducting a warrantless search (resulting in the recovery of a firearm from under the center console), based upon an identified person's 911 call to police reporting that three unidentified persons had reported to him having seen defendant in possession of a firearm, was held to be lawful. Denial of defendant's motion to suppress under **Fourth Amendment** was affirmed because the 911 call was sufficiently reliable to support reasonable suspicion where the 911 call conveyed information from three witnesses and the tip provided information on potentially then-occurring illegal activity as the 911 call gave the police sufficieint probable cause to believe

defendant was carrying a concealed firearm. (***United States v. Vandergroen*** (9th Cir. 2020) 964 F.3rd 876.)

See ***Lange v. California*** (June 23, 2021) __ U.S.__ [141 S.Ct. 2011; 210 L.Ed.2nd 486], above.

- *To prevent a person from committing suicide*. (***Rice v. ReliaStar Life Ins. Co.*** (5th Cir. 2014) 770 F.3rd 1122, 1131; see also ***Fitzgerald v. Santoro*** (7th Cir. 2013) 707 F.3rd 725, 732; ***Roberts v. Spielman*** (11th Cir. 2011) 643 F.3rd 899, 905–906; ***Hancock v. Dodson*** (6th Cir. 1992) 958 F.2nd 1367, 1375–1376.)

  But see ***People v. Ovieda*** (2019) 7 Cal.5th 1034, 1041-1043, where it was noted that when the potentially suicidal person has been brought outside and is secured in police custody, the exigency (allowing for a warrantless entry into the home) no longer exists.

Requirement of a Pre-Seizure Hearing:

Procedural Due Process: It is a procedural due process (**Fifth** or **Fourteenth Amendment**) requirement that when practical, a pre-seizure court hearing must be provided to the owner of the property. (***Mathews v. Eldridge*** (1979) 424 U.S. 319 [96 S.Ct. 893; 47 L.Ed.2nd 18]; see also ***Yagman v. Garcetti*** (9th Cir. 2017) 852 F.3rd 859, 864; and ***Shinault v. Hawks*** (9th Cir. 2015) 782 F.3rd 1053, 1057; **Recchia *v. City of* Los Angeles *Department of Animal Services*** (9th Cir. 2018) 889 F.3rd 553, 561-562.)

However, "where exigent or emergency circumstances justify a warrantless seizure there will be no need to have a hearing before a seizure. See ***United States v. James Daniel Good Real Prop.***, 510 U.S. 43, 62, 114 S.Ct. 492, 126 L.Ed.2nd 490 (1993) ('Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.')" (***Recchia v. City of Los Angeles Department of Animal Services***, *supra*, at p. 561, fn. 6.)

The "***Mathews** Factors*:" ***Mathews v. Eldridge*** (1979) 424 U.S. 319 [96 S.Ct. 893; 47 L.Ed.2nd 18], provides the factors that must be considered in determining the need for such a pre-seizure hearing are:

(1) The private interest affected;

(2) The risk of erroneous deprivation through the procedures used, and the value of additional procedural safeguards; *and*

(3) The government's interest, including the burdens of additional procedural requirements.

(***Mathews v. Eldridge***, *supra*, at p. 335; ***Recchia v. City of Los Angeles Department of Animal Services***, *supra*, at pp. 561-562.)

In ***Recchia***, which involved the seizure of some twenty birds (18 pigeons, a crow and a seagull) under authority of **P.C. § 597.1**, most of which were sick and/or injured, from a homeless person who kept the birds in cardboard boxes while living on the street, the Court ruled that (1) a pet owner's interest in keeping his pets is strong, (2) the risk of an erroneous deprivation by animal welfare officers (trained in making such a decision) is low and there is no real value in imposing additional procedural safeguards, and (3) the governmental interest in seizing such birds without a prior court hearing is strong: "(T)here is a strong general governmental interest in being able to seize animals that may be in imminent danger of harm due to their living conditions, may carry pathogens harmful to humans or other animals, or may otherwise threaten public safety without first needing to have a hearing on the subject." (***Ibid***.)

As to factor #3, see ***Hodel v. Va. Surface Mining & Reclamation Ass'n*** (1981) 452 U.S. 264, 300 [101 S.Ct. 2352; 69 L.Ed.2nd 1].): "Protection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action."

Warrantless Seizure of a Child for Protective Custody Purposes:

"(F)amilies have a 'well-elaborated constitutional right to live together without governmental interference.'" (***Demaree v. Pederson*** (9th Cir. 2018) 887 F.3rd 870, 873; citing ***Wallis v. Spencer*** (9th Cir. 2000) 202 F.3rd 1126, 1136.)

"(U)nder the **Fourth Amendment**, government officials are ordinarily required to obtain prior judicial authorization before removing a child from the custody of her parent." (***Demaree v. Pederson***, *supra*, at p. 878; citing ***Kirkpatrick v. County of Washoe*** (9th Cir. 2016) 843 F.3rd 784, 780.)

Exception: "In an emergency, government officials may take a child out of her home and away from her parents without a court order 'when officials have reasonable cause to believe that the child is likely to experience serious bodily harm in the time that

> would be required to obtain a warrant.' ***Kirkpatrick***, 843 F.3rd at 790 (original italics and internal quotation marks omitted). This requirement "balance[s], on the one hand, the need to protect children from abuse and neglect and, on the other, the preservation of the essential privacy and liberty interests that families are guaranteed under both the Fourth and Fourteenth Amendments of our Constitution.' ***Rogers v. Cty. of San Joaquin***, 487 F.3rd 1288, 1297 (9th Cir. 2007)." (***Demaree v. Pederson***, *supra*, at pp. 878 & 879.)

The state's decision to take custody of a child implicates the constitutional rights of the parent and the child under the **Fourteenth** (due process) and **Fourth Amendments** (seizure), respectively. (***Mabe v. San Bernardino County, Department of Public Social Services*** (9th Cir. 2001) 237 F.3rd 1101, 1106.)

Where doctors recommended immediate medical care (spinal tap and infusion of antibiotics) to determine and treat possible meningitis in a 5-week-old infant, a pre-hearing taking of the child from an uncooperative parent, and temporary detention of that irate parent, is lawful as a "*special needs*" taking. (***Mueller v. Auker*** (9th Cir. 2012) 700 F.3rd 1180, 1185-1190; adopting the factual description as provided at (9th Cir. 2009) 576 F.3rd 979, 982-986; and finding that the officer/civil defendant was entitled to qualified immunity in that the issue is an unsettled one.)

Where social workers took a two-day-old child into protective custody from a hospital without prior judicial authorization due to the mother's addiction to methamphetamine, the father's **Fourteenth Amendment** claim failed because he did not have a constitutionally recognized liberty interest in his relationship with the child since, at the time, no one was confident about whether he was the biological father. There was evidence, however, to support a finding that the child's **Fourth Amendment** had in fact been violated. A reasonable juror could have found that the social workers could not have reasonably believed that the child would likely experience bodily harm during the time it would have taken to obtain a warrant since the child would have very likely remained in the hospital. However, because this issue was not well-settled in the law, the social workers were entitled to qualified immunity on that issue. (***Kirkpatrick v. County of Washoe*** (9th Cir. 2016) 843 F.3rd 784, 788-793.)

> While the parents' right to the custody of their children without governmental interference is to be measured under the **Fourteenth Amendment** due process clause, the child's rights not to be taken from his or her parents is a **Fourth Amendment** seizure issue. (***Id.***, at pp. 788-789.)

It is a rule that the **Fourth Amendment** requires government officials to obtain prior judicial authorization before removing a child from the custody of her parent, at least absent exigent circumstances. (***Id.***, at p. 799; citing ***Rogers v. County of San Joaquin*** (9th Cir. 2007) 487 F.3rd 1288.)

> The problem is determining what constitutes "*exigent circumstances*." ***Rogers*** notes, at pages 1294-1295, that "(b)ottle rot, malnourishment, and disorderly home conditions do not present an imminent risk of serious bodily harm," while the possibility of renewed beatings or child molestation might be.

There was a "genuine issue of material fact" regarding whether the County maintained a policy of unconstitutionally seizing children in non-exigent circumstances, and summary judgment on that issue was held to be improperly granted. The case was remanded for consideration of that issue. (***Id.***, at pp. 793-797.)

(See "*Parent-Child Relationship Cases*," under "*Arrests*" (Chapter 5), above.

Special Needs Searches and Seizures: An exception to the search warrant requirement, as well as the need to even show any "*individualized suspicion*," is when a search is found to serve "*special needs*" beyond the need for normal law enforcement. (***Mann v. County of San Diego*** (9th Cir. 2018) 907 F.3rd 1154, 1164.)

> *Test*: The legality of a warrantless search under the "*special needs*" exception is determined by balancing (1) *the need to search* against (2) *the constitutional intrusiveness* of the search. (***Henderson v. City of Semi Valley*** (9th Cir. 2002) 305 F.3rd 1052, 1059; citing ***Ferguson v. City of Charleston*** (2001) 532 U.S. 67, 78 [121 S.Ct. 1281; 149 L.Ed.2nd 205]; see also ***Mann v. County of San Diego***, *supra*, at p. 1165.)
>
> > Suspicionless searches may be upheld if they are conducted for important "*non-law enforcement purposes*" in contexts where adherence to the warrant and probable cause requirement would be impracticable. (***Friedman v. Boucher*** (9th Cir. 2009) 580 F.3rd 847, 853; finding that a forced extraction of a DNA sample from defendant's mouth by means of a buccal swab for inclusion in Nevada's cold case data bank was *not* justified by the Special Needs exception to the search warrant requirement.)
> >
> > > See also ***City of Los Angeles v. Patel*** (2015) 576 U.S. 409 [135 S.Ct. 2443, 192 L.Ed.2nd 435], involving the warrantless inspection of hotel and motel guest registration records.

See ***People v. Maikhio*** (2011) 51 Cal.4th 1074, where the California Supreme Court, in reversing the lower court, held that a game warden, under authority of **Fish & Game § 1006**, who reasonably believes that a person has recently been fishing or hunting, but lacks reasonable suspicion that the person has violated an applicable fish or game statute or regulation, may stop a vehicle in which the person is riding to demand the person display all fish or game the person has caught or taken. As an administrative, special needs search, the standard **Fourth Amendment** probable cause requirements are irrelevant.

However, the administrative search exception is applicable only to warrantless searches where (1) the search promotes an important governmental interest, (2) is authorized by statute, and (3) the authorizing statute and its regulatory scheme provide specific limitations on the manner and place of the search so as to limit the possibility of abuse. (**Tarabochia v. Adkins** (9th Cir. 2014) 766 F.3rd 1115, 1121-1125; finding a traffic stop to check the plaintiff's fish to be in violation of the **Fourth Amendment** in that the applicable Washington State statutes (**Wash. Rev. Code §§ 77.15.080(1)** & **77.15.096**) did not authorize traffic stops and limited such searches to "while fishing."

Examples:

- *Random testing of student athletes* (***Vernonia School District 47J v. Acton*** (1995) 515 U.S. 646 [115 S.Ct. 2386; 132 L.Ed.2nd 564].) and those involved in extracurricular activities. (***Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*** (2002) 536 U.S. 822 [122 S.Ct. 2559; 153 L.Ed.2nd 735].)

- *Suspicionless drug testing of teachers and administrators* because of the unique role that teachers play in the lives of school children, the *in loco parentis* obligations imposed upon them, and the fact that by statute (in Tennessee), teachers were charged with securing order such that they were "on the 'frontline' of school security, including drug interdiction." (***Knox County Educ. Ass'n v. Knox County Bd. Of Educ.*** (6th Cir. 1998) 158 F.3rd 361, 375.)

- *Random metal detector searches of students*, without any individualized suspicion, to help in keeping weapons off campuses. (***In re Latasha W.*** (1998) 60 Cal.App.4th 1524.)

- *Search of a student's computer* based upon information that the graduate student was "hacking into" the school's e-mail server and had the capability of "threaten(ing) the integrity of campus computer or

communication systems." (***United States v. Heckenkamp*** (9th Cir. 2007) 482 F.3rd 1142.)

- *Drug testing for United States Customs Service employees*, in certain positions. (***Treasury Employees v. Von Raab*** (1989) 489 US. 656 [109 S.Ct. 1384; 103 L.Ed.2nd 685].)

- *Searches of employees' backpacks* to prevent inventory loss. (***United States v. Gonzalez*** (9th Cir. 2002) 300 F.3rd 1048.)

- *Pre-departure airport screening procedures*, including the use of a *magnetometer, at airports*, as an "*administrative search*" to insure that dangerous weapons will not be carried onto an airplane and to deter potential hijackers from attempting to board. (***People v. Hyde*** (1974) 12 Cal.3rd 158; ***United States v. Aukai*** (9th Cir. 2007) 497 F.3rd 955.)

- *Drug and alcohol testing for railway employees* involved in train accidents. (***Skinner v. Railway Labor Executives' Assn.*** (1989) 489 U.S. 602 [103 L.Ed.2nd 639].)

- *Administrative inspections of certain* "*closely regulated*" *businesses*. (***New York v. Burger*** (1987) 482 U.S. 691 [107 S.Ct. 2636; 96 L.Ed.2nd 601].)

- *Administrative inspection of fire-damaged premises* to determine the cause of a fire. (***Michigan v. Tyler*** (1978) 436 U.S. 499 [98 S.Ct. 1942; 56 L.Ed.2nd 486]; see also ***Michigan v. Clifford*** (1984) 464 U.S. 287, 293 [78 L. Ed.2nd 477; 104 S.Ct. 641]; and ***People v. Avalos*** (1988) 203 Cal.App.3rd 1517, 1520.)

- *Administrative inspections to ensure compliance with city housing code*. (***Camara v. Municipal Court of City and County of San Francisco*** (1967) 387 U.S. 523 [87 S.Ct. 1727; 18 L.Ed.2nd 930].)

- *Border Patrol Checkpoints*. (***United States v. Martinez-Fuerte*** (1976) 428 U.S. 543 [96 S.Ct. 3074; 49 L.Ed.2nd 1116].)

- *Sobriety Checkpoints*. (***Michigan Dept. of State Police v. Sitz*** (1990) 496 U.S. 444 [110 S.Ct. 2481; 110 L.Ed.2nd 412].)

- *Entry into a residence when necessary to enforce a court order*, such as a *temporary restraining order* related to domestic violence. (***Henderson v. City of Simi Valley*** (9th Cir. 2002) 305 F.3rd 1052.)

- ***Fourth*** *Waiver searches* of parolees and some probationers. (***In re Tyrell J.*** (1994) 8 Cal.4th 68, 77, overruled on other grounds; citing ***Griffin v.***

Wisconsin (1987) 483 U.S. 868, 873 [107 S.Ct. 3164; 97 L.Ed.2nd 709, 717.)

> See ***Smith v. City of Santa Clara*** (9th Cir. 2017) 876 F.3rd 987, at pages 991-994; differentiating pure "consent" searches (e.g., ***Georgia v. Randolph*** (2006) 547 U.S. 103 [126 S.Ct. 1515; 164 L.Ed.2nd 208]. And see "*Consent Searches*" (Chapter 20), below.

- *A search warrant issued pursuant to* ***Pen. Code § 1524.1***, for HIV testing in specified circumstances, authorized for purposes of public safety, has been referred to as a "*special needs*"-type search, and therefore subject to less stringent requirements than normally applicable. (***Humphrey v. Appellate Division of the Superior Court*** (2002) 29 Cal.4th 569, 574-575.)

- *The taking of biological samples from prison inmates, parolees and probationers* for the purpose of completing a federal *DNA database*, might qualify as a "*special needs*" search. (***United States v. Kincade*** (9th Cir. 2004) 379 F.3rd 813, 823-832.)

- *Search of luggage in a subway facility*: Implemented in response to terrorist attacks on subways in other cities, a program was designed to deter terrorists from carrying concealed explosives onto the New York's subway. The city program established daily inspection checkpoints at selected subway facilities where officers searched bags that met size criteria for containing explosives. Subway riders wishing to avoid a search were required to leave the station. In a bench trial, the district court found that the program comported with the **Fourth Amendment** under the "*special needs doctrine*." On appeal, the court affirmed, finding that the program was reasonable and therefore constitutional. In particular, the court found that preventing a terrorist attack on the subway was a special need, which was weighty in light of recent terrorist attacks on subway systems in other cities. In addition, the court found that the disputed program was a reasonably effective deterrent. Although the searches intruded on a full privacy interest, the court further found that such intrusion was minimal, particularly as inspections involved only certain size containers and riders could decline inspection by leaving the station. (***MacWade v. Kelly*** (2nd Cir. 2006) 460 F.3rd 260.)

- *The search of a high school student's pockets* based upon a standard policy that all students who leave and return to the campus during the school day are subject to search, done to prevent the introduction of drugs and weapons onto the campus., at least where the search is very non-intrusive (i.e., the student is not touched). (***In re Sean A.*** (2010) 191 Cal.App.4th 182.)

- *Enforcement of Fish and Game Regulations*: A game warden, under authority of **Fish & Game § 1006**, who reasonably believes that a person has recently been fishing or hunting, but lacks reasonable suspicion that the person has violated an applicable fish or game statute or regulation, may nonetheless stop a vehicle in which the person is riding to demand the person display all fish or game the person has caught or taken. As an administrative, special needs search, the standard **Fourth Amendment** probable cause requirements are irrelevant. (***People v. Maikhio*** (2011) 51 Cal.4th 1074.)

  However, the administrative search exception is applicable only to warrantless searches where (1) the search promotes an important governmental interest, (2) is authorized by statute, and (3) the authorizing statute and its regulatory scheme provide specific limitations on the manner and place of the search so as to limit the possibility of abuse. (***Tarabochia v. Adkins*** (9th Cir. 2014) 766 F.3rd 1115, 1121-1125; finding a traffic stop to check the plaintiff's fish to be in violation of the **Fourth Amendment** in that the applicable Washington State statutes (**Wash. Rev. Code §§ 77.15.080(1)** & **77.15.096**) did not authorize traffic stops and limited such searches to "while fishing."

  See "Fish and Game Code," Below.

- *Depriving Parents of the Liberty Interest in the Care, Custody and Control of their Child due to Medical Necessity*: Where doctors recommended immediate medical care (spinal tap and infusion of antibiotics) to determine and treat possible meningitis in a 5-week-old infant, a pre-hearing taking of the child from an uncooperative parent, and temporary detention of that irate parent, is lawful as a "*special needs*" taking. (***Mueller v. Auker*** (9th Cir. 2012) 700 F.3rd 1180, 1185-1190; adopting the factual description as provided at (9th Cir. 2009) 576 F.3rd 979, 982-986; and finding that the officer/civil defendant was entitled to qualified immunity in that the issue is an unsettled one.)

- *Breathalyzer Tests for Police Officers Involved in Shootings*: A mandatory suspicionless Breathalyzer test administered to any police officer involved in an Officer Involved Shooting where someone was either injured or killed held to be lawful as a Special Needs search. (***Lynch v. City of New York*** (2nd Cir. 2013) 737 F.3rd 150.)

- *Home "Walk-Throughs" for Purposes of Determining Welfare Eligibility*: Home visits by a social worker, made pursuant to the administration of a welfare program, are not searches because they were made for the purpose of verifying eligibility for benefits and not as part of a criminal investigation. (***Wyman v. James*** (1971) 400 U.S. 309, 317-318 [91 S.Ct.

381; 27 L.Ed.2nd 408]; ***Sanchez v. County of San Diego*** (9th Cir. 2006) 464 F.3rd 916, 920-928; noting applicability of the "*Special Needs*" doctrine.)

- *A city obtaining the transcripts of text messages from a police officer's city owned pager*, necessary for a non-investigatory work-related purpose; i.e., in order to determine whether the character limit on the city's contract was sufficient to meet the city's needs and to determine whether the employee's overages were the result of work-related messaging or personal use. (***Ontario v. Quan*** (2010) 560 U.S.746 [130 S.Ct. 2619; 177 L.Ed.2nd 216].)

- *Searching of school lockers for a firearm* reported to have been used in a shooting by a student on a city transit bus the day before. (***In re J.D.*** (2014) 225 Cal. App. 4th 709, 714-720.)

- *Searches and seizures of students* in the school setting, lessening the standard probable cause requirements for school officials to one of "reasonableness," under the circumstances. (**Scott *v. County of San Bernardino*** (9th Cir. 2018) 903 F.3rd 943, 949, citing ***Vernonia Sch. Dist. 47J v. Acton*** (1995) 515 U.S. 646, 653 [115 S.Ct. 2386; 132 L.Ed.2nd 564].)

- *Jail Booking Strip Searches*: Visual body cavity searches of in-coming inmates as a part of the routine booking process, where the inmate is not touched in any way, upheld despite the lack of probable cause. (***Florence v. Board of Chosen Freeholders of the County of Burlington*** (2012) 566 U.S. 318 [132 S.Ct. 1510; 182 L.Ed.2nd 566].)

  An en banc panel of the Ninth Circuit Court of Appeal, in ***Bull v. City and County of San Francisco*** (9th Cir. 2010) 595 F.3rd 964, overruled itself in its prior decision of ***Giles v. Ackerman*** (9th Cir 1984) 746 F.2nd 614, ***Giles*** having held that a person arrested on minor misdemeanor arrest warrants, with no prior criminal history or any relationship to drugs or weapons, could not be subjected to a strip search even though she was to be put into the general jail population.

- *Where it is shown there to be a strong governmental interest* (i.e., a "special need") *in responding to the sounds of gunfire and preventing violence in a high crime area* where recent shootings and homicides (six shooting and two homicides in that past three months) had occurred, thus constituting an "exigent circumstance." (***United States v. Curry*** (4th Cir. 2019) 937 F.3rd 363.)

> The Appellate Court found that the officers acted reasonably in stopping defendant and the other men without individualized suspicion that any of them were involved in the sounds of gunfire in that area, and patting defendant down for firearms when he declined to raise his short and expose his belt line. The Court recognized that the officers were rushing to respond to shots fired seconds earlier in a densely populated residential neighborhood. The court noted the officers were faced with the prospect that an active shooter might continue to threaten the safety of the public. Even though one purpose of the officers' actions that night may have included ordinary law enforcement, the immediate purpose of stopping defendant and the other men and illuminating them with their flashlights was to protect the public and themselves from the threat posed by an active shooter. (***Ibid***.)

Exceptions to the Exceptions; i.e., where law enforcement is primarily pursuing its general crime control purposes as opposed to serving some "special need," searches or seizures may *not* be allowed. Examples:

- *A highway checkpoint program set up for purposes of drug interdiction*. (***City of Indianapolis v. Edmond*** (2000) [121 S.Ct. 447; 148 L.Ed.2nd 333].)

  > See "*DUI* (and other regulatory "*special needs*") *Checkpoints*," under "*Detentions*" (Chapter 4), above.

- *A state hospital program to test pregnant women for drug use* when the results are made available to law enforcement. (***Ferguson v. City of Charleston*** (2001) 532 U.S. 67 [121 S.Ct. 1281; 149 L.Ed.2nd 205].)

  > The "*special needs*" *doctrine* is inapplicable where the arrest and search at issue in a case were clearly for law enforcement purposes. (***Ferguson v. City of Charleston***, *supra*, at p. 83, fn. 20 [121 S.Ct. 1281; 149 L.Ed.2nd 205]; "In none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes;" and ***City of Indianapolis v. Edmond***, *supra*, at p. 121 [148 L.Ed.2nd 333]; observing that the "special needs" doctrine has never been applied where the purpose of the search was "to detect evidence of ordinary criminal wrongdoing."].)

Examples where the "Special Need" fails to outweigh a person's right to privacy:

> *The preemployment drug and alcohol screening requirement* for a part time "page" who would be responsible for putting books back on library

shelves and, on occasion, staff the desk in the youth services area. (***Lanier v. City of Woodburn*** (9th Cir. 2008) 518 F.3rd 1147.)

A *urinalysis drug* test requirement for *candidates for public office* was held to violate the **Fourth Amendment**. (***Chandler v. Miller*** (1997) 520 U.S. 305 [117 S.Ct. 1295; 137 L.Ed.2nd 513].)

Drug testing as a condition of placement or employment for Customs employees who were required to handle classified material only was rejected as being too broad (***National Treasury Employees Union v. Von Raab*** (1989) 489 U.S. 656 [109 S.Ct. 1384; 103 L.Ed.2nd 685].)

A state hospital's drug testing policy, developed in conjunction with the police, for testing *unwed mothers* for drug abuse, found to be unconstitutional, at least without informing the mothers of the purposes for the test. (***Ferguson v. City of Charleston*** (2001) 532 U.S. 67 [121 S.Ct. 1281; 149 L.Ed.2nd 205].)

A forced, warrantless extraction of a DNA sample from defendant's mouth by means of a buccal swab for inclusion in Nevada's cold case data bank was *not* justified by the "special needs" exception to the search warrant requirement. (***Friedman v. Boucher*** (9th Cir. 2009) 580 F.3rd 847, 853.)

A forced medical examination of minor children without notice to parents:

> Assuming, without deciding, that the "special needs" doctrine applies to medical examinations of children suspected of having been molested, the Ninth Circuit Court of Appeal concluded that searches of the plaintiffs' children in this case were unconstitutional under the special needs balancing test in that they were performed without the necessary notice to the child's parents and their consent where such notice and consent were found *not* to be "impractical" under the circumstances. To reach this conclusion, the Court balanced the children's expectation of privacy against the government's interest in conducting the Polinsky Children's Center medical examinations. (***Mann v. County of San Diego*** (9th Cir. 2018) 907 F.3rd 1154, 1164-1167; Exigent circumstances, i.e., a medical emergency or the fear of evidence dissipating, may necessitate an examination without notice or consent. In this case, however, no such exigencies were found. ***Id***., at p. 1166.)

Undecided Application of the Special Needs Doctrine; *Interviewing a Child Victim on a School Campus*:

*The **Camreta v. Greene** Issue*:

Interviewing a child victim on a school campus without the parents' consent was held by the Ninth Circuit to require a search warrant or other court order, or exigent circumstances, as a **Fourth Amendment** seizure, and did not meet the requirements of a "*special needs*" seizure. (***Greene v. Camreta*** (9th Cir. 2009) 588 F.3rd 1011; certiorari granted.)

This decision, however, was overruled by the United States Supreme Court in ***Camreta v. Greene*** (2011) 563 U.S. 692 [179 L.Ed.2nd 1118], and vacated, making it unavailable for citation, but also leaving the issue unresolved.

The Ninth Circuit subsequently ruled that because the theory of ***Camreta***, having been vacated by the U.S Supreme Court, is not clearly established, civil defendants are entitled to qualified immunity where plaintiff's argument was that social workers violated the Constitution by interviewing his children at school without their parent's permission or a court order; a **Fourth Amendment** issue. (***Capp v. County of San Diego*** (9th Cir. 2019) 940 F.3rd 1046, 1059-1060.)

Pen. Code § 11174.3*: *Interviews with Suspected Child Victims of Abuse or Neglect:

(a) Whenever a representative of a government agency investigating suspected child abuse or neglect or the State Department of Social Services deems it necessary, a suspected victim of child abuse or neglect may be interviewed during school hours, on school premises, concerning a report of suspected child abuse or neglect that occurred within the child's home or out–of–home care facility. The child shall be afforded the option of being interviewed in private or selecting any adult who is a member of the staff of the school, including any certificated or classified employee or volunteer aide, to be present at the interview. A representative of the agency investigating suspected child abuse or neglect or the State Department of Social Services shall inform the child of that right prior to the interview.

The purpose of the staff person's presence at the interview is to lend support to the child and enable him or her to be as

comfortable as possible. However, the member of the staff so elected shall not participate in the interview. The member of the staff so present shall not discuss the facts or circumstances of the case with the child. The member of the staff so present, including, but not limited to, a volunteer aide, is subject to the confidentiality requirements of this article, a violation of which is punishable as specified in **Section 11167.5**. A representative of the school shall inform a member of the staff so selected by a child of the requirements of this section prior to the interview. A staff member selected by a child may decline the request to be present at the interview. If the staff person selected agrees to be present, the interview shall be held at a time during school hours when it does not involve an expense to the school. Failure to comply with the requirements of this section does not affect the admissibility of evidence in a criminal or civil proceeding.

(b) The Superintendent of Public Instruction shall notify each school district and each agency specified in **Section 11165.9** to receive mandated reports, and the State Department of Social Services shall notify each of its employees who participate in the investigation of reports of child abuse or neglect, of the requirements of this section.

Note: **Pen. Code § 11167.5(a)** provides that "(a)ny violation of the confidentiality provided by this article is a misdemeanor punishable by imprisonment in a county jail not to exceed six months, by a fine of five hundred dollars ($500), or by both that imprisonment and fine."

Closely or Pervasively Regulated Businesses or Activities:

Rule: The courts have indicated that a warrant is *not* necessary in those cases where the place to be searched is commercial property, and the industry involved is one that is so "*pervasively regulated*" or "*closely regulated*" that warrantless inspections are necessary to insure proper, or legal, business practices. (***Donovan v. Dewey*** (1981) 452 US. 594, 598-599 [101 S.Ct. 2534; 69 L.Ed.2nd 262, 268-169]; ***New York v. Burger*** (1987) 482 U.S. 691, 700 [107 S.Ct. 2636; 96 L.Ed.2nd 601, 612-613]; ***People v. Paulson*** (1990) 216 Cal.App.3rd 1480, 1483-1484.)

"*Closely regulated*" businesses (***Colonade Catering Corp. v. United States*** (1970) 397 U.S. 72, 74, 77 [90 S.Ct. 774; 25 L.Ed.2nd 60, 63-65].); *or*

"*Pervasively regulated*" businesses (***United States v. Biswell*** (1972) 406 U.S. 311, 316 [92 S.Ct. 1593; 81 L.Ed.2nd 87]; ***New York v. Burger***, *supra*, at p. 700 [96 L.Ed.2nd at pp. 612-613].)

Criteria: To qualify as a closely or pervasively regulated business which may be subject to warrantless, administrative searches, three criteria must be met:

- There must be a *substantial governmental interest* underlying the regulatory scheme authorizing the inspection.

- The warrantless inspections must be *necessary* to further the regulatory scheme.

- The statute's inspection program, in terms of the certainty and regularity of its application, must provide a *constitutionally adequate substitute for a warrant;* i.e.:

  It must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope; *and*

  It must limit the discretion of the inspecting officers.

  (***New York v. Burger***, *supra*, at pp. 702-702 [96 L.Ed.2nd at pp. 613-615; ***People v. Paulson***, *supra*, at p. 1485; ***City of Los Angeles v. Patel*** (2015) 576 U.S. 409 [135 S.Ct. 2443, 192 L.Ed.2nd 435].)

General Examples:

Commercial Trucking is a pervasively regulated industry, allowing for warrantless searches. (***United States v. Delgado*** (9th Cir. 2008) 545 F.3rd 1195, 1200-1204; based upon Missouri statutes allowing for such searches.)

Also, for a "commercial vehicle officer," who had limited law enforcement powers, to contact a regular state Highway Patrol officer to conduct a search, did not require any reasonable suspicion and did not prevent the regular officer from questioning defendant about issues unrelated to commercial vehicle regulations. (***Id***., at pp. 1204-1205.)

A County Jail, including lockers located outside the visitor center but maintained by the jail personnel, particularly with signs warning visitors that they were subject to search, is the equivalent to a closely regulated business allowing for a warrantless administrative search of a visitor and

the property he deposits in the lockers. (***People v. Boulter*** (2011) 199 Cal.App.4th 761.)

Liquor Sales. (***Colonade Catering Corp. v. United States*** (1970) 397 U.S. 72 [90 S.Ct. 774; 25 L.Ed.2nd 60].)

Firearms Dealers. (***United States v. Biswell*** (1972) 406 U.S. 311, 311-312 [92 S.Ct. 1593; 32 L.Ed.2nd 87].)

Mining. (***Donovan v. Dewey*** (1981) 452 U.S. 594 [101 S.Ct. 2534; 69 L.Ed.2nd 262].)

Automobile Junkyards. (***New York v. Burger*** (1987) 482 U.S. 691 [107 S.Ct. 2636; 96 L.Ed.2nd 601].)

*Massage Parlors, per **B&P Code § 4601(f)***. (***Kim v. Dolch*** (1985) 173 Cal.App.3rd 736; ***Killgore v. City of South El Monte*** (9th Cir. 2021) 2021 U.S.App. LEXIS 20257; unpublished.)

Where Licenses Include a Consent to Search:

In some instances, licenses to do business include a consent to search (**26 U.S.C. § 7342**), and may impose sanctions for refusing to give such consent, but do not, by its terms, permit a forcible entry. (***Colonnade Catering Corp. v. United States***, *supra*: Inspections under the federal retail liquor occupational tax stamp act.)

See also ***United States v. Biswell*** (1972) 406 U.S. 311 [92 S.Ct. 1593; 32 L.Ed.2nd 87]; warrantless search of a gun dealer's place of business under authority of the **Gun Control Act** (**18 U.S.C. §§ 921 et seq.**), upheld.

People v. Lee (1986) 186 Cal.App.3rd 743, 749; finding a warrantless entry into the private areas of a business (for the purpose of an arrest, in this case), does *not* affect the applicability of a regulatory scheme authorizing warrantless inspections of the private areas of some regulated businesses, unless the search is being conducted for the purpose of seeking contraband or evidence of crime under the guise of an administrative warrant. (***Donovan v. Dewey*** (1981) 452 U.S. 594, 598, fn. 6 [101 S.Ct. 2534; 69 L.Ed.2nd 262, 268].)

Exceptions:

Hotels and Motels: Hotels and motels do *not* qualify as closely regulated businesses, although an administrative subpoena or warrant is all that is necessary for the inspection of the business' guest registry records. (***City***

of* Los Angeles *v. Patel (2015) 576 U.S. 409 [135 S.Ct. 2443; 192 L.Ed.2nd 435].)

As a Pretext to Perform a Criminal Function:

> Use of an administrative, or "*inspection*" warrant, issued by a court for the purpose of regulating building, fire, safety, plumbing, electrical, health, labor or zoning codes, does not justify an entry by police to make an arrest given the lesser proof standards needed to obtain an administrative warrant. If an entry is effected for the purpose of arresting the occupant, an arrest warrant must first be obtained. (***Alexander v. City and County of San Francisco*** (9th Cir. 1994) 29 F.3rd 1355.)
>
> Pretextual detentions are illegal when the pretext used to conduct an investigation of "*ordinary criminal wrongdoing*" is an officer's statutory administrative authority to conduct warrantless and suspicionless inspections, but where the detention and search would not have occurred but for the officer's intent to conduct the criminal investigation. (***United States v. Orozco*** (9th Cir. 2017) 858 F.3rd 1204.)
>
> The rule under ***Whren*** (see ***Whren v. United States*** (1996) 517 U.S. 806 [116 S.Ct. 1769; 135 L.Ed.2nd 89].), allowing for pretextual stops) does not apply to the conducting of an administrative impoundment and inventory search of a vehicle. (***United States v. Orozco***, *supra*, at pp. 1210-1212; ***United States v. Johnson*** (9th Cir. 2018) 889 F.3rd 1120, 1125-1126.)
>
> > However, see the concurring opinion in ***United States v. Johnson***, *supra*, at pp. 1129-1133, where the two concurring justices note that "such decision contradicts earlier Supreme Court precedent and that ***Orozco*** therefore ought to be reconsidered by our court," and "that the Supreme Court has explicitly—and unanimously—rejected the approach we adopted in ***Orozco***;" citing ***Brigham City v. Stuart*** (2006) 547 U.S. 398 [126 S.Ct. 1943; 164 L.Ed.2nd 650], as authority for this argument.
> >
> > See "*Inventory Searches as an Exception to the Rule of* ***Whren v. United States***," under "*Searches of Vehicles*" (Chapter 12), below.
>
> Where law enforcement officers were asked to assist in the execution of an administrative warrant authorizing the inspection of a private residence for city code violations, they violated the

Fourth Amendment because their primary purpose in executing the warrant was to gather evidence in support of a criminal investigation, and, accordingly, defendant was entitled to suppression of evidence obtained during the search. Although law enforcement had initiated a criminal investigation of defendant before the administrative search, it had concluded that it did not have probable cause to arrest defendant or obtain a search warrant for his home, but it knew that a city was going to obtain an inspection warrant for defendant's home and to request assistance at the inspection, and while accompanying the city on its inspection, law enforcement officers photographed incriminating evidence. (***United States v. Grey*** (9th Cir. 2020) 959 F.3rd 1166.)

***California's Implied Consent Law in Driving Under the Influence* (*DUI*) *Cases*:**

Veh. Code § 23612: *Implied Consent: Advisal Requirements Incident to Arrest for DUI*:

(a)

(1)

(A) A person who drives a motor vehicle is *deemed to have given his or her consent* to chemical testing of his or her *blood* or *breath* for the purpose of determining the *alcoholic content* of his or her blood, if lawfully arrested for an offense allegedly committed in violation of **Section 23140** (DUI by persons under the age of 21), **23152** (DUI by all others) or **23153** (DUI with injury). If a blood or breath test, or both, are unavailable, then **paragraph (2)** of **subdivision (d)** applies.

(B) A person who drives a motor vehicle is *deemed to have given his or her consent* to chemical testing of his or her blood for the purpose of determining the *drug content* of his or her blood, if lawfully arrested for an offense allegedly committed in violation of **Section 23140**, **23152**, or **23153**. If a blood test is unavailable, the person shall be deemed to have given his or her consent to chemical testing of his or her urine and shall submit to a urine test.

(C) The testing shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe the person was driving a motor vehicle in violation of **Section 23140**, **23152**, or **23153**.

(D) The person *shall be told* that his or her *failure to submit to, or the failure to complete, the required breath or urine testing will result in a fine and mandatory imprisonment if the person* is convicted of a violation of **Section 23152** or **23153**. The person shall also be told that his or her failure to submit to, or the failure to complete, the required breath, blood, or urine tests will result in **(i)** the *administrative suspension* by the department of the person's privilege to operate a motor vehicle for a period of one year, **(ii)** the administrative revocation by the department of the person's privilege to operate a motor vehicle for a period of two years if the refusal occurs within 10 years of a separate violation of **Section 23103** as specified in **Section 23103.5**, or of **Section 23140**, **23152**, or **23153** of this code, or of **Section 191.5** or **subdivision (a)** of **Section 192.5** of the **Penal Code** that resulted in a conviction, or if the person's privilege to operate a motor vehicle has been suspended or revoked pursuant to **Section 13353**, **13353.1**, or **13353.2** for an offense that occurred on a separate occasion, or **(iii)** the administrative revocation by the department of the person's privilege to operate a motor vehicle for a period of three years if the refusal occurs within 10 years of two or more separate violations of **Section 23103** as specified in **Section 23103.5**, or of **Section 23140**, **23152**, or **23153** of this code, or of **Section 191.5 (**Gross Vehicular Manslaughter and/or Vehicular Manslaughter While Intoxicated) or **subdivision (a)** of **Section 192.5** of the **Penal Code** (Vehicular Manslaughter; Operating a Vessel in violation of **Harb. & Nav. Code §655(b)**, **(c)**, **(d)**, **(e)**, or **(f)**), or any combination thereof, that resulted in convictions, or if the person's privilege to operate a motor vehicle has been suspended or revoked two or more times pursuant to **Section 13353**, **13353.1**, or **13353.2** for offenses that occurred on separate occasions, or if there is any combination of those convictions, administrative suspensions, or revocations.

The admonition pursuant to **V.C. § 13353** that defendant's refusal to submit to chemical testing would result in a license suspension was not invalidated by the omission of an admonition that refusal would result in a fine or imprisonment. The Department of Motor Vehicles was not seeking a fine or imprisonment. (***Elmore v. Gordon*** (2021) 73 Cal.App.5th 520, 522-523.)

(2)

(A) If the person is lawfully arrested for driving under the influence of an alcoholic beverage, the person has the choice of whether the test shall be of his or her *blood or breath* and the officer *shall advise the person that he or she has that choice*. If the person arrested either is incapable, or states that he or she is incapable, of completing the chosen test, the person shall submit to the remaining test. If a blood or breath test, or both, are unavailable, then **paragraph (2)** of **subdivision (d)** applies.

(B) If the person is lawfully arrested for driving under the influence of any drug or the combined influence of an alcoholic beverage and any drug, the person has the choice of whether the test shall be of his or her blood or breath, and the officer shall advise the person that he or she has that choice.

(C) A person who chooses to submit to a breath test may also be requested to submit to a *blood test* if the officer has reasonable cause to believe that the person was driving under the influence of a drug or the combined influence of an alcoholic beverage and a drug and if the officer has reasonable cause to believe that a blood test will reveal evidence of the person being under the influence. The officer shall state in his or her report the facts upon which those beliefs are based. The officer shall advise the person that he or she is required to submit to an additional test. The person shall submit to and complete a blood test. If the person arrested is incapable of completing the blood test, the person shall submit to and complete a urine test.

(3) If the person is lawfully arrested for an offense allegedly committed in violation of **Section 23140**, **23152**, or **23153**, and, because of the need for medical treatment, the person is first transported to a medical facility where it is not feasible to administer a particular test of, or to obtain a particular sample of, the person's *blood or breath*, the person has the choice of those tests, including a *urine test*, that are available at the facility to which that person has been transported. In that case, the officer shall advise the person of those tests that are available at the medical facility and that the person's choice is limited to those tests that are available.

(4) The officer shall also advise the person that he or she does not have the *right to have an attorney* present before stating whether he or she will submit to a test or tests, before deciding which test or tests to take, or during administration of the test or tests chosen, and that, in the event of refusal to submit to a test or tests, the refusal may be used against him or her in a court of law.

(5) A person who is *unconscious* or otherwise in a condition rendering him or her incapable of refusal is *deemed not to have withdrawn his or her consent* and a test or tests may be administered whether or not the person is told that his or her failure to submit to, or the noncompletion of, the test or tests will result in the suspension or revocation of his or her privilege to operate a motor vehicle. A person who is *dead* is deemed not to have withdrawn his or her consent and a test or tests may be administered at the direction of a peace officer.

(b) A person who is afflicted with *hemophilia* is exempt from the *blood test* required by this section, but shall submit to, and complete, a *urine test*.

(c) A person who is afflicted with a *heart condition* and is using an anticoagulant under the direction of a licensed physician and surgeon is exempt from the *blood test* required by this section, but shall submit to, and complete, a *urine test*.

(d)

(1) A person lawfully arrested for an offense allegedly committed while the person was driving a motor vehicle in violation of **Section 23140**, **23152**, or **23153** may request the arresting officer to have a chemical test made of the arrested person's *blood* or *breath* for the purpose of determining the alcoholic content of that person's *blood*, and, if so requested, the arresting officer shall have the test performed.

(2) If a *blood or breath test* is not available under **subparagraph (A)** of **paragraph (1)** of **subdivision (a)**, or under **subparagraph (A)** of **paragraph (2)** of **subdivision (a)**, or under **paragraph (1)** of this subdivision, the person shall submit to the remaining test in order to determine the percent, by weight, of alcohol in the person's blood. If both the *blood and breath tests* are unavailable, the person shall be deemed to have given his or her consent to chemical testing of his or her *urine* and shall submit to a *urine test*.

(e) If the person, who has been arrested for a violation of **Section 23140**, **23152**, or **23153**, refuses or fails to complete a chemical test or

tests, or requests that a *blood or urine test* be taken, the peace officer, acting on behalf of the department, shall serve the notice of the order of suspension or revocation of the person's privilege to operate a motor vehicle personally on the arrested person. The notice shall be on a form provided by the department.

(f) If the peace officer serves the notice of the order of suspension or revocation of the person's privilege to operate a motor vehicle, the peace officer shall take possession of all driver's licenses issued by this state that are held by the person. The temporary driver's license shall be an endorsement on the notice of the order of suspension and shall be valid for *30 days* from the date of arrest.

(g)

(1) The peace officer shall immediately forward a copy of the completed notice of suspension or revocation form and any driver's license taken into possession under **subdivision (f)**, with the report required by **Section 13380**, to the department. If the person submitted to a *blood or urine test*, the peace officer shall forward the results immediately to the appropriate forensic laboratory. The forensic laboratory shall forward the results of the chemical tests to the department within 15 calendar days of the date of the arrest.

(2)

(A) Notwithstanding any other law, a document containing data prepared and maintained in the governmental forensic laboratory computerized database system that is electronically transmitted or retrieved through public or private computer networks to or by the department is the best available evidence of the chemical test results in all administrative proceedings conducted by the department. In addition, any other official record that is maintained in the governmental forensic laboratory, relates to a chemical test analysis prepared and maintained in the governmental forensic laboratory computerized database system, and is electronically transmitted and retrieved through a public or private computer network to or by the department is admissible as evidence in the department's administrative proceedings. In order to be admissible as evidence in administrative proceedings, a document described in this subparagraph shall bear a certification by the employee of the department who retrieved the document certifying that the information was received or retrieved directly from the

computerized database system of a governmental forensic laboratory and that the document accurately reflects the data received or retrieved.

(B) Notwithstanding any other law, the failure of an employee of the department to certify under **subparagraph (A)** is not a public offense.

(h) A *preliminary alcohol screening* ({"PAS") *test* that indicates the presence or concentration of alcohol based on a breath sample in order to establish reasonable cause to believe the person was driving a vehicle in violation of **Section 23140**, **23152**, or **23153** is a field sobriety test and may be used by an officer as a further investigative tool.

(i) If the officer decides to use a *preliminary alcohol screening* ("PAS") *test*, the officer shall advise the person that he or she is requesting that person to take a preliminary alcohol screening test to assist the officer in determining if that person is under the influence of alcohol or drugs, or a combination of alcohol and drugs. The person's obligation to submit to a *blood, breath, or urine test*, as required by this section, for the purpose of determining the alcohol or drug content of that person's blood, is not satisfied by the person submitting to a preliminary alcohol screening test. The officer shall *advise* the person of that fact and of the person's right to refuse to take the preliminary alcohol screening test.

Note: See "***Veh. Code § 23612;*** *California's* "*implied consent law*," below, for relevant case law.

Veh. Code § 13353*: Blood, Breath or Urine Tests for D.U.I. Arrestees*:

Rule: ***Schmerber v. California*** (1966) 384 U.S. 757, 768 [86 S.Ct. 1826; 16 L.Ed.2nd 908, 918]: The warrantless intrusions into the human body of a person arrested for driving while under the influence of alcohol may, under some circumstances, be upheld assuming the existence of a sufficient exigency; e.g., *blood withdrawal*.)

> It is recognized by the courts that the "'delay necessary to procure a warrant . . . may result in the destruction of valuable evidence,' 'blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible.'" (***People v. Thompson*** (2006) 38 Cal.4th 811, 825; quoting ***Skinner v. Railway Labor Executives' Assn.*** (1989) 489 U.S. 602, 623 [103 L.Ed.2nd 639]; see also ***People v. Toure*** (2015) 232 Cal.App.4th 1096, 1103-1104.)

Limitation: ***Missouri v. McNeely*** (2013) 569 U.S. 141 [133 S.Ct. 1552; 185 L.Ed.2nd 696]:

> ***Schmerber v. California***, *supra, however,* was limited to its circumstances in ***Missouri v. McNeely***, *supra*, where the U.S. Supreme Court held that being arrested for driving while under the influence did not allow for a non-consensual warrantless blood test absent exigent circumstances beyond the fact that the blood was metabolizing at a normal rate.
>
> See ***People v. Ling*** (2017) 15 Cal.App.5th Supp. 1, 3-4, for a description of the history from ***Schmerber*** through ***McNeely.*** "Given the clarification of ***Schmerber*** in ***McNeely***, **Fourth Amendment** challenges to blood draws must now be viewed through a fresh lens that is unencumbered by the past presumption of an existing exception to the warrant requirement." (pg. 4.)

Current Law:

> ***Schmerber*** was not overruled by ***McNeely***, but merely differentiated on its facts (***Birchfield v. North Dakota*** (2016) 579 U.S. 438 [136 S.Ct. 2160; 195 L.Ed.2nd 560].)
>
> In ***Schmerber***, the defendant had been in a traffic collision and had to be transported to the hospital due to his injuries. The Court in ***McNeely*** pointed out "that where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant." (Citation) 'Given these special facts,' we found that it was appropriate for the police to act without a warrant. (Citation)" (***Missouri v. McNeely***, *supra*, at 151.)
>
> Also, the admonition pursuant to **V.C. § 13353** that defendant's refusal to submit to chemical testing would result in a license suspension was not invalidated by the omission of an admonition that refusal would result in a fine or imprisonment. The Department of Motor Vehicles was not seeking a fine or imprisonment. (***Elmore v. Gordon*** (2021) 73 Cal.App.5th 520, 522-523.)

The Unconscious DUI Arrestee:

> The implied consent provisions under **Veh. Code § 23612(a)(5)**, where, by statute, blood may be drawn from an unconscious or dead DUI suspect (see below), was held *not* to overcome the need for a search warrant without a showing of exigent circumstances.

(***People v. Arredondo*** (2016) 245 Cal.App.4th 186, 193-205; no exigency found, pp. 205-206.)

> Note: Petition for Review in ***People v. Arredondo*** was dismissed and the case remanded in light of the decision in ***Mitchell v. Wisconsin*** (June 27, 2019) __ U.S.__, __ [139 S.Ct. 2525; 204 L.Ed.2nd 1040], where the U.S. Supreme Court held that when a DUI arrestee is unconscious, this fact alone will "*almost always*" constitute an exigency, allowing for a warrantless blood draw. (See below.)

In the State of Wisconsin, the state's implied consent statute (**Wis. Stat. § 343.305(2)** & **(3)(a)**), which imposes civil (as opposed to criminal) penalties only, for refusing to provide a blood, breath, or urine sample, has been interpreted to be sufficient to justify a warrantless blood draw absent a specific withdrawal of that consent, pursuant to **Wis. Statute § 343.305(4)**. (***State v. Mitchell*** (2018) 2018 WI 84; defendant, being unconscious, failed to specifically withdraw his statutory implied consent.)

> Other states are in accord. (***People v. Hyde*** (Colo. 2017) 393 P.3rd 962; ***Helton v. Commonwealth*** (Ky. 2009) 299 S.W.3rd 555, 559.)

The U.S. Supreme Court finally ruled on the issue: In the case of an unconscious DUI suspect, the subject's unconsciousness is an exigent circumstance in itself, allowing for a warrantless withdrawal of a blood sample, at least as a general rule although subject to possible exceptions. (***Mitchell v. Wisconsin*** (June 27, 2019) __ U.S.__, __ [139 S.Ct. 2525; 204 L.Ed.2nd 1040]; "In this respect, the case for allowing a blood draw is stronger here than in ***Schmerber* v. *California***, . . ." fn. 8.)

> Immediate medical treatment administered by the hospital staff could delay (or otherwise distort the results of) a blood draw conducted later, upon receipt of a warrant, thus reducing its evidentiary value. (***Id***, at p. __.)
>
> The availability of expedited telephonic search warrant procedures is irrelevant. "(W)ith better technology, the time required (to obtain a search warrant) has shrunk, but it has not disappeared." (***Id***, at p. __.)
>
> But, see dissenting opinion at pp. __-__.

Veh. Code § 23612; *California's* "*Implied Consent Law*" *Interpreted*: **Veh. Code § 23612** (see above, under "*California's Implied Consent Law In Driving Under the Influence* (*DUI*) *Cases*") has been held to be a factor, among the "totality of the circumstances," in determining whether or not a DUI arrestee has given "actual consent" to a warrantless blood draw. (***People v. Harris*** (2015) 234 Cal.App.4th 671, 681-692.)

Case Law:

"(A)ctual consent to a blood draw is not 'implied consent,' but rather a possible result of requiring the driver to choose whether to consent under the implied consent law. (Citation.) '[T]he implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether the driver will give or decline to give actual consent to a blood draw when put to the choice between consent or automatic sanctions. Framed in the terms of "implied consent," choosing the "yes" option affirms the driver's implied consent and constitutes actual consent for the blood draw. Choosing the "no" option acts to withdraw the driver's implied consent and establishes that the driver does not give actual consent.' (Citation)" (***People v. Harris***, *supra*, at p. 686.)

Note: See ***Birchfield v. North Dakota*** (2016) 579 U.S. 438, 444-450 [136 S.Ct. 2160;195 L.Ed.2nd 560], for a historical review of the development of DUI statutes, the importance of obtaining a reading of the suspect's "BAC" ("Blood Alcohol Concentration"), and the advent of implied consent statutes.

"Voluntary consent to a blood test required under the implied consent law satisfies the **Fourth Amendment**." (***People v. Lopez*** (2020) 46 Cal.App.5th 317, 324, citing ***People v. Harris***, *supra*, at p. 685.)

"The implied consent law, **section 23612**, plays a part in our analysis, but it does not itself establish consent." (***People v. Lopez***, *supra*, at p. 325.)

One's "actual consent," however, may itself be implied upon evaluating the "totality of the circumstances." "[N]o words at all need be spoken: in appropriate circumstances, consent to enter may be unmistakably manifested by a gesture alone." (***People v. Lopez***, *supra*, at p. 327, quoting (***People v. Jame***s (1977) 19 Cal.3rd 99, 113.)

> Failure by the officer to read to an arrestee the entire admonition as required by statute is but one factor to consider when determining whether the arrestee did in fact consent to a blood draw. (***People v. Lopez***, *supra*.)

Note: To put this rule into a formula: *Implied consent per* ***Veh. Code § 23612*** *+ circumstances consistent with consent = actual consent*.

Also note **Veh. Code § 13384** (effective since 1999) requiring for all new and renewed driver's licenses to include the applicant's written consent to submit to a chemical test or tests of that person's blood, breath, or urine, or to submit to a preliminary alcohol screening test pursuant to **Veh. Code § 23136** (persons under 21 years of age with a blood alcohol level of .01% or higher) when requested to do so by a peace officer, and for the applicant to sign a written declaration consenting to the above. The legal effect of this mandated written consent has yet to be tested, but may offer a solution to the inability of **section 23612's** "implied consent" provisions to avoid the need for a search warrant. (See ***People v. Arredondo*** (2016) 245 Cal.App.4th 186, 198, & fn. 7; ***People v. Mason*** (2016) 8 Cal.App.5th Supp. 11, 26-27.)

> In ***Mason***, at pg. 26, it was noted that, "(p)roof of that consent by (defendant) here would have at least brought the case closer to the probation condition or advance express-consent context." However, the Court still "doubt(ed)" it would "automatically" encompass the "rights and concerns" addressed under the **Fourth Amendment**. In ***Mason***, no evidence of the defendant's status as a licensed driver was in the record, so the issue was not decided.
>
> Note: Petition for Review was dismissed in ***Arredondo*** and the case remanded in light of the decision in ***Mitchell v. Wisconsin*** (June 27, 2019) __ U.S.__, __ [139 S.Ct. 2525; 204 L.Ed.2nd 1040], where the U.S. Supreme Court held that when a DUI arrestee is unconscious, this fact alone will "almost always" constitute an exigency, allowing for a warrantless blood draw.

Where defendant's blood was taken over his objection and without a warrant, ***Missouri v. McNeely***, *supra*, did not mandate suppression of the blood result in that ***McNeely*** was decided after the arrest in this case. Also, defendant was subject to search and seizure conditions under his "post-release community supervision" (**PRCS**) terms, eliminating the need for a search warrant. With

probable cause to believe that he was driving while under the influence of alcohol when he had a traffic accident, his mandatory **PRCS** search and seizure conditions, authorizing the blood draw without the necessity of a search warrant, was not in violation of the **Fourth Amendment**. (***People v. Jones*** (2014) 231 Cal.App.4th 1257, 1262-1269.)

A non-violent and/or non-manipulative refusal to submit to a blood or breath test is *not* a violation of the "resisting a peace officer" statute; **P.C. § 148**. "To permit a refusal in and of itself to be independently punished under **section 148**—wholly outside the implied consent scheme and the Legislature's policy judgments—would be inappropriate." "(A) person has the right to refuse to consent to a search" and "the exercise of a constitutional right cannot be punished under **section 148**." (***People v. Valencia*** (2015) 240 Cal.App.4th Supp. 11, 16-27.)

In a prosecution for driving under the influence of alcohol, blood draw evidence should have been suppressed under the **Fourth Amendment** in that under the totality of the circumstances, the People failed to show that defendant actually—freely and voluntarily—consented to a blood draw to which she had physically submitted after an incomplete implied consent admonishment. The admonishment, which stated that defendant was required to submit to a blood test, but did not include the consequences of refusal and was misleading. Defendant had a **Fourth Amendment** right, notwithstanding implied (or "deemed") consent, to refuse and to bear the consequences of such a refusal. Implied consent does not constitute real or actual consent in fact, for purposes of the **Fourth Amendment**. Also, the People failed to offer any evidence of any advance express consent by defendant, or even that she was a licensed California driver. (***People v. Mason*** (2016) 8 Cal.App.5th Supp. 11, 18-33.)

> Per the Court, such implied consent "is not real or actual consent in fact for purposes of the **Fourth Amendment**, though it may be perfectly fine for purposes of administrative proceedings involving forfeiture of driving privileges under the implied consent law upon a refusal to submit to a duly requested chemical test. (***Id***., at pp. 27-28; see ***Hughey v. Dept. of Motor Vehicles*** (1991) 235 Cal.App.3rd 752, 757.)

The Appellate Department of the San Diego Superior Court has held that sending blood results to a drug lab in those "driving while under the influence" cases where testing for alcohol failed to show

sufficient alcohol to account for the degree that the suspect appeared to be under the influence, and where the defendant had consented only to have her blood tested for alcohol, as opposed to drugs, was a violation of the **Fourth Amendment** in that such drug testing is beyond the scope of the consent given; i.e., for alcohol only. (***People v. Pickard*** (2017) 15 Cal.App.5th Supp. 12, 15-17.)

> The Court further noted that to send the blood to a drug lab constituted "a procedural recurring or systematic failure by the law enforcement agency's personnel to abide by the **Fourth Amendment**." As a result, good faith did not prevent a court from suppressing the test result for drugs as being beyond the scope of the consent given where the defendant is told only that her blood will be tested for alcohol. (***Id***., at pp. 16-17.)

Subdivision (a) (1)(D) of California's implied consent law (**Veh. Code § 23612**) requires an arresting officer to at least attempt to provide the required admonition that a suspected drunk driver's refusal to submit to a chemical test to determine the alcohol content of his or her blood will result in the suspension of the person's privilege to operate a motor vehicle for a period of one year. There is a material difference between attempting to admonish an uncooperative suspect and the invited conclusion as occurred here that compliance with a statutorily mandated admonition was altogether unnecessary because of the defendant's disruptive and combative behavior. Because it was undisputed that the arresting officer never admonished defendant, the suspension of his driver's license was subject to reversal even though he was uncooperative and combative towards the officer. (***Munro v. Department of Motor Vehicles*** (2018) 21 Cal.App.5th 41.)

An arresting officer's failure to advise defendant under **Veh. Code § 23612(a)(2)(B)**, of his statutory right to choose either a blood or breath test did not violate the **Fourth Amendment** of the **U.S. Constitution**, and thus **Cal. Const., art. I, § 28, subd. (f)(2)** required the admission of blood test results into evidence. (***People v. Vannesse*** (2018) 23 Cal.App.5th 440.)

Where defendant was charged with misdemeanor DUI, the appellate court concluded that defendant freely consented to the search of his blood. Although a statement by the arresting officer was incomplete under **Veh. Code § 23612(a)(1)(D)**, there was no evidence the officer intended to deceive defendant about his right to refuse a blood altogether. Nor was the officer's statement about

the implied consent law demonstrably false. At no point before or after defendant consented to the test did he indicate any objection. Looking at the totality of the circumstances, including the officer's conduct, the existence of the implied consent law, and defendant's actions before and after he consented to the blood test, the appellate court could not say the trial court's finding that defendant voluntarily consented to the test was error. (***People v. Balov*** (2018) 23 Cal.App.5th 696.)

> "[T]he implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether the driver will give or decline to give actual consent to a blood draw when put to the choice between consent or automatic sanctions. Framed in the terms of 'implied consent,' choosing the 'yes' option affirms the driver's implied consent and constitutes actual consent for the blood draw. Choosing the 'no' option acts to withdraw the driver's implied consent and establishes that the driver does not give actual consent." [Citation.]" (***Id***., at p. 702; ***People v. Lopez*** (2020) 46 Cal.App.5th 317, 326.)

The **Fourth Amendment** did not require a warrant for a blood draw because defendant was lawfully arrested on suspicion of driving under the influence and he freely and voluntarily exercised the choice California law gave him to take a blood test instead of a breath test. These facts brought the blood draw into the category of breath-or-blood searches that require no warrant under the search-incident-to-arrest doctrine. (***People v. Gutierrez*** (2018) 27 Cal.App.5th 1155.)

The **Fourth Amendment** was held not to have prohibited a finding of implied consent to a blood draw under California's former law, even though defendant was advised that the law required a chemical test, because he was given a choice of tests. Just because the state cannot compel a warrantless blood test does not mean that it cannot offer one as an alternative to the breath test that it clearly *can* compel. The trial court properly found that defendant's consent to a blood draw was voluntary even though he had been advised that a breath or blood test was required by the law. Both arresting officers testified to the circumstances under which defendant gave his consent to the blood test and there was no testimony that he only gave actual consent because of the threat of criminal prosecution. (***People v. Nzolameso*** (2019) 39 Cal.App.5th 1181.)

The **Fourth Amendment** did not require suppression of evidence from a warrantless blood draw because substantial evidence supported a finding that defendant consented. After the officer instructed her that the implied consent law required her to undergo a blood draw (suspecting that defendant was under the influence of a drug), defendant did not object or refuse to undergo the test, did not resist any of the officers' directions, and voluntarily placed her arm on the table to allow the phlebotomist to draw her blood. The result was not changed by the officer's failure to relate the admonitions regarding the consequences of refusal. (***People v. Lopez*** (2020) 46 Cal.App.5th 317.)

"Despite its common name, the implied consent law implicitly grants a suspect the right not to consent to a test." (***Id***., at p. 326.)

Failure by the officer to read to an arrestee the entire admonition as required by statute is but one factor to consider when determining whether the arrestee did in fact consent to a blood draw. (***People v. Lopez***, *supra*, at pp. 327-328; citing ***People v. Harris*** (2015) 234 Cal.App.4th 671, 676-692.)

Burden of Proof in Blood Draw Cases:

Where the circumstances of a blood draw authorized by a valid search warrant are typical and routine, i.e., not peculiarly within the knowledge of the People, the burden of proof is on the defendant as to the **Fourth Amendment** requirement that the blood be drawn in a reasonable manner. Defendant had the burden to prove that the manner of a warranted blood draw was not reasonable because of the typical and routine circumstances, including that the blood was drawn at the hospital and that defendant was in as good a position as the officer to observe the draw. Defendant failed in this case to carry his burden. He did not, for example, aver that the blood draw procedures were unsanitary, painful, or unsafe. (***People v. Fish*** (2018) 29 Cal.App.5th 462.)

Other California & United States Regulatory/Administrative Searches:

Veh. Code § 2805: Vehicle Inspections in Connection with Theft Investigations:

(a) For the purpose of locating stolen vehicles, (1) any member of the California Highway Patrol, or (2) a member of a city police department, a member of a county sheriff's office, or a district attorney investigator, whose primary responsibility is to conduct vehicle theft investigations, may inspect any vehicle of a type required to be registered under this code,

or any identifiable vehicle component thereof, on a highway or in any public garage, repair shop, terminal, parking lot, new or used car lot, *automobile dismantler's lot*, vehicle shredding facility, vehicle leasing or rental lot, vehicle equipment rental yard, vehicle salvage pool, or other similar establishment, or any agricultural or construction work location where work is being actively performed, and may inspect the title or registration of vehicles, in order to establish the rightful ownership or possession of the vehicle or identifiable vehicle component.

> As used in this subdivision, "*identifiable vehicle component*" means any component which can be distinguished from other similar components by a serial number or other unique distinguishing number, sign, or symbol.

Veh. Code § 320: An Established Place of Business:

> **(b)**: An automobile dismantler where the books and records pertinent to the type of business being conducted are kept. A place of business of an automobile dismantler which qualified as an "established place of business" before *September 17, 1970*, is an "established place of business" as defined in this section.
>
> (b) A member of the California Highway Patrol, a member of a city police department or county sheriff's office, or a district attorney investigator whose primary responsibility is to conduct vehicle theft investigations, may also inspect, for the purposes specified in subdivision (a), implements of husbandry, special construction equipment, forklifts, and special mobile equipment in the places described in **subdivision (a)** or when that vehicle is incidentally operated or transported upon a highway.
>
> (c) Whenever possible, inspections conducted pursuant to **subdivision (a) or (b)** shall be conducted at a time and in a manner so as to minimize any interference with, or delay of, business operations.
>
> (See ***People v. Woolsey*** (1979) 90 Cal.App.3rd 994; ***People v. Calvert*** (1993) 18 Cal.App.4th 1820; ***People v. Potter*** (2005) 128 Cal.App.4th 611.)
>
> See "*Searches of Vehicles*" (Chapter 12), below.

Pen. Code § 171e: Inspection of a firearm to determine whether it is loaded for purposes of **P.C. §§ 171c** & **171d** (Firearms in state buildings and governmental residences, respectively),

Pen. Code § 25850(b) (formerly **P.C. § 12031(a)**): Inspection of a firearm in a public place.

Pen. Code § 18250 (formerly **P.C. § 12028.5**): Seizure of firearms and other deadly weapons at domestic violence scenes.

Fish and Game Code: There is case law that refers to the regulation of hunting and fishing as having relaxed search and seizure standards due to the fact that they are "*highly regulated*" activities, and that requiring warrants would make it impossible to effectively implement hunting and fishing laws. But the case law is very sparse:

> ***F&G § 8011***: Allowing the warrantless inspection of the records of a wholesale fish dealer licensed under **F&G § 8040(a)**.
>
> *Cases*:
>
> > ***People v. Harbor Hut Restaurant*** (1983) 147 Cal.App.3rd 1151; upholding the warrantless inspection of the fish in a restaurant under the theory that "*fishing*" is a "*highly regulated business*."
> >
> > ***Betchard v. Dept. of Fish and Game*** (1984) 158 Cal.App.3rd 1104; upheld the routine and warrantless inspections of plaintiff's agricultural rangeland upon which deer hunting was often done. But the court noted that the relaxed standards were due to the fact that the areas entered were "*open fields*" and the intrusion into the plaintiff's privacy rights was minimal.
> >
> > > The court also noted that a hunter has given up a certain amount of his or her privacy rights: "Hunters are required to be licensed. By choosing to engage in this highly regulated activity, there is a fundamental premise that there is an implied consent to effective supervision and inspection as directed by statute." (***Id.***, at p. 1110.)
> >
> > ***People v. Perez*** (1996) 51 Cal.App.4th 1168, upheld a highway checkpoint used to implement hunting regulations.
> >
> > A game warden, under authority of **Fish & Game § 1006** (see below), who reasonably believes that a person has recently been fishing or hunting, but lacks reasonable suspicion that the person has violated an applicable fish or game statute or regulation, may nonetheless stop a vehicle in which the person is riding to demand the person display all fish or game the person has caught or taken. As an administrative, special needs search, the standard **Fourth Amendment** probable cause requirements are irrelevant. (***People v. Maikhio*** (2011) 51 Cal.4th 1074.)

Pursuant to **F&G Code § 1006**; "The department may inspect the following:

> **(a)** All boats, markets, stores and other buildings, except dwellings, and all receptacles, except the clothing actually worn by a person at the time of inspection, where birds, mammals, fish, reptiles, or amphibia may be stored, placed, or held for sale or storage.
> **(b)** All boxes and packages containing birds, mammals, fish, reptiles, or amphibia which are held for transportation by any common carrier."

However, The Ninth Circuit Court of Appeal has held that the administrative search exception is applicable only to warrantless searches where (1) the search promotes an important governmental interest, (2) is authorized by statute, and (3) the authorizing statute and its regulatory scheme provide specific limitations on the manner and place of the search so as to limit the possibility of abuse. (**Tarabochia v. Adkins** (9th Cir. 2014) 766 F.3rd 1115, 1121-1125; finding a traffic stop to check the plaintiff's fish to be in violation of the **Fourth Amendment** in that the applicable Washington State statutes (**Wash. Rev. Code §§ 77.15.080(1)** & **77.15.096**) did not authorize traffic stops and limited such searches to "while fishing."

Financial Code:

Fin. Code § 21206: Inspection of pawned property. (See ***Sanders v. City of San Diego*** (9th Cir. 1996) 93 F.3rd 1423, 1427; ***G&G Jewelry Inc. v. City of Oakland*** (9th Cir. 1993) 989 F.2nd 1093, 1099-1101, and fn. 4.)

United States Code:

14 U.S.C. § 89(a): The Coast Guard has statutory authority to search vessels, giving them plenary authority to stop vessels for document and safety inspections. (***People v. Eng*** (2002) 94 Cal.App.4th 1184; drugs discovered; see "*Border Searches*" (Chapter 18), below.)

49 U.S.C. § 44901: Transportation Security Administration (TSA) screening of luggage bound for airline flights. (See ***United States v. McCarty*** (9th Cir. 2011) 2011 U.S.App. LEXIS 18874; child pornography observed during a lawful TSA administrative search may lawfully be used to establish probable cause to arrest.

The case was remanded and vacated, where defendant's motion to suppress was denied at ***United States v. McCarty*** (U.S. Dist. Hawaii, 2011) 835 F. Supp.2nd 938.)

Arson Investigations:

*Arson Investigations done immediately upon the extinguishing of a fire, before firefighters leave the scene and the building is secured. (**Michigan v. Clifford*** (1984) 464 U.S. 287, 294 [104 S.Ct. 641; 78 L. Ed. 2nd 477].)

School Searches:

Rule: The **Fourth Amendment** protects students on a public school campus against unreasonable searches and seizures. (***In re K.J.*** (2018) 18 Cal.App.5th 1123, 1128.)

However, Searches and seizures of students in the school setting is recognized as a "special needs" search or seizure, lessening the standard probable cause requirements for school officials to one of "reasonableness," under the circumstances. (***Scott v. County of San Bernardino*** (9th Cir. 2018) 903 F.3rd 943, 949, citing ***Vernonia Sch. Dist. 47J v. Acton*** (1995) 515 U.S. 646, 653 [115 S.Ct. 2386; 132 L.Ed.2nd 564].) (See "*Special Needs Searches and Seizures*," above.)

Although ***T.L.O.*** dealt with searches and not seizures, the same standards have specifically been extended its special needs test to seizures conducted by school officials in the school setting. (***Scott v. County of San Bernardino***, *supra*.)

Students in General:

Rule: Recognizing that students (K through high school) do retain some **Fourth Amendment** protections, and that school officials are, in effect, government employees, the Supreme Court struck a balance and found that school administrators may conduct searches of students and their personal belongings on no more than a "*reasonable suspicion*." (***New Jersey v. T.L.O.*** (1985) 469 U.S. 325 [105 S.Ct. 733; 83 L.Ed.2nd 720].)

Although ***T.L.O.*** dealt with searches and not seizures, the same standards have specifically been extended its special needs test to seizures conducted by school officials in the school setting. (***Scott v. County of San Bernardino***, *supra*.)

See ***Horton v. Goose Creek Independent School District*** (5th Cir. 1982) 690 F.2nd 470, 480 to 482, for a detailed analysis of the "*The **Fourth Amendment** in the Public Schools*," and why a relaxed search and seizure standard is applied in analyzing the relationship between students and school administrators.

> ***Horton*** deals with the use of canines to "sniff" students, holding that such an act constitutes a "search" for **Fourth Amendment** purposes, eventually holding that "the type of canine inspection of the student's person involved in this case cannot be justified by the need to prevent abuse of drugs and alcohol when there is no individualized suspicion, and we hold it unconstitutional." (Pgs. 482-483.)

A school search "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." (***New Jersey v. T.L.O.***, *supra*, at p. 342.)

"It is well settled that the actions of public school officials are 'subject to the limits placed on state action by the **Fourteenth Amendment**.'" (***In re K.J.*** (2018) 18 Cal.App.5th 1123, 1128; quoting ***New Jersey v. T.L.O.***, *supra*, at p. 334.)

Although ***T.L.O.*** dealt with searches and not seizures, the same standards have specifically been extended its special needs test to seizures conducted by school officials in the school setting. (***Scott v. County of San Bernardino*** (9th Cir. 2018) 903 F.3rd 943, 949.)

Constitutional Protections and Statutory Restrictions:

Cal. Const., **article I**, **section 28(c)**, provides that students and staff of public schools have "the inalienable right to attend campuses which are safe, secure, and peaceful."

> In a case involving whether, and under what circumstances, a college or university owes a duty of care to protect students from harm, the Supreme Court held that universities do in fact have such a legal duty, under certain circumstances, to protect

or warn their students from foreseeable violence in the classroom or during curricular activities. The trial court properly denied a public university's motion for summary judgment on this ground. While the Supreme Court concluded the university did owe a duty to protect plaintiff, who was stabbed during a chemistry lab by a fellow student who was mentally ill, it remanded the case for the court of appeal to decide whether trial issues of material fact existed on the questions of breach of immunity. (***The Regents of the*** **University of California *v.* Superior Court** (2018) 4 Cal.5th 607.)

On remand, the Second District Court of Appeal (Div. 7) found that in determining whether a public university had breached its duty to protect students from foreseeable acts of violence with respect to a student who had been attacked and injured by another student in a chemistry laboratory, the ordinary negligence standard of care applied. Triable issues of fact as to whether the university had information showing that the attacker posed a foreseeable threat to other students and, if so, whether the university acted reasonably in response to the threat precluded summary judgment. Because the allegations of negligent conduct did *not* include failing to confine the attacker, **Gov't. Code § 856** (i.e., immunity regarding confinement decisions) was inapplicable. Discretionary act immunity under **Gov't. Code, §§ 815.2(b)** and **820.2** did *not* apply because the alleged acts and omissions were ministerial. A treating psychologist was immune from liability under **Civ. Code, § 43.92**. Writ relief was granted in part and denied in part. (***Regents of University of California v. Superior Court*** (2018) 29 Cal.App.5th 890.)

Edu. Code § 49050: The **Education Code** provides that "(n)o school employee shall conduct a search that involves:

- Conducting a body cavity search of a pupil manually or with an instrument.

- Removing or arranging any or all of the clothing of a pupil to permit a visual inspection of the underclothing, breast, buttocks, or genitalia of the pupil."

The Use of Restrains and/or Seclusion as a Disciplinary Measure by School Officials:

See ***A.T. v. Baldo*** (9th Cir. 2019) 2019 U.S. App. LEXIS 38325; unpublished, where it was held that at the very least, teachers and staff were entitled to qualified immunity from an alleged **Fourth Amendment** violation for using "restraints and seclusion" (sometimes referred to as 'containment' or 'isolation') to discipline the plaintiff's child over three years, beginning in the second grade.

"The courts that have addressed this issue have concluded that, while students have a clearly established **Fourth Amendment** right to be free from arbitrary and excessive corporal punishment, the use of physical restraints and seclusion in school settings—particularly in special education classrooms—is not necessarily unlawful. *See* ***C.N. v. Willmar Pub. Schs., Indep. Sch. Dist. No. 347***, 591 F.3rd 624, 633 (8th Cir. 2010) (teacher's allegedly excessive use of restraints and seclusion that were part of developmentally delayed student's IEP (Individualized Education Plan), 'even if overzealous at times and not recommended . . . was not a substantial departure from accepted judgment, practice or standards and was not unreasonable in the constitutional sense'); ***Couture*** (***v. Bd. of Educ. of Albuquerque Pub. Schs***) 535 F.3rd at 1251-52, 1256 (10th Cir. 2008) (repeated use of timeout rooms over a two-month period to address student's disruptive and dangerous behavior was reasonable, particularly in light of the fact that timeouts were prescribed in the student's IEP as a mechanism to teach him behavioral control); ***Alex G. ex rel. Dr. Steven G. v. Bd. of Trs. of Davis Joint Unified Sch. Dist.***, 387 F. Supp. 2d 1119, 1125 (E.D. Cal. 2005) (use of physical restraints against aggressive and violent autistic student not unlawful despite parents' non-consent, where state law allows such restraints when the student poses an immediate danger to himself or others). ⁋ Even where restraints and seclusion are used in a manner that exceeds what is authorized in the student's IEP, courts have generally found their use to be constitutionally permissible.

See ***Payne v. Peninsula Sch. Dist.***, 623 F. App'x 846, 847-48 (9th Cir. 2015) (no violation of clearly established rights where teacher repeatedly placed autistic student in prolonged isolation in a small, dark room as a punishment and had student assist in cleaning up after he defecated in the room, both of which violated student's IEP); ***Miller v. Monroe Sch. Dist.***, 159 F. Supp. 3d 1**238, 1249 (W.D. Wash. 2016)** (finding no clearly established right against holds and seclusions that were performed for discriminatory reasons, by a teacher without the proper training, for lengths that exceeded the maximum time limit in student's IEP). (**Ibid**.)

Case Law:

With information from another student that a minor (Marissa) was supplying other students with prescription and over-the-counter pills at school, that alcohol could be obtained at the plaintiff Savana Safford's home, and information from Marissa that Savana had supplied her with the pills, and with pills and other contraband being found in Savana's day planner that was in Marissa's possession (which Savana admitted was hers), a search of Savana's backpack and outer clothing by school administrators was justified by a reasonable suspicion that Savana might have more pills in her possession. However, this level of suspicion was not sufficient to justify the greater intrusion of having Savana strip down to her underwear and pull her bra and panties out to see what fell out, thus partially exposing herself to school officials. (***Safford Unified School District #1 v. Redding*** (2009) 557 U.S. 364 [129 S.Ct. 2633; 174 L.Ed.2nd 354]; finding that the school officials were entitled to qualified immunity from civil liability under these circumstances.)

Using a *drug-sniffing dog* to do sniffs of a student, being more intrusive, are considered to be a search and controlled by the **Fourth Amendment**, but only requires a finding of a "*reasonable suspicion*" when the person sniffed is a student. (***B.C. v. Plumas*** (9th Cir. 1999) 192 F.3rd 1260; random and suspicionless drug-sniff search of students held to be unreasonable under the circumstances.)

It is the opinion of the California Attorney General that a policy of unannounced, random, neutral dog sniffing of students' personal belongings, such as backpacks, purses, jackets, and outer garments, after ordering students to leave these items in a classroom and remain in another area, would be unconstitutional absent some

suspicion or probable cause to support the search. (83 ***Opn.Cal.Atty. Gen***. 257 (2000))

See ***Burlison v. Springfield Public Schools*** (8th Cir. 2013) 708 F.3rd 1034, upholding, under the circumstances, the use of dogs to sniff students backpacks, purses and other personal belongings after instructing the students to leave these items in a classroom. The procedures used by the school district and police officers to conduct the sweeps reasonably addressed the concerns over drug usage in school in a manner that was minimally intrusive to the students and their belongings.

Use of *metal detectors* at the entrances of a school building, despite the lack of individualized suspicion, is lawful as a "*special needs*" search. (***In re Latasha W.*** (1998) 60 Cal.App.4th 1524.)

Patting a non-student down for possible weapons on a high school campus, where the defendant/minor was to be moved to the security office, need not be justified by an articulable suspicion that he might be armed. (***In re Jose Y.*** (2006) 141 Cal.App.4th 748.)

A school resource officer, although employed as a municipal police officer, while working full time on a high school campus, adopts the relaxed "*reasonable suspicion*" standard applicable to school officials. (***In re William V.*** (2003) 111 Cal.App.4th 1464; see also ***In re Alexander B.*** (1990) 220 Cal.App.3rd 1572, 1577-1578.)

The suspicionless search of a student was upheld where it was conducted pursuant to an established policy applying to all students and was consistent with the type of action on the part of a school administrator that fell well within the definition of "*special needs*" of a governmental agency. The search was of a limited nature, being told only to empty out his pockets, as he was not subjected to physical touching of his person nor was he exposed to the intimate process required for a urine sample necessary for drug testing. The purpose of the search was to prevent the introduction of harmful items (weapons and drugs) into the school environment. Given the general application of the policy to all students engaged in a form of rule violation that could easily lend itself to the introduction of drugs or weapons into the school environment (i.e., leaving during the school day without permission and returning later), further individualized suspicion was not required. (***In re Sean A.*** (2010) 191 Cal.App.4th 182, 186-190.)

But see the dissent (***Id***. at pp. 191-198) criticizing the decision as a non-particularized, suspicionless search of a student in violation of the principles of ***New Jersey v. T.L.O.*** (1985) 469 U.S. 325 [105 S.Ct. 733; 83 L.Ed.2nd 720], where the Supreme Court held that a reasonable suspicion is required. (See above)

Searching student lockers on less than probable cause, based upon a report that a student had been involved in a shooting on a city transit bus the day before and that he might have a firearm on campus, was justified under a "special needs" theory and upheld. (***In re J.D.*** (2014) 225 Cal. App. 4th 709, 714-720.)

Note: Ironically, J.D.'s sawed-off shotgun was not the firearm being sought, but was found accidentally while lawfully looking for a pistol that was reported to be in the possession of another minor on campus.

Note: The Court in this case, in upholding the search of the students' lockers, provides a summary of some very frightening statistics involving violence in our schools, from high-profile school shootings to individualized acts of violence. (See ***Id***., at p. 714.)

Also, as to whether the fact that local city police became involved in the search for the firearm in this case might have somehow converted it into something other than a school search, the Court noted that; "the secondary role of the police officers does not cancel the fundamental feature of this case—administrators seeking to secure the school premises from potential for violence." (***Id***., at p. 720.)

The warrantless search of the defendant/minor's cellphone was reasonable at its inception for purposes of the **Fourth Amendment** because a loaded firearm and its magazine cartridge had been seized from a trashcan earlier, the defendant had lingered outside the principal's office where the student (a known friend of defendant's), suspected of possessing the firearm, was being detained, and where the defendant was questioned after trying to get away. While being questioned, the defendant physically resisted as he was fingering his cellphone in his pocket. A warrant was not necessary before school officials searched the data on the phone because school officials needed only a reasonable suspicion to conduct a warrantless search, and were confronted by a situation in which a loaded firearm had been discovered on school property and they were reasonably concerned that the defendant might be

using his phone to communicate with other students who might possess another firearm or weapon that the officials did not know about. (***In re* Rafael C.** (2016) 245 Cal.App.4th 1288.)

No **Fourth Amendment** violation occurred when defendant, a minor, was detained at school by an officer designated as a school resource officer, and a back-up officer. Prior to the detention at issue, the resource officer received a report from a vice principal that a male student had a gun. Having the principal remove defendant from class, and then the officer grabbing defendant's backpack and putting him in handcuffs as a safety measure, was reasonable under the circumstances. A warrantless search of the defendant's person was justified at its inception by an anonymous tip from another student who sent a text to the vice principal, saying that there was "a guy with a loaded gun" on campus, and in response to questions, that a video showed a student sitting in a classroom, displaying a gun and a magazine clip, and that she knew who the suspect was, even though she did not know his name. The vice principal's physical description of him as one of two students, with the tipster identifying defendant as the one with the gun, was sufficient to justify defendant's detention and search. (***In re K.J.*** (2018) 18 Cal.App.5th 1123, 1133-1135.)

See also "*Minors*," under "*Detentions*" (Chapter 4), above.

Athletics and Extracurricular Activities: Given the extent of the drug problem in public schools, and the importance of the governmental interest in preventing the problem from worsening (i.e., a "*Special Needs*" search), the U.S. Supreme Court has approved (warrantless) mandatory random drug tests for certain categories of students as the price for participating in:

School Athletics: (***Vernonia School District 47J v. Acton*** (1995) 515 U.S. 646 [115 S.Ct. 2386; 132 L.Ed.2nd 564].)

The California Supreme Court approved a similar program for a national college athletic organization (NCAA). (***Hill v. National Collegiate Athletic Assn.*** (1994) 7 Cal.4th 1.)

Extracurricular Activities: (***Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*** (2002) 536 U.S. 822 [122 S.Ct. 2559; 153 L.Ed.2nd 735].)

Airport Searches:

Reasonableness:

Warrantless airport screenings must be reasonable to be lawful. (***United States v. Marquez*** (9th Cir. 2005) 410 F.3rd 612.)

"*Reasonableness*" is determined by balancing the right to be free of intrusion with society's interest in safe air travel. (***United States v. Pulido-Baquerizo*** (9th Cir. 1986) 800 F.2nd 899, 901.)

Airport searches are reasonable when:

- They are no more extensive or intensive than necessary, in light of current technology, to detect weapons or explosives;
- They are confined in good faith to that purpose; *and*
- Passengers are given the opportunity to avoid the search by electing not to fly.

(***United States v. Davis*** (9th Cir. 1973) 482 F.2nd 893, 913; ***Torbet v. United Airlines, Inc.*** (9th Cir. 2002) 298 F.3rd 1087, 1089-1090; ***United States v. Marquez***, *supra*., at p. 616.)

In an older case, subject to question due to changing times and dangers (although never overruled), a Puerto Rico statute authorizing "police to search the luggage of any person arriving in Puerto Rico from the United States" was held to be unconstitutional because it failed to require either probable cause or a warrant. (***Torres v. Puerto Rico*** (1979) 442 U.S. 465, 466-471 [99 S.Ct. 2425; 61 L.Ed.2nd 1].)

Second, Random Screening:

A second, more intense, yet random screening of passengers as a part of airline boarding security procedures, is constitutional. (***United States v. Marquez*** (9th Cir. 2005) 410 F.3rd 612.)

Once having gone through the initial screening, a person loses his right to revoke his "*implied consent*" to being searched and must submit his person (***United States v. Aukai*** (9th Cir. 2007) 497 F.3rd 955.) and his carry-on luggage (***Torbet v. United Airlines, Inc.*** (9th Cir. 2002) 298 F.3rd 1087.) to a secondary screening, so long as the selection of those subject to such secondary screenings is done objectively. E.g.:

Carry-on luggage was lawfully searched even though it had already gone through an x-ray examination without incident. (***Torbet v. United Airlines, Inc.***, *supra*.)

Because defendant had attempted to board a flight *without valid identification*. Per TSA (Transportation Security Administration) rules, anyone attempting to board a commercial airplane without a government issued, picture identification, will be subject to a secondary screening. (***United States v. Aukai***, *supra*; defendant selected for "*wanding*" of his person even though he had already walked through the magnetometer without setting off an alarm.)

Per ***Torbet*** and ***Aukai***, *supra,* the first, initial screening, whether by x-ray of one's carry-on luggage, or of the defendant's person having walked through a magnetometer, is deemed "*inconclusive*" even though "*it doesn't affirmatively reveal anything suspicious*," or when it *fails to* "*rule out every possibility of dangerous contents*," thus justifying the need for a secondary screening. So long as such secondary screenings are administered "*objectively*," they are lawful.

Note: ***United States v. Aukai***, *supra*, found that "*implied consent*" is not a proper theory for upholding airport searches. Rather, a warrantless, suspicionless search of a passenger, after the passenger has passed through the magnetometer (or has put his carry-on luggage on the conveyor belt for x-raying) is lawful as an "*administrative search*."

Baggage Searches:

A search of luggage bound for an airline flight may be searched (i.e., "screened") by Transportation Security Services (TSA) officers without a warrant or probable cause as an administrative search, looking for explosives or other safety hazards. Such a search may not be used as a ruse to conduct an exploratory search for criminal evidence. However, evidence of criminal activity observed in plain sight during such an administrative search may be used as probable cause for a criminal investigation. (***United States v. McCarty*** (9th Cir. 2011) 2011 U.S. App. LEXIS 18874; child pornography observed during a lawful TSA administrative search may lawfully be used to establish probable cause to arrest; case vacated and remanded, where defendant's motion to suppress

was denied at ***United States v. McCarty*** (U.S. Dist. Hawaii, 2011) 835 F. Supp.2nd 938.)

***Inventory Searches*:**

"The inventory search doctrine is an exception to the warrant requirement that allows authorities to search items within their lawful custody. ***South Dakota v. Opperman***, 428 U.S. 364, 369, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976); ***Illinois v. Lafayette***, 462 U.S. 640, 648, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983); ***Florida v. Wells***, 495 U.S. 1, 4-5, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990). One of the most important features of the doctrine is the existence of standardized instructions. ***Colorado v. Bertine***, 479 U.S. 367, 375-76, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987). 'Standardized' need not mean 'written.' Rather, our case law indicates that 'standardized' instructions limit the discretion of officers and apply consistently across cases. See ***Wells***, 495 U.S. at 4 (referring to 'standardized criteria' or 'established routine'); see also Standardized, Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/standardized ('brought into conformity with a standard: done or produced in a standard, consistent way')." (***Snitko v. United States*** (9th Cir. 2024) 90 F.4th 1250, 1261.)

Note: See "*Inventory Searches of Impounded Vehicles*," under "*Searches of Vehicles*" (Chapter 12), below, and "*Booking Inventory Searches*," under "*Jail, Prison, and Prisoner Searches*," under "*Searches of Persons*" (Chapter 11), below.

The standardized procedures need not be written. (***Ibid***., citing ***United States v. Mancera-Londono*** (9th Cir. 1990) 912 F.2nd 373, 375-376.)

"The need for a 'standardized' policy is necessarily a feature of the inventory search doctrine because, if an inventory is conducted pursuant to a standardized policy, a court knows that such a search would have been conducted regardless of the degree of suspicion an officer has of a person's (or an automobile's) criminality." (***Ibid***., citing ***United States v. Garay*** (9th Cir. 2019) 938 F.3rd 1108, 1111.)

Also, having "dual motives" (e.g., to inventory and to seek out evidence of criminal wrong-doing), at least in the Ninth Circuit, is permissible in the inventory search context. That is, in the case of inventory searches, 'the mere presence of a criminal investigatory motive or a dual motive—one valid, and one impermissible—does not render an [inventory] search invalid.'" (***Id***., at 1261-1262; citing ***United States v. Johnson*** (9th Cir. 2018) 889 F.3rd 1120, 1126.)

However: "[A]n inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." (***Id***., at p. 1267;

quoting ***Florida v. Wells*** (1990) 495 U.S. 1, at p. 4 [110 S.Ct. 1632; 109 L.Ed.2nd 1].)

Ultimately, the Court held that the searches conducted in the ***Snitko*** case were *not* standard inventory searches, despite the government's attempt to portray it as such. In so holding, the Court commented as follows: "We note that it is particularly troubling that the government has failed to provide a limiting principle to how far a hypothetical 'inventory search' conducted pursuant to customized instructions can go. At oral argument, for example, the government failed to explain why applying the inventory exception to this case would not open the door to the kinds of 'writs of assistance' the British authorities used prior to the Founding to conduct limitless searches of an individual's personal belongings. It was those very abuses of power, after all, that led to adoption of the **Fourth Amendment** in the first place." (See pgs. 1262-1263.)

***The Minimal Intrusion Exception*:**

General Rule: The United States Supreme Court has recognized, at least by inference, that in those instances where there is a "*minimal intrusion*" into a defendant's privacy rights, suppression of the resulting evidence may not be required. "When faced with special law enforcement needs, diminished expectations of privacy, *minimal intrusions*, or the like, [it] has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." (Italics added; ***Illinois v. McArthur*** (2001) 531 U.S. 326, 330 [121 S.Ct. 946; 148 L.Ed.2nd 838].)

Federal Cases:

"(A)lthough a warrant may be an essential ingredient of reasonableness much of the time, for less intrusive searches it is not" (***United States v. Concepcion*** (7th Cir. 1991) 942 F.2nd 1170, 1172; the issue being whether turning a key in a door lock was a search, but such a minimal intrusion that a search warrant was not necessary.)

Without obtaining a warrant, the police searched the defendant's cellphone for its phone number. The police later used the number to the phone's call history from the telephone company. Even though there was no urgent need to search the cellphone for its phone number, the Seventh Circuit pointed out "that bit of information might be so trivial that its seizure would not infringe the **Fourth Amendment**." (***United States v. Flores-Lopez*** (7th Cir. 2012) 670 F.3rd 803, 806-807.)

California Law:

California's First District Court of Appeal (Div. 5) has found this theory to be a whole separate exception to the search warrant requirement, calling it the "*Minimal Intrusion Exception*." (***People v. Robinson*** (2012) 208 Cal.App.4th 232, 246-255; "The minimal intrusion exception to the warrant requirement rests on the conclusion that in a very narrow class of 'searches' the privacy interests implicated are 'so small that the officers do not need probable cause; for the search to be reasonable." (***Id***., at p. 247.)

Noting that searches of the person, at least absent an officer-safety issue, and searches of a residence, *may* be outside the scope of the minimal intrusion theory. (***Id***., at p. 249.)

"Although the United States Supreme Court has not clearly articulated the parameters of the exception, federal authorities provide sufficient support for concluding that in appropriate circumstances, the minimal intrusion exception to the warrant requirement may be applied to uphold warrantless searches based on less than probable cause. Moreover, although the high court's decisions in the area have primarily been justified by officer safety concerns (Citations), nothing in the high court's jurisprudence appears to preclude the possibility that a justification less than officer safety could be sufficient to justify an intrusion as minimal as that involved in the present case." (***Id***., at pp. 249-250.)

Also, the fact that the defendant's front door was within the curtilage of his home, which also enjoys **Fourth Amendment** protection, did not alter the result. With the front door being an area open to the general public, there was no violation in approaching the door and inserting the key. (***Id***., at p. 253, fn. 23.)

See "*Minimal Intrusion*," under "*Exceptions*," to the "*Fruit of the Poisonous Tree*," under "*Procedural Rules*" (Chapter 2), above, and "*The Minimal Intrusion Exception*," under "*Searches and Seizures*" (Chapter 8), above.

***Private Search Doctrine*:**

See "*Private Search Doctrine*," under "*Searches of Containers*" (Chapter 16), below.

Prescription Monitoring Programs and *Mandatory Drug Dispensing Records*:

Federal Program: "(T)the federal government has regulated opioids under the **CSA. Pub. L. No. 91-513**, **Tit. II**, **84 Stat. 1236**, **1250 (1970)** (codified at **21**

U.S.C. § 812) (classifying as Schedule II drugs any opiate produced 'by extraction from substances of vegetable origin, or independently by means of chemical synthesis'). As the First Circuit recognized, under the **CSA**, registered dispensers of controlled substances must maintain records of each substance dispensed and make those records available for inspection and copying by the Attorney General for at least two years. (***United States Department of Justice v.*** ***Ricco Jonas*** (1st Cir. 2022) 24 F.4th (718) at 735; *see also* **21 U.S.C. § 827(a)(3)**, **(b)**. And since the **CSA's** inception, the Attorney General has had the authority to obtain these records without a warrant when investigating crimes related to controlled substances. **Pub. L. No. 91-513**, **Tit. II**, **84 Stat. 1236**, **1272** (1970) (codified at **21 U.S.C. § 876(a)**) ('[T]he Attorney General may . . . require the production of any records . . . which the Attorney General finds relevant or material to [an] investigation [related to controlled substances].'); *see also* ***Ricco Jonas***, 24 F.4th at 735 ('Both federal and New Hampshire laws regulate controlled substances by requiring pharmacies . . . to maintain prescription drug records and keep them open for inspection by law enforcement officers without the need of a warrant.')." (***United States v. Motley*** (9th Cir. 2023) 89 F.4th 777, 784-785; discussing Nevada's similar laws [**Nev. Rev. Stat. § 453.162** (establishing the "Prescription Monitoring Program" [i.e., "PMP" database]; **Nev. Admin. Code § 453.520(2)(a)**; classifying 'opium and opiate' as a **Schedule II** drug), and holding that as such, there is no "expectation of privacy" in such records.)

> *Note*: "***CSA***" refers to the federal "***Controlled Substances Act***." (**Pub. L. No. 91-513**, **Tit. II**, **84 Stat. 1236**, **1250** (1970) (codified at **21 U.S.C. § 812)**
>
> See also fn. 2 in ***United States v. Motley***, at p. 779, noting that: "As of February 2018, 50 states, the District of Columbia, and two territories (Guam and Puerto Rico) had operational [prescription drug monitoring programs (PDMPs)] within their borders."
>
> And since the CSA's inception, the Attorney General has had the authority to obtain these records without a warrant when investigating crimes related to controlled substances. **Pub. L. No. 91-513, Tit. II, 84 Stat. 1236, 1272** (1970) (codified at **21 U.S.C. § 876(a)**) ("[T]he Attorney General may . . . require the production of any records . . . which the Attorney General finds relevant or material to [an] investigation [related to controlled substances]."); *see also* ***Ricco Jonas***, 24 F.4th at 735 ("Both federal and New Hampshire laws regulate controlled substances by requiring pharmacies . . . to maintain prescription drug records and keep them open for inspection by law enforcement officers without the need of a warrant.").
>
> A concurring opinion argued that this is an issue the Court did not need to reach, but rather than "good faith" and "harmlessness" would have saved the search in any case. But in so arguing, the concurring opinion offers an

argument to the effect that a warrantless search of the defendant's medical prescription records should be illegal. (***United States v. Motley***, *supra*, at p. 789-792.)

CURES: California's prescription drug monitoring program" is known as "CURES," for "*Controlled Substance Utilization and Review System*." (**H&S Code §§ 11165** to **11166**) It is a database of Schedule II, Schedule III, Schedule IV and Schedule V controlled substance prescriptions dispensed in California serving the public health, regulatory oversight agencies, and law enforcement. CURES, as noted by the Legislature, is committed to the reduction of prescription drug abuse and diversion without affecting legitimate medical practice or patient care.

H&S Code § 11165.1 requires all California licensed health care practitioners authorized to prescribe Schedule II, Schedule III, Schedule IV and Schedule V controlled substances to register for access to CURES upon issuance of a Drug Enforcement Administration Controlled Substance Registration Certificate. California licensed pharmacists must register for access to CURES upon issuance of a Board of Pharmacy Pharmacist License.

H&S Code § 11165(d) requires that for each prescription for a Schedule II, Schedule III, Schedule IV, or Schedule V controlled substance, as defined in the controlled substances schedules in federal law and regulations, the dispensing pharmacy, clinic, or other dispenser shall report specified dispensing information to the Department of Justice or contracted prescription data processing vendor as soon as reasonably possible, but not more than *one working day* after the date a controlled substance is released to the patient or patient's representative.

H&S Code § 11165(i) states that veterinarians shall report dispensation information as soon as reasonably possible, but not more than seven days after the date a controlled substance is dispensed.

H&S Code § 11190(c) requires that for each Schedule II, Schedule III, and Schedule IV controlled substance, as defined in **H&S Code § 11007**, dispensed by a prescriber pursuant to **B&P § 4170**, the dispensing prescriber shall report to the Department of Justice the information required by **subdivision (c)** on a weekly basis.

H&S Code §11165.6 provides that "(a) prescriber shall be allowed to access the CURES database for a list of patients for whom that prescriber is listed as a prescriber in the CURES database."

Note: There is no case law discussing the "expectation of privacy" issue as it might relate to CURES. But it would seem that the rule of ***United States v. Motley*** would apply here as well.

***Chapter 10*:**

Searches With a Search Warrant:

Search Warrant Defined: A "*search warrant*" is "an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him or her to search for a person or persons, a thing or things, or personal property, and bring it before the magistrate." (**Pen. Code § 1523**)

Basic Requirements: The "precise and clear" words of the **Fourth Amendment** "require only three things" for a search warrant to be valid:

First, warrants must be issued by neutral, disinterested magistrates.

See "*Requirement of a 'Neutral and Detached' Magistrate*," below.

Second, those seeking the warrant must demonstrate to the magistrate that there is probable cause to believe that the evidence sought will aid in a particular apprehension or conviction for a particular offense.

See "Probable Cause," under "*The Affidavit to the Search Warrant*," below.

Finally, warrants must describe the things to be seized, as well as the place to be searched," with "particularity."

See "*The* '*Reasonable Particularity*' *Requirement*," below.

(***Bill v. Brewer*** (9th Cir. 2015) 799 F.3rd 1295, 1300; citing ***Dalia v. United States*** (1979) 441 U.S. 238, 255 [99 S.Ct. 1682; 60 L.Ed.2nd 177]. See also ***United States v. Artis*** (9th Cir. 2019) 919 F.3rd 1123, 1129.)

The Ninth Circuit Court of Appeal has since held that there is a *fourth requirement*; i.e., that the magistrate must be authorized by law to issue warrants in the jurisdiction where the warrant will be executed. (***United States v. Henderson*** (9th Cir. 2018) 906 F.3rd 1109, 1117; ***United States v. Artis***, *supra,* at p. 1129, fn. 1.)

***General Principles*:**

The **Fourth Amendment** protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and provides, "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (***Price v. Superior Court*** (2023) 93 Cal.App.5th 13, 35.)

"When magistrates consider a search warrant application, they must make a practical and commonsense decision about whether the affidavit shows a fair probability police will find contraband or evidence of a crime at a particular place. The reviewing court's duty is simply to ensure the magistrate had a

substantial basis for that conclusion. This standard is flexible and easy to apply. (***Illinois v. Gates*** (1983) 462 U.S. 213, 238–239 [76 L. Ed. 2d 527, 103 S. Ct. 2317].) The determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior. (***Illinois v. Wardlow*** (2000) 528 U.S. 119, 125 [145 L. Ed. 2d 570, 120 S. Ct. 673].) [⁋] These standards are federal. California state law must adhere to them. (***People v. Souza*** (1994) 9 Cal.4th 224, 232–233 . . . .)" (***People v. Delgado*** (2022) 78 Cal.App.5th 425, 429.)

In ***United States v. King*** (9th Cir. 2021) 985 F.3rd 702, at pg. 707, the Ninth Circuit Court of Appeal drew two principles from the **Fourth Amendment's** wording, at least as relevant to this case:

> "The first is fundamental. A warrant must be supported by probable cause—meaning a 'fair probability that contraband or evidence of a crime will be found in a particular place based on the totality of circumstances.' ***United States v. Diaz***, 491 F.3rd 1074, 1078 (9th Cir. 2007) (simplified). Put simply, it amounts to 'circumstances which warrant suspicion.' ***Locke v. United States***, 11 U.S. 339, 348, 3 L.Ed. 364 (1813). And importantly, it requires 'less . . . evidence [than that] which would justify condemnation, and may rest upon evidence which is not legally competent in a criminal trial.' ***United States v. Bridges***, 344 F.3d 1010, 1014-15 (9th Cir. 2003) (simplified)."
>
> "The second principle is more technical. A warrant must not be overbroad. The scope of a warrant must be limited by its probable cause, ***United States v. SDI Future Health, Inc.***, 568 F.3rd 684, 702 (9th Cir. 2009), and must 'never include more than is covered' by that probable cause, ***United States v. Whitney***, 633 F.2nd 902, 907 (9th Cir. 1980)."

Preference for Search Warrants: No doubt because warrants are, at the very least, recommended (if not mandated) by the **Fourth Amendment**, the courts have long shown a preference for using a search warrant whenever possible:

> "Although '[t]he text of the **Fourth Amendment** does not specify when a search warrant must be obtained,' courts 'ha[ve] inferred that a warrant must [usually] be secured,' 'subject to a number of exceptions.'" (***People v. Maxwell*** (2020 58 Cal.App.5th 546, 553, quoting ***Birchfield v. North Dakota*** (2016) 579 U.S. 438, 456 [195 L.Ed.2nd 560; 136 S.Ct. 2160].)
>
> Entry into a residence under the authority of a search warrant is one of the few recognized exceptions to the rule under the **Fourth Amendment** forbidding governmental intrusions in to one's home or the curtilage of his home. (See ***Collins v. Virginia*** (2018) 584 U.S. 586, 602-603 [138 S.Ct. 1663; 201 L.Ed.2nd 9].)
>
> *However*: "The **Fourth Amendment** does not require officers to get warrants. Rather, it requires that officers not conduct 'unreasonable searches and seizures.' The role of the **Warrant Clause** of the **Fourth Amendment** is simply to specify

one set of conditions under which an entry into a residence can be reasonable—that is, where the officers have a warrant that satisfies the conditions articulated in the **Warrant Clause**. "That is not, however, the only way that an entry can be reasonable. Officers can also enter with consent, or under certain emergency or exigent circumstances. See ***Michigan v. Clifford***, 464 U.S. 287, 293 [104 S.Ct. 641; 78 L.Ed.2nd 477 (1984) ('[A]ny official entry must be made pursuant to a warrant in the absence of consent or exigent circumstances.'). An entry into a residence that is not under a warrant, that lacks consent, and that is not justified by exigent circumstances or an emergency is unreasonable. ***Id***. Under such circumstances, the **Fourth Amendment** imposes a duty on officers not to enter. And it is entry itself that constitutes the breach of that duty." (***Mendez v. County of Los Angeles*** (9th Cir. 2018) 897 F.3rd 1067, 1075.)

"Our cases have determined that '[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, reasonableness generally requires the obtaining of a judicial warrant.' (Citations) 'In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.' (Citation) The burden is on the People to establish an exception applies. (Citations.)" (***People v. Macabeo*** (2016) 1 Cal.5th 1206, 1213; see also ***People v. Ovieda*** (2019) 7 Cal.5th 1034, 1041.)

> "The prosecution bears the burden of establishing an exception applies." (***People v. Hall*** (2020) 57 Cal.App.5th 946, 951; citing ***People v. Macabeo***, *supra*.)

"'[T]he text of the **Fourth Amendment** does not specify when a search warrant must be obtained.' ***Kentucky v. King***, 563 U. S. 452, 459, 131 S. Ct. 1849, 179 L.Ed. 2nd 865 (2011); see also ***California v. Acevedo***, 500 U. S. 565, 581, 111 S.Ct. 1982, 114 L.Ed.2nd 619 (1991) (Scalia, J., concurring in judgment) ('What [the text] explicitly states regarding warrants is by way of limitation upon their issuance rather than requirement of their use'). But 'this Court has inferred that a warrant must [usually] be secured.' ***King***, 563 U. S., at 459, 131 S. Ct. 1849, 179 L.Ed. 2nd 865." (***Birchfield v. North Dakota*** (2016) 579 U.S. 438, 456 [136 S.Ct. 2160; 195 L.Ed.2nd 560]; a DUI, blood test case.)

"The **Fourth Amendment** demonstrates a 'strong preference for searches conducted pursuant to a warrant . . . .'" (***People v. Harris*** (2015) 234 Cal.App.4th 671, 682; quoting ***Maryland v. Dyson*** (1999) 527 U.S. 465, 466 [119 S.Ct. 2013; 144 L.Ed.2nd 442].)

"In ***Jones v. United States*** [(1960)] 362 U.S. 257, 270 [80 S.Ct. 725; 4 L.Ed.2nd 697, 708] this Court, strongly supporting the preference to be accorded searches under a warrant, indicated that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." (***United States v. Ventresca*** (1965) 380 U.S. 102, 106 [85 S.Ct. 741; 13 L.Ed.2nd 684, 687].)

***Search Warrants Not Always Required*:**

> "'Law enforcement officers are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable cause' ***Hoffa* v. *United States***, 385 U.S. 293, 310, 87 S.Ct. 408, 17 L.Ed.2nd 374 (1966). Faulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution." (Kentucky v. King (2011) 563 U.S. 452, 467 [131 S.Ct. 1849; 179 L.Ed.2nd 865].)
>
> > First, the police may wish to speak with the occupants of a dwelling before deciding whether it is worthwhile to seek authorization for a search. They may think that a short and simple conversation may obviate the need to apply for and execute a warrant. See ***Schneckloth* v. *Bustamonte***, 412 U.S. 218, 228, 93 S.Ct. 2041, 36 L.Ed.2nd 854 (1973). Second, the police may want to ask an occupant of the premises for consent to search because doing so is simpler, faster, and less burdensome than applying for a warrant. A consensual search also "may result in considerably less inconvenience" and embarrassment to the occupants than a search conducted pursuant to a warrant. ***Ibid***. Third, law enforcement officers may wish to obtain more evidence before submitting what might otherwise be considered a marginal warrant application. Fourth, prosecutors may wish to wait until they acquire evidence that can justify a search that is broader in scope than the search that a judicial officer is likely to authorize based on the evidence then available. And finally, in many cases, law enforcement may not want to execute a search that will disclose the existence of an investigation because doing so may interfere with the acquisition of additional evidence against those already under suspicion or evidence about additional but as yet unknown participants in a criminal scheme." (***Id.***, at pp. 466-467.)
>
> Failing to obtain an "anticipatory search warrant" prior to conducting a controlled delivery of a package containing a tracking device to defendant's residence, causing the officers to have to make a warrantless entry into the residence when the tracking device alarm went off, fearing that the evidence would be destroyed, did not result in a constitutional violation. (***United States v. Iwai*** (9th Cir. 2019) 930 F.3rd 1141, 1144-1145.)

Why Search Warrants are Preferred: There are a number of reasons why use of a search warrant to conduct any search is preferable even in those instances when one might not be legally required. For instance:

> 1. *Presumption of Lawfulness* (or *Reasonableness*): Use of a search warrant raises a presumption in a later motion to suppress evidence (per **P.C. § 1538.5**) that the search was *lawful*. The defense has the burden of proof in attempting to rebut this presumption. (***Theodor v. Superior Court*** (1972) 8 Cal.3rd 77, 101;

People v. Kurland (1980) 28 Cal.3rd 376; ***United States v. Johnson*** (9th Cir. 2019) 913 F.3rd 793, 802.)

Burden of Proof: Defendant, as the moving party in attacking a warrant, bears the burden of going forward with the evidence. (***People v. Thompson*** (1990) 221 Cal.App.3rd 923, 936-37.) To do so the defendant must not only demonstrate standing (***Ibid***.), he must also prove by a preponderance of the evidence that the search was conducted without a warrant. (***People v. Williams*** (1999) 20 Cal.4th 119; ***Badillo v. Superior Court*** (1956) 46 C.2nd 269.) If, however, the search was supported by a warrant, the burden stays with the defendant. (***Theodor v. Superior Court*** (1972) 8 Cal.3rd 77, 101; ***People v. Gallo*** (1981) 127 Cal.App.3rd 828, 840.) A presumption of validity attaches to a search warrant because it has already been reviewed by a magistrate. (***People v. Hobbs*** (1994) 7 Cal.4th 948, 969.) A defendant claiming that the warrant or supporting affidavit is inaccurate or incomplete bears the burden of alleging and then proving the errors or omissions. (***People v. Amador*** (2000) 24 Cal.4th 387, 393.)

With the burden of attacking a search warrant upon the defendant, and the necessity of making a "*substantial showing*," even before being allowed to hold an evidentiary hearing (See "*A **Franks** Hearing*," under "*Motion to Traverse*," below), it is extremely difficult for a defendant to successfully challenge a search conducted pursuant to a search warrant. (See ***People v. Wilson*** (1986) 182 Cal.App.3rd 742; ***United States v. Norris*** (9th Cir. 2019) 938 F.3rd 1114, 1122.)

"(W)here (the) circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common sense, manner. . . . (R)esolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." (***United States v. Ventresca*** (1965) 380 U.S 102, 109 [85 S.Ct. 741; 13 L.Ed.2nd 684, 689]; see also ***United States v. King*** (9th Cir. 2021) 985 F.3rd 702, 707-708.)

This judicially mandated preference for warrants has specifically been adopted by the California Supreme Court. (***People v. Superior Court* [*Johnson*]** (1972) 6 Cal.3rd 704, 711; ***People v. Mesa*** (1975) 14 Cal.3rd 466, 469.)

Minor, technical errors will not likely result in any sanction. (See ***People v. Stipo*** (2011) 195 Cal.App.4th 664, 670; listing the wrong time for an occurrence, missing the actual time by 20 minutes.)

The magistrate's failure to initial that part of a search warrant listing the defendant's residence, where she did initial those parts of the warrant describing defendant's person and his vehicle, held to be a "minor technical error rather than evidence of a constitutional deficiency in the contents of the search warrant." The search of the residence, based upon the search warrant, was upheld where all the circumstances (including the magistrate's testimony at a suppression hearing) indicated that there was probable cause to search the residence and that the magistrate had intended to approve the search of the residence. (***United States v. Hurd*** (9th Cir. 2007) 499 F.3rd 963.)

When illegally obtained information is used as a part of a search warrant's probable cause, that information must be excised from the affidavit. If, after this is done, probable cause justifying the search is still found, the search will be upheld. (***People v. Williams*** (2017) 15 Cal.App.5th 111, 124-125; see "*Motion to Traverse*," below.)

"Doubts as to whether an affidavit supporting a search warrant establishes probable cause are resolved in favor of the validity of the warrant. (***People v. Tousant*** (2021) 64 Cal.App.5th 804, 816-817, citing ***People v. Frank*** (1985) 38 Cal.3d 711, 722.)

> Further noting that "(w)hen determining whether probable cause existed for the issuance of a search warrant, we assess the totality of the circumstances under which the warrant issued." Citing ***Illinois v. Gates*** (1983) 462 U.S. 213. 230-235 [103 S.Ct. 2317; 76 L.Ed.2nd 527].

Motion to Quash: Motion attacking the sufficiency of the *probable cause* in the warrant affidavit as it is written. (**Pen. Code § 1538.5(a)(1)(B)**)

Normally, only the warrant and affidavit itself may be considered by the trial court in ruling on a motion to quash. An exception might be when a law enforcement officer's testimony is necessary to interpret some of the language in the affidavit. (See ***People v. Christian*** (1972) 27 Cal.App.3rd 554.)

In reviewing the sufficiency of the affidavit on a motion to quash, the reviewing court ordinarily considers only the "four corners" of the affidavit. (See ***Whiteley v. Warden*** (1971)

401 U.S. 560, 565, fn. 8 [91 S.Ct. 1031; 28 L.Ed.2nd 306].) In determining the sufficiency of an affidavit in support of a warrant, the test of probable cause is "whether the facts contained in the affidavit are such as would lead a [person] of ordinary caution or prudence to believe, and conscientiously to entertain, a strong suspicion of the guilt of the accused." (***People v. Kraft*** (2000) 23 Cal.4th 978, 1041.)

See ***People v. Lazarus*** (2015) 238 Cal.App.4th 734, 763-766; motion to quash denied where affidavit was held to be supported by probable cause despite 23-year lapse between crime and the issuance of a search warrant for defendant's home, vehicle and computers.

Motion to Traverse: Motion attacking the truth of the information contained in the warrant affidavit. The defendant is entitled to an evidentiary hearing (i.e., referred to as a "***Franks** Hearing*") under limited circumstances. (***Franks v. Delaware*** (1978) 438 U.S. 154 [98 S.Ct. 2674; 57 L.Ed.2nd 667].)

Purpose: "A motion to traverse a warrant challenges the completeness and truthfulness of the warrant affidavit's probable cause showing." (***Price v. Superior Court*** (2023) 93 Cal.App.5th 13, 48.)

"Generally, in order to traverse a warrant, the defendant must show that '(1) the affidavit included a false statement made "knowingly and intentionally, or with reckless disregard for the truth," and (2) "the allegedly false statement is necessary to the finding of probable cause."'" (***Id***., quoting ***People v. Hobbs*** (1994) 7 Cal.4th 948, 974; which in turn quotes ***Franks v. Delaware***, *supra*, at pp. 155–156.)

In ***Price***, the Court found the lack of any mention in the warrant affidavit that there was nothing about the victim's home (where he was murdered) that indicated that marijuana was being sold out of the home, to be immaterial to the finding of probable cause. (***Id.***, a p. 49.)

A "***Franks** Hearing*:" Defendant is entitled to an evidentiary "***Franks** Hearing*" *only* after making a "*substantial showing*" that:

- The affidavit contains statements (or makes material omissions) that are *deliberately* false or were made with a *reckless* disregard for the truth (***People v. Scott*** (2011) 52

Cal.4th 452, 484; ***Ewing v. City of Stockton*** (9th Cir. 2009) 588 F.3rd 1218, 1223-1228; ***Bravo v. City of Santa Maria*** (9th Cir. 2011) 665 F.3rd 1076, 1087-1088; ***People v. Lazarus*** (2015) 238 Cal.App.4th 734, 767-768; (***United States v. Fisher*** (9th Cir. 2022) 56 F.4th 673, 679, fn. 7.), (or omitted information which the magistrate would have wanted to know); *and*

- The affidavit's remaining contents are reevaluated after the false statements are excised (or omitted material information is considered) to see if, as corrected, there is still sufficient evidence to justify a finding of probable cause. (***Franks v. Delaware*** (1978) 438 U.S. 154, 155-156 [98 S.Ct. 2674; 57 L.Ed.2nd 667, 672]; precluding the cross-examination of the affiant until the necessary showing is made. See also ***People v. Kurland*** (1980) 28 Cal.3rd 376, 385-388; ***People v. Wilson*** (1986) 182 Cal.App.3rd 742, 747; ***Theodor v. Superior Court*** (1972) 8 Cal.3rd 77, 103; ***People v. Cook*** (1978) 22 Cal.3rd 67, 78; and ***People v. Bradford*** (1997) 15 Cal.4th 1229, 1297; ***People v. Lewis et al.*** (2006) 39 Cal.4th 970, 989; ***United States v. Craighead*** (9th Cir. 2008) 539 F.3rd 1073, 1080-1082; ***Ewing v. City of Stockton*** (9th Cir. 2009) 588 F.3rd 1218, 1223-1228); ***United States v. Payton*** (9th Cir. 2009) 573 F.3rd 859, 861; ***People v. Scott*** (2011) 52 Cal.4th 452, 475-476; ***United States v. Ruiz*** (9th Cir. 2014) 758 F.3rd 1144, 1148; ***People v. Lazarus*** (2015) 238 Cal.App.4th 734, 768; ***United States v. Ubaldo*** (9th Cir. 2017) 859 F.3rd 690, 703; ***People v. Williams*** (2017) 15 Cal.App.5th 111, 124-125; ***United States v. Norris*** (9th Cir. 2019) 938 F.3rd 1114, 1122; ***United States v. Nault*** (9th Cir. 2022) 41 F.4th 1073, 1081.)

  If the affidavit is corrected as suggested by the defendant and would still warrant a finding of probable cause, then no ***Franks*** hearing is required. (***People v. Sandoval*** (2015) 62 Cal.4th 394, 409.)

  If, however, after omitting misstatements and "reforming the affidavit by altering statements" to conform to what really happened, the Court finds insufficient probable cause to support the issuance of the warrant, then the resulting evidence will be suppressed. (***United States v. Roman*** (1st Cir. 2019) 942 F.3rd 43.)

> A negligent or innocent mistake does not warrant suppression. (***United States v. Perkins*** (9th Cir. 2017) 850 F.3rd 1109, 1116.)

A search warrant affidavit was held to be sufficient to establish probable cause even if the affiant intentionally made a false statement that a Kleenex box was linked to defendant through scientific evidence (where it was not). The affidavit was also not rendered insufficient by the omission of the fact that the victim, before identifying defendant, had identified another individual in a photographic lineup. (***People v. Miles*** (2020) 9 Cal.5th 513, 570-578.)

- Where defendant alleged that he had an expert ready to testify about a different criminal case addressing a sniff by the same canine, Nato, the was used in this case, defendant's motion for a Franks hearing was denied. The expert determined that the search in the prior case was unreliable because Nato was distracted and only alerted the fourth time he was directed to a particular area. The Court here upheld the trial court's ruling that this was insufficient to warrant a Franks hearing. In so ruling, it was noted that the search warrant affidavit in this case only said that Nato had "proven reliable in prior incidents." At most, this expert report established only that Nato's alert was unreliable on a single unrelated occasion. The fact that Nato's sniff had been unreliable on one prior occasion does not mean Nato had not been reliable in most or a large number of prior incidents, which is all the affidavit implies. Nor does it establish that the affidavit described Nato's sniff of a suspect's truck in a false or misleading way. Without more, defendant therefore was not entitled to a Franks hearing. (***United States v. Nault*** (9th Cir. 2022) 41 F.4th 1073, 1081-1082.)

Or:

- The affidavit contains information that is the direct product of a ***Fourth Amendment*** violation. (See ***People v. Weiss*** (1999) 20 Cal.4th 1073.)

> Where a defendant's motion to traverse is unaccompanied by any of the evidentiary material required of the moving party the court may properly deny the request for the hearing. Conclusory

contradictions of the affiant's statements are insufficient to justify a ***Franks*** hearing. Even if the defense is able to establish that the statements were inaccurate, the court properly denies the request if the defense fails to demonstrate that the statements were material to the determination of probable cause. (***People v. Panah*** (2005) 35 Cal.4th 395, 456.)

In a "*Motion to Traverse*" a search warrant affidavit, only *intentional* or *reckless* inaccuracies are grounds for sanctions, and in those cases the sanction is limited to striking the inaccurate information, retesting the warrant affidavit for probable cause after striking that information. Unintentional or negligent misstatements are left in the affidavit. (***Franks v. Delaware*** (1978) 438 U.S. 154 [98 S.Ct. 2674; 57 L.Ed.2nd 667]; ***People v. Wilson*** (1986) 182 Cal.App.3rd 742; ***United States v. Ubaldo*** (9th Cir. 2017) 859 F.3rd 690, 703.)

Note: But remember, the defendant must have "*standing*" to challenge the collection of the illegal information in order to contest its inclusion in the warrant affidavit. See "*Standing*," under "*Searches and Seizures*" (Chapter 8), above.)

See "*Independent Source Doctrine*," below

Even if wiretap evidence (which defendant argued was obtained in violation of the "work product" privilege, the recorded conversation being between a suspect and a defense investigator, a fact that was not contained in the affidavit to the later-issued search warrant for the suspect's residence) was excised from the warrant, the warrant was held to still contain sufficient probable cause justifying the issuance of the warrant. (***People v. Fayed*** (2020) 9 Cal.5th 147, 187-189.)

Defendant waived his claim that he was entitled to a ***Franks*** hearing on the ground that the agent's trial testimony materially differed from his warrant affidavit because the claim was waived as it was known to defendant and intentionally not pursued. Even so, there was no plain error as any error would have had to be predicated on an expectation that the district court should have remembered

what was in a warrant affidavit submitted two years earlier, realized that the testimony was inconsistent with it, and then evaluated that inconsistency under a standard never before applied to a similar context. (***United States v. Rusnak*** (9th Cir. 2020) 981 F.3rd 697.)

Material Omissions: A defendant who challenges a search warrant based upon an affidavit containing *omissions* bears the burden of showing that the omissions, had they been included, would have been material to the magistrates' determination of probable cause. (***People v. Bradford*** (1997) 15 Cal.4th 1229, 1297; ***People v. Lazarus*** (2015) 238 Cal.App.4th 734, 768; ***People v. Lee*** (2015) 242 Cal.App.4th 161, 171-172; ***United States v. Perkins*** (9th Cir. 2017) 850 F.3rd 1109, 1116; ***People v. Fayed*** (2020) 9 Cal.5th 147, 184-187.)

> "To prevail on a ***Franks*** challenge, the defendant must establish two things by a preponderance of the evidence: first, that 'the affiant officer intentionally or recklessly made false or misleading statements or omissions in support of the warrant[,]' and second, that the false or misleading statement or omission was material, i.e., 'necessary to finding probable cause.' ***United States v. Martinez-Garcia***, 397 F.3rd 1205, 1214-15 (9th Cir. 2005). If both requirements are met, 'the search warrant must be voided and the fruits of the search excluded . . . .' ***Franks***, 438 U.S. at 156." (***United States v. Perkins***, supra.)
>
> "Omissions or misstatements resulting from negligence or good faith mistakes will not invalidate an affidavit which on its face establishes probable cause." (***Ewing v. City of Stockton*** (9th Cir. 2009) 588 F.3rd 1218, 1224.)
>
> Neglecting to include an informant's criminal history could invalidate a warrant, in that the magistrate's decision will usually require a determination of the informant's credibility. (***United States v. Reeves*** (9th Cir. 2000) 210 F.3rd 1041.)
>
> Omitting facts which would have *supported* a finding of probable cause had it been included is *not* grounds to traverse a warrant. (***People v. Lim*** (2001) 85 Cal.App.4th 1289.)
>
> "Facts omitted from a search warrant affidavit are 'not material' if 'there is no 'substantial possibility they would

have altered a reasonable magistrate's probable cause determination,' and their omission did not 'make the affidavit[s] substantially misleading.'" (***People v. Lazarus*** (2015) 238 Cal.App.4th 734, 768; citing ***People v. Eubanks*** (2011) 53 Cal.4th 110, 136.)

Intentional or reckless misstatements and/or omissions in a search warrant affidavit are material errors whenever a magistrate would not have found probable cause absent those errors, and may result in potential civil liability for the affiant. (***Chism v. Washington State*** (9th Cir. 2011) 661 F.3rd 380; where had the information been reported to the magistrate correctly, it would have been apparent that other parties had used the plaintiffs' previously stolen credit card to purchase child pornography.)

> For a plaintiff in a civil lawsuit to survive a summary judgment motion where it is alleged that there were material misstatements or omission in a search warrant, he must make a *substantial showing* that there were misstatements and/or omissions in the warrant affidavit that were either *deliberately* or *recklessly* included (or, for an omission, excluded), and that but for the misstatements or omissions, the warrant not would have been approved by the magistrate. Purely negligent or unintentional mistakes in a search warrant affidavit are irrelevant to the validity of the warrant. In this case, the Court had no difficulty finding that the affiant's misstatements and omissions were at the very least reckless. (***Ibid***.)

The affiant's failure to disclose that the plaintiff's son was in jail at the time of the issuance of the warrant, and for over six months prior, and therefore not only was not present in the home, but moreover could not have been involved in a described shooting or the storage of weapons used in it. Plaintiffs presented sufficient evidence to establish a genuine issue as to whether a detective's omission of this material fact was intentional or reckless, as opposed to merely negligent. Had the omitted facts of the son's two-year sentence and custody status been included, it was extremely doubtful that an issuing judge would simply have issued the warrant or authorized nighttime service without more information. (***Bravo v. City of Santa Maria*** (9th Cir. 2011) 665 F.3rd 1076, 1083-1088.)

Omitting an informant's entire criminal history from a warrant affidavit may be grounds to invalidate the warrant. However, the warrant is still valid so long as that information wasn't intentionally or recklessly left out, *or* if it wouldn't have made a difference to the magistrate even if he'd known. (***Garcia v. County of Merced*** (9th Cir. 2011) 639 F.3rd 1206, 1211-1212.)

Failing to include in a warrant affidavit information about one of the witnesses connections to drug trafficking was held to be a material omission that was "recklessly" left out. However, there was found to sufficient probable cause when added to the affidavit in that the witness' information was sufficiently corroborated by other witnesses and the physical evidence. (***United States v. Ruiz*** (9th Cir. 2014) 758 F.3rd 1144, 1148-1152.)

Where there was evidence that a suspect used the victim's credit card without his permission, there was no error in the affiant not including in the affidavit her (the affiant's) working relationship with the victim (a fellow sheriff's deputy), the victim and the suspect's ongoing custody dispute (having had two children together), and the extent of the victim's and the suspect's financial intermingling. None of these facts were the type that, even if known by the magistrate, would have prevented him from finding probable cause. (***Cameron v. Craig*** (9th Cir. 2013) 713 F.3rd 1012, 1019-1020.)

See ***People v. Lazarus*** (2015) 238 Cal.App.4th 734, 767-769; finding no material omissions or misrepresentations in two affidavits in search warrants for defendant's residence, vehicles and computers in warrants issued 23 years after defendant's crime.

In a search warrant authorizing law enforcement to seize firearms from defendant, it was not material under the **Fourth Amendment** that the affiant failed to include information in the affidavit that defendant had purchased the guns almost 17 years before the current prosecution and six years before the conviction that made it illegal for him to possess guns, in that probable cause was sufficiently established by evidence that defendant was prohibited from owning any firearms and that guns were currently registered to him without the necessity of showing when

he'd obtained the guns. Also, defendant did not make the necessary substantial showing required for a ***Franks*** hearing because the failure to include the timing information in the warrant affidavit did not establish a reckless disregard for the truth in the absence of any evidence that defendant had disposed of the guns, that the registration information was inaccurate, or that the omitted purchase date was relevant. (***People v. Lee*** (2015) 242 Cal.App.4th 161, 169-176.)

"A defendant can challenge a search warrant by showing that the affiant deliberately or recklessly omitted material facts that negate probable cause when added to the affidavit." (***People v. Eubanks*** (2011) 53 Cal.4th 110, 136.) However, while "(e)very falsehood makes an affidavit inaccurate, . . . not all omissions do so." Only material or relevant adverse facts need to be included in a warrant affidavit. "[F]acts are 'material' and hence must be disclosed if their omission would make the affidavit *substantially misleading*. On review under (**P.C.**) **section 1538.5**, facts must be deemed material for this purpose if, because of their inherent probative force, there is a substantial possibility they would have altered a reasonable magistrate's probable cause determination." (***People v. Kurland*** (1980) 28 Cal.3rd 376, 385.) Conclusory allegations that admittedly were based upon assumptions only are insufficient to justify a ***Franks*** hearing. The fact that police had obtained a search warrant for someone else's house based upon other evidence that someone other than defendant had committed the murder that defendant was suspected of committing did not detract from the later developed probable cause to believe defendant was the killer. Also, the failure to include a witness' complete criminal history, particularly when the magistrate already had information as to the witness' illegal activities, was not a material omission. (***People v. Sandoval*** (2015) 62 Cal.4th 394, 405-412.)

Plaintiff (defendant in a criminal case) filed a **42 U.S.C. § 1983** lawsuit against several civil defendants, including agents of the Grand Forks Narcotics Task Force ("GFNTF"), alleging two **Fourth Amendment** violations; i.e., that a search warrant the GFNTF obtained was based upon a deliberate falsehood or reckless disregard for the truth in that they used an informant to develop and generate false evidence incorporated in an affidavit; and that the

> GFNTF deprived Plaintiff of a preliminary hearing at which Plaintiff would have been discharged because the warrant was not supported by probable cause. Plaintiff appealed the grant of summary judgment dismissing these claims. The Eighth Circuit affirmed. The Court agreed with the district court that the affidavit provided probable cause to arrest Plaintiff. Even had it been corrected to include missing information Plaintiff alleged was recklessly omitted, there was no evidence any of the civil defendants knew about an allegedly false "murder-for-hire" allegation when the warrant affidavit was submitted. An agent does not "violate a clearly established constitutional right by omitting information from a warrant application that he does not actually know, even if the reason is his own reckless investigation." As Plaintiff's subsequent, lengthy investigation of the informant makes clear, minimal further investigation into the informant's criminal history would not have exonerated Plaintiff. (***Howe v. Gilpin*** (8th Cir. 2023) 65 F.4th 975.)

2. *Presumption of Unlawfulness* (or *Unreasonableness*) *Without a Warrant*: The absence of a search warrant raises a presumption that the search was *unlawful*, which the prosecution is required to rebut. (***Mincey v. Arizona*** (1978) 437 U.S. 385, 390 [98 S.Ct. 2408; 57 L.Ed.2nd 290, 298-299]; ***In re Tyrell J.*** (1994) 8 Cal.4th 68, 76, overruled on other grounds.)

> The prosecution bears the burden of providing proof of a recognized exception to the warrant requirement, justifying a warrantless search. (***Welsh v. Wisconsin*** (1984) 466 U.S. 740, 749-750 [104 S.Ct. 2091; 80 L.Ed.2nd 732, 742-743]; ***People v. James*** (1977) 19 Cal.3rd 99, 106.)
>
> "Warrantless searches and seizures (of persons) are presumed to be unreasonable, 'subject only to a few specifically established and well-delineated exceptions.'" (***People v. Thomas*** (2018) 29 Cal.App.5th 1107, 1113; citing ***People v. Diaz*** (2011) 51 Cal.4th 84, 90.)
>
> > "Such 'specifically established and well-delineated exceptions' include exigent circumstances, searches incident to arrest, vehicle searches, and border searches." (***United States v. Cano*** (9th Cir. 2019) 934 F.3rd 1002, 1011.)
> >
> > But there are exceptions to each of these exceptions. "*First*, any search conducted under an exception must be within the scope of the exception. *Second*, some searches, even when conducted within the scope of the exception, may be so intrusive that they require

> additional justification, up to and including probable cause and a search warrant." (***Ibid***. Italics added.)

Warrantless entries by police into a residence are presumed illegal unless justified by either consent, or probable cause with exigent circumstances. (***Payton v. New York*** (1980) 445 U.S. 573, 586 [100 S.Ct. 1371; 63 L.Ed.2nd 639]; ***People v. Coddington*** (2000) 23 Cal.4th 529, 575.)

3. *Good Faith*:

Rule: Evidence seized pursuant to a search warrant will not be suppressed even if the warrant was defective so long as the officers acted in reasonable and objective good faith in relying upon the warrant and serving it. (***United States v. Leon*** (1984) 468 U.S. 897 [104 S.Ct. 3405; 82 L.Ed.2nd 677]; ***Massachusetts v. Sheppard*** (1984) 468 U.S. 981 [104 S.Ct. 3424; 82 L.Ed.2nd 737]; ***People v. Rodrigues-Fernandez*** (1986) 182 Cal.App.3rd 742; ***United States v. Crews*** (9th Cir. 2007) 502 F.3rd 1130; ***Messerschmidt et al. v. Millender*** (2012) 565 U.S. 535 [132 S.Ct. 1235; 182 L.Ed.2nd 47]; ***United States v. Schesso*** (9th Cir. 2013) 730 F.3rd 1040, 1050-1051; ***Armstrong v. Asselin*** (9th Cir. 2013) 734 F.3rd 984, 989-995; ***United States v. Schesso*** (9th Cir. 2013) 730 F.3rd 1040, 1050-1051; ***United States v. Needham*** (9th Cir. 2013) 718 F.3rd 1190; 1194; (***People v. Lazarus*** (2015) 238 Cal.App.4th 734, 766-767; ***United States v. Elmore*** (9th Cir. 2019) 917 F.3rd 1068, 1075-1079; ***United States v. King*** (9th Cir. 2021) 985 F.3rd 702, 709-710; ***People v. Lepere*** (2023) 91 Cal.App.5th 727, 732; ***Price v. Superior Court*** (2023) 93 Cal.App.5th 13, at pp. 49-51.)

> "Under the good faith exception to the exclusionary rule: 'Evidence obtained by police officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate is ordinarily not excluded under the **Fourth Amendment**, even if a reviewing court ultimately determines the warrant is not supported by probable cause.'" (***People v. Lepere*** (2023) 91 Cal.App.5th 727, 733; quoting (***People v. French*** (2011) 201 Cal.App.4th 1307, 1323)

History: See ***People v. Macabeo*** (2016) 1 Cal.5th 1206, 1219-1223, for a history of the Good Faith exception to the exclusionary rule.

Exclusionary Rule Restricted: The Exclusionary Rule is "restricted to those situations in which its remedial purpose is effectively advanced." (***Illinois v. Krull*** (1987) 480 U.S. 340, 347 [107 S.Ct. 1160; 94 L.Ed.2nd 364, 373].)

> "The good faith exception rests on the premise that the purpose of the exclusionary rule is to deter official misconduct by depriving

the state of the fruits of unlawful searches." (***People v. Arredondo*** (2016) 245 Cal.App.4th 186, 208.)

> *Note*: Petition for Review was dismissed and the case remanded in light of the decision in ***Mitchell v. Wisconsin*** (June 27, 2019) __ U.S.__, __ [139 S.Ct. 2525; 204 L.Ed.2nd 1040], where the U.S. Supreme Court held that when a DUI arrestee is unconscious, this fact alone will "almost always" constitute an exigency, allowing for a warrantless blood draw.

The good faith reliance upon a state statute allowing for a warrantless administrative search was justified where the statute was not obviously unconstitutional. (***Illinois v. Krull***, *supra*; see also ***Michigan v. DeFillippo*** (1979) 443 U.S. 31, 37-38, and fn. 3 [99 S.Ct. 2627; 61 L.Ed.2nd 343, 439-350]; good faith reliance on an ordinance that was later declared to be unconstitutional. See also ***People v. Arredondo*** (2016) 245 Cal.App.4th 186, 206-210.)

> In evaluating the applicability of "good faith reliance upon a statute, two questions must be answered: (1) Does substantial evidence support a finding that the officer relied on the statute, and (2) was such reliance "reasonable" for purposes of the good faith exception? (***Id.***, at p. 208.)

> *Note*: Petition for Review was dismissed in ***Arredondo*** and the case remanded in light of the decision in ***Mitchell v. Wisconsin*** (June 27, 2019) __ U.S.__, __ [139 S.Ct. 2525; 204 L.Ed.2nd 1040], where the U.S. Supreme Court held that when a DUI arrestee is unconscious, this fact alone will "almost always" constitute an exigency, allowing for a warrantless blood draw.

Application of the Exclusionary Rule is *unwarranted* where it would *not* result in appreciable deterrence to unlawful police conduct. (***Arizona v. Evans*** (1995) 514 U.S. 1 [131 L.Ed.2nd 34]; An arrest based upon erroneous court records.)

The Exclusionary Rule should not be applied to evidence obtained by a police officer whose reliance on a search warrant issued by a neutral magistrate was objectively reasonable, even though the warrant was ultimately found to be defective. (***United States v. Leon*** (1984) 468 U.S. 897 [104 S.Ct. 3405; 82 L.Ed.2nd 677]; see also ***Massachusetts v. Sheppard*** (1984) 468 U.S. 981 [104 S.Ct. 3424; 82 L.Ed.2nd 737].)

Similarly, the alleged unconstitutionality of a statute, the violation for which serves as the basis for a search warrant, is irrelevant so long as officers reasonably relied upon the statute's validity at the time of the obtaining of the search warrant. (***United States v. Meek*** (9th Cir. 2004) 366 F.3rd 705, 714.)

An officer's reasonable reliance upon the advice of a prosecutor, although not conclusive, is some evidence of good faith. (***Dixon v. Wallowa County*** (9th Cir, 2003) 336 F.3rd 1013, 1019; see also ***Stevens v. Rose*** (9th Cir. 2002) 298 F.3rd 880, 884.)

See also ***Johnston v. Koppes*** (9th Cir. 1988) 850 F.2nd 594, 596, listing four relevant factors in evaluating the officer's good faith reliance on advice of a lawyer:

- Whether the attorney was independent;
- Whether the advice addressed the constitutionality of the proposed action;
- Whether the attorney had all the relevant facts; *and*
- Whether the advice was sought before or after the officer's actions.

A defective search warrant description (i.e., lack of particularity) may be cured where the affidavit supplies the necessary particularity. However, the government has the burden of proving that the officers who executed the warrant read and were guided by the contents of the affidavit. (***United States v. SDI Future Health, Inc.*** (9th Cir. 2009) 568 F.3rd 684, 706; citing ***United States v. Luk*** (9th Cir. 1988) 859 F.2nd 667, 677.)

"'(A) warrant issued by a magistrate normally suffices to establish' that a law enforcement officer has 'acted in good faith in conducting the search.'" "(E)vidence seized will not be excluded where officers rely on warrants that are later ruled to be invalid if their reliance was objectively reasonable." (Citations omitted; ***People v. Stipo*** (2011) 195 Cal.App.4th 664, 673.)

A search warrant affidavit that was held to be insufficient due to a lack of detail in the affidavit, using information from three informants what was conclusory only, and that corroborated each other only as to "pedestrian facts" that could have been known to anyone, was saved by the "good faith" rule because a reasonable officer could have been let to believe the warrant was good due to prior cases holding that information from unconnected informants may be enough to establish probable cause. (***People v. French*** (2011) 201 Cal.App.4th 1307, 1323-1325.)

The federal Fourth Circuit Court of Appeal, in a split 2-1 decision, found the warrantless, extended, accessing of two of defendants' cell-site data (221 days' worth of cell site location information [CSLI], which itself yielded an impressive 29,659 location data points for defendant Graham and 28,410 for co-defendant Jordan, enough to provide a "reasonably detailed account of their movements" during the intervals covered by the disclosure orders) amounted to an unconstitutional search under the **Fourth Amendment**. Officers obtained court orders pursuant to the "**Stored Communications Act**" (**18 U.S.C. § 2703(d)**), but not search warrants. The resulting information was used against the defendants at trial. The Appellate Court refused, however, to order the suppression of the collected information because of the **Fourth Amendment's** "*good faith*" exception, and thus affirmed both the defendants' convictions of various charges associated with a series of armed robberies. (***United States v. Graham*** (4th Cir. 2015) 796 F.3rd 332.)

However, it was held that police lacked a "good faith" basis for the search of defendant's residence that was separate from the residence listed in the search warrant, but from which it as believed that defendant used the same IP address, even assuming there was a wireless signal extending from the identified residence to defendant's residence, because they had no actual evidence to support the belief that defendant had a password to the network or that he had accessed it in any fashion. (***People v. Nguyen*** (2017) 12 Cal.App.5th 574, 586-587.)

Also, "the good-faith exception may not be invoked when "the search warrant was issued in part on the basis of evidence obtained from an illegal search." (***United States v. Artis*** (9th Cir. 2019) 919 F.3rd 1123, 1133; quoting ***United States v. Wanless*** (9th Cir. 1989) 882 F.2nd 1459, 1466-1467, and citing ***United States v. Vasey*** (9th Cir. 1987) 834 F.2nd 782, 789.)

> In Artis, a search warrant was obtained in reliance upon plain sight observations made in an earlier search which the prosecution had conceded included illegally observed evidence.

"A prosecutor's independent judgment may break the chain of causation between the unconstitutional actions of other officials and the harm suffered by a constitutional tort plaintiff." (***Wilkenson v. Magrann*** (9th Cir. 2019) 781 F.3rd Appx 669 (unpublished), at p. 670; quoting ***McSherry v.*** **City of Long Beach**

(9th Cir. 2009) 584 F.3rd 1129, 1137; and ***Beck v. City of Upland*** (9th Cir. 2008) 527 F.3rd 853, 862.)

In a warrant authorizing the search of two residences on the same property, divided by a road through the property, the affidavit to which describing primarily the criminal activities of the one resident with little if anything to indicate that the plaintiff, who lived in the other residence, was also involved, the Eighth Circuit Court of Appeal held that the lack of any particularity describing how the plaintiff might have been involved invalidated the warrant as it applied to him. The Court found the affidavit in support of the warrant was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." The Court concluded that the search of defendant's residence was not saved by the "***Leon*** Good Faith" exception as no reasonable officer would believe that there was a fair probability that evidence of another man's burglaries would be found in the defendant's residence; the officers knew the men maintained separate residences on the property and they offered little more than a hunch that defendant's residence was being used to store property stolen by the other man. (***United States v. Ralston*** (8th Cir. 2024) 88 F.4th 776.)

Civil Cases and Qualified Immunity: The standards applicable to the "Good Faith" exception in a criminal case are the same as used in civil cases where it is found that "*qualified immunity*" protects an officer from civil liability. (***United States v. Needham*** (9th Cir. 2013) 718 F.3rd 1190; 1194-1195.)

Exceptions to the Good Faith Rule:

Rule: "A police officer may not shift all of the responsibility for the protection of an accused's **Fourth Amendment** rights to the magistrate by executing a warrant no matter how deficient it may be in describing the places to be searched and the items to be seized. An officer applying for a warrant is required to exercise reasonable professional judgment. [Citations]" (***People v. Bradford*** (1997) 15 Cal.4th 1229, 1292; see also ***United States v. Elmore*** (9th Cir. 2019) 917 F.3rd 1068, 1077.)

Exceptions: Pursuant to ***United States v. Leon*** (1984) 468 U.S. 897, 922-923 [104 S.Ct. 3405; 82 L.Ed.2nd 677], and other cases (see below), the "*Good Faith*" rule *does not* apply when:

- *The Magistrate was Misled*: The magistrate issuing the search warrant was *misled* by information in the affidavit

that the affiant knew was false or would have known was false except for a reckless disregard for the truth. (See ***United States v. Crews*** (9th Cir. 2007) 502 F.3rd 1130, 1138-1139.)

> This probably applies to material omissions in the warrant affidavit as well. (***United States v. Flores*** (9th Cir. 1982) 679 F.2nd 173; ***United States v. Lefkowitz*** (9th Cir. 1980) 618 F.2nd 1313.)
>
> "(S)uppression of evidence is an appropriate remedy only if 'the magistrate or judge in issuing [the] warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth,' the affidavit is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,' or the affidavit is so deficient in particularizing the place to be searched or the things to be seized that the executing officer 'cannot reasonably presume it to be valid.' (***Leon***, *supra*, at p. 923.) In considering the issue, we apply the objective test of 'whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization.'" (***People v. Lazarus*** (2015) 238 Cal.App.4th 734, 766-767; upholding a search warrant with 23-year-old information constituting the probable cause.)

- *Magistrate Abandoned his Judicial Role*: The issuing magistrate has "*wholly abandoned his judicial role . . .*" to the extent that no reasonably well-trained officer would rely upon the warrant. For example:

> Issuing a warrant based upon a "*bare bones*" affidavit; i.e., one written in "*conclusory*," as opposed to "*factual*," language. (See ***United States v. Harper*** (5th Cir. 1986) 802 F.2nd 115; and ***United States v. Maggitt*** (5th Cir.1985) 778 F.2nd 1029, 1036.)
>
> Where the judge becomes a part of the searching party, personally authorizing seizures during the search. (***Lo-Ji Sales, Inc. v. New York*** (1979) 442 U.S. 319 [99 S.Ct. 2319; 60 L.Ed.2nd 920].)

A judge who merely acts as a "*rubber stamp*" signer of warrants, approving anything submitted for issuance. (See ***United States v. Brown*** (7th Cir. 1987) 832 F.2nd 991; and ***Rodriguez v. Superior Court*** (1988) 199 Cal.App.3rd 1453.)

- *Lack of Indicia of Probable Cause*: A search warrant affidavit that is so *lacking in the indicia of probable cause* that official belief in the existence of probable cause is entirely unreasonable. (***Malley v. Briggs*** (1986) 475 U.S. 335, 344-345 [89 L.Ed.2nd 271]; see also ***United States v. Crews*** (9th Cir. 2007) 502 F.3rd 1130, 1135-1138; ***Messerschmidt et al. v. Millender*** (2012) 565 U.S. 535 [132 S.Ct. 1235; 182 L.Ed.2nd 47]; ***United States v. Underwood*** (9th Cir. 2013) 725 F.3rd 1076, 1081-1088; ***United States v. Needham*** (9th Cir. 2013) 718 F.3rd 1190; 1194.)

  "Even if an affidavit fails to establish probable cause, "'an officer cannot be expected to question the magistrate's probable-cause determination,' . . . *id.* at 921, unless the affidavit is 'bare bones,' . . . , 'it fails to provide a colorable argument for probable cause,'" ***United States v. Jobe*** (9th Cir. 2019) 933 F.3rd 1074, 1077, quoting ***United States v. Leon*** (1984) 468 U.S. 897, 921 [104 S.Ct. 3405; 82 L.Ed.2nd 677] and ***United States v. Underwood*** (9th Cir. 2013) 725 F.3rd 1076, 1085.)

  However, "the threshold for establishing this exception is a high one, and it should be." (***Messerschmidt et al. v. Millender***, *supra*., at p. 547 [132 S.Ct. at p. 1245].)

  E.g.: The "*bare bones*" warrant, written in "*wholly conclusory statements*" as opposed to *factual allegations*. (***United States v. Maggitt***, *supra*.; ***United States v. Barrington*** (5th Cir. 1986) 806 F.2nd 529, 542; ***United States v. Underwood***, *supra*, and below.)

  Delay of 52 days between a controlled buy of almost a pound of marijuana and the execution of a search warrant, despite the officer's expert opinion and good faith belief that the seller would still have

contraband in his residence (the sale taking place in a parking lot in another city), was held to be stale. The officer's belief was not objectively reasonable, under the circumstances. (***People v. Hulland*** (2003) 110 Cal.App.4th 1646.)

A warrant that failed to identify a particular suspect as an alleged "chemist" arriving from a foreign country, to provide any basis for the tip that a chemist was coming to the United States, or to describe any activity by the suspect that was indicative of setting up a meth lab, failed to make even a "colorable argument for probable cause." (***United States v. Luong*** (9th Cir. 2006) 470 F.3rd 898.)

Officers obtained a warrant and searched defendant's home for a firearm that was used in a homicide that had occurred nine months earlier. Defendant himself was not a suspect in the homicide. But it was believed that two of his sons had some connection to it. The officers did not find the firearm from the homicide. However, they did find two other firearms and ammunition, which Defendant Grant unlawfully possessed because he was a convicted felon. Disagreeing with the trial court, the Ninth Circuit held that the search warrant affidavit did not establish probable cause that the firearm used in the homicide might be located in defendant's home. Other than a single conversation between defendant and one of his sons, nothing in the affidavit suggested any connection between the sought-for gun and defendant's home. The Court further held that the good-faith exception did not apply because the officers' reliance on the warrant was unreasonable. (***United States v. Grant*** (9th Cir. 2012) 682 F.3rd 827, 832-841.)

> "(A)n association 'through family . . . affiliation' is insufficient to establish probable cause." (***United States v. Elmore*** (9th Cir. 2019) 917 F.3rd 1068, 1075; quoting ***United States v. Grant***, *supra*, at pp. 836-837.)

The trial court was held to have properly suppressed drug trafficking evidence found in defendant's home because the search warrant was defective under the **Fourth Amendment** in that the affidavit failed to establish probable cause: The good faith exception to the exclusionary rule was per se not met because the affidavit was a bare bones affidavit that was "*so lacking in indicia of probable cause*," relying primarily on unsupported conclusions, that it failed to provide a colorable argument for probable cause. Even assuming the affidavit was not a bare bones affidavit, the good faith exception was not met because an analysis of the totality of the circumstances, including extrinsic factors, established that reliance was objectively unreasonable. (***United States v. Underwood*** (9th Cir. 2013) 725 F.3rd 1076, 1081-1088.)

See also ***People v. Lepere*** (2023) 91 Cal.App.5th 727, 733; repeating the rule that the good faith exception does not apply when the warrant affidavit is "'*so lacking in indicia of probable cause*' that an officer's reliance on the warrant is objectively unreasonable." (Quoting People v. French (2011) 201 Cal.App.4th 1307, 1323.)

See also ***United States v. Jobe*** (9th Cir. 2019) 933 F.3rd 1074, 1077-1078, where although there was insufficient probable cause in a search warrant affidavit to support the seizure of defendant's laptop, the Court declined to suppress the contents of the laptop in that the "warrant contained sufficient information to render (the investigator's) reliance on the warrant reasonable."

- *Warrant Deficient*: The warrant is so *lacking in those specifics required of warrants* that it cannot in good faith be presumed valid. (See ***Massachusetts v. Shepard*** (1984) 468 U.S. 981 [82 L.Ed.2nd 737].)

  E.g.: The officer's reliance on the magistrate's probable cause determination is not objectively reasonable. I.e.: Should a reasonably well-trained officer have known that the search warrant was defective despite the magistrate's authorization?

(See ***People v. Lim*** (2001) 85 Cal.App.4th 1289, 1296-1297.)

In this regard, it adds to the officer's good faith to have his warrants reviewed and approved by a deputy district attorney prior to taking it to a magistrate. (See ***People v. Camarella*** (1991) 54 Cal.3rd 592, 602-607.)

- *Affidavit Based on Illegally Collected Information*: "*Good Faith*" is not applicable when the *information* upon which the warrant is based *was gathered in an earlier illegal search*. (***United States v. Vasey*** (9th Cir. 1987) 834 F.2nd 782; ***People v. Baker*** (1986) 187 Cal.App.3rd 562; ***People v. Brown*** (1989) 210 Cal.App.3rd 849.)

  However, it must be the defendant's own **Fourth Amendment** rights that were violated. (***People v. Weiss*** (1999) 20 Cal.4th 1073, 1081.)

  Information gathered in violation of someone else's **Fourth Amendment** rights, for which this defendant has no standing to challenge, *may* be used in a search warrant affidavit. (***People v. Madrid*** (1992) 7 Cal.App.4th 1888, 1896.)

Exigent Circumstances:

The Ninth Circuit Court of Appeal has indicated that it might be appropriate to factor in exigent circumstances, such as necessary time restraints, in determining whether the "good faith" exception applies. (***United States v. Weber*** (9th Cir. 1990) 923 F.2nd 1338, 1346; ***United States v. Ramos*** (9th Cir. 1991) 923 F.2nd 1346, 1355, fn. 18, overruled on other grounds.)

But claiming an exigency as an excuse for applying a good faith exception will not be upheld where the officers do not treat the situation accordingly. (***United States v. Luong*** (9th Cir. 2006) 470 F.3rd 898, 904; claiming that the dangerousness of a possible meth lab in a residential area justified application of the good faith exception was rejected when the officers waited seven hours to obtain the warrant and then three more hours before executing it.

See "*Exigent Circumstances*," under "*Warrantless Searches and Seizures*" (Chapter 9), above.

Additional Case Law:

"Good Faith" applied to a warrant where the description of the property to be seized was erroneously left out of the warrant affidavit. (***People v. Rodriguez-Fernandez*** (1991) 235 Cal.App.3rd 543; ***People v. Alvarez*** (1989) 209 Cal.App.3rd 660.)

Failure to restrict the description of the place to be searched to the defendant's room, making the warrant "*over-broad*," where that room was all that was in fact searched, was excused under the "*good faith*" rule. (***People v. MacAvoy*** (1985) 162 Cal.App.3rd 746, 759-763.)

A warrant that failed to identify a particular suspect as an alleged "chemist" arriving from a foreign country, to provide any basis for the tip that a chemist was coming to the United States, or to describe any activity by the suspect that was indicative of setting up a meth lab, failed to make even a "colorable argument for probable cause." (***United States v. Luong*** (9th Cir. 2006) 470 F.3rd 898.)

An officer's "*good faith*" is not grounds for denying a defendant's motion to suppress based on a violation of the *wiretap statutes* (see below). (***People v. Jackson*** (2005) 129 Cal.App.4th 129, 153-160.)

Officers executing a search warrant violated the **Fourth Amendment** because the warrant was facially defective in that it only listed the place to search as the motel. While a judge had orally approved an expansion of the warrant to the search of a home as well, the officers failed to correct the warrant itself. The text of the **Fourth Amendment** requires the warrant to specify the place to be searched, which the warrant in this case failed to do. However, when the officers were subsequently sued, the district court erred in denying the officers' qualified immunity motion because it was not clearly established at the time that the search based upon the warrant in issue would violate the **Fourth Amendment**. An officer could have believed—based on the lack of direct case law at the time—that he or she could search the home because the court had orally approved it, even if the officer failed to make that change on the warrant. The district court's denial of qualified immunity for the officers was reversed and remanded. (***Manriquez v. Ensley*** (9th Cir. 2022) 46 F.4th 1124.)

4. ***Ramey*** *Inapplicable*: Arrests within a residence (See ***People v. Ramey*** (1976) 16 Cal.3rd 263.) during the execution of a search warrant may be made without an arrest warrant. (***People v. McCarter*** (1981) 117 Cal.App.3rd 894, 908.)

See "***People v. Ramey***," under "*Arrests*" (Chapter 5), above.

5. *Consensual Searches* may always be stopped by the subject withdrawing his or her consent; i.e., the suspect is in control of the extent and duration of the search. (See ***People v. Martinez*** (1968) 259 Cal.App.2nd Supp. 943.) Execution of a warrant, obviously, does not require the consent nor even the cooperation of the occupant.

6. *Informants*, who do no more than provide probable cause in an affidavit for a search warrant, may normally be kept confidential. (**E.C. § 1042(b)**)

See "*Keeping Confidential Informants Confidential*," below.

7. *Acting in the Performance of His* (*or Her*) *Duties*: An officer serving a search warrant, even if later found to be lacking in probable cause, is "*acting in the performance of his (or her) duties*" should a criminal offense in which this is an element (e.g., **P.C. §§ 148** (Resisting Arrest)**, 243(b)** (Battery on a Peace Officer) occur during the service of the warrant. (***People v. Gonzales*** (1990) 51 Cal.3rd 1179, 1222.)

8. *Opportunity to Objectively Evaluate Existing Probable Cause*: Requiring law enforcement officers to obtain a search warrant prior to invading the privacy of an individual, noting the necessity of first objectively evaluating any existing probable cause and then locating and convincing a neutral magistrate of the existence of that probable cause, is a "built-in safeguard" against acting without first considering the dangers involved, "serv(ing the) . . . important purpose of encouraging considered reflection before officers take action." (***Mendez v. County of Los Angeles*** (9th Cir. 2018) 897 F.3rd 1067, 1079-1081.)

Practice Note: The common practice of having a deputy district attorney review and approve proposed search warrants adds to the validity of this factor.

***Mental Patients Detained per Welf. & Insti. Code § 5150*: *Seizure of Weapons*:**

Search Warrant Requirement:

Although ***Welf. & Insti. Code § 8102(a)*** authorizes the "*confiscation*" of firearms or other deadly weapons owned, possessed, or under the control of a detained or apprehended mental patient, a search warrant must be used in order to lawfully enter the house and/or to search for weapons in those cases where there are no exigent circumstances and the defendant has not given consent. (***People v. Sweig*** (2008) 167 Cal.App.4th 1145 (petition granted, see below); rejecting the People's argument that a

warrantless entry to search for and seize the detainee's firearms was justified under law enforcement's "community caretaking" function.)

Pen. Code § 1524(a)(10): *Search Warrants* for Firearms and other Deadly Weapons:

The ***Sweig*** Court also found, however, that a search warrant, at least at the time, was not provided for under **Pen. Code § 1524** (see "*Statutory Grounds for Issuance* (**Pen. Code § 1524(a)(1)** through **(20)**)," below) when the defendant was detained pursuant to **W&I § 5150** only. The Court suggested that the Legislature should fix the problem with a legislative amendment to **Section 1524**.

As a result, the Legislature amended **Pen. Code § 1524**, effective *1/1/2010*, to add new **subdivision (a)(10)**, which now lists as a legal ground for the issuance of a search warrant the following: "When the property or things to be seized include a firearm or any other deadly weapon that is owned by, or in possession of, or in the custody or control of, a person described in **W&I § 8102(a)**."

The petition to the California Supreme Court on ***People v. Sweig*** was granted, making this case no longer available for citation, with review being dismissed on 10/11/09 when the above amendment to **Pen. Code § 1524** was enacted.

Exigent Circumstances and Community Caretaking Exceptions to the Warrant Requirement:

See ***Rupf v. Yan*** (2000) 85 Cal.App.4th 411, at pages 421-422, where a warrantless seizure of a mental patient's firearms from his home was not challenged, the Court perhaps inferring an "*exigent circumstance*" when it noted that:

"The exercise of the police power to regulate firearms is clearly related to the public health, safety and welfare. (Citations.) Respondent identifies the object of the statute as providing a means whereby authorities can confiscate firearms in an emergency situation and may keep firearms from mentally unstable persons. The legislative history of the statute expressly recognizes the urgency and importance of such an objective . . . ." (***Ibid***.)

And see ***Caniglia v. Strom*** (1st Cir. 2020) 953 F.3rd 112 (Cert granted), where the federal First Circuit Court of Appeal held that (1) the "community caretaking" theory did in fact apply to residences, and (2) that entering the plaintiff's residence to seize his firearms and ammunition while he was being evaluated for mental issues at a local mental facility

was lawful as a function of the officers' community caretaking responsibilities where plaintiff was reported to have talked about suicide, he had guns in the house, it was believed that he could be released from the hospital at any time, and the officers searched only where they were told by plaintiff's girlfriend that the guns were located.

The Supreme Court reversed the First Circuit in this case, unequivocally ruling that community caretaking *does not* apply to residences. (***Caniglia v. Strom*** (May 17, 2021) __ U.S. __ [141 S.Ct. 1596; 209 L.Ed.2nd 604].) (See "*Welfare Checks; the* '*Community Caretaking Function*,' '*Exigencies*,' *and the* '*Emergency Aid Doctrine*,'" under "*Searches of Residences and Other Buildings* (Chapter 13), below.)

"*Gun Violence Restraining Orders*" *per Pen. Code §§ 18100-18500*:

Pen. Code §§ 18100-18500 provides for the seizure and retention of a person's firearms and ammunition via a "*Gun Violence Restraining Order*" (sometimes referred to as "*Extreme Risk Protection Orders*," or "*ERPO*s"), also known as California's "*Red Flag Statutes*," whenever "there is reasonable cause to believe that the person poses an immediate and present danger of causing personal injury to themselves or another person by having custody or control of a firearm." (**Pen. Code § 18108(c)**)

Note: Provisions are made in the **Penal Code** (i.e., see **Pen. Code § 1524(a)(14)**) for obtaining a search warrant to search for, and seize, firearms and ammunition from a person described under theses statutes and who is uncooperative in voluntarily surrendering such items. **Pen. Code § 29810(c)(4)** also provides that after making the necessary probable cause finding as noted in **subd. (3)**, the court is required to issue an order for the search and removal of firearms upon a finding that the defendant has failed to relinquish firearms.

The definition of firearms for purposes of "*gun violence restraining orders*" (GVROs) has been expanded by providing that for the purposes **Pen. Code §§ 18100–18205**, "*firearm*" includes the frame or receiver of the weapon and includes a precursor part.

Per this section as amended, a "*firearm precursor part*" has the same meaning as in **Pen. Code § 16531(a)**; i.e., a component of a firearm that is necessary to build or assemble a firearm and is either an unfinished receiver or an unfinished handgun frame.
Note: As a result, pursuant to enforcing a GVRO, law enforcement is authorized to seize an intact firearm or parts of a firearm (which could be used to assemble a "*ghost gun*").

Pen. Code § 1524(a)(14): "When the property or things to be seized are *firearms or ammunition* or both that are owned by, in the possession of, or in the custody or control of a person who is the subject of *a gun violence restraining order* that has been issued *pursuant to* ***Pen. Code §§ 18100 et seq***. if a prohibited firearm or ammunition or both is possess, owned, in the custody of, or controlled by a person against whom a gun violence restraining order has been issued, the person has been lawfully serviced with that order, and the person has failed to relinquish the firearm as required by law."

Pen. Code § 1524(a)(15): Beginning *January 1, 2018*, the property or things to be seized include *a firearm* that is owned by, or in the possession of, or in the custody or control of, a person who is subject to the *prohibitions regarding firearms pursuant to* ***P.C. §§ 29800*** *or* ***29805***, and the court has made a finding *pursuant to* ***P.C. § 29810(c)(3)*** that the person has failed to relinquish the firearm as required by law.

> *Note*: **Pen. Code § 29800** is the firearms prohibition that applies to convicted felons and narcotic drug addicts. **Pen. Code § 29805** is the 10-year firearms prohibition for persons convicted of a specified misdemeanor.

> *Note*: **Pen. Code § 29810(c)(4)**, after making the necessary finding as noted in **subd. (3)**, requires the court to issue an order for the search and removal of firearms upon a probable cause finding that the defendant has failed to relinquish firearms.

***Independent Source Doctrine*:**

Rule: Where information later used in a search warrant has been discovered via an illegal search or seizure, the "*Independent Source Doctrine*" allows for the admission of the evidence recovered during the execution of that warrant that has been discovered by means wholly independent of any constitutional violation. (***People v. Weiss*** (1999) 20 Cal.4th 1073.)

> "[It] teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position tha[n] they would have been in if no police error or misconduct had occurred. [Citations.] When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.' [Citation.]" ***Id***., at pp. 1077-1078.)

The Two-Prong Test: Where a search warrant affidavit supporting a search warrant contains both information obtained by unlawful conduct as well as

untainted information, a two-prong test applies to justify application of the independent source doctrine. (***People v. Weiss***, *supra*., at pp. 1078-1079, 1082.)

- The affidavit, *excised of any illegally obtained information*, must be sufficient to establish probable cause.

- The evidence must support a finding that "the police subjectively would have sought the warrant even without the illegal conduct."

  See also ***People v. Superior Court* [*Corbett*]** (2017) 8 Cal.App.5th 670, 693-594; "When the affidavit supporting a search warrant contains information derived from unlawful conduct as well as other, untainted, information, 'the reviewing court must excise all tainted information but then must uphold the warrant if the remaining information establishes probable cause;'" citing ***People v. Weiss***, *supra*, at p. 1081; and ***Franks v. Delaware*** (1978) 438 U.S. 154 [98 S.Ct. 2674; 57 L.Ed.2nd 667].

Case Law:

If the application contains probable cause apart from the improper information, then the warrant is lawful and the independent source doctrine applies, provided that the officers were not prompted to obtain the warrant by what they observed during the initial entry. (See also ***People v. Robinson*** (2012) 208 Cal.App.4th 232, 241.)

See also ***United States v. Merriweather*** (9th Cir. 1985) 777 F.2nd 503, where the Court inappropriately labeled the admissibility of illegally discovered evidence as an application of the "*inevitable discovery*" rule instead of the "*independent source doctrine*." In noting this error, the Ninth Circuit Court of Appeal, in ***United States v. Lundin*** (9th Cir. 2016) 817 F.3rd 1151, 1161-1162, describes the differences between the two legal theories for saving evidence that was otherwise discovered illegally: "Unlike the inevitable discovery doctrine, which asks whether evidence '*would have*' been discovered by lawful means rather than by means of the illegal search, ***Nix v. Williams***, 467 U.S. 431, 447, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984) (emphasis added), the independent source doctrine asks whether the evidence *actually* was 'obtained independently from activities untainted by the initial illegality.' ***Murray v. United States***, 487 U.S. 533, 537, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988)."

Because all tangible and intangible evidence obtained as a result of alleged **Fourth Amendment** violations was independently rediscovered or re-seized under the independent source doctrine when agents executed a search warrant that was both sought and issued independently of any such violations, the district court correctly denied a motion to suppress. (***United States v. Saelee*** (9th Cir. 2022) 51 F.4th 327, 334-339.)

***Non-Standard Types of Warrants and Orders*:**

Types of Warrants: There are a number of types of warrants, typically referred to by description terms of art. For instance:

- *Telephonic Search Warrants*:

  Rule: Telephonic search warrants, with an oral affidavit taken under oath and recorded and later transcribed, is statutorily provided for. (**Pen. Code § 1526**)

  Procedure:

  Generally used during those hours when the courts are closed and a magistrate is otherwise not personally present, although there is no legal impediment to using this procedure during court hours.

  Pen. Code § 1526:

  (a) Before issuing the search warrant, the magistrate may examine on oath the person seeking the warrant and any witnesses the person may produce, and shall take his or her affidavit or their affidavits in writing, and cause the affidavit or affidavits to be subscribed by the party or parties making them. If the affiant transmits the proposed search warrant and all affidavits and supporting documents to the magistrate using facsimile transmission equipment, email, or computer server, the conditions in **subd. (c)** apply.

  (b) In lieu of the written affidavit required in **subd. (a)**, the magistrate may take an oral statement under oath if the oath is made under penalty of perjury and recorded and transcribed. The transcribed statement shall be deemed to be an affidavit for the purposes of this chapter. The recording of the sworn oral statement and the transcribed statement shall be certified by the magistrate receiving it and shall be filed with the clerk of the court. In the alternative, the sworn oral statement shall be recorded by a certified court reporter and the transcript of the statement shall be certified by the reporter, after which the magistrate receiving it shall certify the transcript which shall be filed with the clerk of the court.

  (c)

  (1) The affiant shall sign under penalty of perjury his or her affidavit in support of probable cause for issuance of a

search warrant. The affiant's signature may be in the form of a digital signature or electronic signature if email or computer server is used for transmission to the magistrate.

(2) The magistrate shall verify that all the pages sent have been received, that all the pages are legible, and that the declarant's signature, digital signature, or electronic signature is genuine.

(3) If the magistrate decides to issue the search warrant, he or she shall do both of the following:

(A) Sign the warrant. The magistrate's signature may be in the form of a digital signature or electronic signature if email or computer server is used for transmission by the magistrate.

(B) Note on the warrant the date and time of the issuance of the warrant.

(4) The magistrate shall transmit via facsimile transmission equipment, email, or computer server the signed search warrant to the affiant. The search warrant signed by the magistrate and received by the affiant shall be deemed to be the original warrant. The original warrant and any affidavits or attachments in support thereof shall be returned as provided in **P.C. § 1534**.

See **Pen. Code § 1528(b)**, authorizing a peace officers, under a magistrate's direction, to sign the magistrate's name to a "duplicate original" of the search warrant during the telephonic search warrant process.

Case law:

The availability of telephonic search warrant procedures when considering the issue of whether an exigency exists is irrelevant. "(W)ith better technology, the time required (to obtain a search warrant) has shrunk, but it has not disappeared." (***Mitchell v. Wisconsin*** (June 27, 2019) __ U.S.__, __ [139 S.Ct. 2525; 204 L.Ed.2nd 1040]; on the issue of seeking a search warrant for one's blood when the suspect is unconscious, in the hospital, and unable to give an express consent.

But, see dissenting opinion at pp. __-__.

> However, while sitting outside defendant's residence, waiting to hear whether an alarm may sound in a package delivered to his home, officers should have considered, at least, obtaining a search warrant. "'(T)the government must also show that a warrant could not have been obtained in time, . . . [and] that a telephonic warrant was unavailable or impractical.'" (***United States v. Iwai*** (9th Cir. 2020) 930 F.3rd 1141, 1154 (dissenting opinion); quoting ***United States v. Good*** (9th Cir 1986) 780 F.2nd 773, 775.)

- *Anticipatory Search Warrants*:

  Rule: Issuance of a warrant, conditioned upon the happening of a particular event (e.g., the delivery of illegal substances or articles to a particular address; i.e., a "*triggering condition*"), is legal. (***United States v. Grubbs*** (2006) 547 U.S. 90, 93-97 [164 L.Ed.2nd 195]; ***United States v. Garcia*** (2nd Cir. 1989) 882 F.2nd 699; ***United States v. Iwai*** (9th Cir. 2019) 930 F.3rd 1141, 1149 (dissenting opinion); and see ***United States v. Loy*** (3rd Cir. 1999) 191 F.3rd 360, 364; listing cases upholding the concept.)

  > "(T)he fact that the contraband is not 'presently located at the place described in the warrant' is immaterial, so long as 'there is probable cause to believe that it will be there when the search warrant is executed.' ***United States v. Lowe***, 575 F.2d 1193, 1194 (6th Cir. 1978), . . . *see* ***United States v. Dornhofer***, 859 F.2d 1195, 1198 (4th Cir. 1988), ..." (***United States v. Garcia***, *supra*., at p. 702.)

  Prerequisites: To be constitutional under the **Fourth Amendment's** requirement that there be probable cause, *two* prerequisites of probability must be satisfied:

  - That there is a "*fair probability*" that contraband or evidence of a crime will be found in a particular place; *and*

  - That there is probable cause to believe the triggering condition will in fact occur.

  (***United States v. Grubbs***, *supra*, see also ***United States v. Ruddell*** (9th Cir. 1995) 71 F.3rd 331, 333; and ***United States v. Hendricks*** (9th Cir. 1984) 743 F.2nd 653, 654-657; ***United States v. Goff*** (9th Cir. 1982) 681 F.2nd 1238, and ***United States v. Wylie*** (5th Cir 1990) 919 F.2nd 969, 974-

975; ". . . when it is known that contraband is on a *sure course* to its destination . . . .")

Case Law:

Anticipatory warrants "'require the magistrate to determine (1) that it is now probable that (2) contraband, evidence of a crime, or a fugitive will be on the described premises (3) when the warrant is executed.' (Citation) Thus, the supporting affidavit from police must show 'not only that if the triggering condition occurs there is a fair probability that contraband or evidence of a crime will be found in a particular place, but also that there is probable cause to believe the triggering condition will occur.'" (***United States v. Iwai*** (9th Cir. 2019) 930 F.3rd 1141, at p. 1150 (dissenting opinion), quoting ***United States v. Grubbs***, *supra*, at pp. 96-97.)

The "*Sure Course*" requirement: "(P)lacing a package containing a valid mailing address in the mail establishes probable cause—a 'sure course'—to believe that the package will be found at that destination" upon the execution of an anticipatory search warrant." (See ***United States v. Iwai***, *supra*, at pp. 1150-1153 (dissenting opinion); describing this as a "*fair probability*" (or "*probable cause*") standard. See also ***United States v. Hendricks*** (9th Cir. 1983 743 F.2nd 653, 655.)

California Rules:

California authority, questionable since the United States Supreme Court's decision in ***United States v. Grubbs***, *supra*, has held that; "(A)n anticipatory warrant may issue on *clear showing* that the police's right to search at a certain location for particular evidence of a crime will exist within a reasonable time in the future. (Citations)" ***People v. Sousa*** (1993) 18 Cal.App.4th 549, 558.)

> While failure to describe the conditions precedent on the face of the warrant itself, or incorporate them by reference to the affidavit, is not necessarily fatal to the validity of the warrant, it is better practice to do so anyway. (***People v. Sousa***, *supra*, at p. 561.)

Practice Note: If only to eliminate the issue, and because California cases may end up in the Ninth Circuit at some

point, the better procedure is to describe the anticipatory nature of the warrant on the face of the warrant itself.

Federal Rules:

Failure of the warrant itself to clearly specify on its face the anticipatory nature of the warrant (i.e., that it is not to be served until the happening of a specific event, such as above) *may* invalidate the warrant. (***United States v. Hotal*** (9th Cir. 1998) 143 F.3rd 1223; ***United States v. Vesikuru*** (9th Cir. 2002) 314 F.3rd 1116, 1123-1130; ***United States v. Grubbs*** (2006) 547 U.S. 90, 99-102 [164 L.Ed.2nd 195]; concurring opinion.)

Practice Note: Preparation and approval by a magistrate of an anticipatory search warrant has the tactical advantage of making the warrant effective immediately upon the happening of the described "*triggering event*," thus eliminating the delay between such an event and the eventual obtaining of a warrant.

Tip: State the contingency on the *face of the warrant* itself: E.g.; "THIS WARRANT IS LEGALLY EFFECTIVE AND CAN BE SERVED *ONLY IF* A SALE OF NARCOTICS TAKES PLACE AT THE PREMISES TO BE SEARCHED. (Initials of the magistrate)"

The Federal Ninth Circuit Court of Appeal has indicated that if the warrant specifically incorporates an attached affidavit which describes the anticipatory nature of the warrant, this *might* suffice. However, the affidavit must then accompany the warrant to the scene of the search to be valid. (***United States v. Hotal***, *supra*.; ***United States v. McGrew*** (9th Cir. 1997) 122 F.3rd 847, 849-850.)

Other federal circuits have upheld the validity of an anticipatory warrant without the conditions specified on the warrant itself, *if*: (1) Clear, explicit, and narrowly drawn conditions for the execution of the warrant are contained in the affidavit; and (2) those conditions are actually satisfied before the warrant is executed. (See ***United States v. Moetamedi*** (2nd Cir. 1995) 46 F.3rd 225, 229; ***United States v. Rey*** (6th Cir. 1991) 923 F.2nd 1217, 1221; ***United States v. Dennis*** (7th Cir. 1997) 115 F.3rd 524, 529; ***United States***

v. Tagbering (8th Cir. 1993) 985 F.2nd 946, 950; ***United States v. Hogoboom*** (10th Cir. 1979) 112 F.3rd 1081, 1086-1087.)

According to the Ninth Circuit Court of Appeal, a copy of the document that describes the triggering conditions (i.e., the warrant itself, the affidavit, or any other attachments) must be presented to the lawful occupants (along with a copy of the warrant) upon the execution of the warrant. Failing to do so will invalidate the anticipatory search warrant as a **Fourth Amendment** violation. (***United States v. Grubbs*** (9th Cir. 2004) 377 F.3rd 1072, as reprinted and amended at 389 F.3rd 1306; certiorari granted; revered and remanded; (2006) 547 U.S. 90, 98-99 [164 L.Ed.2nd 195]; see above.)

See also ***United States v. Vesikuru*** (9th Cir. 2002) 314 F.3rd 1116, 1123-1124, holding that an "*anticipatory warrant*," the conditions precedent for which being contained in the affidavit and incorporated into the warrant by reference, requires the presence of both the warrant and affidavit at the scene.

> In that California interprets the **Fourth Amendment** differently, the general rule being that it is *not* required that a copy of the warrant be shown to, or left with, the occupants of the place being searched (see ***People v. Calabrese*** (2002) 101 Cal.App.4th 79.), it is likely that there also is no requirement that the conditions triggering an anticipatory search warrant be described in any documents given to the occupants.

While strict compliance with the triggering condition is not always required, where the triggering condition clearly did not occur (e.g., when the undercover agent was to hand-deliver a package containing contraband to defendant, but instead gave it to a woman who answered the door), then the warrant which was subsequently executed was held to be invalid. (***United States v. Perkins*** (6th Cir. TN 2018) 887 F.3rd 272.)

- *Sneak and Peek Warrants*: A "*sneak and peek*" warrant is one which authorizes surreptitious entry of a premises, without notice, often during the nighttime, and provides that objects of the search are not to be seized but may only be noted, photographed, copied or otherwise recorded.

Some courts, particularly the Federal Ninth Circuit Court of Appeal, are critical of such warrants for failure to require notice to the occupants, but have reluctantly upheld them. (See ***United States v. Freitas*** (9th Cir. 1986) 800 F.2nd 1451; ***United States v. Johns*** (9th Cir. 1998) 851 F.2nd 1131, 1134-1135.)

The federal courts are concerned that a "*sneak and peak*" warrant violates **Federal Rules of Criminal Procedure, Rule 41**. **Rule 41** requires that the officer executing the warrant either give to the owner of the searched premises a copy of the warrant and a receipt for the property taken, or leave the copy and receipt on the premises. It also requires that the inventory be made in the presence of the owner of the premises "or in the presence of at least one credible person other than the applicant for the warrant."

> However, "a violation of **Rule 41** . . . does not lead to suppression of evidence unless: (1) it is a 'fundamental' violation—that is, a violation that 'in effect, renders the search unconstitutional under traditional **fourth amendment** standards' [Citation], (2) 'the search might not have occurred or would not have been so abrasive if the Rule had been followed [Citation]' or (3) 'there is evidence of intentional and deliberate disregard of a provision of the Rule.' [Citation]" (***United States v. Johns***, *supra*., at p. 1134.)

Other courts have approved sneak and peak warrants so long as *delayed notice* is given, after approval by the magistrate that there is good cause for the delay. (***United States v. Villegas*** (2nd Cir. 1990) 899 F.2nd 1324, 1327.)

> *Note*: No California case has ruled upon the legality of such a procedure.

The Supreme Court, however, although never directly discussing the issue, has intimated that notice may be delayed if to do otherwise might defeat the purpose of the warrant. (***Katz v. United States*** (1967) 389 U.S. 347, 355, fn. 16 [88 S.Ct. 507; 19 L.Ed.2nd 576, 584]; discussing the lack of need for "*prior notice*" in a wiretap case.)

- **Pen. Code § 1524.1**: *AIDS Testing*: A search warrant requiring a criminal suspect to submit to a blood test for the HIV virus may be issued by the court after a request by a victim and a hearing showing probable cause to believe that the accused committed a charged offense, and probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the accused to the victim.

This provision is for the benefit of the victim, and, per the requirements of the section, is *not* intended to serve as an aid in the prosecution of any criminal suspect. (**Pen. Code § 1524.1(a)**)

A judge may approve a search warrant upon finding probable cause to believe the defendant committed a crime and that the AIDS virus has been transferred from the accused to the victim (**Subd. (b)(1)**), or the defendant is charged with one or more of a specified list of sex offenses and there exists a police report alleging an as of yet uncharged listed sex offense. (**Subd. (b)(2)**)

A declaration by the victim's mother "*on information and belief*," even though not being based on her personal knowledge, was found to be legally sufficient to support a search warrant pursuant to this section. *Hearsay* may be used to support the affidavit required by this section. (***Humphrey v. Appellate Division of the Superior Court*** (2002) 29 Cal.4th 569.)

Because such a warrant is concerned with the public safety, such a warrant comes within the less stringent requirement of a "*Special Needs*" search. (***Id.***, a pp. 574-575.) (See below.)

- **Pen. Code § 1524.2(b)**: *Records of Foreign Corporations Providing Electronic Communications or Remote Computing Services*: Foreign corporations doing business in California, providing *electronic communications* or *remote computing services* to the general public, must respond to a search warrant issued by a California court and properly served, when asked for records revealing the *identity of customers* using the services, *data* stored by, or on behalf of, the customer, the *customer's usage* of those services, the *recipient* or *destination* of communications sent to or from those customers, or the *content* of those communications.

Definitions:

"*Electronic communications services*" and "*remote computing services*" is to be construed in accordance with the federal **Electronic Communications Privacy Act**: **18 U.S.C. §§ 2701 et seq.**

18 U.S.C. § 2701 refers to **18 U.S.C. § 2501**, **subdivision (15)** of which defines "*electronic communication service*" as a "service which provides to users thereof the ability to send or receive wire or electronic communications."

18 U.S.C. § 2501(1), **(18):** "*Wire communication*" includes "any aural transfer (i.e., one containing the human voice)

made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) . . . ."

This includes telephone conversations. (***Briggs v. American Air Filter Co., Inc.*** (5th Cir. 1980) 630 F.2nd 414; ***United States v. Harpel*** (10th Cir. 1974) 493 F.2nd 346.)

A "*foreign corporation*" is one that is qualified to do business in California pursuant to **Corp. Code § 2105**, although based in another state.

Per **Corp. Code § 2105**, foreign corporations must consent to service of process as a condition of doing business in California.

"*Properly served*" means that a search warrant has been delivered by hand, or in a manner reasonably allowing for proof of delivery if delivered by United States mail, overnight delivery service, or facsimile to a person or entity listed in **Corp. Code § 2110**, or any other means specified by the recipient of the search warrant, including email or submission via an Internet web portal that the recipient has designated for the purpose of service of process. (**Subd. (a)(6)**)

Corp. Code § 2110 requires that an agent, in California, identified by the corporation as the person responsible for accepting service of process, including search warrants, be served.

Providing the Requested Information: The foreign corporation is required to provide the information requested within five (5) business days, which may be shortened or extended upon a showing of good cause, and to authenticate such records, thus making them admissible in court per **Evid. Code §§ 1561**, **1562**. (**P.C. § 1524.2(b)**)

Out-of-State Warrants: The section further requires California corporations to honor out-of-state search warrants as if issued within this state. (**Pen. Code § 1524.2(c)**)

- **Pen. Code § 1524.3(a)**: *Records of Foreign Corporations Providing Electronic Communications or Remote Computing Services*: Foreign corporations providing *electronic communications* or *remote computing*

services must disclose to a governmental prosecuting or investigating agency, when served with a search warrant issued by a California court pursuant to **Pen. Code § 1524(a)(7)** (i.e., in misdemeanor cases), records revealing the *name*, *address*, local and long distance telephone *toll billing records*, *telephone number* or other *subscriber number or identity*, and *length of service* of a subscriber to or customer of that service, the *types of services* the subscriber or customer utilized, and *the contents of communication* originated by or addressed to the service provider when the governmental entity is granted a search warrant pursuant to **Pen. Code § 1524(a)(7)**.

(b): The search warrant shall be limited to only that information necessary to achieve the objective of the warrant, including by specifying the target individuals or accounts, the applications or services, the types of information, and the time periods covered, as appropriate.

(c) Information obtained through the execution of a search warrant pursuant to this section that is unrelated to the objective of the warrant shall be sealed and not be subject to further review without an order from the court.

(d)

(1) A governmental entity receiving subscriber records or information under this section shall provide notice to a subscriber or customer upon receipt of the requested records. The notification may be delayed by the court, in increments of 90 days, upon a showing that there is reason to believe that notification of the existence of the search warrant may have an "*adverse result*."

(2) An "*adverse result*" for purposes of **para. (1)** means any of the following:

(A) Endangering the life or physical safety of an individual.
(B) Flight from prosecution.
(C) Tampering or destruction of evidence.
(D) Intimidation of a potential witness.
(E) Otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(e) Upon the expiration of the period of delay for the notification, the governmental entity shall, by regular mail or email, provide a copy of the process or request and a notice, to the subscriber or customer. The notice shall accomplish all of the following:

(1) State the nature of the law enforcement inquiry with reasonable specificity.

(2) Inform the subscriber or customer that information maintained for the subscriber or customer by the service provider named in the process or request was supplied to or requested by the governmental entity, and the date upon which the information was supplied, and the request was made.

(3) Inform the subscriber or customer that notification to the subscriber or customer was delayed, and which court issued the order pursuant to which the notification was delayed.

(4) Provide a copy of the written inventory of the property that was taken that was provided to the court pursuant to **P.C. § 1537**.

(f) A court issuing a search warrant pursuant to **P.C. § 1524(a)(7)**, on a motion made promptly by the service provider, may quash or modify the warrant if the information or records requested are unusually voluminous in nature or compliance with the warrant otherwise would cause an undue burden on the provider.

(g) A provider of wire or electronic communication services or a remote computing service, upon the request of a peace officer, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a search warrant or a request in writing and an affidavit declaring an intent to file a warrant to the provider. Records shall be retained for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request by the peace officer.

(h) No cause of action shall be brought against any provider, its officers, employees, or agents for providing information, facilities, or assistance in good faith compliance with a search warrant.

- **Pen. Code §§ 11470-11482:** *Court Orders Authorizing the Interruption of Communication Services*:

  Public Util. Code §§ 7907-7908, dealing with the interruption of communication services, was *repealed*, effective *1/1/2018* and replaced by more detailed provisions in **Pen. Code §§ 11470-11482** (**Part 5**, **Title 1**, **Chapter 3**, **Article 7**).

  Pen. Code § 11470: *Definitions*: For the purposes of this article, the following terms have the following meanings:

  (a) "*Communication service*" means any communication service that interconnects with the public switched telephone network and

is required by the Federal Communications Commission to provide customers with 911 access to emergency services.

(b) "*Government entity*" means every local government, including a city, county, city and county, a transit, joint powers, special, or other district, the state, and every agency, department, commission, board, bureau, or other political subdivision of the state, or any authorized agent thereof.

(c) "*Interrupt communication service*" means to knowingly or intentionally suspend, disconnect, interrupt, or disrupt a communication service to one or more particular customers or all customers in a geographical area.

(d) "*Judicial officer*" means a magistrate, judge, commissioner, referee, or any person appointed by a court to serve in one of these capacities, of a superior court.

(e) "*Service provider*" means a person or entity, including a government entity, that offers a communication service.

***Procedures*:**

Pen. Code § 11471: *Prohibition on the Interruption of Communications Services; Exceptions*:

(a) Except as authorized by this article, no government entity, and no service provider acting at the request of a government entity, shall interrupt a communication service for either of the following purposes:

(1) To prevent the communication service from being used for an illegal purpose.

(2) To protect public health, safety, or welfare.

(b) A government entity *may* interrupt a communication service for a purpose stated in **subdivision (a)** in any of the following circumstances:

(1) The interruption is authorized by a court order pursuant to **P.C. § 11473**.

(2) The government entity reasonably determines that **(A)** the interruption is required to address an extreme emergency situation that involves immediate danger of

death or great bodily injury, **(B)** there is insufficient time, with due diligence, to first obtain a court order under **P.C. § 11473**, and **(C)** the interruption meets the grounds for issuance of a court order under **P.C. § 11473**. A government entity acting pursuant to this paragraph shall comply with **P.C. § 11475**.

(3) Notwithstanding **P.C. §§ 591**, **631**, or **632**, or **Pub. Util. Code § 7906**, a supervising law enforcement official with jurisdiction may require that a service provider interrupt a communication service that is available to a person if **(A)** the law enforcement official has probable cause to believe that the person is holding hostages and is committing a crime, or is barricaded and is resisting apprehension through the use or threatened use of force, and **(B)** the purpose of the interruption is to prevent the person from communicating with anyone other than a peace officer or a person authorized by a peace officer. This paragraph does not authorize the interruption of communication service to a wireless device other than a wireless device used or available for use by the person or persons involved in a hostage or barricade situation.

Pen. Code § 11472: *Application for Court Order*:

(a) An application by a government entity for a court order authorizing the interruption of a communication service shall be made in writing upon the personal oath or affirmation of the chief executive of the government entity or his or her designee, to the presiding judge of the superior court or a judicial officer designated by the presiding judge for that purpose.

(b) Each application shall include all of the following information:

(1) The identity of the government entity making the application.

(2) A statement attesting to a review of the application and the circumstances in support of the application by the chief executive officer of the government entity making the application, or his or her designee. This statement shall state the name and office of the person who effected this review.

(3) A full and complete statement of the facts and circumstances relied on by the government entity to justify

a reasonable belief that the order should be issued, including the facts and circumstances that support the statements made in **paragraphs (4)** to **(7)**, inclusive.

(4) A statement that probable cause exists to believe that the communication service to be interrupted is being used or will be used for an unlawful purpose or to assist in a violation of the law. The statement shall expressly identify the unlawful purpose or violation of the law.

(5) A statement that immediate and summary action is needed to avoid serious, direct, and immediate danger to public health, safety, or welfare.

(6) A statement that the proposed interruption is narrowly tailored to the specific circumstances under which the order is made and would not interfere with more communication than is necessary to achieve the purposes of the order.

(7) A statement that the proposed interruption would leave open ample alternative means of communication.

(8) A statement that the government entity has considered the practical disadvantages of the proposed interruption, including any disruption of emergency communication service.

(9) A description of the scope and duration of the proposed interruption. The application shall clearly describe the specific communication service to be interrupted with sufficient detail as to customer, cell sector, central office, or geographical area affected.

(c) The judicial officer may require the applicant to furnish additional testimony or documentary evidence in support of an application for an order under this section.

(d) The judicial officer shall accept a facsimile copy of the signature of any person required to give a personal oath or affirmation pursuant to subdivision (a) as an original signature to the application.

Pen. Code § 11473: *Issuance of a Court Order; Necessary Findings*:

Upon application made under **P.C. § 11472**, the judicial officer may enter an ex parte order, as requested or modified, authorizing

interruption of a communication service in the territorial jurisdiction in which the judicial officer is sitting, if the judicial officer determines, on the basis of the facts submitted by the applicant, that all of the following requirements are satisfied:

(a) There is probable cause that the communication service is being or will be used for an unlawful purpose or to assist in a violation of the law.

(b) Absent immediate and summary action to interrupt the communication service, serious, direct, and immediate danger to public health, safety, or welfare will result.

(c) The interruption of communication service is narrowly tailored to prevent unlawful infringement of speech that is protected by the **First Amendment** to the United States Constitution or **Section 2** of **Article I** of the California Constitution, or a violation of any other rights under federal or state law.

(d) The interruption of a communication service would leave open ample alternative means of communication.

Pen. Code § 11474: *Contents of a Court Order*:

An order authorizing an interruption of a communication service shall include all of the following:

(a) A statement of the court's findings required by **P.C. § 11473**.

(b) A clear description of the communication service to be interrupted, with specific detail as to the affected service, service provider, and customer or geographical area.

(c) A statement of the period of time during which the interruption is authorized. The order may provide for a fixed duration or require that the government end the interruption when it determines that the interruption is no longer reasonably necessary because the danger that justified the interruption has abated. If the judicial officer finds that probable cause exists that a particular communication service is being used or will be used as part of a continuing criminal enterprise, the court may order the permanent termination of that service and require that the

terminated service not be referred to another communication service.

(d) A requirement that the government entity immediately serve notice on the service provider when the interruption is to cease.

Pen. Code § 11475: *Required Actions of a Government Entity Interrupting a Communication Service; Application for a Court Order; Statement of Intent*:

A government entity that interrupts a communication service pursuant to **P.C. § 11471(b)(2)** shall take all of the following steps:

(a) Apply for a court order under **P.C. § 11472** without delay. If possible, the application shall be filed within *six hours* after commencement of the interruption. If that is not possible, the application shall be filed at the first reasonably available opportunity, but in no event later than *24 hours* after commencement of an interruption of a communication service. If an application is filed more than six hours after commencement of an interruption of a communication service, the application shall include a declaration, made under penalty of perjury, stating the reason for the delay.

(b) Prepare a signed statement of intent to apply for a court order. The statement of intent shall clearly describe the extreme emergency situation and the specific communication service to be interrupted. If a government entity does not apply for a court order within six hours, the government entity shall submit a copy of the signed statement of intent to the court within six hours.

(c) Provide conspicuous notice of the application for a court order on the government entity's Internet Web site without delay, unless the circumstances that justify an interruption of a communication service without first obtaining a court order also justify not providing the notice.

Pen. Code § 11476: *Interruption of Communication Services for a Geographical Area; Notification to the Governor's Office of Emergency Services*:

(a) If an order issued pursuant to **P.C. § 11473** or a signed statement of intent prepared pursuant to **P.C. § 11475** would authorize the interruption of a communication service for all

customers of the interrupted communication service within a geographical area, the government entity shall serve the order or statement on the Governor's Office of Emergency Services.

(b) The Governor's Office of Emergency Services shall have policy discretion on whether to request that the federal government authorize and effect the proposed interruption.

Pen. Code § 11477: *Notice to the Service Provider and the Customer*:

If an order issued pursuant to **P.C. § 11473** or a signed statement of intent prepared pursuant to **P.C. § 11475** is *not* governed by **P.C. § 11476**, the government entity shall serve the order or statement on both of the following persons:

(a) The appropriate service provider's contact for receiving requests from law enforcement, including receipt of state or federal warrants, orders, or subpoenas.

(b) The affected customer, if the identity of the customer is known. When serving an affected customer, the government entity shall provide notice of the opportunity for judicial review under **P.C. § 11479**.

Pen. Code § 11478: *Civil Liability; Designation of a Security Employee; Compliance with PUC or Federal Communication Commission Rules and Notification Requirements*:

(a) Good faith reliance by a service provider on a court order issued pursuant to **P.C. § 11473**, a signed statement of intent prepared pursuant to **P.C. § 11475**, or the instruction of a supervising law enforcement officer acting pursuant to **P.C. §11471(b)(3)** shall constitute a complete defense for the service provider against any action brought as a result of the interruption of a communication service authorized by that court order, statement of intent, or instruction.

(b) A communications service provider shall designate a security employee and an alternate security employee, to provide all required assistance to law enforcement officials to carry out the purposes of this article.

(c) A service provider that intentionally interrupts communication service pursuant to this article shall comply with any rule or notification requirement of the Public Utilities Commission (PUC)

or Federal Communications Commission, or both, and any other applicable provision or requirement of state or federal law.

Pen. Code § 11479: *Customer's Remedies*:

(a) A person whose communication service has been interrupted pursuant to this article may petition the superior court to contest the grounds for the interruption and restore the interrupted service.

(b) The remedy provided in this section is not exclusive. Other laws may provide a remedy for a person who is aggrieved by an interruption of a communication service authorized by this chapter.

Pen. Code § 11480: *Legislature's Finding and Declaration*:

The Legislature finds and declares that ensuring that California users of any communication service not have that service interrupted, and thereby be deprived of 911 access to emergency services or a means to engage in constitutionally protected expression, is a matter of statewide concern and not a municipal affair, as that term is used in **Section 5** of **Article XI** of the California Constitution.

Pen. Code § 11481: *Exceptions*:

(a) This article does *not* apply to any of the following actions:

(1) The interruption of a communication service with the consent of the affected customer.

(2) The interruption of a communication service pursuant to a customer service agreement, contract, or tariff.

(3) The interruption of a communication service to protect the security of the communication network or other computing resources of a government entity or service provider.

(4) The interruption of a communication service to prevent unauthorized wireless communication by a prisoner in a state or local correctional facility, including a juvenile facility.

(5) The interruption of a communication service to transmit an emergency notice that includes, but is not limited to, an Amber Alert, a message transmitted through the federal

Emergency Alert System, or a message transmitted through the federal Wireless Emergency Alert System.

(6) An interruption of a communication service pursuant to a statute that expressly authorizes an interruption of a communication service, including **B&P Code §§ 149** and **7099.10**, and **Publ. Util. Code §§ 2876**, **5322**, and **5371.6**.

(7) An interruption of communication service that results from the execution of a search warrant.

(b) Nothing in this section provides authority for an action of a type listed in **subdivision (a)** or limits any remedy that may be available under law if an action of a type listed in **subdivision (a)** is taken unlawfully.

Pen. Code § 11482: *The Public Utilities Commission*:

This article does not restrict, expand, or otherwise modify the authority of the Public Utilities Commission.

- *Geofence Warrants (AKA; Reverse Location Warrants)***:**

Definition and History: "'A geofence is a virtual fence or perimeter around a physical location. Like a real fence, a geofence creates a separation between that location and the area around it. … [¶] It can be any size or shape, even a straight line between two points. [¶] Geofences are created using mapping software, which allow the user to draw the geofence over the desired geographic area. It is made up of a collection of coordinates (i.e., latitude and longitude) or in the case of a circular geofence one point that forms the center.'" (fn. 1, omitted) [¶] "'Geofence warrants (sometimes called 'reverse location searches') are official requests by law enforcement authorities to access the device location data gathered by large tech companies like Google. The warrants specify a time and geographic area, and require the companies to turn over information on any devices that were in that area at that time. While this data is typically anonymized, it can be used in conjunction with other investigative techniques to tie devices to specific users—and identify persons of interest in a criminal investigation.'" (fn. 2, omitted) [¶] "'The government filed its first geofence search warrant in 2016, and by the end of 2019, Google was receiving about 180 search warrant requests per week from law enforcement officials across the country. … Between 2018 and 2020, Google received about 20,000 geofence warrant requests for data, including over 11,500 in 2020 alone.'" (fn. 3, omitted) (***People v. Meza*** (2023) 90 Cal.App.5th 520, 526)

The omitted footnotes above provide the following resources:

1. Verizon Connect, *What Is A Geofence*? <https://www.verizonconnect.com/glossary/what-is-a-geofence/#:~:text=A%20geofence%20is%20a%20virtual,straight%20line%20between%20two%20points> [as of April 13, 2023], archived at < https://perma.cc/A3A6-NPZ9>.

2. SecureMac, *What Are Geofence Warrants*? (Sept. 8, 2020) <https://www.securemac.com/blog/what-is-geofencing> [as of April 13, 2023], archived at <https://perma.cc/74XS-KWGZ>.

3. Owsley, *The Best Offense Is A Good Defense: Fourth Amendment Implications of Geofence Warrants* (2022) 50 Hofstra L.Rev. 829, 834; see also Brief of Amicus Curiae Google LLC in Support of Neither Party, filed December 20, 2019 in ***United States v. Chatrie*** (E.D.Va. 2019, No. 3:19-cr-00130-MHL) (Google Amicus Brief) ("Google has observed over a 1,500% increase in the number of geofence requests it received in 2018 compared to 2017; and to date, the rate has increased over 500% from 2018 to 2019").

See also ***Price v. Superior Court*** (2023) 93 Cal.App.5th 13, at pp. 22, 27, & 30-32, for a detailed description of what a geofence warrant is, and—in excruciating detail—how it works.)

Case Law: ***People v. Meza*** (2023) 90 Cal.App.5th 520, was the first California case decision (state or federal) dealing with the writing and execution of a geofence search warrant.

Probable Cause: In the warrant affidavit, the affiant noted in ***Meza*** (at p. 528) that "I know most people in today's society possess cellular phones and other items (e.g. tablets, watches, laptops) used to communicate electronically. . . . Most people carry cellular phones on their person and will carry them whenever they leave their place of residence." In addition, the affiant explained: "Suspects involved in criminal activity will typically use cellular phones to communicate when multiple suspects are involved." Therefore, the affiant concluded that identification of individuals in a murder victim's vicinity on the day of the murder would assist investigators in locating the drivers of the vehicles involved in the murder, who investigators believed had been following the victim throughout the morning. The Court, in concluding that this was sufficient to establish probable cause, held (at pp. 536-537): "It was reasonable for the magistrate to conclude the perpetrators were carrying cellphones the morning of the murder and used them in

coordinating their movements. Not only did (the affiant) opine, based on his training and experience, that criminal suspects use cell phones to coordinate criminal activity, but also such an inference was reasonable in today's society, especially given the suspected movement of the individuals to various locations in separate vehicles."

Particularity: See also ***People v. Meza***, *supra*, at pgs. 637-538, discussing the "particularity" requirement as it relates to geofence search warrants, noting at pg. 536, fn. 10, that the United States Supreme Court, in ***Carpenter v. United States*** (June 22, 2018) ___ U.S. ___, [201 L.Ed.2nd 507; 138 S.Ct. 2206, 2219], "has suggested in a different context that an individual has a right to privacy regarding his or her current and historical location;" i.e., retrieval of wireless carrier cell tower data to determine suspect's location "invaded [suspect's] reasonable expectation of privacy in the whole of his physical movements."

> "Particularity is the requirement that the warrant must clearly state what is sought." (***People v. Meza***, *supra*, at p. 535, quoting ***In re Grand Jury Subpoenas Dated Dec. 10, 1987*** (9th Cir. 1991) 926 F.2nd 847, 856.)
>
> "'(T)he "purpose of the "particularity" requirement of the **Fourth Amendment** is to avoid general and exploratory searches by requiring a particular description of the items to be seized.' (***People v. Bradford*** (1997) 15 Cal.4th 1229, 1296 . . . .) 'However, a warrant "need only be reasonably specific" [citation], and the "specificity required 'varies depending on the circumstances of the case and the type of items involved.'"' (***People v. Robinson*** . . . ((2010)) 47 Cal.4th (1104,) at p. 1132 ['particularity "is a flexible concept, reflecting the degree of detail available from the facts known to the affiant and presented to the issuing magistrate"'].) "[T]his requirement is held to be satisfied if the warrant imposes a meaningful restriction upon the objects to be seized."' (***People v. Frank*** (1985) 38 Cal.3rd 711, 724 . . . .) In other words, '[t]he description in a search warrant must be sufficiently definite that the officer conducting the search "can, with reasonable effort ascertain and identify the place intended." [Citation.] Nothing should be left to the discretion of the officer.' (***People v. Dumas*** (1973) 9 Cal.3rd 871, 880 . . .]; see also ***United States v. Blakeney*** (4th Cir. 2020) 949 F.3rd 851, 863 [warrants met particularity requirement where they 'describe the items to be seized with enough particularity to constrain the

> discretion of the executing officers and prevent a general search']; ***United States v. Collins*** (9th Cir. 1987) 830 F.2nd 145, 145–146 [warrant not sufficiently particular where it contained an incorrect address and imprecise description, resulting in search of the wrong house].)" (***People v. Meza***, supra, at p. 537; finding that a geofence warrant had failed to meet the particularity requirement.)

Breath: The ***Meza*** court (at pp. 539-543) also found the geofence search warrant to be overbroad: "In determining whether a warrant is overbroad courts consider 'whether probable cause existed to seize all items of a category described in the warrant' and 'whether the government could have described the items more particularly in light of the information available to it at the time the warrant issued.'" (quoting ***United States v. Shi*** (9th Cir. 2008) 525 F.3rd 709, 731–732; and referencing ***People v. Hepner*** (1994) 21 Cal.App.4th 761, 778.)

> Finding the warrant to run afoul of both of these requirements, the ***Meza*** Court notes that:
>
> > "First, the warrant authorized the identification of any individual within six large search areas without any particularized probable cause as to each person or their location."
> >
> > "Second, law enforcement officials failed to draw the search boundaries as narrowly as they could have given the information available."
> >
> > "The timeframes designated in the geofence warrant were also not narrowly tailored." (pg. 540.)
> >
> > "The warrant here, authorizing the search of more than 20 acres total over a cumulative period of more than five hours in residential and commercial areas did not meet this fundamental threshold requirement." (pg. 541.)

Good Faith: "(T)he [United States] Supreme Court held that when 'an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope,' the 'marginal or nonexistent benefits' produced by suppressing the evidence obtained 'cannot justify the substantial costs of exclusion.'" (***United States v. Leon*** (1984) 468 U.S. 897, 920-922.) In the ***Meza*** case, at the time the warrant at issue here was

sought, there was very little case law providing the officers with guidance on the obtaining of a geofence search warrant. For this reason, the defendants' convictions were upheld despite the constitutional violations noted above. (pgs. 543-545.)

The California Electronic Communications Privacy Act (or ***CalECPA***): **Pen. Code §§ 1546-1546.4:** The Court rejected defendants' arguments to the effect that a geofence warrant violates the **CalECPA**. Specifically, the Court held that *(1)* it is not necessary under **CalECPA** to specifically target specific individuals or accounts. Rather, **CalECPA** requires only that a warrant must describe with particularity the information to be seized as is "appropriate and reasonable" to the case at issue. (**P.C. § 1546.1(d)(1)**) The warrant in this case described the target individuals and accounts with the greatest degree of particularity available to investigators; i.e., individuals whose devices were located within the search boundaries at certain times. There is no requirement in the statute that a suspect's name or other identifying information be included in the warrant to ensure its validity. *(2)* The Court further held that the warrant was not defective merely because it failed to specify the "applications and services covered" by the warrant. (See **Pen. Code § 1524.3(b)**) In a geofence warrant, the government is not seeking data or content related to a particular application or service. Rather, what is sought is the service provider's (i.e., Google's) record of all electronic contacts with that device, regardless of which applications or services originated the contact. Accordingly, the failure to name a particular application or service in this instance did not result in a violation of **CalECPA**. *(3)* Lastly, the Court rejected the defendants' argument to the effect that any constitutional infirmities in the warrant create an independent violation of **CalECPA**. In so ruling, the Court noted simply that, "(t)here is nothing in the cited language that, without more, converts a **Fourth Amendment** violation into a statutory violation." (pgs. 545-546.)

Other Cases: Several Seventh Circuit (Illinois) decisions have issued memorandum opinions, two denying applications for such a warrant and one granting the application, each discussing the constitutional issues in their use:

In ***In re Search of Info. Stored at Premises Controlled by Google*** (7th Cir. U.S. Dist. Ct., Nor. Dist., East. Div., Of Ill., Aug. 24, 2020) 2020 U.S. Dist. LEXIS 152712, a federal magistrate rejected the government's application for such a warrant, ruling in a **Fourth Amendment** case that the Government's amended application for a search warrant to obtain Goggle's historical

information lacked probable cause since the warrant harnessed the technology of the geofence to generate a list of device IDs that the Government may easily use to learn the subscriber identities, noting that such a warrant is unconstitutionally overbroad. Secondly, the items to be seized were not particularly described.

In ***In re Search of Info. Stored at Premises Controlled by Google*** (7th Cir. U.S. Dist. Ct., Nor. Dist., East Div., of Ill., 2020) 2020 U.S.Dist. LEXIS 165185, issued by another magistrate, issued a similar ruling, finding the government's application for such a search warrant to violate the constitutional restrictions on overbreadth and particularity.

In ***In re Search Warrant Application for Geofence Location Data Stored at Google Concerning an Arson Investigation*** (7th Cir. U.S. Dist. Ct., Nor. Dist., East. Div., of Ill., Oct. 29, 2020) 2020 U.S. Dist. LEXIS 201248.), however, the magistrate granted the agents' application for a search warrant, describing how this warrant (the warrant itself remaining sealed) differs from the two previous denials. In this third search warrant application, the federal went to great lengths in discussing how the agents were able to minimize the constitutional issues by limiting their warrant application in the time span described (from between 15 to 37 minutes, respectively). They also minimized the geographical locations for which Google's data was to be concerned, typically to a specific roadway or commercial parking lot. As described by the magistrate, the agents "narrowly crafted (the time spans and locations) to ensure that location data, with a fair probability, will capture evidence of the crime only." In writing the warrant application in such a manner, the magistrate noted that the agents limited the warrant request in its scope as much as possible, thus minimizing the constitutional issues.

Other District Court decisions:

A magistrate denied a geofence warrant application because search area included two public streets and an uninvolved business with no explanation as to why suspects might be found in those locations and contained no justification for the time period requested. (***In re Search of Information That Is Stored at the Premises Controlled by Google, LLC*** (D.Kan. 2021) 542 F.Supp.3rd 1153.)

A geofence warrant application was denied because the search area included unrelated business, public street, residential units and parking lot during 90 minute period despite no showing all

individuals in those locations were involved in the offense. (***In re Search of: Info. Stored at Premises Controlled by Google*** (N.D.Ill. 2020) 481 F.Supp.3rd 730.)

Where police were investigating criminal activity at a business located in an industrial area, they obtained surveillance footage from inside the business showing the suspects engaging in criminal activity. Based on the precise locations of the suspects and the times depicted in the footage, police designated a geofence area of less than a quarter of an acre, including the front-half of the business and the parking lot but excluding another business in the building and the road bordering the building. The time period in the warrant totaled 185 minutes in increments of two to 27 minutes on 8 different days based on when police knew the suspects had been present. The warrant affidavit also explained that, during the designated time periods, the suspects were either alone inside the business or were in the proximity of "'on average' no more than 2 or 3 others." (at p. 73.) The magistrate judge granted the warrant application, finding the government had "appropriately contoured the temporal and geographic windows in which it is seeking location data" and the warrant did not "have the potential of sweeping up the location data of a substantial number of uninvolved persons." (***In re Search of Information that Is Stored at the Premises Controlled by Google LLC*** (D.D.C. 2021) 579 F.Supp.3rd 62.)

A geofence warrant application was granted where the search area excluded residences and commercial buildings, the time periods sought were approximately 15 to 30 minutes per location, and there was evidence that the premises in search areas were unoccupied during relevant time periods. Per the Court: "(T)he government has structured the geofence zones to minimize the potential for capturing location data for uninvolved individuals and maximize the potential for capturing location data for suspects and witnesses." (***In re Search Warrant Application for Geofence Location Data Stored at Google Concerning Arson Investigation*** (N.D.Ill. 2020) 497 F.Supp.3rd 345.)

Defendant's motion to suppress was denied where a geofence warrant had sought identification of individuals in the United States Capitol Building over a four and a half hour period on January 6, 2021. The Court found that the warrant was narrowly tailored to include individuals improperly inside the Capitol given that the building was closed to the public and the search area excluded nearby grounds, did not include any commercial businesses or residences, and there had been substantial road

closures during the relevant time period. (***United States v. Rhine*** (D.D.C. 2023, No. 21-0687) 2023 U.S.Dist. Lexis 12308.)

Where a geofence warrant was issued directing Google to search a 17.5-acre area surrounding a bank where a robbery had occurred, with a timeframe for approximately 30 minutes prior to the robbery and 30 minutes after the robbery, a total of one hour, the district court noting that the search area included a church and that the search identified individuals "who may not have been remotely close to the Bank to participate in or witness the robbery," the Federal District Court found the warrant was overbroad because it failed to "include any facts to establish probable cause to collect such broad and intrusive data" from each individual within the search area. (***United States v. Chatrie*** (E.D.Va. 2022) 590 F.Supp.3rd 901.)

Further California Case Law:

Price v. Superior Court (2023) 93 Cal.App.5th 13, followed ***Meza***:

While the ***Meza*** decision was still pending, Riverside County Sheriff's detectives were putting together a geofence warrant in a murder case with two suspects. In ***Price***, the Court held that:

The "probable cause" standard was met by the detective noting that cellphones are commonly used by almost everyone, and that co-conspirators will commonly communicate between themselves while using cellphones. (pgs. 38-40.)

The geofence warrant was not overbroad, having limited itself to a minimized geographical area and time span. In so ruling, the Court noted that; "if a geofence warrant is narrowly tailored, in its initial search parameters, or geographic scope and time period, to maximize the probability it will capture only suspects and witnesses, and to minimize searches of location data and identifying information of individuals for whom there is no probable cause to believe were suspects or witnesses (uninvolved individuals), then the discretion afforded to the executing officer by Google's multistep production protocol will be constitutionally immaterial." (pg. 41; citing ***Arson***

Investigation (N.D.Ill. 2020) 497 F.Supp.3rd 345, 360-363.)

> The Court found in ***Price*** that the "geofence warrant was a model of particularity in geographic scope and time period," and that "(t)he target location was likewise narrowly tailored to 'minimize the potential for capturing location data for uninvolved individuals.'" (Pg. 43.)

Good Faith: "(E)ven if the geofence warrant is invalid under the **Fourth Amendment**, the good faith exception applies. No deterrent purpose would be served by suppressing the geofence warrant evidence or its fruits." (Id., at p. 51.)

The ***California Electronic Communications Privacy Act*** (or ***CalECPA***): **Pen. Code §§ 1546-1546.4:** The Court held that the **CalECPA** did not require the suppression of the evidence obtained as a result of the warrants in this case. Specifically:

> **P.C. § 1546.1(d)(1):** This statute only requires a warrant for electronic information to describe the information it seeks by "*specifying, as appropriate and reasonable*, the time periods covered, the target individuals or accounts, the applications or services covered, and the types of information sought . . . ." (Italics added) A geofence warrant *seeks to identify* target individuals through location data generated from, and accounts and identifying information associated with, devices located in the geofence. The identities of the "target individuals" and their "accounts" with the service provider are unknown to the agency executing a geofence warrant. It is therefore not "*appropriate and reasonable*" for this type of warrant to identify the individuals or accounts who are the target of the warrant. (pg. 53.)
>
> Also, defendant's argument that pursuant to **P.C. § 1546.1(d)(1)**, the warrant is invalid in

that it does not specify the "*applications or services covered*" by the warrant, was held by the Court to confuse the electronic information the warrant sought (location data emitted from and identifying information associated with devices in the geofence) with applications or services that the devices or the service provider (Google) used to obtain, store, and retrieve the location data and identifying information. These applications and services were merely incidental to the "type of information sought," the location data and identifying information. Quoting ***People v. Meza*** (at pg. 546): "With a geofence warrant, . . . the government is not seeking data or content related to a particular application or service. Rather, what is sought is the service provider's record of all electronic contact with that device, regardless of which applications or services originated the contact." Thus, it was not appropriate and reasonable for the geofence warrant to specify the applications or services that the devices or Google used to obtain, store, and retrieve "types of information sought," the location data and identifying information. (Pg. 54.)

The Court also rejected, out of hand, defendant's argument that the warrant failed to include a detailed description of the types of information it sought, as required by **P.C. § 1546.1(d)(1)**. (Pgs. 54-55.)

P.C. § 1546.4(a): This section allows "[a]ny person" to "move to suppress any electronic information obtained or retained in violation of the **Fourth Amendment** to the United States Constitution *or* of [**CalECPA**]." The Court rejected the defendant's argument that this means that a **Fourth Amendment** particularity violation also violates **CalECPA's** particularity requirement. "To the contrary, the remedies provision refers to **Fourth**

Amendment and **CalECPA** violations as separate violations, by its use of the disjunctive term "or." The remedies provision does "'nothing more than expressly preserve an individual's existing rights under the federal Constitution.'" (Pg. 55.)

P.C. § 1546.2(a)(1): This section requires a government entity that executes a warrant for electronic information to "*serve* upon, or deliver to by registered or first-class mail, electronic mail, or other means reasonably calculated to be effective, *the identified targets of the warrant … , a notice* that informs the recipient that information about the recipient has been compelled or obtained, and states with reasonable specificity the nature of the government investigation under which the information is sought." (Italics added.) The notice must include a copy of the warrant and must be "provided contemporaneously with the execution of [the] warrant." Delayed notice, however, is provided for pursuant to **subdivision (b)(1)**, so long as the court determines that "there is reason to believe that (immediate) notification may have an *adverse result*, but only for the period of time that the court finds there is reason to believe that the notification may have that adverse result, and not to exceed 90 days." (Italics added.) An "'*adverse result*'" means "[d]anger to the life or physical safety of an individual," "[f]light from prosecution," "[d]estruction of or tampering with evidence," "[i]ntimidation of potential witnesses," or "[s]erious jeopardy to an investigation or undue delay of a trial." (**P.C. § 1546(a)**.) The court may grant successive extensions of the notice delay period, of up to 90 days for each extension, based on a continued showing of an adverse result. (**P.C. § 1546.2(b)(2)**.) **P.C. § 1546.2(b)(3)** provides that upon the expiration of the delayed notice period,

including extensions, the government entity is required to serve the identified target or targets of the warrant with all of the information described in **section 1546.2(a)(1)** [notice of the warrant, including the nature of the investigation, and a copy of the warrant], together with copies of or a summary of the information obtained pursuant to the warrant, "including, at a minimum, the number and types of records disclosed, the date and time when the earliest and latest records were created, and a statement of the grounds for the court's determination to grant a delay in notifying the individual." If there is no identified target of a warrant, then within three days of the execution of the warrant, the government entity is required to "submit to the Department of Justice" the information described in **P.C.§ 1546.2(a)**—notice of the warrant, including the nature of the investigation, and a copy of the warrant (**P.C. § 1546.2(c)**). If an order delaying notice of the warrant has been issued (**P.C. § 1546.2(b)(1)–(2)**), then, upon the expiration of the notice delay period, including extensions, the government is required to serve the department with notice of the warrant, including the nature of the investigation, a copy of the warrant, and a copy or summary of all electronic information obtained pursuant to the warrant. (**P.C. § 1546.2(c)**.) The department is required to "publish all those reports on its Internet Web site within 90 days of receipt," but it "may redact names or other personal identifying information from the reports." (***Ibid***.) Defendant in ***Price*** complained of the delay in notification in the instant case.

P.C. §§ § 1546(a), **1546.2(a)(1), (2), & (b)(1) & (2)**: Notice and Delayed Notice: A government entity that executes a warrant for electronic information to "*serve* upon, or deliver to by registered or first-class mail, electronic mail, or other means reasonably

calculated to be effective, *the identified targets of the warrant . . . , a notice* that informs the recipient that information about the recipient has been compelled or obtained, and states with reasonable specificity the nature of the government investigation under which the information is sought." However, "[T]he government entity may submit a request supported by a sworn affidavit for an order delaying notification and prohibiting any party providing information from notifying any other party that information has been sought. The court shall issue the order if the court determines that there is reason to believe that notification may have an *adverse result*, but only for the period of time that the court finds there is reason to believe that the notification may have that adverse result, and not to exceed 90 days." An "'adverse result'" means "[d]anger to the life or physical safety of an individual," "[f]light from prosecution," "[d]estruction of or tampering with evidence," "[i]ntimidation of potential witnesses," or "[s]erious jeopardy to an investigation or undue delay of a trial." The trial court may grant successive extensions of the notice delay period, of up to 90 days for each extension, based on a continued showing of an adverse result. The affiant in ***Price*** failed to seek an order for an extension of the already obtained delayed notice. The Court rejected defendant's argument that this required the trial court to suppress the resulting evidence, or that it overcame the prosecution's argument that the officer's "good faith" did not apply. (Pgs. 55-63.)

***Business Records*:**

Evid. Code § 1560(f): *Search Warrants for Business Records; Admissibility in Criminal Proceedings*:

> Where a search warrant for business records is served upon the custodian of records or other qualified witness of a business in compliance with **P.C.**

§ 1524 (listing the various lawful grounds for issuance of a search warrant) regarding a criminal investigation in which the business is neither a party nor the place where any crime is alleged to have occurred, and the search warrant provides that the warrant will be deemed executed if the business causes the delivery of records described in the warrant to the law enforcement agency ordered to execute the warrant, it is sufficient compliance therewith, making such records admissible in evidence if the custodian or other qualified witness delivers by mail or otherwise a true, legible, and durable copy of all of the records described in the search warrant to the law enforcement agency ordered to execute the search warrant, together with the affidavit as described in **Evid. Code § 1561** (below) within five days after the receipt of the search warrant or within such other time as is set forth in the warrant.

Evid. Code § 1561: *Affidavit of Custodian Of Records for Business Records Obtained via Subpoena Duces Tecum or Search Warrant*:

This section allows for the admissibility in a criminal proceeding of business records when obtained via a "subpoena duces tecum" and when accompanied by an affidavit of the custodian or other qualified witness, laying the evidentiary foundation for the admissibility of such records as described in the section, is amended in **subd. (a)(2)** to include records obtained by a search warrant, as described in **Evid. Code § 1560**, above.

Pen. Code § 1524.4: *Service Providers and Law Enforcement Contact Process*:

(a) This section applies to a service provider that is subject to the **Electronic Communications Privacy Act** (**Pen. Code §§ 1546 et seq.**) and that operates in California. This section does not apply to a service provider that does not offer services to the general public.

(b)

(1) Every service provider described in **subdivision (a)** shall maintain a law enforcement contact process that meets the criteria set forth in **paragraph (2)**.

(2) Every service provider described in **subdivision (a)** shall ensure, at a minimum, that its law enforcement contact process meets all of the following criteria:

(A) Provides a specific contact mechanism for law enforcement personnel.

(B) Provides continual availability of the law enforcement contact process.

(C) Provides a method to provide status updates to a requesting law enforcement agency on a request for assistance.

(3) Every service provider described in **subdivision (a)** shall, by *July 1, 2017*, file a statement with the Attorney General describing the law enforcement contact process maintained pursuant to **paragraph (1)**. If a service provider makes a material change to its law enforcement contact process, the service provider shall, as soon as practicable, file a statement with the Attorney General describing its new law enforcement contact process.

(c) The Attorney General shall consolidate the statements received pursuant to this section into one discrete record and regularly make that record available to local law enforcement agencies.

(d) The exclusive remedy for a violation of this section shall be an action brought by the Attorney General for injunctive relief. Nothing in this section shall limit remedies available for a violation of any other state or federal law.

(e) A statement filed or distributed pursuant to this section is confidential and shall not be disclosed pursuant to any state law, including, but not limited to, the **California Public Records Act** (**Gov't. Code §§ 6250 et seq.**)

***Requirement of a "Neutral and Detached" Magistrate*:**

Rule: The lawful issuance of a search warrant requires a "*neutral and detached*" magistrate, as required by the **Fourth Amendment**. (***Coolidge v. New Hampshire*** (1971) 403 U.S. 443 [91 S.Ct. 2022; 29 L.Ed.2nd 564].)

"'The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" ((***People v.***) ***Kraft*** ((2000)) 23 Cal.4th (978), at pp. 1040-1041.) "The magistrate's determination of probable cause is entitled to deferential review." (***Id.*** at p. 1041.) The search "warrant can be upset only if the affidavit fails as a matter of law to set forth sufficient competent evidence" supporting the finding of probable cause. (***People v. Lepere*** (2023) 91 Cal.App.5th 727, 733; quoting ***Skelton v. Superior Court*** (1969) 1 Cal.3rd 144, 150.)

Statutory Rules and Case Law:

Pen. Code § 808: Only bench officers who are designated "*magistrates*" and authorized to issue warrants are judges of the superior courts, justices of the state appellate courts, and justices of the state Supreme Court.

This necessarily excludes court commissioners, judges pro tem, referees, and federal judges.

Federal Rule of Criminal Procedure 41(b)(1) permits "a magistrate judge with authority in the district . . . to issue a warrant to search for and seize a person or property *located within the district*."

A "*Network Investigative Technique*" (i.e., "NIT") warrant issued by a federal magistrate judge in the Eastern District of Virginia exceeded the general territorial scope identified in **Fed. Rules of Crim. Proc. 41(b)(1)**, and was void ab initio, because it authorized a search of an activating computer in California. The NIT mechanism is not a "tracking device," under **Rule 41(b)(4)**, which provides an exception for devices that track the movement of a person or property. However, under the good faith exception, the **Fourth Amendment** did not require the suppression of the resulting evidence. (***United States v. Henderson*** (9th Cir. 2018) 906 F.3rd 1109, 1113-1120.)

But see ***United States v. Vortman*** (9th Cir. 2020) 81 Fed. Appx. 470; unpublished: Defendant's motion for dismissal based on a claim of outrageous government conduct was barred because defendant's actions in using a website to access child pornography were completely voluntary. The government did not threaten, coerce, or prod him to use the website. Upon consideration of the six ***Black*** factors (see ***United States v. Black*** (9th Cir. 2013) 733 F.3rd 294, 303.), also required a finding that the government's conduct was not outrageous. A network investigative technique (NIT) warrant obtained by the Government (taking over and operating an child porn site) did not violate the **Fourth Amendment** as it was issued by a neutral magistrate, backed by probable cause, and was sufficiently particular to be constitutional. While the NIT warrant violated **Fed. Rules of Crim. Pro. 41(b)**, suppression was not warranted because the government's violation was technical, the violation did not prejudice defendant, and the government did not deliberately disregard **Rule 41(b)** (limiting the general territorial scope of a warrant).

Federal Rule 41 is *inapplicable* to the situation where federal officers are seeking evidence of a violation of state law only,

intending to file criminal charges in state court. (***United States v. Artis*** (9th Cir. 2019) 919 F.3rd 1123, 1130; FBI agents, as members of a federal and state joint task force.)

Also, **Rule 41** is inapplicable to "searches conducted by state officers with state warrants issued by state judges, with minimal or no federal involvement," even if federal prosecution results. (***United States v. Piver*** (9th Cir. 1990) 899 F.2nd 881, 882. See also ***United States v. $186,416.00 in United States Currency*** (9th Cir. 2010) 590 F.3rd 942, 948.)

Note: The idea behind this theory is to insure that there is an impartial arbitrator between an over-zealous law enforcement officer, seeking to intrude upon a person's privacy rights, and the person whose privacy rights are about to be intruded upon, who may fairly and objectively determine whether *probable cause* exists sufficient to justify the intended government intrusion.

Violation: Violations of this rule have occurred when:

The state attorney general in charge of the investigation issued the warrant in his capacity as a justice of the peace. (***Coolidge v. New Hampshire*** (1971) 403 U.S. 443 [91 S.Ct. 2022; 29 L.Ed.2nd 564].)

The magistrate personally participated in the search. (***Lo-Ji Sales, Inc. v. New York*** (1979) 442 U.S. 319 [99 S.Ct. 2319; 60 L.Ed.2nd 920].)

The magistrate was paid a fee for each warrant issued, with no compensation for warrants which were not approved. (***Connally v. Georgia*** (1977) 429 U.S. 245 [97 S.Ct. 546; 50 L.Ed.2nd 444].)

The investigating deputy sheriff had the warrant issued by his father, a judge. (***O'Connor v. Superior Court*** (1998) 65 Cal.App.4th 113: However, this warrant was saved by application of the "*good faith*" rule.)

No Violation:

Choosing to seek a search warrant from a state court magistrate instead of a federal magistrate in order avoid a federally imposed rule (See ***United States v. Comprehensive Drug Testing, Inc.*** (9th Cir. 2010) 621 F.3rd 1162, recommending a certain protocol for warrants involving computerized data) does not negate a finding of good faith so long as not done with the "knowledge . . . that the search was unconstitutional under the **Fourth Amendment**." (***United States v. Schesso*** (9th Cir. 2013) 730 F.3rd 1040, 1050-1051.)

Additional Case Law:

> Because an application for a search warrant ordinarily would be presented ex parte, allowing no opportunity to contest issuance of the search warrant and no opportunity to peremptorily challenge the magistrate authorizing it, such ex parte determinations are not the result of a hearing upon a contested issue within the meaning of **Code Civ. Proc. § 170.6(a)(2)**, and a peremptory challenge as contemplated by **Pen. Code § 1538.5(b)**, to the magistrate who issued the search warrant therefore could lie. A peremptory challenge in this case was held to be timely made when it was made at least five days before the hearing because the application for a search warrant was not a hearing. The relevant hearing for purposes of determining timeliness was accordingly the hearing on the motion challenging the warrant. The peremptory challenge, therefore, was timely filed prior to that hearing. (***Los Angeles County Metropolitan Transportation Authority v. Superior Court*** (2021) 68 Cal.App.5th 920.)

***Composition of a Search Warrant*:**

Three Parts: A search warrant comes in *three* parts:

- *The Warrant* itself.
- *The Affidavit* to the Search Warrant.
- *The Receipt and Inventory* (or "*Return*").

The Warrant: *The Warrant Itself*, signed by a magistrate, directing a peace officer to search a "*particular*" person, place or vehicle, for a "*particular*" person, thing, or list of property.

> ***Pen Code §§ 1523, 1529***: *Contents*: The *search warrant* must include the following:
>
> - The name of every person whose affidavit has been taken.
>
> - The statutory grounds for issuance. (See **Pen Code §§ 1524**, **1524.2** and/or **1524.3**.)
>
> - A description with *reasonable particularity* of the persons, places and vehicles to be searched.
>
> - A description with *reasonable particularity* of the persons, things or property to be seized.
>
> > A warrant that fails to include a list of the things to be seized, at least where the list is not in an affidavit or other attachment that is incorporated by reference and which then

accompanies the warrant to the scene of the search, is "*facially deficient*," and in violation of the **Fourth Amendment**. (***Groh v. Ramirez*** (2004) 540 U.S. 551 [124 S.Ct. 1284; 157 L.Ed.2nd 1068].)

Failure to list the property to be seized, or at the least a reference to, and incorporation of, a list of the property, is a **Fourth Amendment** violation, and constitutes a defect the officers writing the warrant, and/or supervising the search, should have been aware of. (***Ramirez v. Butte-Silver Bow County*** (9th Cir. 2002) 298 F.3rd 1022; finding that the affiant and supervising ATF agent *did not* have qualified immunity from civil liability in a civil suit for failing to list the property to be seized on the face of the warrant.)

And see ***United States v. Celestine*** (9th Cir. 2003) 324 F.3rd 1095, describing "the policies that underlie the warrant requirement; providing the property owner assurance of the lawful authority of the executing officer, his need to search, and the limits of his power to search."

- Authorization for a *nighttime search* (if necessary; see **Pen. Code § 1533**).

- The *signature* of the magistrate.

- The *date* issued.

Pen. Code § 1524(a)(1) through **(20)**: *Statutory Grounds for Issuance*:

(1): When the property to be seized was *stolen or embezzled*.

Note: Includes misdemeanors.

(2): When the property or things to be seized were *used as the means of committing a felony*.

(3): When the property or things to be seized are in the possession of any person with *the intent to use it as a means of committing a public offense*, or in the possession of another *to whom he may have delivered it* for the purpose of concealing it or preventing them from being discovered.

The term "*public offense*" includes misdemeanors. (***People v. Garcia*** (1969) 274 Cal.App.2nd 100, 103.)

(4): When the property or things to be seized consist of any item or constitute any evidence that *tends to show a felony has been committed*, or tends to show *that a particular person has committed a felony*.

(5): When the property or things to be seized consists of evidence which tends to show that *sexual exploitation of a child* (per **P.C. § 311.3**), or possession of matter depicting *sexual conduct of a person under the age of 18 years* (per **P.C. § 311.11**), has occurred or is occurring. (See ***In re Duncan*** (1987) 189 Cal.App.3rd 1348.)

(6): When there is a warrant *to arrest a person*.

(7): When a provider of an *electronic communication service or remote computing service* has records or evidence, as specified in **P.C. § 1524.3**, showing *that property was stolen or embezzled* constituting a misdemeanor, or that property or things are in the possession of any person with the intent *to use them as a means of committing a misdemeanor* public offense, or in the possession of another to whom he or she may have delivered them *for the purpose of concealing them or preventing their discovery*.

(8): When the property or things to be seized include an item or any evidence that tends to show *a violation of **Labor Code § 3700.5***, or tends to show that a particular person has violated **L.C. § 3700.5**.

> **Labor Code § 3700.5** deals with the failure to secure the payment of compensation, which is defined as "every benefit or payment conferred by this division upon an injured employee, or in the event of his or her death, upon his or her dependents, without regard to negligence." (**L.C. § 3207**)

(9): When the property or things to be seized include a *firearm or any other deadly weapon* at the scene of, or at the premises occupied or under the control of the person arrested in connection with, *a domestic violence incident* involving a threat to human life or a physical assault as provided in **P.C. § 18250**. This section does not affect warrantless seizures already authorized under the statute.

> *Note*: **Pen. Code § 18250** gives authority to any of the law enforcement officers listed in the section who is at the scene of a domestic violence incident involving a threat to human life or a physical assault, and who is serving a

protective order as defined in **Fam. Code § 6218**, or is serving a gun violence restraining order issued pursuant to **P.C. §§ 18100 et seq.**, to take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present.

(10): When the property or things to be seized include a *firearm or any other deadly weapon* that is owned by, or in possession of, or in the custody or control of, *a person described in **W&I § 8102(a)***.

Note: **W&I § 8102(a)** lists any person who:

- Has been detained or apprehended for examination of his or her mental condition (e.g., per **W&I § 5150**); *or*

- Is a person described in **W&I § 8100** (**(a)** mental patients receiving inpatient treatment, *or* **(b)** mental patients after having communicated a threat to a psychotherapist.)

- Is a person described in **W&I § 8103** (**(a)** persons adjudicated to be a danger to others or as a mentally disordered sex offender, *or* **(b)** persons found to be not guilty by reason of insanity in serious cases, *or* **(c)** persons found to be not guilty by reason of insanity in other cases, *or* **(d)** persons found mentally incompetent to stand trial, *or* **(e)** persons placed under conservatorship, *or* **(f)** persons taken into custody as a danger to themselves or others, *or* **(g)** persons certified for intensive treatment.

(11): When the property or things to be seized include *a firearm* that is owned by, or in possession of, or in the custody or control of, a person who is subject to the *prohibitions regarding firearms pursuant to **Fam. Code § 6389***, if a prohibited firearm is possessed, owned, in the custody of, or controlled by a person against whom a protective order has been issued pursuant to **Fam. Code § 6218**, the person has been lawfully served with that order, and the person has failed to relinquish the firearm as required by law.

Fam. Code § 6389 makes it illegal for a person subject to a protective order to own, possess, purchase, or receive a

firearm or ammunition while the protective order is in effect. Accordingly, firearms that are within the possession or control of the restrained person must be relinquished: "Upon issuance of a protective order, as defined in **Section 6218**, the court shall order the respondent to relinquish any firearm in the respondent's immediate possession or control or subject to the respondent's immediate possession or control." (**Subd. (c)(1)**) The statute establishes specific procedures for firearms surrender. The relinquishment process "shall occur by immediately surrendering the firearm in a safe manner, upon request of any law enforcement officer, to the control of the officer, after being served with the protective order." (**Subd. (c)(2)**) "Alternatively," if there is no request for relinquishment, "the relinquishment shall occur within 24 hours of being served with the order, by either surrendering the firearm in a safe manner to the control of local law enforcement officials, or by selling the firearm to a licensed gun dealer . . . ." (**Ibid**.) Within 48 hours of service of the order, the restrained person must file a receipt with the court that issued the order and the law enforcement agency that served it showing that the firearm was surrendered to law enforcement or sold to a licensed gun dealer. (**Ibid**.)

Fam. Code § 6218 defines the term "*protective order*" as including orders enjoining specific acts of abuse (**Fam. Code § 6320**), excluding a person from a dwelling (**Fam. Code § 6321**), and, as relevant here, enjoining other specified behavior (**Fam. Code § 6322**).

Case Law: See ***People v. Superior Court* [*Corbett*]** (2017) 8 Cal.App.5th 670, 686-693: The fact that a search warrant was eventually obtained to search defendant's home for firearms, after an earlier warrantless search was conducted, but when the warrant affidavit did not specify that the warrant was obtained pursuant to **Pen. Code § 1524(a)(11)**, did *not* trigger the inevitable discovery doctrine.

(12): A search warrant may be issued for the use of a *tracking device* when the information to be received from the tracking device constitutes evidence that tends to show that a felony has been committed or is being committed, or a misdemeanor violation of the **F&G Code;** or a misdemeanor violation of the **Pub. Res. Code** has been committed or is being committed, or tends to show that a particular person has committed or is committing any of

these crimes, or will assist in locating a person who has committed or is committing any of these crimes.

Search Warrant Requirement: A tracking device search warrant shall be executed pursuant to the provisions of **Pen. Code § 1534(b)**.

Pen. Code § 1534(b): Tracking Device Search Warrant Procedures:

(1): A tracking device search warrant issued pursuant to **Pen. Code § 1524(a)(12)** (see above) shall identify the person or property to be tracked and shall specify a reasonable length of time, not to exceed *30 days* from the date the warrant is issued, that the device may be used.

The court may, for good cause, grant one or more extensions for the time that the device may be used, with each extension lasting for a reasonable length of time, not to exceed 30 days.

The search warrant shall command the officer to execute the warrant by installing a tracking device or serving a warrant on a third-party possessor of the tracking data.

The officer shall perform any installation authorized by the warrant during the daytime unless the magistrate, for good cause, expressly authorizes installation at another time.

Execution of the warrant shall be completed no later than *10 days* immediately after the date of issuance. A warrant executed within this *10-day* period shall be deemed to have been timely executed and no further showing of timeliness need be made. After the expiration of 10 days, the warrant shall be void, unless it has been executed.

(2) An officer executing a tracking device search warrant shall not be required to knock and announce their presence before executing the warrant.

(3) No later than *10 calendar days* after the use of the tracking device has ended, the officer executing the warrant shall file a return to the warrant.

(4)

(A) No later than *10 calendar days* after the use of the tracking device has ended, the officer who executed the tracking device warrant shall notify the person who was tracked or whose property was tracked pursuant to **Pen. Code § 1546.2(a)(1)**.

***Note*: Subd. (a)(2)** provides that "(n)otwithstanding **paragraph (1)**, notice is not required if the government entity accesses information concerning the location or the telephone number of an electronic device in order to respond to an emergency 911 call from that device."

(B) Notice under this paragraph may be delayed pursuant to **Pen. Code § 1546.2(b)**.

See "***The California Electronic Communications Privacy Act***: ***Pen. Code §§ 1546-1546.4***," under "*Searches of High Tech Devices*" (Chapter 17), below.

(5) An officer installing a device authorized by a tracking device search warrant may install and use the device only within California.

(6)

(A) As used in this section, "tracking device" means any electronic or mechanical device, or software, that permits the tracking of the movement of a person or object.

(B) Nothing in this section shall be construed to authorize the use of any device

or software for the purpose of tracking the movement of a person or object.

(7) As used in this section, "*daytime*" means the hours between *6 a.m. and 10 p.m.* according to local time.

Note: **Subdivision (12)** of **Pen. Code § 1524(a)**, and **Pen. Code § 1534(b)**, are in response to the U.S. Supreme Court's determination to the effect that the installation and use of a tracking device on a suspect's motor vehicle is a search, under the **Fourth Amendment**, and requires a search warrant as a general rule. (See ***United States v. Jones*** (2012) 565 U.S. 400 [132 S.Ct. 945; 181 L.Ed.2nd 911].)

(13) To obtain *a blood sample* in **Veh. Code §§ 23140** (person under age 21 driving with BA of 0.05% or higher), **23152** (DUI), and **23153** (DUI with injury) cases when the person has refused to submit to or has failed to complete a blood test, and the sample will be drawn in a "*reasonable, medically approved manner*." This new paragraph is not intended to abrogate a court's mandate to determine the propriety of the issuance of a search warrant on a case-by-case basis.

The Supreme Court has held that being arrested for driving while under the influence did not allow for a non-consensual warrantless blood test absent exigent circumstances beyond the fact that the blood was metabolizing at a normal rate. (***Missouri v. McNeely*** (2013) 569 U.S. 141 [133 S.Ct. 1552; 185 L.Ed.2nd 696].)

See "*California's Implied Consent Law In Driving Under the Influence* (*DUI*) *Cases*," under "*Warrantless Searches and Seizures*" (Chapter 9), above.

(14) The property or things to be seized are *firearms or ammunition* or both that are owned by, in the possession of, or in the custody or control of a person who is the subject of *a gun violence restraining order* that has been issued pursuant to **Pen. Code §§ 18100 et seq**. if a prohibited firearm or ammunition or both is possess, owned, in the custody of, or controlled by a person against whom a gun violence restraining order has been issued, the person has been lawfully serviced with that order, and the person has failed to relinquish the firearm as required by law.

See **Pen. Code §§ 18100 et seq**., re: *Gun Violence Restraining Orders*, and **Pen. Code § 1542.5**: *Seizure of a Restrained Person's Firearms During the Execution of a Search Warrant.*

(15) The property or things to be seized include *a firearm* that is owned by, or in the possession of, or in the custody or control of, a person who is subject to the *prohibitions regarding firearms pursuant to **Pen. Code §§ 29800** or **29805***, and the court has made a finding pursuant to **Pen. Code § 29810(c)(3)** that the person has failed to relinquish the firearm as required by law.

Note: **Pen. Code § 29800** is the firearms prohibition that applies to convicted felons and narcotic drug addicts. **Pen. Code § 29805** is the 10-year firearms prohibition for persons convicted of a specified misdemeanor.

Note: **Pen. Code § 29810(c)(4)**, after making the necessary finding as noted in **subd. (3)**, requires the court to issue an order for the search and removal of firearms upon a probable cause finding that the defendant has failed to relinquish firearms.

(16) When the property or things to be seized are *controlled substances* or a *device, contrivance, instrument, or paraphernalia* used for unlawfully using or administering a controlled substance pursuant to the authority in **H&S § 11472**.

Note: **H&S § 11472** provides: "Controlled substances and any device, contrivance, instrument, or paraphernalia used for unlawfully using or administering a controlled substance, which are possessed in violation of this division, may be seized by any peace officer and in the aid of such seizure a search warrant may be issued as prescribed by law."

(17) When a *sample of the blood* of a person constitutes evidence that tends to show a violation of *operating a boat* or a specified water device under the influence of alcohol or a drug, or with a blood alcohol level of 0.04 percent or more, or while addicted to any drug (**Harb. & Nav. Code § 655(b)**, **(c)**, **(d)**, **(e)**, and **(f)**), and the person has refused an officer's request to submit to, or has failed to complete, a blood test; and the sample will be drawn in a "reasonable, medically approved manner."

This subdivision also provides that this is not intended to abrogate a court's mandate to determine the propriety of the issuance of a search warrant on a case-by-case basis.

California's implied consent law, for drivers of a motor vehicle arrested for driving while under the influence (**Veh. Code § 23612(a)(5)**), does not apply to drivers of boats under the same circumstances. Such a person has the right to refuse to submit to a blood or breath test, and must be told this by the arresting officer. Then, any submission to a blood or breath test must be freely and voluntary consented to in order to be admissible in evidence. (***People v. Gutierrez*** (2019) 33 Cal.App.5th Supp. 11.)

(18) When the property or things to be seized consists of evidence that tends to show that *a violation of* ***Pen. Code § 647(j)(1)****,* ***(2)****, or* ***(3)*** (*Disorderly Conduct*) has occurred or is occurring.

Pen. Code § 647(j) is the misdemeanor "*disorderly conduct*" offense:

> **(1)** A person who looks through a hole or opening, into, or otherwise views, by means of any instrumentality, including, but not limited to, a periscope, telescope, binoculars, camera, motion picture camera, camcorder, mobile phone, electronic device, or unmanned aircraft system, the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside. This subdivision does not apply to those areas of a private business used to count currency or other negotiable instruments.
>
> **(2)** A person who uses a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another identifiable person under or through the clothing being worn by that other person, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that

person and invade the privacy of that other person, under circumstances in which the other person has a reasonable expectation of privacy. For the purposes of this paragraph, "identifiable" means capable of identification, or capable of being recognized, meaning that someone, including the victim, could identify or recognize the victim. It does not require the victim's identity to actually be established.

(3)

(A) A person who uses a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another identifiable person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person. For the purposes of this paragraph, "identifiable" means capable of identification, or capable of being recognized, meaning that someone, including the victim, could identify or recognize the victim. It does not require the victim's identity to actually be established.

(B) Neither of the following is a defense to the crime specified in this paragraph:

(i) The defendant was a cohabitant, landlord, tenant, cotenant, employer, employee, or business partner or associate of the victim, or an agent of any of these.

(ii) The victim was not in a state of full or partial undress.

(4)

(A) A person who intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.

(B) A person intentionally distributes an image described in subparagraph (A) when that person personally distributes the image, or arranges, specifically requests, or intentionally causes another person to distribute that image.

(C) As used in this paragraph, "*intimate body part*" means any portion of the genitals, the anus and in the case of a female, also includes any portion of the breasts below the top of the areola, that is either uncovered or clearly visible through clothing.

(D) It shall not be a violation of this paragraph to distribute an image described in **subparagraph (A)** if any of the following applies:

(i) The distribution is made in the course of reporting an unlawful activity.

(ii) The distribution is made in compliance with a subpoena or other court order for use in a legal proceeding.

(iii) The distribution is made in the course of a lawful public proceeding.

(5) This subdivision does not preclude punishment under any section of law providing for greater punishment.

Note: An "*Identifiable person*" is defined as a person "capable of identification, or capable of being recognized, meaning that someone could identify or recognize the victim, including the victim herself or himself. It does not require the victim's identity to actually be established."

Case Law:

Defendant minor made a cellphone sex video without the victim's consent or knowledge, then showed the video at school. The defendant tried to overturn a true finding under **Pen. Code § 647(j)(3)(A)** (intimate recordings by a "concealed" device that violates privacy) arguing that by placing his cellphone in plain view, it couldn't have been "concealed." The Court disagreed. Contrary to defendant's "revisionist view of the record," by capitalizing on the fact that his victim was turned away from him during the sex act, he "concealed" the cellphone until he finally decided to announce that she was being recorded. (***In re R.C.*** (2019) 39 Cal.App.5th 302.)

(19) *For a Vehicle's Internal* "*Recording Device*:"

(A) When the property or things to be seized are data, from a recording device installed by the manufacturer of a motor vehicle, that constitutes evidence that tends to show the commission of a felony or misdemeanor offense involving a motor vehicle, resulting in death or serious bodily injury to any person. The data accessed by a warrant pursuant to this paragraph shall not exceed the scope of the data that is directly related to the offense for which the warrant is issued.

(B) For the purposes of this paragraph, "*recording device*" has the same meaning as defined in **subdivision (b)** of

Section 9951 of the **Vehicle Code**. The scope of the data accessible by a warrant issued pursuant to this paragraph shall be limited to the information described in **subdivision (b)** of **Section 9951** of the **Vehicle Code**.

Note: **Veh. Code § 9951(b)** provides that "*recording device*" means a device that is installed by the manufacturer of a vehicle and does one or more of the following, for the purpose of retrieving data after an accident:

1. Records how fast and in which direction the motor vehicle is traveling.
2. Records a history of where the motor vehicle travels.
3. Records steering performance.
4. Records brake performance, including whether brakes were applied before an accident.
5. Records the driver's seatbelt status.
6. Has the ability to transmit information concerning an accident in which the motor vehicle has been involved to a central communications system when an accident occurs.

(C) For the purposes of this paragraph, "*serious bodily injury*" has the same meaning as defined in **paragraph (4)** of **subdivision (f)** of **Section 243** of the **Penal Code**.

Note: **Pen. Code § 243(f)(4)** defines "*serious bodily injury*" as a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement.

Note: This instrument, referred to in the statute as a "*recording device*," is sometimes labeled as its "*black box*."

(20) *Photographs of Deceased Persons at an Accident or Crime Scene*: When the property or things to be seized consists of evidence that tends to show that a violation of **Section 647.9** has occurred or is occurring. Evidence to be seized pursuant to this paragraph shall be limited to evidence of a violation of **Section**

647.9 and shall not include evidence of a violation of a departmental rule or guideline that is not a public offense under California law."

Note: **Pen. Code § 647.9**, effective *1/1/2021*, deals with the misdemeanor crime of "First Responders Photographing Deceased Persons" at the scene of an accident or a crime.

For Grounds Not Listed: There is authority from other jurisdictions for the argument that a search warrant may be issued for purposes not specifically listed in the statutory grounds contained in **P.C. § 1524**; the authority for a court issuing warrants being derived from the Common Law. See:

"The power to issue a search warrant is a common law power in America. . . ." (***United States v. Torres*** (7th Cir. 1984) 751 F.2nd 875, 879.)

"A court of general jurisdiction has inherent power to issue a search warrant within the limits set forth in the **Fourth Amendment**." (***United States v. Falls*** (8th Cir. 1994) 34 F.3rd 674, 678.)

Also note that California magistrates have historically exercised an inherent authority to issue, for example, ***Ramey*** warrants (See "***Ramey*** *Warrant*," under "*Arrests*" (Chapter 5, above), ***Steagald*** warrants (See *The* "***Steagald*** *Warrant*," under "*Arrest*" (Chapter 5, above), and ***Jones*** warrants (for GPS tracking; see "*Electronic Tracking Devices*" (*Transmitters*), under "*New Technology*" (Chapter 14, below), long before these types of warrants were statutorily authorized. There is a strong argument, therefore, that so long as a search warrant issued by a magistrate complies with the requirements of the **Fourth Amendment**, evidence obtained within the scope of that warrant will not be inadmissible merely because the warrant does not fit neatly within a specific statutory authorization. See also ***Bowling v. Rector*** (10th Cir. 2009) 584 F.3rd 956, 966: This is because "[T[he question ... is not whether the search was authorized by state law. The question is whether the search was reasonable under the **Fourth Amendment**." (Citing ***Cooper v. California*** (1967) 386 US 58, 61 [87 S.Ct. 788; 17 L.Ed.2nd 730].)

See also ***People v. Robinson*** (2010) 47 Cal.4th 1104, 1119; "Pursuant to **article I, section 28**, of the California Constitution, a trial court may exclude evidence under **Penal Code section**

1538.5 *only* if exclusion is mandated by the federal Constitution." (Italics added; ***People v. Banks*** (1993) 6 Cal.4th 926, 934 . . . .) Our Constitution thus prohibits employing an exclusionary rule that is more expansive than that articulated by the United States Supreme Court. (***People v. Crittenden*** (1994) 9 Cal.4th 83, 129. . . .) The Court thus concluded that the nonconsensual extraction of defendant's blood, although a state statutory violation, did not violate the **Fourth Amendment**, thus rendering the results admissible into evidence.

Other Provisions:

Pen. Code § 1534(c): *Duplicate Originals*: If a duplicate original search warrant has been executed, the peace officer who executed the warrant shall enter the exact time of its execution on its face.

Pen. Code § 1534(d): *Returns*: A search warrant may be made returnable before the issuing magistrate or his or her court.

See also **Pen. Code §§ 1524.2(b)** and **1524.3(a)**, re: "*Records of Foreign Corporations Providing Electronic Communications or Remote Computing Services*." (above)

Other Case Law:

It is irrelevant that a peace officer lists an incorrect charged offense, justifying the issuance of the warrant, so long as there is some legal grounds for the issuance of the warrant under some statute. (***United States v. Meek*** (9th Cir. 2004) 366 F.3rd 705, 713-714; A "statutory variance in the affidavit is not fatal to the warrant's validity.")

In a federal case, the failure of the warrant to include a copy of the court's official seal, if a violation at all (**28 U.S.C. § 1691**), is merely a technical violation and will not result in a finding that the warrant is legally insufficient. (***United States v. Smith*** (9th Cir. 2005) 424 F.3rd 992, 1008.)

Restrictions and Other Search Warrant Provisions:

Pen. Code § 1524(b): Authority to Take Property: The property, things, person, or persons described in **subdivision (a)** may be taken on the warrant from any place, or from any person in whose possession the property or things may be.

Pen. Code § 1524(c): Restrictions on Property Taken: Notwithstanding **subdivision (a)** or **(b)**, a search warrant shall *not* be issued for any documentary evidence in the possession or under the control of any person who is a *lawyer* as defined in **Section 950** of the **Evidence Code**, a *physician* as defined in **Section 990** of the **Evidence Code**, a *psychotherapist* as defined in **Section 1010** of the **Evidence Code**, or a *member of the clergy* as defined in **Section 1030** of the **Evidence Code**, and who is not reasonably suspected of engaging or having engaged in criminal activity related to the documentary evidence for which a warrant is requested unless the following procedure has been complied with:

> **(1)** At the time of the issuance of the warrant, the court shall appoint a special master in accordance with **subdivision (d)** to accompany the person who will serve the warrant. Upon service of the warrant, the special master shall inform the party served of the specific items being sought and that the party shall have the opportunity to provide the items requested. If the party, in the judgment of the special master, fails to provide the items requested, the special master shall conduct a search for the items in the areas indicated in the search warrant.
>
> **(2)**
>
> > **(A)** If the party who has been served states that an item or items should not be disclosed, they shall be sealed by the special master and taken to court for a hearing.
> >
> > **(B)** At the hearing, the party searched shall be entitled to raise any issues that may be raised pursuant to **Section 1538.5** as well as a claim that the item or items are privileged, as provided by law. The hearing shall be held in the superior court. The court shall provide sufficient time for the parties to obtain counsel and make motions or present evidence. The hearing shall be held within three days of the service of the warrant unless the court makes a finding that the expedited hearing is impracticable. In that case, the matter shall be heard at the earliest possible time.
> >
> > **(C)** If an item or items are taken to court for a hearing, any limitations of time prescribed in **Chapter 2** (commencing with **Section 799**) of **Title**

3 of **Part 2** shall be tolled from the time of the seizure until the final conclusion of the hearing, including any associated writ or appellate proceedings.

(3) The warrant shall, whenever practicable, be served during normal business hours. In addition, the warrant shall be served upon a party who appears to have possession or control of the items sought. If, after reasonable efforts, the party serving the warrant is unable to locate the person, the special master shall seal and return to the court, for determination by the court, any item that appears to be privileged as provided by law.

Pen. Code § 1524(d): Special Master, Defined:

(1) As used in this section, a "*special master*" is an attorney who is a member in good standing of the California State Bar and who has been selected from a list of qualified attorneys that is maintained by the State Bar particularly for the purposes of conducting the searches described in this section. These attorneys shall serve without compensation. A special master shall be considered a public employee, and the governmental entity that caused the search warrant to be issued shall be considered the employer of the special master and the applicable public entity, for purposes of **Division 3.6** (commencing with **Section 810**) of **Title 1** of the **Government Code**, relating to claims and actions against public entities and public employees. In selecting the special master, the court shall make every reasonable effort to ensure that the person selected has no relationship with any of the parties involved in the pending matter. Information obtained by the special master shall be confidential and may not be divulged except in direct response to inquiry by the court.

(2) In any case in which the magistrate determines that, after reasonable efforts have been made to obtain a special master, a special master is not available and would not be available within a reasonable period of time, the magistrate may direct the party seeking the order to conduct the search in the manner described in this section in lieu of the special master.

Pen. Code § 1524(e): Accompanying the Special Master: Any search conducted pursuant to this section by a special master may

be conducted in a manner that permits the party serving the warrant or that party's designee to accompany the special master as the special master conducts the search. However, that party or that party's designee may not participate in the search nor shall they examine any of the items being searched by the special master except upon agreement of the party upon whom the warrant has been served.

Pen. Code § 1524(f): Documentary Evidence: As used in this section, "*documentary evidence*" includes, but is not limited to, writings, documents, blueprints, drawings, photographs, computer printouts, microfilms, x-rays, files, diagrams, ledgers, books, tapes, audio and video recordings, films, and papers of any type or description.

Pen. Code § 1524(g): Restriction: No warrant shall issue for any item or items described in **Section 1070** of the **Evidence Code**.

> *Note*: **Evid. Code § 1070** is the "*Newsman's Privilege Section*:"
>
> > **(a)** A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose, in any proceeding as defined in **Section 901**, the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.
> >
> > **(b)** Nor can a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any

unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

(c) As used in this section, "*unpublished information*" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

See "*Newsroom Searches*," under "*Limitations on the Use of Search Warrants*," below.

Pen. Code § 1524(h): Restriction: No warrant shall issue for any item or items that pertain to an investigation into a prohibited violation, as defined in **Section 629.51**.

Note: **P.C. § 629.51** refers to an item or items that pertain to an investigation into a "*prohibited violation*," as defined in **P.C. § 629.51**, as providing, facilitating, obtaining, or intending or attempting to provide, facilitate, or obtain, an *abortion* that is lawful under California law.

Pen. Code § 1524(i): Attorney Work Product: Notwithstanding any other law, no claim of *attorney work product* as described in **Chapter 4** (commencing with **Section 2018.010**) of **Title 4** of **Part 4** of the **Code of Civil Procedure** shall be sustained where there is probable cause to believe that the lawyer is engaging or has engaged in criminal activity related to the documentary evidence for which a warrant is requested unless it is established at the hearing with respect to the documentary evidence seized under the warrant that the services of the lawyer were not sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.

Pen. Code § 1524(j): In-Camera Hearings: Nothing in this section is intended to limit an attorney's ability to request an in-camera hearing pursuant to the holding of the Supreme Court of California in ***People v. Superior Court* (*Laff*)** (2001) 25 Cal.4th 703.

Pen. Code § 1524(k): Evidence of Identity Theft: In addition to any other circumstance permitting a magistrate to issue a warrant for a person or property in another county, when the property or things to be seized consist of any item or constitute evidence that tends to show a violation of **Section 530.5 (**i.e., "Identity Theft"), the magistrate may issue a warrant to search a person or property located in another county if the person whose identifying information was taken or used resides in the same county as the issuing court.

Pen. Code § 1524(*l*): Cause of Action for Providing Location Information: This section shall not be construed to create a cause of action against any foreign or California corporation, its officers, employees, agents, or other specified persons for providing location information.

Pen. Code § 1546.5: Restrictions on Electronic Communications:

A California corporation or a corporation with principal executive offices located in California and that provides electronic communication services is prohibited from providing records, information, facilities, or assistance pursuant to a warrant, court order, subpoena, wiretap order, pen register order, trap and trace order, or other legal process issued by another state, that relates to an investigation into or enforcement of a prohibited violation, as defined in **P.C. § 629.51**.

The Attorney General is authorized to bring a civil action to compel compliance with this new section.

Note: **P.C. § 629.51** defines "*prohibited violation*" as providing, facilitating, obtaining, or intending or attempting to provide, facilitate, or obtain, an abortion that is lawful under California law. The goal of the bill is to prohibit cooperating with, or providing information to, a law enforcement agency in another state that has different abortion laws.

The Affidavit to the Search Warrant:

Defined: A sworn statement, sworn to by the affiant, describing the "*probable cause*" to search a particular person, place, or vehicle for a particular person, thing, or list of property. (**Pen. Code §§ 1525**, **1527**)

Referred to as the "*Statement of Probable Cause*" in jurisdictions where a combined search warrant and affidavit form is used. (See ***People v. Hale*** (2005) 133 Cal.App.4th 942.)

"*Probable Cause*:"

The probable cause showing must be made in the warrant affidavit. (***Price v. Superior Court*** (2023) 93 Cal.App.5th 13, 35-36; citing ***People v. Carrington*** (2009) 47 Cal.4th 145, 161.)

"The **Fourth Amendment** to the United States Constitution prohibits 'unreasonable searches and seizures' and requires search warrants to be issued only upon a showing of 'probable cause' describing with particularity 'the place to be searched, and the . . . things to be seized.' United States Supreme Court decisions establish an exclusionary rule that, when applicable, forbids the use of evidence obtained in violation of the **Fourth Amendment** at trial. (***Herring v. United States*** (2009) 555 U.S. 135, 139 [129 S.Ct. 695; 172 L.Ed.2nd 496, . . .].) '"'Probable cause sufficient for issuance of a warrant requires a showing that makes it '"substantially probable that there is specific property lawfully subject to seizure presently located in the particular place for which the warrant is sought."' [Citation.] That showing must appear in the affidavit offered in support of the warrant. [Citation.]'" (***People v. Bryant, Smith and Wheeler*** (2014) 60 Cal.4th 335, 365) . . . at pp. 369-370, quoting ***People v. Carrington*** (2009) 47 Cal.4th 145, 161 . . . .) Probable cause may be shown by evidence that would not be competent at trial, including '"'information and belief.'" (***People v. Varghese*** (2008) 162 Cal.App.4th 1084, 1103 . . . , quoting ***Humphrey v. Appellate Division*** (2002) 29 Cal.4th 569, 573 . . . .)" (***People v. Lazarus*** (2015) 238 Cal.App.4th 734, 763.)

See also ***People v. Meza*** (2023) 90 Cal.App.5th 520, 535-538, discussing the "particularity" requirement as it relates to geofence search warrants, noting at pg. 535, fn. 10, that the United States Supreme Court, in ***Carpenter v. United States*** (June 22, 2018) ___ U.S. ___, [201 L.Ed.2nd 507; 138 S.Ct. 2206, 2219] "has suggested in a different context that an individual has a right to privacy regarding his or her current and historical location;" i.e., retrieval of wireless carrier cell tower data to determine suspect's location "invaded [suspect's] reasonable expectation of privacy in the whole of his physical movements."

"Particularity is the requirement that the warrant must clearly state what is sought." (***People v. Meza***, supra, at p. 535, quoting ***In re Grand Jury Subpoenas Dated Dec. 10, 1987*** (9th Cir. 1991) 926 F.2nd 847, 856.)

> "'(T)he "purpose of the "particularity" requirement of the **Fourth Amendment** is to avoid general and exploratory searches by requiring a particular description of the items to be seized.' (***People v. Bradford*** (1997) 15 Cal.4th 1229, 1296 . . . .) 'However, a warrant "need only be reasonably specific" [citation], and the "specificity required 'varies depending on the circumstances of the case and the type of items involved.'"' (***People v. Robinson*** . . . ((2010)) 47 Cal.4th (1104,) at p. 1132 ['particularity "is a flexible concept, reflecting the degree of detail available from the facts known to the affiant and presented to the issuing magistrate"'].) "[T]his requirement is held to be satisfied if the warrant imposes a meaningful restriction upon the objects to be seized."' (***People v. Frank*** (1985) 38 Cal.3rd 711, 724 . . . .) In other words, '[t]he description in a search warrant must be sufficiently definite that the officer conducting the search "can, with reasonable effort ascertain and identify the place intended." [Citation.] Nothing should be left to the discretion of the officer.' (***People v. Dumas*** (1973) 9 Cal.3rd 871, 880 . . .]; see also ***United States v. Blakeney*** (4th Cir. 2020) 949 F.3rd 851, 863 [warrants met particularity requirement where they 'describe the items to be seized with enough particularity to constrain the discretion of the executing officers and prevent a general search']; ***United States v. Collins*** (9th Cir. 1987) 830 F.2nd 145, 145–146 [warrant not sufficiently particular where it contained an incorrect address and imprecise description, resulting in search of the wrong house].)" (***People v. Meza***, supra, at p. 537; finding that a geofence warrant had failed to meet the particularity requirement.)

"Probable cause does not require conclusive evidence that a search will uncover relevant evidence, only that 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.' (***People v. Kraft*** . . . ((2000)) 23 Cal.4th (978) at p. 1041; accord, (***Illinois v.***) ***Gates*** . . . ((1983)) 462 U.S. (213) at p. 238.) '[S]ufficient probability, not certainty, is the touchstone of reasonableness under the **Fourth Amendment**.' [***People v. Beck and Cruz*** (2019) 8 Cal.5th 548, 592 . . . ; see also People v. Carrington (2009) 47 Cal.4th 145, 163 . . . .] ['[t]he showing required in order to establish probable cause is less than a preponderance of the evidence or even a prima facie case'].) In making this determination a magistrate may draw reasonable inferences about where evidence is likely to be found based on the nature of the evidence and the type of offense. (See ***Gates***, at p.

240; ***People v. Sandlin*** (1991) 230 Cal.App.3d 1310, 1315 [281 Cal. Rptr. 702].)" (***People v. Meza*** (2023) 90 Cal.App.5th 520, 536.)

> "(O)ur Supreme Court has held the probable cause threshold 'is less than a preponderance of the evidence or even a prima facie case.'" (***People v. Lepere*** (2023) 91 Cal.App.5th 727, 733; quoting ***People v. Bryant, Smith and Wheeler*** (2014) 60 Cal.4th 335, 370.)

"Probable cause 'is a more demanding standard than mere reasonable suspicion. [Citation.] It exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found . . . ." [Citation.] In determining whether a reasonable officer would have probable cause to search, we consider the totality of the circumstances.'" (***People v. Sims*** (2021) 59 Cal.App.5th 943, 951, quoting ***People v. Lee*** (2019) 40 Cal.App.5th 853, at p. 862.)

"To procure a warrant an officer must have probable cause. The probable cause requirement erects a barrier against police intrusions and the associated risk of harm, except where the intrusions are adequately justified. The requirement thus represents the balance we have struck as a society in defining when it is permissible for an officer to impose a risk of harm on innocent members of the public in service of the competing social need to have effective law enforcement. But where probable cause is lacking, imposing that risk cannot be justified." (***Mendez v. County of Los Angeles*** (9th Cir. 2018) 897 F.3rd 1067, 1079.) "The showing required in order to establish probable cause is less than a preponderance of the evidence or even a prima facie case." (***People v. Williams*** (2017) 15 Cal.App.5th 111, 124; quoting ***People v. Carrington*** (2009) 47 Cal.4th 145, 163.)

In evaluating the sufficiency of a warrant affidavit: "The task of the issuing magistrate is simply to make a *practical common-sense* decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of the persons supplying hearsay information, there is a *fair probability* that contraband or evidence of a crime will be found in a particular place." (Emphasis added; ***Illinois v. Gates*** (1983) 462 U.S. 213 [103 S.Ct. 2317; 76 L.Ed.2nd 527] see also ***United States v. Ventresca*** (1965) 380 U.S. 102, 108 [85 S.Ct. 741; 13 L.Ed.2nd 684, 689]; ***United States v. Adjani*** (9th Cir. 2006) 452 F.3rd 1140, 1145; and see ***Florida v. Harris*** (2013) 568 U.S.

237, 243-245 [133 S.Ct. 1050; 185 L.Ed.2nd 61]; a warrantless search of a vehicle based upon a drug-detection dog's sniff.)

> See also ***United States v. King*** (9th Cir. 2021) 985 F.3rd 702, 707-709; listing "*any firearm*" in a search warrant affidavit for the search of a felon's home held not to be overbroad.)

"'In determining whether an affidavit is supported by probable cause, the magistrate must make a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." [Citation] The sufficiency of the affidavit must be evaluated in light of the totality of the circumstances. [Citation].'" (***People v. Garcia*** (2003) 111 Cal.App.4th 715, 721; quoting ***Fenwick & West v. Superior Court*** (1996) 43 Cal.App.4th 1272, 1278; ***People v. Lieng*** (2010) 190 Cal.App.4th 1213, 1228-1229.)

> "The purpose of the exclusionary rule is . . . to deter illegal police conduct, not deficient police draftsmanship." (***People v. Superior Court* [*Nasmeh*]** (2007) 151 Cal.App.4th 85, 97.)
>
> Note that the Supreme Court in ***Illinois v. Gates***, *supra*, also describes the standard for probable cause in a search warrant affidavit as a "*fair probability*" (pg. 238) or a "*substantial chance*" (pg. 244, fn. 13) that contraband or evidence of a crime will be found in a particular place, which is arguably a lesser standard than as described in older California cases requiring a "*substantial probability*." (E.g.; see ***People v. Cook*** (1978) 22 Cal.3rd 67, 84, fn. 6; and ***United States v. Talley*** (Dist. Ct. N.D. 2020) 467 F. Supp.3rd 832, 835.)

"A search warrant must be supported by probable cause. (**U.S. Const.**, **Fourth Amendment**; **§ 1525**.) In determining whether probable cause exists, the magistrate considers the totality of the circumstances. (***Illinois v. Gates*** (1983) 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527.) 'Probable cause, unlike the fact itself, may be shown by evidence that would not be competent at trial. [Citation.] Accordingly, information and belief alone may support the issuance of search warrants, which require probable cause. [Citations.]' (***Humphrey v. Appellate Division*** (2002) 29 Cal.4th 569, 573, 127 Cal.Rptr.2d 645, 58 P.3d 476.)" (***People v. Varghese*** (2008) 162 Cal.App.4th 1084, 1103.)

California follows the ***Gates*** "*totality of the circumstances*" test. (E.g., see ***People v. Spears*** (1991) 228 Cal.App.3rd 1, 17.)

In ***People v. Varghese***, at page 1103, the Appellate Court notes that perfection in writing a search warrant is not required: "Because they are often written by non-lawyers in the midst of an investigation, technical requirements for elaborate specificity have no place in the review of search warrant affidavits." (See also ***People v. Lepere*** (2023) 91 Cal.App.5th 727, 735.)

Probable cause must be shown for each of the items listed in the warrant as property to be seized, justifying its seizure. (***People v. Frank*** (1985) 38 Cal.3rd 711, 726-728.)

Probable cause showing a sufficient "*nexus*" between the evidence to be seized and the place to be searched must also be established. (***People v. Garcia*** (2003) 111 Cal.App.4th 715, 721.)

However, the Ninth Circuit Court of Appeal has shown a reluctance to find probable cause when it is based upon "*a lengthy chain of inferences*." (***United States v. Gourde*** (9th Cir. 2004) 382 F.3rd 1003; no probable cause to support the issuance of a search warrant when based upon the defendant's known subscription to a child pornography website, unlimited access to the child pornography on the website, defendant's failure to unsubscribe after two months, and an expert's opinion that the above necessarily means that defendant would likely be in personal possession of child pornography.)

The fact that the person whose property (i.e., a computer in this case) is seized and searched is not at that time subject to arrest (i.e., no probable cause) does not mean that the seizure and search of that property is not lawful. (***United States v. Adjani*** (9th Cir. 2006) 452 F.3rd 1140, 1146-1147.)

A warrant that establishes probable cause to search a vehicle for items missing from a possible homicide victim's residence will necessarily also allow for the seizure of that vehicle for later examination at a police lab, and to search the vehicle for trace evidence related to the missing items, even if the seizure of the car and the search for trace evidence is not specifically mentioned in the warrant. (***People v. Superior Court* [*Nasmeh*]** (2007) 151 Cal.App.4th 85, 94-98.)

A description of the affiant's training and experience, the fact that persons involved in drug trafficking commonly conceal caches of drugs in their residences and businesses, the fact that one of the co-conspirator's telephone was listed as being to that residence, and a description of coconspirators use of the defendant's residence each time a sale of drugs was ordered, was sufficient to establish probable cause for a search warrant for that residence. (***United States v. Garcia-Villalba*** (9th Cir. 2009) 585 F.3rd 1223, 1232-1234.)

A warrant affidavit need not include all of the information available to the police, so long as the omitted facts are not material, nor must a police officer ordinarily continue the investigation seeking further corroboration once the officer has probable cause. (***Ewing v. City of Stockton*** (9th Cir. 2009) 588 F.3rd 1218, 1226-1227.)

A single photograph of a nude minor (female child who is between 8 and 10 years old), by itself, is insufficient to establish probable cause for a search warrant. But a second such photo, under the "totality of the circumstances," *is* enough. (***United States v. Battershell*** (9th Cir. 2006) 457 F.3rd 1048.)

However, a single photograph of a nude minor (female of about 15 to 17 years of age), when combined with other suspicious circumstances (e.g., 15 computers in house found in complete disarray, with two minors not belonging to the defendant, where the defendant, a civilian, is staying in military housing), *may* be enough to justify the issuance of a search warrant. (***United States v. Krupa*** (9th Cir. 2011) 658 F.3rd 1174, 1177-1179; but see dissent, pp. 1180-1185.)

The known fact that defendant uploaded a particular child pornography video to a decentralized peer-to-peer file-sharing network known an "eDonkey," was sufficient by itself to establish a "fair probability" that defendant would have other child pornography on his computer system. (***United States v. Schesso*** (9th Cir. 2013) 730 F.3rd 1040, 1045-1047; search warrant upheld.)

Evidence of a person's abnormal sexual interest in children, including inappropriate touching, does *not*, by itself, establish probable cause to believe that the person might also have child pornography at his home (***Dougherty v. City of Covina*** (9th Cir. 2011) 654 F.3rd 892.) or on his computer. (***United States v.***

Needham (9th Cir. 2013) 718 F.3rd 1190, 1193-1196; search warrant upheld under the Good Faith doctrine.)

> "(A) search warrant issued to search a suspect's home computer and electronic equipment lacks probable cause when (1) no evidence of possession or attempt to possess child pornography was submitted to the issuing magistrate; (2) no evidence was submitted to the magistrate regarding computer or electronics use by the suspect; and (3) the only evidence linking the suspect's attempted child molestation to possession of child pornography is the experience of the requesting police officer, with no further explanation." (***Id.***, at pp. 1194-1195.)

It is irrelevant that a theft victim is not identified by name in a search warrant affidavit so long as the theft of the victim's property is otherwise sufficiently described. (***People v. Scott*** (2011) 52 Cal.4th 452, 485-486.)

Where evidence of illegal guns and ammunition was recovered in the execution of a search warrant, the Court found that the magistrate had a substantial basis for concluding there was a fair probability that evidence of a crime would be found in defendant's home. There was probable cause to believe defendant was the president of a local chapter of a motorcycle gang even though he was apparently the treasurer only. The search warrant sought club documents, not for their indication of membership in the gang, but because those documents detailed illegal activity. The warrant was not an unconstitutional general warrant. Any falsity about his status as the president was immaterial in that he was apparently still an officer. (***United States v. Vasquez*** (9th Cir. 2011) 654 F.3rd 880, 883-885.)

A search warrant affidavit was found to be legally insufficient to establish probable cause when information from three separate informants was found to be conclusory only, corroborating each other only as to "pedestrian facts" that could have been known to anyone (i.e., "*pedestrian facts*"). Information from an arrestee was based upon hearsay only. Information from two other informants did not describe first-hand information, failing to describe the facts and circumstances underlying the informants' conclusions that defendant and his girlfriend were dealing drugs. Information that the girlfriend had a prior criminal history did not specify the details of that history. Also, the fact that one of the informants had supplied information to law enforcement before was lacking in detail as to the nature of the prior reports and how long ago.

(***People v. French*** (2011) 201 Cal.App.4th 1307; warrant saved by the officer's reasonable good faith.)

The police officer affiant in a search warrant failed to disclose that the plaintiff's son was in jail at the time of the issuance of the warrant, and for over six months prior, and therefore not only was not present in the home, but moreover could not have been involved in a described shooting or the storage of weapons used in it. Plaintiffs presented sufficient evidence to establish a genuine issue as to whether a detective's omission of this material fact was intentional or reckless, as opposed to merely negligent. Had the omitted facts of the son's two-year sentence and custody status been included, it was extremely doubtful that an issuing judge would simply have issued the warrant or authorized nighttime service without more information. (***Bravo v. City of Santa Maria*** (9th Cir. 2011) 665 F.3rd 1076, 1083-1088.)

Upon a motion to suppress evidence recovered pursuant to a search warrant, the issue is whether there was a fair probability that evidence related to the suspected offense(s) might be found in the place to be searched. The fact that that evidence is instead used to prosecute a separate offense is irrelevant. (***United States v. Nguyen*** (9th Cir. 2012) 673 F.3rd 1259; evidence collected in a state investigation of **Election Code** violations (**Elect. Code § 18540**; threats to influence voters) but later used to prosecute defendant on federal charges (**18 U.S.C. § 1512(b)(3)**; obstruction of justice for failing to disclose the full extent of his knowledge regarding the creation and mailing of the letter at issue.)

A search warrant for defendant's home was based upon the belief that defendant's two sons had some connection with a homicide and that the firearm used would be found in defendant's home. The Court found that the warrant affidavit failed to establish sufficient probable causes to believe that either son might have taken the firearm to defendant's home, or even that the sons might have possessed the firearm themselves. The court further held that the good-faith exception did not apply in this case because the officers' reliance on the warrant was unreasonable. (***United States v. Grant*** (9th Cir. 2012) 682 F.3rd 827, 832-841.)

A search warrant, supported by probable cause, authorized the police to search defendant's house and seize gang indicia of any sort. Such indicia could logically be found in defendant's cellphone, which had the capacity to store people's names, telephone numbers and other contact information, as well as music, photographs, artwork, and communications in the form of emails

and messages. Defendant's phone was the likely container of many items that were the functional equivalent of those specifically listed in the warrant. The text messages seized during the search of defendant's phone were related to a gang-related assault that he was suspected of committing, and their suppression was thus not required under the exclusionary rule. (***People v. Rangel*** (2012) 206 Cal.App.4th 1310, 1315-1317.)

There is no duty on the part of the affiant to investigate the suspect's version of the events before obtaining a search warrant. (***Cameron v. Craig*** (9th Cir. 2013) 713 F.3rd 1012, 1019.)

An affiant's subjective intent in seeking a search warrant is irrelevant. "(O)nce probable cause exists, and a valid warrant has been issued, the officer's subjective intent in conducting the search is irrelevant." (***People v. Lee*** (2015) 242 Cal.App.4th 161; quoting ***People v. Carrington*** (2009) 47 Cal.4th 145, 168.)

"'The test for probable cause is not reducible to "precise definition or quantification."'" (***Florida v. Harris*** (2013) 568 U.S. 237, 243 [133 S.Ct. 1050, 1055].) But we have stated that it is "'"less than a preponderance of the evidence or even a prima facie case."'" (***People v. Bryant, Smith and Wheeler*** (2014) 60 Cal.4th 335, 370.) "'"The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the '"veracity"' and '"basis of knowledge"' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."'" ((***People v.***) ***Kraft*** ((2000) 23 Cal.4th 978), at pp. 1040-1041, quoting ***Illinois v. Gates*** ((1983) 462 U.S. 213), at p. 238 ([76 L.Ed.2nd 527, 103 S.Ct. 2317].) "'The magistrate's determination of probable cause is entitled to deferential review.'" (***Id.***, at p. 1041; accord ***People v. Carrington*** (2009) 47 Cal.4th 145, 161.) We explained in ***Skelton v. Superior Court*** (1969) 1 Cal.3rd 144, 150, that the warrant "'can be upset only if the affidavit fails as a matter of law to set forth sufficient competent evidence"' supporting the finding of probable cause." (***People v. Westerfield*** (2019) 6 Cal.5th 632, 659-662; upholding five successive warrants.)

"Probable cause exists where the totality of the circumstances indicate a 'fair probability that . . . evidence of a crime will be found in a particular place.' ***Illinois v. Gates***, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2nd 527 (1983). This standard does not require the affidavit to establish that the evidence is in fact in the place to be searched, or even that it is more likely than not to be

there. ***United States v. Fernandez***, 388 F.3rd 1199, 1254 (9th Cir. 2004), modified 425 F.3rd 1248 (9th Cir. 2005). Rather, the issuing judge 'need only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit.' ***Id.*** (quotation omitted)." (***United States v. Elmore*** (9th Cir. 2019) 917 F.3rd 1068, 1074.)

> While a magistrate's determination of probable cause is entitled to "*great deference*," it is subject to second guessing by the appellate court. (***Ibid***; citing ***United State***s ***v. Krupa*** (9th Cir. 2011) 658 F.3rd 1174, 1177.)

Summary judgment for the city and police officers was proper in an elderly mobile home resident's civil action, who claimed that the issuance and execution of a search warrant on her home and her detention incident to the search was unconstitutional under the **Fourth Amendment**. Under the facts of this cases, the informant's reliability had been established and the probability that probative evidence or contraband would be found gave the officers probable cause to search the entire property, which included the plaintiff's mobile home as well as other structures, to investigate an illegal marijuana operation. The Court further held that the officers acted reasonably when they continued to search the mobile home even after discovering that the named suspect did not live in the home. Also, plaintiff's one-hour detention was not unreasonable based on her age (74). (***Blight v. City of Manteca*** (9th Cir. 2019) 944 F.3rd 1061, 1066-1069.)

Probable cause sufficient to justify the issuance of a search warrant existed when a rape victim's description of being attacked by defendant in his trailer, supported by her visible injuries, made "it substantially probable that there was specific property lawfully subject to seizure presently located in" the trailer. The fact that the information came from other detectives (i.e., hearsay) did "not eviscerate the probable cause." (***People v. Suarez*** (2020) 10 Cal.5th 116, 153-154; "Thus hearsay may be the basis for issuance of the warrant 'so long as there [is] a substantial basis for crediting the hearsay;" quoting ***People v. Gonzale***z (1990) 51 Cal.3rd 1179, 1207, fn. 3.)

> Because the search warrant validly authorized the search of defendant's trailer, it also allowed for a search of the yard around the trailer; i.e., the trailer's curtilage. "Because the warrant authorized a search of this residence, it 'also authorize[d] without so stating the search of the residence's curtilage;" ***People v. Suarez***, *supra*, quoting ***United States***

v. Gorman (9th Cir. 1996) 104 F.3rd 272, 273; and ***People v. Smith*** (1994) 21 Cal.App.4th 942, 950; "[A] warrant to search 'premises' located at a particular address is sufficient to support the search of outbuildings and appurtenances in addition to the main building when the various places searched are part of a single integral unit;" *LaFave, Search and Seizure* (5th ed. 2018) § 4.10(a), pp. 932–934.)

Defendant's motion to suppress firearms was properly denied because the warrant did not violate the **Fourth Amendment** where the officer's affidavit raised the inference that defendant possessed other firearms. Also, the facts, taken together, provided the magistrate judge with a "substantial basis" to authorize the search for "*any firearm*." In any case, the good-faith exception applied because reasonably well-trained officers would *not* have known that the search of defendant's residence for "any firearm" might, arguably, been in legal doubt. (***United States v. King*** (9th Cir. 2021) 985 F.3rd 702, 707-709.)

In a case in which defendant appealed the trial court's denial of his motion to suppress video evidence of his role in the beatings of new gang members, the appellate court concluded that a search warrant affidavit was supported by probable cause. The affidavit presented reasonable support for an inference police had witnessed what probably was a transfer of illegal contraband from a known gang hangout to an SUV. Together with the gang's surge in criminality and the locale's status as a busy gang hangout, there was probable cause to search it for guns, drugs, and other evidence of gang-related crime. Defendant's argument the affidavit omitted material information by failing to date his four felony convictions was incorrect. The affidavit presented information that was current, not stale. Whether defendant's convictions were old or new was immaterial. (***People v. Delgado*** (2022) 78 Cal.App.5th 425.)

In a child pornography case under **Pen. Code § 311.11**, the search warrant affidavit was not rendered deficient by the fact that an alleged anonymous tipster provided the information linking defendant to two pornographic images. The police and magistrate had reason to believe that the cyber-tips came from a reliable witness employed by an electronic communication service provider who acted in accord with the provider's federal obligation to report apparent child pornography and that a reliable person at National Center for Missing and Exploited Children (NCMEC) forwarded the two images to the police in accord with NCMEC's legal obligation. That the affidavit did not provide the name of

either individual did not, under the totality of the circumstances, undermine the determination that the tips came from unbiased citizen informants who could be presumed reliable. (***People v. Rowland*** (2022) 82 Cal.App.5th 1099.)

Where a confidential informant tipped off law enforcement that defendant was dealing drugs out of his residence in Henderson, North Carolina, the officers used the informant to make two controlled purchases of crack cocaine from defendant over the span of a week, at defendant's residence. A search warrant was obtained for defendant's residence, during the execution of which cocaine and other evidence was recovered. A jury convicted defendant of possessing a firearm and ammunition as a felon, possessing cocaine and marijuana with intent to distribute, and maintaining a place for the purpose of distributing, manufacturing, or using cocaine and marijuana. On appeal, defendant challenged his convictions with the argument, among other grounds, that the cocaine was not tested prior to issuance of the search warrant. The Fourth Circuit affirmed. The court explained that contrary to defendant's argument, probable cause did not require the officers to test the crack cocaine after the buys to confirm its illicit nature. In the warrant application, the lead officer stated that he had eight years of law enforcement experience, was assigned to investigate "the possession and sale of illegal controlled substances," and had received training about controlled substances. The magistrate could reasonably conclude the officer visually identified the substance the informant purchased from defendant as crack cocaine, even though the warrant application did not say whether the officer tested it. (***United States v. Hicks*** (4th Cir. 2023) 64 F.4th 546.)

On appeal: "The question facing a reviewing court asked to determine whether probable cause supported the issuance of the warrant is whether the magistrate had a substantial basis for concluding a fair probability existed that a search would uncover wrongdoing." (***People v. Lepere*** (2023) 91 Cal.App.5th 727, 732, citing ***People v. Kraft*** (2000) 23 Cal.4th 978, 1040.)

> In ***Lepere***, at p. 735, it was held that an expert officer's opinion, as the affiant where he listed his training and experience, is of value in establishing probable cause. "We find that the opinion simply reinforced the veracity of the affidavit. (See ***People v. Tuadles*** (1992) 7 Cal.App.4th 1777, 1784 . . . .][opinions of officers with training and experience are valuable in interpreting the circumstances and conduct described by an affidavit].)"

Cellphones and Probable Cause:

In a geofence warrant case (i.e., ***Price v. Superior Court*** (2023) 93 Cal.App.5th 13, at p. 36.), the defendant argued the affiant's opinion that people commonly carry cellphones and that co-conspirators commonly communicate between themselves with cellphones was insufficient to establish the necessary probable cause. The Court rejected this argument, noting the following at pages 39-40:

> "It is also a matter of indisputable common knowledge that most people carry cell phones virtually all the time, and courts may take judicial notice of 'facts and propositions that are of such common knowledge . . . that they cannot reasonably be the subject of dispute.' (**Evid. Code, § 452, subd. (g)**.) In 2018, the United States Supreme Court observed that individuals 'compulsively carry cell phones with them all the time.' (***Carpenter v. United States*** ((June 22, 2018)), *supra*, 585 U.S. (__) at p. ___ [138 S.Ct. (2473) at p. 2218] ['While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time.']; see ***Riley v. California*** ((2014)), *supra*, 573 U.S. (373) at p. 385 ['[M]odern cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.'].) Other courts have followed suit in recognizing that nearly everyone regularly carries a cell phone. (***United States v. James*** (8th Cir. 2021) 3 F.4th 1102, 1105 ['Even if nobody knew for sure whether the [suspect] *actually* possessed a cell phone, the judges were not required to check their common sense at the door and ignore the fact that most people "compulsively carry [**36] cell phones with them all the time."']; ***D.C. Federal Crimes***, *supra*, 579 F.Supp.3d (62) at p. 78 ['The core inquiry here is probability, not certainty, and it is eminently reasonable to assume that criminals, like the rest of society, possess and use cell phones to go about their daily business.'].) The common knowledge that most people carry cell phones gave the issuing magistrate a substantial basis for concluding there was a fair probability that the suspects were carrying cell phones at the time of the shooting." [¶] "Second, the affidavit explained why there was a fair probability that the suspects' cell phones were sending location data to Google, and that Google had location data and identifying information associated with the suspects' cell phones or devices that would reveal the

> suspects' identities. The affidavit cited a February 2018 study showing that around 99.9 percent of all smartphones were supported by Google's Android operating system or Apple's iOS operating system. The affidavit explained that all Android-supported devices have a Google account; the use of a Google application also requires a Google account; Apple iPhones, like Google's Android devices, support Google applications; and a Google account cannot be activated without providing Google with a name and phone number for the Google account. Also, Google collects and retains location data from all Android-operated devices and devices using Google applications, as long as the device's location services are enabled. The location data is 'stored forever' unless the user deletes it." [¶] "Although this explanation of how Google obtains and retains location data and identifying information did not show it was certain that Google would have location data and identifying information revealing the suspects' identities, the explanation demonstrated a fair probability this was the case, and this fair probability was sufficient. (***Arson Investigation*** (N.D.Ill. 2020) 497 F.Supp.3d (345) at pp. 355–356.) The affidavit provided a substantial basis for the issuing magistrate to conclude there was a fair probability that the suspects were carrying cell phones and would be identified through location data and identifying information through the geofence search. Thus, the affidavit showed probable cause to believe the geofence search would reveal the suspects' identities."

Excising Illegally Obtained Information:

> When information is contained in the affidavit which is the product of a prior illegal search, that information may be excised and the remainder retested for probable cause. "A search warrant is not 'rendered invalid merely because some of the evidence included in the affidavit is tainted.' (Citation) The warrant remains valid if, after excising the tainted evidence, the affidavit's 'remaining untainted evidence would provide a neutral magistrate with probable cause to issue a warrant.'" (***United States v. Job*** (9th Cir. 2017) 871 F.3rd 852, 863-864; citing ***United States v. Nora*** (9th Cir. 2014) 765 F.3rd 1049, 1058; and quoting ***United States v. Reed*** (9th Cir. 1994) 15 F.3rd 928, 933.)
>
> > "For search warrant affidavits containing 'both information obtained by unlawful conduct as well as untainted information, a two-prong test applies to justify application

> of the independent source doctrine.' (***People v. Robinson*** (2012) 208 Cal.App.4th 232, 241. . . .) 'First, the affidavit, *excised of any illegally obtained information*, must be sufficient to establish probable cause.' (***Ibid***.) 'Second, the evidence must support a finding that "the police subjectively would have sought the warrant even without the illegal conduct."' (***Ibid***.)" (***People v. Tousant*** (2021) 64 Cal.App.5th 804, 818-819; citing ***People v. Weiss*** (1999) 20 Cal.4th 1073.)
>
> See "*Independent Source Doctrine*," above.

DNA Swab Search Warrant Taken for the Purpose of Eliminating Others as a Suspect:

> A state court order pursuant to **Arizona Revised Statutes § 13-3905** authorizing the collection of DNA samples from officers of the Phoenix Police Department satisfied the **Warrant Clause** of the **Fourth Amendment** in that the orders were issued by a state court judge and described a saliva sample to be seized by mouth swab from the person of plaintiff police officers. The state court expressly found probable cause to believe that the crime of homicide had been committed and that excluding public safety personnel as the source of the of DNA left at the scene would have plainly aided in the conviction of an eventual criminal defendant by negating any contention at trial that police had contaminated the relevant evidence. No undue intrusion occurred because it was hardly unreasonable to ask sworn officers to provide saliva samples for the sole purpose of demonstrating that DNA left at a crime scene was not the result of inadvertent contamination by on-duty public safety personnel. (***Bill v. Brewer*** (9th Cir. 2015) 799 F.3rd 1295.)

Minimum Contents of a Warrant Affidavit: At a minimum, a warrant affidavit should include the following:

- *The Name or Names of the Affiant*(*s*).

  > It is not necessary that the affiant be a sworn peace officer. "(T)here seems no reason why seeking one (i.e., a search warrant) should be confined to peace officers instead of unsworn members of law enforcement." (***People v. Bell*** (1996) 45 Cal.App.4th 1030, 1054-1055.)

A warrant may also be supported by affidavits from more than one person. (See ***Skelton v. Superior Court*** (1969) 1 Cal.3rd 144.)

- *The Statutory Grounds for Issuance*. (See **Pen. Code §§ 1524**, **1524.2** and/or **1524.3**.)

  It is irrelevant that a peace officer lists an incorrect charged offense justifying the issuance of a warrant, so long as there is *some* legal grounds for the issuance of the warrant under some statute. (***United States v. Meek*** (9th Cir. 2004) 366 F.3rd 705, 713-714; a "statutory variance in the affidavit is not fatal to the warrant's validity.")

  See "**Pen. Code § 1524(a)(1)** through **(20)**: *Statutory Grounds for Issuance*," above.

  See also "**Pen. Code §§ 1524.2(b)** and **1524.3(a)**, re: '*Records of Foreign Corporations Providing Electronic Communications or Remote Computing Services*.'"

- *A Physical Description*, with "*reasonable particularity*," of the Persons, Places, Things and Vehicles to be Searched.

  A warrant's description of the property to be searched will be reviewed by the appellate courts in a *common sense* and *realistic* fashion. (***People v. Minder*** (1996) 46 Cal.App.4th 1784; ***United States v. Ventresca*** (1965) 380 U.S 102, 109 [85 S.Ct. 741; 13 L.Ed.2nd 684, 689].)

  See "The '*Reasonable Particularity*' Requirement," below.

- *A Physical Description*, with "*reasonable particularity*," of the Persons, Things or Property to be Seized.

  See "*The* '*Reasonable Particularity*' *Requirement*," below.

- *A Detailed Statement of the Expertise* (i.e., training and experience) of the Affiant.

- *A Chronological Narrative and* "*Factual* (as opposed to *conclusory*) *Description*" (see "*Description of the Facts; Factual vs. Conclusory Language*," below) of the circumstances substantiating the officer's conclusion that Probable Cause for a search exists. This would include:

- Facts showing the commission of a crime (or crimes);

- Facts connecting the listed suspect(s) to the crime(s);

- Facts connecting the suspect(s) to the location(s), vehicle(s), and/or person(s) to be searched;

- Facts connecting the property to be seized to the location(s), vehicle(s), and/or person(s) to be searched;

- Facts describing how the descriptions were obtained.

> The facts as described in the search warrant affidavit making up the "*probable cause*" for issuance of a warrant must be attested to by the affiant as the truth. Failing to do so *may* invalidate the warrant.
>
> > *See*: ***People v. Hale*** (2005) 133 Cal.App.4th 942; not a fatal error, being one of "*form*" over "*substance*." *And*: ***People v. Leonard*** (1996) 50 Cal.App.4th 878; finding it to be one of "*substance*" over "*form*," and fatal to the validity of the warrant.

- *Police Reports*, *Charts*, *Maps*, Etc., may be used as exhibits, attached and "incorporated by reference," but should not be used as a substitute for a statement of probable cause.

> The term "*incorporate by reference*" is a term of art that is not always necessary to use. So long as the warrant affidavit makes reference to any attachments, it can be assumed that the magistrate considered it. (See ***People v. Stipo*** (2011) 195 Cal.App.4th 664, 669-670.)

- *The Affiant's Conclusions* (i.e., his/her opinion) based upon his or her training and experience, that:

> Probable cause exists for the search; *and*
>
> The item(s) sought will be found at the location(s) to be searched.
>
> > A qualified officer/affiant can attach special significance to his observations and set forth expert

opinion in an affidavit. (***People v. Carvajal*** (1988) 202 Cal.App.3rd 487, 496-498.)

"(L)aw enforcement officers may draw upon their expertise to interpret the facts in a search warrant application, and such expertise may be considered by the magistrate as a factor supporting probable cause." (***People v. Nicholls*** (2008) 159 Cal.App.4th 703, 711, child molest case; see also ***People v. Williams*** (2017) 15 Cal.App.5th 111, 125, an animal cruelty case.)

"The magistrate issuing the warrant 'is entitled to rely upon the conclusions of experienced law enforcement officers in weighing the evidence supporting a request for a search warrant as to where evidence of crime is likely to be found. [Citation.] It is not essential that there be direct evidence that such evidence will be at a particular location. Rather, the magistrate '"'is entitled to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense."' (Citations)" (***People v. Lazarus*** (2015) 238 Cal.App.4th 734, 764.)

- *Justification for a Nighttime Search*, if necessary. (See **P.C § 1533**, and "*Nighttime Searches*," below.)

The "*Reasonable Particularity*" Requirement (**Pen. Code §§ 1525**, **1529**); *The Persons, Places, Things and Vehicles to be Searched*:

Rule: The persons, places, things and vehicles to be searched must be described with sufficient detail so that an officer executing the warrant may, with reasonable effort, ascertain and identify the person, place, thing or vehicle intended. (***People v. Grossman*** (1971) 19 Cal.App.3rd 8, 11.)

Case Law:

"The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one 'particularly describing the place to be searched and the persons or things to be seized.'" ((***Maryland v.) Garrison*** ((1987) 480 U.S. 79) at p. 84 ([94 L.Ed.2nd 72, 107 S.Ct. 1013], quoting U.S. Const., 4th Amend.) 'It is

axiomatic that a warrant may not authorize a search broader than the facts supporting its issuance.' (***Burrows v. Superior Court*** (1974) 13 Cal.3rd 238, 250 . . .) '[T]he scope of a lawful search is "defined by the object of the search and the places in which there is probable cause to believe that it may be found."' (***Garrison***, *supra*, at p. 84, quoting ***United States v. Ross*** (1982) 456 U.S. 798, 824 [72 L. Ed. 2d 572, 102 S. Ct. 2157].) 'If the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more.' (***Horton v. California*** (1990) 496 U.S. 128, 140 [110 L.Ed.2nd 112, 110 S.Ct. 2301].)" (***People v. Nguyen*** (2017) 12 Cal.App.5th 574, 581.)

> The Court in ***Nguyen*** noted that had the officers not realized that the rear building was actually a separate residence until after they'd discovered defendant's computer, then the result might have been different pursuant to the rule in ***Maryland v. Garrison***, *supra*. (***Id***., at pp. 583-584.)

"The **Fourth Amendment's** particularity requirement is not a mere technicality; it is an express constitutional command. The particularity requirement 'confines an officer executing a search warrant strictly within the bounds set by the warrant.' ***Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics***, 403 U.S. 388, 394 n.7, 91 S.Ct. 1999, 29 L.Ed.2nd 619 (1971). 'To the extent [government] agents want[] to seize relevant information beyond the scope of the warrant, they should [seek] a further warrant.' ***United States v. Sedaghaty***, 728 F.3rd 885, 914 (9th Cir. 2013)." (¶) "The particularity requirement serves foundational constitutional interests and must be zealously protected. 'The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another.' ***Marron v. United States***, 275 U.S. 192, 196, 48 S. Ct. 74, 72 L.Ed. 231, Treas. Dec. 42528 (1927). In addition, the particularity requirement 'assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search,' ***Groh v. Ramirez***, 540 U.S. 551, 561, 124 S. Ct. 1284, 157 L.Ed.2nd 1068 (2004) (citation omitted), and

'greatly reduces the perception of unlawful or intrusive police conduct,' ***Illinois v. Gates***, 462 U.S. 213, 236, 103 S. Ct. 2317, 76 L.Ed.2nd 527 (1983). To serve these ends, the particularity requirement leaves nothing 'to the discretion of the officer executing the warrant.' ***Marron***, 275 U.S. at 196. 'Absent some grave emergency, the **Fourth Amendment** has interposed a magistrate between the citizen and the police.' ***McDonald v. United States***, 335 U.S. 451, 455, 69 S.Ct. 191, 93 L.Ed. 153 (1948)." (***United States v. Ramirez*** (9th Cir. 2020) 976 F.3rd 946, 951-952.)

See also ***People v. Meza*** (2023) 90 Cal.App.5th 520, 537-538, discussing the "particularity" requirement as it relates to geofence search warrants.

In a warrant authorizing the search of two residences on the same property, divided by a road through the property, the affidavit to which describing primarily the criminal activities of the one resident with little if anything to indicate that the plaintiff, who lived in the other residence, was also involved, the Eighth Circuit Court of Appeal held that the lack of any particularity describing how the plaintiff might have been involved invalidated the warrant as it applied to him. The Court found the affidavit in support of the warrant was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." The Court concluded that the search of defendant's residence was not saved by the "**Leon** Good Faith" exception as no reasonable officer would believe that there was a fair probability that evidence of another man's burglaries would be found in the defendant's residence; the officers knew the men maintained separate residences on the property and they offered little more than a hunch that defendant's residence was being used to store property stolen by the other man. (***United States v. Ralston*** (8th Cir. 2024) 88 F.4th 776.)

Factors: The following factors will be considered by the court:

- Whether probable cause exists to seize all items of a particular type described in the warrant;

- Whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not; *and*

- Whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued.

  (***United States v. Adjani*** (9th Cir. 2006) 452 F.3rd 1140, 1148.)

Suggested Procedures:

The affiant should personally view the place, etc., to be searched, if possible, in order to guarantee the accurateness of the description in the warrant.

Too much detail, so long as it is accurate, is better than not enough.

Use of photographs and/or diagrams, attached as exhibits, may be advisable.

More than one person, place or vehicle may be listed in a single warrant so long as there is probable cause described in the affidavit for each.

A later judicial finding that the search of one of the listed locations is not supported by probable cause will not necessarily affect the search of any of the other locations where the probable cause supporting the search of the other locations is in itself sufficient. (***People v. Joubert*** (1983) 140 Cal.App.3rd 946.)

"*Good faith*" may save a warrant with a defective description. (See ***People v. MacAvoy*** (1984) 162 Cal.App.3rd 746, 763-765.)

See "*Good Faith*," under "*Why Search Warrants are Preferred*," above.

Additional Case Law:

"It is enough if the description is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended." (***Steele v. United States*** (1925) 267 U.S. 498, 503 [45 S.Ct. 414; 69 L.Ed. 757].)

"The test for determining the validity of a warrant is [(1)] whether the warrant describes the place to be searched with

'sufficient particularity to enable law enforcement officers to locate and identify the premises with reasonable effort,' and [(2)] whether any reasonable probability exists that the officers may mistakenly search another premises." (***United States v. Brobst*** (9th Cir. 2009) 558 F.3rd 982, 991-994, quoting ***United States v. Mann*** (9th Cir. 2004) 389 F.3rd 869, 876.)

> In ***Brobst***, the affiant had the wrong street number and the physical description matched other residences in the area as well. However, the officers took steps to verify that they had the right house (e.g., checking a tax/property map and asking neighbors) before executing the warrant. Also, the residence had defendant's name posted on it. The search was upheld.

A warrant's description of the property to be searched will be reviewed by the appellate courts in a *common sense* and *realistic* fashion. (***People v. Minder*** (1996) 46 Cal.App.4th 1784; ***United States v. Ventresca*** (1965) 380 U.S 102, 109 [85 S.Ct. 741; 13 L.Ed.2nd 684, 689].)

Defendant's home office being found in a separate residence behind the business itself, with a separate street number (1015½ instead of 1015), was held to be irrelevant in that the warrant itself, reviewed by a prosecutor, sufficiently described defendant's home office as a place to be searched. (***United States v. Scully*** (5th Cir. 2020) 951 F.3rd 656.)

The fact that the affiant himself is personally familiar with the place to be searched, and therefore could reasonably be expected to find it, has been held, at least in one case, to be a factor which will help to overcome errors in the description. (***People v. Amador*** (2000) 24 Cal.4th 387; wrong street number and faulty physical description not fatal when no other houses in the area could likely be mistaken for the place to be searched, and the affiant, who executed the warrant, was familiar with the place.)

An incorrect address was not fatal to the warrant when two agents executing the warrant personally knew which premises was intended to be searched and other circumstances helped to identify the correct house. (***United States v. Turner*** (9th Cir. 1985) 770 F.3rd 1508, 1511.)

The "*curtilage*" of the home is included as a part of the home, whether or not specifically mentioned in the warrant. (***United States v. Gorman*** (9th Cir. 1996) 104 F.3rd 272.)

Because the search warrant validly authorized the search of defendant's trailer, it also allowed for a search of the yard around the trailer; i.e., the trailer's curtilage. "Because the warrant authorized a search of this residence, it 'also authorize[d] without so stating the search of the residence's curtilage;" ***People v. Suarez*** (2020) 10 Cal.5th 116, 153, quoting ***United States v. Gorman*** (9th Cir. 1996) 104 F.3rd 272, 273; and ***People v. Smith*** (1994) 21 Cal.App.4th 942, 950; "[A] warrant to search 'premises' located at a particular address is sufficient to support the search of outbuildings and appurtenances in addition to the main building when the various places searched are part of a single integral unit;" *LaFave, Search and Seizure* (5th Ed. 2018) § 4.10(a), pp. 932–934.)

> But, what constitutes a part of the curtilage may be an issue. (See ***United States v. Cannon*** (9th Cir. 2001) 264 F.3rd 875; the defendant's storage areas attached to a second residence, rented to a third party, to the rear of the main residence, properly searched as within the curtilage of the main residence.)
>
> *See* "*Curtilage of the Home*," under "*Other Buildings and Places*," under "*Searches of Residences and Other Buildings* (Chapter 13), below.
>
> *Note*: The better practice is to specifically include in the description of the place to be searched all places around the residence one might expect to find the items being searched for, thus eliminating the issue.

Because "(a) magistrate is entitled to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense (***United States v. Angulo-Lopez*** (9th Cir. 1986) 791 F.2nd 1394, 1399.)," a search of a narcotics suspect's vehicle, based upon no more than the affiant's knowledge, gained through training and experience, that persons who traffic in

drugs often secret more narcotics and other evidence in their vehicles, may be authorized. (***United States v. Spearman*** (9th Cir. 1976) 532 F.2nd 132, 133.)

> The same argument can be made for authorizing the search of a narcotics suspect's *person*, even though away from his home. (***United States v. Elliott*** (9th Cir. 2003) 322 F.3rd 710.)
>
> However, when a vehicle is not specifically listed in the search warrant as something the officers have probable cause to search, its mere proximity to the premises searched does not give officers the right to search the vehicle based upon its apparent connection to that property. (***People v. Casares*** (2016) 62 Cal.4th 808, 836.)

The computer of a roommate, the roommate himself not being targeted, where there is probable cause to believe that the suspect has access to the roommate's computer, was properly listed in the warrant affidavit as an item to be searched. The critical element in a search is not whether the owner of property to be searched is a suspect, but rather whether there is reasonable cause to believe that it contains sizable evidence. (***United States v. Adjani*** (9th Cir. 2006) 452 F.3rd 1140.)

Getting a search warrant for a residence where it is believed that the suspect is at least staying part time, recognizing the a person may have one domicile but several residences, is proper. (***United States v. Crews*** (9th Cir. 2007) 502 F.3rd 1130, 1139; citing ***Martinez v. Bynum*** (1983) 461 U.S. 321, 339 [103 S.Ct. 1838; 75 L.Ed.2nd 879].)

The wrong address listed in the warrant, caused by an address change effected by local authorities from one town to another, did not affect the validity of the search warrant when the officers could still reasonably ascertain the correct house to be searched. (***United States v. Brobst*** (9th Cir. 2009) 558 F.3rd 982, 991-994; steps taken by the officers at the scene to verify that they were about to search the right house.)

A general provision in a warrant giving police authorization to search "any vehicles under the control of [the real property] or the occupants of the premises to be searched,

at the time the warrant is to be served as established by DMV documents and records, possession of keys or actual use of the vehicles and/or statements of the witnesses," was held to be sufficient to allow for the search of a vehicle found on the front lawn of defendant's residence where a records check revealed that a release of liability was issued to defendant's mother who lived at the residence. (***People v. Camel*** (2017) 8 Cal.App.5th 989, 998-999.)

> Whether or not a warrant description is "*overbroad*" is a question of law and dependent upon the circumstances. "In analyzing this question, we consider the purpose of the warrant, the nature of the items sought, and the totality of the circumstances surrounding the case. 'A warrant that permits a search broad in scope may be appropriate under some circumstances, and the warrant's language must be read in context and with common sense.'" (***Id.***, at p. 999.)

In a prosecution for possession of child pornography (**Pen. Code § 311.11(a)**), defendant's motion to quash a search warrant and suppress the resulting evidence seized from his laptop computer was properly granted by the trial court. The evidence in issue was seized from a residence located behind and separate from the address listed in the search warrant affidavit as the location of an Internet account that was sharing child pornography online. The warrant for the listed address permitted the search of the residence, garages, and outbuildings on the property at the listed address. The trial court found that the search of defendant's residence, which was completely separate from that property, was overbroad and thus violated the **Fourth Amendment**. Defendant's residence, found behind the residence listed in the warrant, was no longer a garage associated with the front residence, because at the time of the search it had a bedroom, a kitchen, a bathroom, and a living space, and there was no evidence it was capable of housing a vehicle. It was also not an outbuilding because there was no evidence it was used in connection with the main house or that it served as anything other than a separate residence for defendant. Even if the language of the warrant could be interpreted to include a search of defendant's residence, the warrant affidavit did not establish probable cause for such a search because the police had no basis to believe the network with the suspect

IP address was accessed from defendant's residence. Finally, the police lacked a "good faith" basis for the search of defendant's residence, even assuming there was a wireless signal extending from the identified residence to defendant's residence, because they had no evidence that defendant had a password to the network or that he had accessed it in any fashion. (***People v. Nguyen*** (2017) 12 Cal.App.5th 574, 581-588.)

The "*Reasonable Particularity*" *Requirement* (**Pen. Code §§ 1525**, **1529**); *The property to be seized*:

Rule: *The property to be seized* must be described with sufficient particularity so that an officer with no knowledge of the facts underlying the warrant and looking only at the description of the property on the face of the warrant would be able to recognize and select the items described while conducting the search. (See ***People v. Superior Court* [*Williams*]** (1978) 77 Cal.App.3rd 69, 77; providing a complete discussion of cases approving and disapproving certain descriptions.)

Issues: In determining whether a warrant's description of the items to be seized is sufficiently specific to be constitutional under the **Fourth Amendment**, a court must consider three issues:

- Whether probable cause exists to seize all items of a particular type described in the warrant;

- Whether the warrants sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not; *and*

- Whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued.

(***Millender v. County of Los Angeles*** (9th Cir. 2010) 620 F.3rd 1016, 1024; certiorari granted; where the Ninth Circuit was reversed on the issue of whether the officers were entitled to qualified immunity, holding in a 6-3 decision that they were. See ***Messerschmidt v. Millender*** (2012) 565 U.S. 535 [132 S.Ct. 1235; 182 L.Ed.2nd 47].)

"*General Warrants*:" Warrants without sufficient particularity (i.e., "*general warrants*") are legally insufficient and invalid. (***Burrows v. Superior Court*** (1974) 13 Cal.3rd 238, 249-250.)

"The Founding generation crafted the **Fourth Amendment** as a 'response to the reviled 'general warrants' and "writs of assistance" of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." (***Riley v. California*** (2014) 573 U.S. 373, 403 [134 S.Ct. 2473; 189 L.Ed.2nd 430, 452].)

"The purpose of the '*particularity*' requirement of the **Fourth Amendment** is to avoid general and exploratory searches by requiring a particular description of the items to be seized. [Citation]" (***People v. Bradford*** (1997) 15 Cal.4th 1229, 1296; citing ***Coolidge v. New Hampshire*** (1971) 403 U.S 443, 467 [91 S.Ct. 2022; 29 L.Ed.2nd 564, 583]; and ***Stanford v. Texas*** (1965) 379 U.S. 476, 485 [85 S.Ct. 506; 13 L.Ed.2nd 431, 437].)

"*Particularity*" is the requirement that the warrant must clearly state what is sought.

> "*Breadth*" deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based. (***United States v. SDI Future Health, Inc.*** (9th Cir. 2009) 568 F.3rd 684, 702. See also ***People v. Meza*** (2023) 90 Cal.App.5th 520, 539-543, citing ***In re Grand Jury Subpoenas Dated Dec. 10, 1987*** (9th Cir. 1991) 926 F.2nd 847, 856-857.)
>
> > "'This is distinct from the particularity requirement because it "prevents the magistrate from making a mistaken authorization to search for particular objects in the first instance, no matter how well the objects are described."'" (***People v. Meza***, *supra*, quoting ***United States v. Weber*** (9th Cir. 1990) 923 F.2nd 1338, 1342.)

This "*particularity*" requirement serves two important purposes. It:

- Limits the discretion of the officers executing the warrant; *and*

- Informs the property owner or resident of the proper scope of the search.

(***United States v. Vesikuru*** (9th Cir. 2002) 314 F.3rd 1116, 1123-1124; (***United States v. SDI Future Health, Inc.***, *supra*, at pp. 701-705.)

A search warrant and affidavit that fails to "*particularly describe*" and place "*meaningful restrictions*" on the property to be seized, violates the **Fourth Amendment**. (***United States v. Bridges*** (9th Cir. 2003) 344 F.3rd 1010.)

Describing in the warrant itself (as opposed to the affidavit) the suspected criminal offense(s) *might* be enough to overcome an otherwise "*overly broad*" description of the property to be seized, in that it at least puts the searching officers on some notice as to the limits of their discretion. (***Id.***, at p. 1018.)

An exception to this rule (i.e., "*overly broad*") might be when the place being searched is a business, and it is alleged and substantiated in the affidavit that the business's "*entire operation was permeated with fraud*." (***Id.***, at pp. 1018-1019; ***United States v. SDI Future Health, Inc.*** (9th Cir. 2009) 568 F.3rd 684, 703, and fn. 13.)

See ***United States v. Smith*** (9th Cir. 2005) 424 F.3rd 992, 1004-1006.

In ***Smith***, an "*extraordinarily broad*" search warrant was held to be justified where it was determined that "the entirety of the businesses operated by (defendants) are criminal in nature." (***Id.***, at p. 1006.)

Overbreadth issues in a search warrant affidavit may be satisfied under the "doctrine of severance," where only legally admissible evidence is actually used at trial. Under this doctrine, a court may sever out information seized from a computer that was the product of an overly broad warrant affidavit, leaving only that which was lawfully seized. (***United States v. Flores*** (9th Cir. 2015) 802 F.3rd1028, 1042-1046.)

> The same issue existed for a federal grand jury subpoena that was held to be overly broad and should have been quashed in that it included e-mail information sought from a former state governor's e-mail account that might include information in which the governor had a reasonable expectation of privacy (including, but not limited to, communications protected by the attorney-client privilege). (***Grand Jury Subpoena v. Kitzhaber*** (9th Cir. 2016) 828 F.3rd 1083, 1087-1094.)

Listing in a warrant all computers in defendant's residence, when the officers had no way of knowing which computers might contain incriminating information for which there was probable cause to believe was in at least one of the computers, was held to be legally sufficient. (***People v. Fayed*** (2020) 9 Cal.5th 147, 185-187.)

"(T)he more specificity the warrant describes the items sought, the more limited the scope of the search. Conversely, the more generic the description, the greater the risk of a prohibited general search. (Citation)" (***People v. Balint*** (2006) 138 Cal.App.4th 200, 206.)

Seizure of "*all computer media*" is not too broad, given the difficulty in determining what might be on such media prior to a forensic examination by experts, at least so long as there is an explanation in the affidavit explaining why a wholesale seizure is necessary under the circumstances. (***United States v. Hill*** (9th Cir. 2006) 459 F.3rd 966, 973-977.)

Use of language such as; " . . . *including, but not limited to* . . ." should not be used, in that such a description is *too general*, and legally insufficient to justify seizure of any property intended to be included under the "*not limited to*" phrase. (See ***United States v. Reeves*** (9th Cir. 2000) 210 F.3rd 1041, 1046-1047; ***United States v. Bridges*** (9th Cir. 2003) 344 F.3rd 1010, 1017-1018.)

"Indicia tending to establish the identity of persons in control of the premises," has been held to be specific enough. (***Ewing v. City of Stockton*** (9th Cir. 2009) 588 F.3rd 1218, 1229.)

Finding a small amount of marijuana on an arrestee's person, and observing him earlier with a single, semi-automatic pistol, were insufficient to support an allegation that "marijuana, heroin, and methamphetamine, or . . . evidence of gang membership," as well as "'[f]irearms, assault rifles, handguns of any caliber and shotguns of any caliber,' as well as ammunition for such firearms," would be found in defendant's home. Even discovery of his criminal history; i.e., that he'd been convicted of the illegal possession of a firearm and for being a felon in possession of a firearm, did not support a belief that multiple firearms might be found in his home. (***United States v. Nora*** (9th Cir. 2014) 765 F.3rd 1049, 1052-1060.)

> *See* "*The **Cleland** Warrant; Narcotics*," below.
>
> See also ***United States v. King*** (9th Cir. 2021) 985 F.3rd 702, 707-709, where the Court found that an affidavit for the search of a felon's home, and describing "any firearm," was held not to be overbroad, differentiating this case from the facts in ***Nora***.

Although defendant had met a false imprisonment victim through social media several months before the crime, a probation condition upon conviction that allows law enforcement unrestricted computer searches for material prohibited by law was overbroad under the **Fourth Amendment**. Such a condition allows for searches of vast amounts of personal information unrelated to defendant's criminal conduct or his potential future criminality. A narrower means might include either requiring defendant to provide his social media account and passwords to his probation officer for monitoring, or restricting his use of, or access to, social media websites and applications without the prior approval of his probation officer. A condition requiring defendant not to delete his browser history was held to be valid, assuming a properly narrowed condition monitoring his use of social media can be fashioned. (***People v. Appleton*** (2016) 245 Cal.App.4th 717, 721-728.)

Items listed in a search warrant to be seized that are found to be "*overbroad*" may be severed without affecting the otherwise valid portions of the warrant. This is true whether the issue arises in a criminal (***United States v. SDI Future Health, Inc.*** (9th Cir. 2009) 568 F.3rd 684, 707.) or

a civil case. (***Ewing v. City of Stockton*** (9th Cir. 2009) 588 F.3rd 1218, 1228-1229.)

Additional Case Law:

The United States Supreme Court reversed the Ninth Circuit's ***Millender v. County of Los Angeles*** decision (i.e., ***Millender v. County of Los Angeles*** (9th Cir. 2010) 620 F.3rd 1016; cert. granted) in ***Messerschmidt et al. v. Millender*** (2012) 565 U.S. 535 [132 S.Ct. 1235; 182 L.Ed.2nd 47], holding that officers were entitled to qualified immunity from civil liability when their conduct, even if illegal, did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The Supreme Court held that based upon a suspect's known gang affiliation, his use of firearms, and his tendency towards violence, that it was not unreasonable to assume that more than just the gun used in his crime, and relevant gang paraphernalia, might be found in the defendant's residence where the suspect was known to live.

See also: ***United States v. Spilotro*** (9th Cir. 1986) 800 F.2nd 959, 963; ***United States v. Wong*** (9th Cir. 2003) 334 F.3rd 831.)

See also ***United States v. King*** (9th Cir. 2021) 985 F.3rd 702, 707-709, where the Court found that an affidavit for the search of a felon's home, and describing "any firearm," was held not to be overbroad, differentiating this case from the facts in ***Millender***.

However, "a search warrant need only be reasonably specific, rather than elaborately detailed. . . . (T)he specificity required depends on the circumstances of the case and the type of items involved." (***Ewing v. City of Stockton*** (9th Cir. 2009) 588 F.3rd 1218, 1228; citing ***United States v. Brobst*** (9th Cir. 2009) 558 F.3rd 982, 993.)

"In determining whether seizure of particular items exceeds the scope of the warrant, courts (are to) examine whether the items are similar to, or the 'functional equivalent' of, items enumerated in the warrant, as well as containers in which they are reasonably likely to be found." (***People v. Rangel*** (2012) 206 Cal.App.4th 1310, 1316; upholding the seizure and search of defendant's cellphone (i.e.,

"smartphone") although not mentioned in the warrant, but where the officers were authorized to seize "gang indicia."

"*Particularity*" refers to the requirement that the warrant must clearly state what is sought. "*Breadth*" deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based. (***United States v. Brobst*** (9th Cir. 2009) 558 F.3rd 982, 994-995; citing ***United States v. Towne*** (9th Cir. 1993) 997 F.2nd 537, 554; ***United States v. SDI Future Health, Inc.*** (9th Cir. 2009) 568 F.3rd 684, 702; ***Millender v. County of Los Angeles*** (9th Cir. 2010) 620 F.3rd 1016, 1024; certiorari granted; see ***Messerschmidt et al. v. Millender*** (2012) 565 U.S. 535 [132 S.Ct. 1235; 182 L.Ed.2nd 47], above. See also ***Price v. Superior Court*** (2023) 93 Cal.App.5th 13, at p.36.)

The description must "*place a meaningful restriction* on the objects to be seized . . ." (***People v. Murray*** (1978) 89 Cal.App.3rd 809, 832.)

Documents or other evidence showing "*dominion and control*" (i.e., "*D and C papers*") over the place being searched should be listed among the items for which the affiant wishes to search. (***People v. Williams*** (1992) 3 Cal.App.4th 1535; ***People v. Rushing*** (1989) 209 Cal.App.3rd 618; ***People v. Nicolaus*** (1991) 54 Cal.3rd 551, 575.)

> "Indicia tending to establish the identity of persons in control of the premises," has been held to be specific enough to meet the "particularly" requirements for a search warrant. (***Ewing v. City of Stockton*** (9th Cir. 2009) 588 F.3rd 1218, 1229.)

In an Internet sexual solicitation of a child case, the following items were held to be appropriate in a search warrant for the suspect's house and vehicle: "(S)exually explicit material or paraphernalia used to lower the inhibition of children, sex toys, photography equipment, child pornography, as well as material related to past molestation such as photographs, address ledgers including names of other pedophiles, and journals recording sexual encounters with children," as well as the defendant's computer system, including "computer equipment, information on digital and magnetic storage devices,

computer printouts, computer software and manuals, and documentation regarding computer use." (***United States v. Meek*** (9th Cir. 2004) 366 F.3rd 705, 714-716.)

So long as sufficiently described, it is not necessary that a warrant affidavit contain the actual photographs of what is alleged to be child pornography. (***United States v. Battershell*** (9th Cir. 2006) 457 F.3rd 1048.)

But what is, and what is not, "*child pornography*" might be an issue. As a "starting point" for determining the existence of "*lasciviousness*" in a photo or photos, a court may use the following non-exclusive six factor test:

- Whether the focal point of the visual depiction is on the child's genitalia or pubic area;
- Whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
- Whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
- Whether the child is fully or partially clothed, or nude;
- Whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
- Whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

(***United States v. Hill*** (9th Cir. 2006) 459 F.3rd 966, 970-973, citing ***United States v. Dost*** (S.D. Cal. 1986) 636 F.Supp. 828, 832.)

Practice Note: It is best to include a sample of the pornography in issue as an attachment to a warrant affidavit, for the magistrate to consider. (See ***United States v. Perkins*** (9th Cir. 2017) 850 F.3rd 1109.) However, such an attachment should be sealed per ***People v. Hobbs*** (1994) 7 Cal.4th 948 (see *Sealing the Warrant Affidavit*; i.e., *the* "***Hobbs Warrant***," below) to prevent any unnecessary publication of the pornography itself, particularly when dealing with child victims.

Things the affiant "*hopes to find*," but for which there is no articulable reason to believe will be found, should not be listed. However, property that there is a "*fair probability*" would be found, given the nature of the offense, may be listed despite the lack of any specific evidence that such an item is in fact in the place to be searched. (See ***People v. Ulloa*** (2002) 101 Cal.App.4th 1000; computer containing Internet correspondence in a child molest case.)

"In determining whether a warrant is sufficiently particular in describing the place to be searched or the things to be seized, courts look to 'such factors as the purpose for which the warrant was issued, the nature of the items to which it is directed, and the total circumstances surrounding the case.'" (***Price v. Superior Court*** (2023) 93 Cal.App.5th 13, 35; quoting ***People v. Rogers*** (1986) 187 Cal.App.3rd 1001, 1008.) "'Neither "[c]omplete precision' nor 'near certainty' is required." (quoting ***People v. Amador*** (2000) 24 Cal.4th 387, 392; ***People v. Hepner*** (1994) 21 Cal.App.4th 761, 775–776.)

"*Telephone calls*" (i.e., authorization to intercept them while executing the warrant) should be listed where there is probable cause to believe the telephone is being used for illegal purposes. (***People v. Warner*** (1969) 270 Cal.App.2nd 900, 907, bookmaking case; ***People v. Nealy*** (1991) 228 Cal.App.3rd 447, 452, narcotics case.)

> The contents of a telephone call to a narcotics dealer's home asking to buy narcotics, answered by the police executing a search warrant, are admissible into evidence as a judicially created exception to the Hearsay Rule. (***People v. Morgan et al.*** (2005) 125 Cal.App.4th 935.)
>
> > The ***Morgan*** Court further determined that the telephone call was "*non-testimonial*," as described in ***Crawford v. Washington*** (2004) 541 U.S. 36 [124 S.Ct. 1354; 158 L.Ed.2nd 177], and thus admissible over a **Sixth Amendment**, "*right to confrontation*" objection. (***People v. Morgan***, *supra*, at pp. 946-947.)
>
> Other courts have held that the contents of a telephone call are admissible as non-hearsay

circumstantial evidence of the defendants' dope dealing. (***People v. Nealy*** (1991) 228 Cal.App.3rd 447; and ***People v. Ventura*** (1991) 1 Cal.App.4th 1515.)

Practice Note: Asking for authorization to answer the telephone for the purpose of establishing "*dominion and control*" over the place being searched (E.g.; "*Hello, is Doper John home*?") is also a good practice.

Computers, including disks, etc., based upon the affiant's knowledge that criminals will often chronicle their criminal activities on their computers, may often be included. With sufficient probable cause connecting a computer to criminal activity, the computer and all its attachments, disks, etc., are subject to seizure and removal to a lab where it may be properly and carefully inspected by experts. (***United States v. Hay*** (9th Cir. 2000) 231 F.3rd 630; see also ***People v. Ulloa*** (2002) 101 Cal.App.4th 1000.)

See also ***Guest v. Leis*** (6th Cir. 2001) 255 F.3rd 325, 334-337; seizure of the whole computer system was not unreasonable so long as there was probable cause to conclude that evidence of a crime would be found on the computer.

And ***Mahlberg v. Mentzer*** (8th Cir. 1992) 968 F.2nd 772; seizure of computer equipment, programs and disks *not* listed in the warrant upheld.

Seizure of computers in a homicide investigation justified by probable cause to believe that specific documentary evidence would reasonably be found in the defendant's computer. (***United States v. Wong*** (9th Cir. 2003) 334 F.3rd 831.)

A laptop computer, open and running, properly seized as potential evidence of dominion and control over the searched premises, even though not specifically listed in the warrant. (***People v. Balint*** (2006) 138 Cal.App.4th 200; see also ***People v. Varghese*** (2008) 162 Cal.App.4th 1084, 1100-1103.)

The computer of a roommate, the roommate himself not being targeted, where there is probable cause to believe that the suspect has access to the roommate's computer, was properly listed in the warrant affidavit as an item to be searched. The critical element in a search is not whether the owner of property to be searched is a suspect, but rather whether there is reasonable cause to believe that it contains seizeable evidence. (***United States v. Adjani*** (9th Cir. 2006) 452 F.3rd 1140.)

The seizure of defendant's computer and all computer related items (e.g., compact disks, floppy disks, hard drives, memory cards, DVDs, videotapes, and other portable digital devices), based upon no more than the discovery of one printed-out photo of child pornography, was lawful in that it was reasonable to conclude that the picture had come from his computer and that similar pictures were likely to be stored in it. (***United States v. Brobst*** (9th Cir. 2009) 558 F.3rd 982, 994.)

Failure of the magistrate's order to include an authorization to search defendant's computer, even though in the statement of probable cause the affiant indicated a desire to search any possible computers found in defendant's house, was a fatal omission. Searching defendant's computer, therefore, went beyond the scope of the warrant's authorization. (***United States v. Payton*** (9th Cir. 2009) 573 F.3rd 859, 861-864.)

> The fact that the issuing magistrate testified to an intent to allow for the search of defendant's computers, and that the warrant included authorization to search for certain listed records which might be found in a computer, was held to be irrelevant. (***Id***. at pp. 862-863.)
>
> But see ***United States v. Giberson*** (9th Cir. 2008) 527 F.3rd 882, where it was held that some circumstances might lead searching officers to a reasonable conclusion that documentary evidence they are seeking would be contained in computers found at

the location, authorizing the search of those containers despite the failure of the warrant to list computers as things that may be searched. It was recommended, however, that the computer be seized and a second warrant be obtained authorizing its search.

See ***People v. Rangel*** (2012) 206 Cal.App.4th 1310, 1316, likening defendant's "smartphone" to a computer, given its capability to store photographs, e-mail addresses, and other personal information.

See "*Computer Searches*," under "*Probable Cause Issues*," below, and under "*Searches of High Tech Devices*" (Chapter 17), below.

Inadvertent changes to the language of a warrant and affidavit after it is signed by the judge create issues that could result in suppression of all, or maybe a part of, the evidence seized, depending upon the flagrancy of the violation. (***United States v. Sears*** (9th Cir. 2005) 411 F.3rd 1124; severance and partial suppression held to be sufficient sanction where the officer used the wrong attachment describing the places to be searched and property to be seized which was different in only a few, minor ways.)

Acting upon information that defendant—a convicted felon—probably had a firearm in his home, a warrant affidavit that authorized officers to search for to search for "[a]ny firearm" and various other firearm-related items, was held not to be overbroad, thus complying with the **Fourth Amendment**. (***United States v. King*** (9th Cir. 2021) 985 F.3rd 702, 707-709.)

Supplementing the Affidavit: To be legally effective, the affidavit may be supplemented by an examination, under oath, of the affiant by the magistrate. (**Pen. Code § 1526**)

The oral examination, however, will not be considered part of the probable cause unless reduced to writing and signed by the affiant. (***Charney v. Superior Court*** (1972) 27 Cal.App.3rd 888, 891.)

Information not contained "within the four corners of a written affidavit given under oath" will not be considered and cannot be

used to help establish probable cause. (***United States v. Luong*** (9th Cir. 2006) 470 F.3rd 898, 904, 905.)

> Note that there is some federal case authority to the contrary, from other circuits, allowing information known to the affiant and orally told to the magistrate to be considered. (See ***United States v. Frazier*** (6th Cir. 2005) 423 F.3rd 526, 535-536; ***United States v. Legg*** (4th Cir. 1994) 18 F.3rd 240, 243.244; and see dissenting opinion in ***United States v. Luong***, *supra*., at pp. 905-907.)

Combined Affidavit with Warrant: Some authorities advocate the use of a combined search warrant and affidavit form with an attached declaration of probable cause. (See ***People v. MacAvoy*** (1984) 162 Cal.App.3rd 746.)

> However, care must be taken to insure that the attached declaration of probable cause is "*incorporated by reference*," signed, and sworn to by the officer, for the warrant to be legally sufficient. (***People v. Leonard*** (1996) 50 Cal.App.4th 878; defective warrant saved under "*Good Faith*" exception. See also (***United States v. SDI Future Health, Inc.*** (9th Cir. 2009) 568 F.3rd 684, 699-700.)
>
> > Incorporation may be made simply by using "*suitable words of reference*." (***Id***., at pp. 699-700; citing ***United States v. Towne*** (9th Cir. 1993) 997 F.2nd 537, 545.)
>
> While no specific language is necessary, the Ninth Circuit has upheld such wording as; "*Upon the sworn complaint made before me there is probable cause to believe that the* [*given*] *crime . . . has been committed*." (***United States v. Vesikuru*** (9th Cir. 2002) 314 F.3rd 1116, 1120; see also ***United States v. SDI Future Health, Inc.***, *supra*, at pp. 699-700.)
>
> The Ninth Circuit also requires that the incorporated affidavit is either attached physically to the warrant or a least accompanies the warrant while agents execute the search. (***United States v. SDI Future Health, Inc.***, *supra*, at p. 699.)
>
> Also, such a format potentially raises issues concerning the need to provide a copy of the affidavit to the suspect, along with the warrant. (See ***United States v. Gantt*** (9th Cir. 1999) 194 F.3rd 987, 1001, and fn. 7; affidavit needed to cure a deficiency in the description of the property to be seized; and ***United States v. Smith*** (9th Cir. 2005) 424 F.3rd 992, 1006-1008.)

Multiple Affiants/Affidavits: There may be more than one affiant and/or more than one affidavit in support of a search warrant. (***Skelton v. Superior Court*** (1969) 1 Cal.3rd 144; **P.C. § 1527**.)

Staleness: The information contained in the warrant affidavit must not be "*stale*." (***People v. Mesa*** (1975) 14 Cal.3rd 466, 470.) Information that is remote in time (i.e., between the development of the probable cause and the obtaining of a search warrant) may be deemed to be too stale and therefore unreliable. (***Alexander v. Superior Court*** (1973) 9 Cal. 3rd 387, 393.)

Drug Sales Cases: Delays of more than *four weeks*, at least in a narcotics sales case and absent some new evidence tending to show the continued presence of the controlled substances in question, are generally considered insufficient to demonstrate present probable cause. For instance:

See ***Hemler v. Superior Court*** (1975) 44 Cal.App.3rd 430, 433-434; delay of 34 days between controlled sale of heroin and the officer's affidavit for the search warrant is stale.

Delay of 52 days between a controlled buy of almost a pound of marijuana and the execution of a search warrant, despite the officer's expert opinion that the seller would still have contraband in his residence (the sale taking place in a parking lot in another city), was held to be stale. (***People v. Hulland*** (2003) 110 Cal.App.4th 1646.)

A delay of two months and three weeks (82 days) between the purchase of methamphetamine and the obtaining of a search warrant for defendant's house was too long. With the information being stale, the warrant was invalid as to him. It is irrelevant that defendant's purchase of drugs was part of a nine-month investigation into a drug-trafficking conspiracy involving multiple suspects when there was no showing that defendant himself was involved at all during the two months and three weeks in question. (***People v. Hirata*** (2009) 175 Cal.App.4th 1499.)

The delay of some 24 days between the seizure of defendant's cellphone and the obtaining of a search warrant to search it was not unreasonable under the circumstances. In this case, the Court reasoned that because smartphones "retain data for long periods of time," delay between the time a cellphone is seized and when it is searched is not

likely to cause stored personal data to be lost, or data of potential evidentiary relevance to become stale. In addition, the court added that the defendant (from whom the cellphone was seized) was in police custody for the entire twenty-four-day period, and there was no evidence that either he or anyone acting on his behalf made a request or demand for the cellphone's return, or even inquired about it. The Court concluded that when defendants do not seek the return of seized property, they cannot establish that the delay affected legitimate interests protected by the **Fourth Amendment**. (***United States v. Bragg*** (8th Cir. 2022) 44 F.3rd 1067.)

Stale Probable Cause to Arrest or Search:

While staleness may be an issue when obtaining a warrant, it is not generally an issue when it relates to probable cause in making an arrest for an offense that occurred days earlier. (See ***United States v. Haldorson*** (7th Cir. 2019) 941 F.3rd 284: There is no requirement that officers arrest a suspect at "the moment probable cause is established.")

Note: Caution, however, must be taken to insure that during the intervening delay, the probable cause has not dissipated as a result of subsequent events or newly acquired information to the point where the sufficiency of the evidence supporting the probable cause no longer exists.

The fact that defendant's four felony convictions were years earlier is irrelevant to the issue of staleness when defendant's documented recent events showed that he was currently an active member of a street gang. (***People v. Delgado*** (2022) 78 Cal.App.5th 425, 431.)

Animal Cruelty Case:

Information concerning prior complaints of animal cruelty spanning a four-year time period properly considered as part of the probable cause in a search warrant affidavit for a search of defendants' property when the prior complaints tended to show that defendants were keeping, and apparently breeding, numerous pit bulls on their property. "It was not unreasonable for that information to be considered relevant to the possible existence of an ongoing

dogfighting operation on defendants' property." (***People v. Williams*** (2017) 15 Cal.App.5th 111, 125.)

Exception: *Historical Warrants*:

While "*stale information*" by itself will not generally support a finding of probable cause, when combined with some evidence of a present criminal violation, an ongoing pattern of criminal activity may add up to sufficient probable cause. (***People v. Mikesell*** (1996) 46 Cal.App.4th 1711; sometimes called an "*historical warrant*."

See also ***People v. Medina*** (1985) 165 Cal.App.3rd 11, 20-21; and ***United States v. Fries*** (9th Cir. 2015) 781 F.3rd 1137, 1150- 1151.)

A continuing criminal enterprise, with no reason to believe the defendant has moved from her home where she was known to have lived some six months earlier, negated any staleness issue. (***People v. Gibson*** (2001) 90 Cal.App.4th 371, 380-381.)

Other Exceptions:

Expert opinion that, under the circumstances, the sought-for property is likely still to be found on the premises to be searched will normally overcome an issue of staleness. (See ***United States v. Lacy*** (9th Cir. 1997) 119 F.3rd 742; 10-month old information concerning the receiving of child pornography.)

But see ***People v. Hulland*** (2003) 110 Cal.App.4th 1646, where the officer's expert opinion was held to be insufficient to overcome a staleness (52 days) issue in a narcotics sales case.

"If circumstances would justify a person of ordinary prudence to conclude that an activity had continued to the present time, then the passage of time will not render the information stale." (***People v. Carrington*** (2009) 47 Cal.4th 145, 164; quoting ***People v. Hulland***, *supra*, at p. 1652.)

In ***Carrington***, the California Supreme Court held that it there was a "*fair probability*" that defendant would still have stolen checks in her home even after two months when some of the checks

> remained outstanding, as well as a key to the business that she'd burglarized. (***People v. Carrington***, *supra*., at pp. 163-164.)

Evidence that the defendant's criminal activities are a continuing offense, with no reason to believe that the defendant know he was being investigated, and every reason to believe that defendant would retain incriminating evidence, a search warrant will not be held to be based upon stale information. (***People v. Stipo*** (2011) 195 Cal.App.4th 664, 672-673; a computer-hacking enterprise.)

With about two months between the last illegal use of the victim's address and Social Security number and the later issuance of a search warrant for defendant's residence, the warrant affidavit was still held to support a finding of probable cause. This finding was based upon a series of similar incidents over several years, all of which could be either directly or circumstantially connected to defendant. (***People v. Jones*** (2013) 217 Cal.App.4th 735.)

In that defendant fit the profile of a collector of child pornography, and the affiant included in the warrant affidavit the fact that individuals who possess, distribute, or trade in child pornography, rarely, if ever, dispose of sexually explicit images of children because they tend to treat such photos as "prized possessions," the fact that a warrant was not obtained and executed until some 20 months after defendant had uploaded a child pornography video did not make the information stale. (***United States v. Schesso*** (9th Cir. 2013) 730 F.3rd 1040, 1047.)

Despite the passage of 23 years, and despite the fact that defendant had changed residences in that time period, the nature of the items sought (i.e., a firearm [the murder weapon], information stored on a computer, and photographs, journals and diaries), being items people normally hold onto for years, and that this defendant, having been in love with the victim's husband, wouldn't have likely discarded, the information in the affidavit listing these as items or information being sought, was not stale in that it was probable that defendant would not have discarded these items, or removed the information from her computer. (***People v. Lazarus*** (2015) 238 Cal.App.4th 734, 765-776.)

> Obtaining a search warrant for defendant's Facebook account almost 3½ months after information was developed that it might contain incriminating information was held not to be so stale that there was no longer a fair possibility that the evidence might still be there, particularly since the affiant submitted a preservation request 2 months after the probable cause was developed. Even if deleted, the information could likely be recovered. (***United States v. Flores*** (9th Cir. 2015) 802 F.3rd1028, 1046-1047.)
>
> Documentary gun registration information is not considered "stale" even though it shows that the firearms in question were purchased years earlier (17 years in this case), at least absent other information showing that the guns were disposed of in the meantime. (***People v. Lee*** (2015) 242 Cal.App.4th 161, 172-173.)

Fingerprints: Note ***Hayes v. Florida*** (1985) 470 U.S. 811 [105 S.Ct. 1643; 84 L.Ed.2nd 705], for the proposition that a search warrant may, *without probable cause*, authorize the temporary detention of a person for the purpose of taking fingerprints *if*:

- There is at least a "*reasonable suspicion*" that the suspect committed a criminal act;
- There is a reasonable basis for believing that fingerprints will establish or negate the suspect's connection with that crime; *and*
- The procedure used is carried out with dispatch.

> "There is thus support in our cases for the view that the **Fourth Amendment** would permit seizures for purposes of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch." (***Hayes v. Florida***, *supra*, at p. 817.)
>
> *Note*: The Court in ***Hayes*** specifically declined to decide whether this would include transporting the subject to the station for fingerprinting. Because a non-consensual transportation is generally considered to be an arrest, requiring full "*probable cause*" (See "*Detentions*" (Chapter 4), above), it is strongly suggested that the procedure be conducted in the field.

See also ***Davis v. Mississippi*** (1969) 394 U.S. 721, 727-728 [89 S.Ct. 1394; 22 L.Ed.2nd 676]; noting that the taking of fingerprints of a person who is merely subject to a temporary detention is lawful.

And Note ***Virgle v. Superior Court*** (2002) 100 Cal.App.4th 572, 574; where the Court referred to ***Hayes*** with approval.

Although the above holding in ***Hayes*** is dicta, it is "carefully considered language" that should be accorded weight. (***United States v. Dorcely*** (D.C. Cir. 2006) 454 F.3rd 366, 375.)

Description of the Facts; Factual vs. Conclusory Language: and circumstances that comprise the probable cause: "*Conclusory*," as opposed to "*factual*," allegations by the affiant are legally insufficient. (***Barnes v. Texas*** (1965) 380 U.S. 253 [13 L.Ed.2nd 818].)

Note: The affiant must describe the *facts and circumstances* which comprise the probable cause, so that a magistrate may independently evaluate the existence or nonexistence of sufficient facts to justify issuance of the warrant. Merely listing the affiant's conclusions, without describing the facts and circumstances that lead to the affiant's conclusions, is legally insufficient.

Using terms such as "*pornography*" and "*harmful matter*" without describing what it is the affiant believes is pornographic, is a conclusory statement that may invalidate a warrant. (***People v. Hale*** (2005) 133 Cal.App.4th 942; warrant saved by other language in the affidavit from which the magistrate could infer the pornographic nature of the pictures.)

A "*purely conclusory*" statement by a narcotics officer that the residence from which a box suspected of containing narcotics was a "stash house," with no evidence indicating what facts or circumstances led the officer to reach this conclusion, "was entitled to little if any weight" in the probable cause determination. (***United States v. Cervantes*** (9th Cir. 2012) 703 F.3rd 1135, 1148-1140; discussing the warrantless search of a vehicle, based upon probable cause.)

"*Good Faith*:" Officers obtaining a search warrant in "*good faith*" and acting in reasonable reliance on an otherwise facially valid warrant, issued by a neutral and detached magistrate, will not require suppression of evidence even when the warrant is later found to be lacking in probable

cause. (***United States v. Leon*** (1984) 468 U.S. 897 [104 S.Ct. 3405; 82 L.Ed.2nd 677].)

> See "*Good Faith*," under "*Why Search Warrants are Preferred*," above. See also "*The* "*Good Faith*" *Exception*," under "*Searches and Seizures*" (Chapter 8), above.

Use of Hearsay: Use of *hearsay* in an affidavit, or even "*double* (i.e., multiple level) *hearsay*," is okay "so long as there [is] a substantial basis for crediting the hearsay." (***United States v. Ventresca*** (1965) 380 U.S 102, 108 [85 S.Ct. 741; 12 L.Ed.2nd 684, 688-689], quoting ***Jones v. United States*** (1960) 362 U.S. 257, 272 [80 S.Ct. 725; 4 L.Ed.2nd 697, 708]; ***People v. Superior Court* [*Bingham*]** (1979) 91 Cal.App.3rd 463, 469.) In fact, it is usually unavoidable. (***People v. Magana*** (1979) 95 Cal.App.3rd 453, 460, 462; ***People v. Suarez*** (2020) 10 Cal.5th 116, 153; "Thus hearsay may be the basis for issuance of the warrant 'so long as there [is] a substantial basis for crediting the hearsay;" quoting ***People v. Gonzale***z (1990) 51 Cal.3rd 1179, 1207, fn. 3.)

> See also ***City of Santa Cruz v. Municipal Court*** (1989) 49 Cal.3rd 74, 87-88; ***People v. Smith*** (1976) 17 Cal.3rd 845, 850.
>
> Each level of hearsay, however, must be shown in the affidavit to be reliable. (See ***People v. Superior Court* [*Bingham*]**, *supra*; ***Caligari v. Superior Court*** (1979) 98 Cal.App.3rd 725; ***People v. Love*** (1985) 168 Cal.App.3rd 104.)

Miranda *Violation Statements*: Statements taken in violation of the defendant's ***Miranda*** rights (***Miranda v. Arizona*** (1966) 384 U.S. 436 [86 S.Ct. 1602; 16 L.Ed.2nd 694].), so long as not coerced or involuntary, may be used in an affidavit adding to the probable cause. (***United States v. Patterson*** (9th Cir. 1987) 812 F.2nd 1188, 1193; ***People v. Brewer*** (2000) 81 Cal.App.4th 442.)

Third Party's ***Fourth Amendment*** *Violation*: Evidence obtained in violation of someone else's (i.e., someone other than the present defendant's) **Fourth Amendment** (*search and seizure*) rights may be used as part of the probable cause in a search warrant affidavit, unless the defendant can show that he has "*standing*" (i.e., it was *his* reasonable expectation of privacy that was violated) to challenge the use of the evidence. (***People v. Madrid*** (1992) 7 Cal.App.4th 1888, 1896.)

> "*Standing*" depends upon a showing that it was the defendant's own constitutional rights which were violated. (***People v. Shepherd*** (1994) 23 Cal.App.4th 825, 828.)

See "*Standing*," under "*Searches and Seizures*" (Chapter 8), above.

Information in a search warrant affidavit that is the product of a violation of the defendant's own **Fourth Amendment** rights will be excised from the affidavit. The redacted affidavit will then be retested to determine whether probable cause still exists. (***People v. Weiss*** (1999) 20 Cal.4th 1073, 1081; ***People v. Williams*** (2017) 15 Cal.App.5th 111, 124-125; see also ***People v. Suarez*** (2020) 10 Cal.5th 116, 153.)

Use of Privileged Information:

Passive Recipient: Information that comes into the hands of law enforcement that may be "*privileged information*," obtained without any "*complicity*" on the part of law enforcement, may be used as a part of the probable cause justifying the issuance of the search warrant. (***People v. Navarro*** (2006) 138 Cal.App.4th 146; Attorney-Client information supplied by the attorney in violation of **E.C. §§ 950 et seq.**; see also ***United States v. White*** (7th Cir. 1992) 970 F.2nd 328.)

The issue is one of a **Fifth (**and **Fourteenth**) **Amendment** "*due process*" violation. (***People v. Navarro***, *supra*.)

Being a "*passive recipient of privileged information*" shows a lack of "*complicity*." (***People v. Navarro***, *supra*, at pp. 158-162.)

Deliberate Violation: To show that law enforcement was *not* just a passive recipient of privileged information, the defendant must prove that:

- The government (i.e., law enforcement) knew a lawyer-client relationship existed between the defendant and his informant;
- The government deliberately intruded into that relationship; *and*
- The defendant was prejudiced as a result.

(***People v. Navarro***, *supra*, citing ***United States v. Kennedy*** (10th Cir. 2000) 225 F.3rd 1197, 1194-1195.)

Case Law:

Law enforcement officers gaining access to, and reading, privileged material (defendant's notes to his attorney), a **Sixth Amendment** violation, did not require dismissal of the case or any other sanctions absent evidence that defendant was somehow "disadvantaged" by the violation. In this case, jail sheriff's deputies looked at notes defendant had written to his attorney. However, there was no evidence that any of the information discovered by this violation was passed onto the prosecutors. None of the deputies were witnesses in the case. There being no prejudice, defendant's motion to dismiss was properly denied. (***People v. Ervine*** (2009) 47 Cal.4th 745, 764-772.)

When a prosecutor instructs her investigator to eavesdrop on an attorney-client conversation in a courtroom holding cell, such an act is so egregious as to warrant dismissal of the case. (***Morrow v. Superior Court*** (1994) 30 Cal.App.4th 1252.)

However, law enforcement officers intentionally eavesdropping on an attorney-client conversation that takes place at the offices of the law enforcement agency, without the complicity of a prosecutor, is not so egregious as to require dismissal. Exclusion of the discovered information, and any products of that information, is sufficient a remedy under the circumstances. (***People v. Shrier et al.*** (2010) 190 Cal.App.4th 400.)

A prison inmate has a viable lawsuit under **42 U.S.C. § 1983** where he has alleged that prison officials have opened and read, as opposed to merely inspected for contraband, his legal mail addressed to his attorney, and, in seeking injunctive relief, he sufficiently alleged the threatened repetition of his **Sixth Amendment** rights where he remains incarcerated and a corrections director personally informed him that prison officials were permitted to read his legal mail. (***Nordstrom v. Ryan*** (9th Cir. 2014) 762 F.3rd 903,908-912; citing ***Wolff v. McDonnell*** (1974) 418 U.S. 539, 576-577 [94 S.Ct. 2963; 41 L.Ed.2nd 935], which upheld the right of jail officials to open and inspect, but not read, mail to an inmates attorney.)

California Rule of Professional Conduct Rule 4.4 (patterned after the **American Bar Association's Model Rule 4.4**):

> Where it is reasonably apparent to a lawyer (including a prosecutor) who has received a writing that was inadvertently sent or produced and relates to a lawyer's representation of a client, and the recipient lawyer knows or reasonably should know that the writing is privileged or subject to the work product doctrine, the lawyer shall refrain from examining the writing any more than it is necessary to determine that it is privileged or protected work product and shall promptly notify the sender.
>
> *Note*: While this does not affect law enforcement's receipt of privileged material, nor does it provide for an exclusionary rule, it is an *ethics* issue for a lawyer, including prosecutors, when he or she receives privileged material, whether directly or from a law enforcement source.

Nighttime Searches: Justification for a nighttime search must be established in the warrant affidavit by establishing "*good cause*," risking the *possible* suppression of evidence if it is not. (**P.C. § 1533**; ***Tuttle v. Superior Court*** (1981) 120 Cal.App.3rd 320, 328.)

> "*Nighttime*" for purposes of executing a search warrant is *between 10:00 p.m. and 7:00 a.m.* (**P.C. § 1533**) The search need only be commenced before 10:00 p.m. It is irrelevant how long after 10:00 p.m. it takes to finish the search. (***People v. Zepeda*** (1980) 102 Cal.App.3rd 1, 7-8.)
>
> *See* ***Rodriguez v Superior Court*** (1988) 199 Cal.App.3rd 1453, 1470; suggesting that because a night search does not violate any constitutional principles, evidence discovered during a nighttime search without judicial authorization should *not* result in suppression of any evidence. (See also ***Tidwell v. Superior Court*** (1971) 17 Cal.App.3rd 780, 787.)
>
> But see ***Bravo v. City of Santa Maria*** (9th Cir. 2011) 665 F.3rd 1076, 1085-1086, where the Court found the failure to justify the need for a nighttime search to be the intrusive equivalent of failing to comply with the "knock and notice" requirements.
>
> *The test* for determining "*good cause*" (thus allowing for a nighttime search) is as follows: "(T)he affidavit furnished the magistrate must set forth specific facts which show a necessity for

service of the warrant at night rather than between the hours of 7 a.m. and 10 p.m. This means that the magistrate must be informed of facts from which it reasonably may be concluded that the contraband to be seized will not be in the place to be searched during the hours of 7 a.m. to 10 p.m." (***People v. Watson*** (1977) 75 Cal.App.3rd 592, 598.)

The need for a nighttime search may be shown by a description of "some factual basis for a prudent conclusion that the greater intrusiveness of a nighttime search is justified by the exigencies of the situation." (***People v. Kimble*** (1988) 44 Cal.3rd 480, 494.)

Note: While typically this is an issue in the searches of *residences*, the statute (**P.C. § 1533**) is not so restricted. Therefore, a search warrant authorizing the search of a person, vehicle, or other container *may* also require a "*nighttime endorsement*" if executed at night (i.e., 10:00 p.m. to 6:00 a.m.).

Leaving a Copy at the Scene: It is *not* legally required that a copy of the affidavit be left at the scene (***United States v. Celestine*** (9th Cir. 2003) 324 F.3rd 1095, 1107.), at least when the place to be searched and the property to be seized is sufficiently described in the search warrant itself. (***United States v. McGrew*** (9th Cir. 1997) 122 F.3rd 847.)

See "*Leaving a Copy of the Warrant, Affidavit and/or Receipt and Inventory*," below.

See also ***People v. Calabrese*** (2002) 101 Cal.App.4th 79, below, under "*The* '*Receipt and Inventory*'": **P.C. § 1535** is *not* to be interpreted as a requirement to show to the suspect, or to leave a copy of at the scene, the search warrant itself.

Pen. Code § 964*: *Victim and Witness Confidential Information: **Pen. Code § 964** requires the establishment of procedures to protect the confidentiality of "*confidential personal information*" of victims and witnesses. The section is directed primarily at prosecutors and the courts, but also contains a provision for documents filed by law enforcement with a court in support of search and arrest warrants; i.e., *an affidavit*.

"*Confidential personal information*" includes, *but is not limited to*, addresses, telephone numbers, driver's license and California identification card numbers, social security numbers, date of birth, place of employment, employee identification numbers, mother's maiden name, demand deposit account numbers, savings or checking account numbers, and credit card numbers. (**Subd. (b)**)

The "*Receipt and Inventory*" (or "*Return*"): This document is self-descriptive. It is used to list the property seized as a result of the execution of the search warrant, serving as an inventory of such property. (**Pen. Code § 1535**)

The original is returned to the Court with the original warrant and affidavit.

A copy is left with the person from whom property is taken, or left at the place searched, as a receipt of for those items taken by the searching officers.

See "*Leaving a Copy of the Warrant, Affidavit and/or Receipt and Inventory*," below.

Pen. Code § 1535 is *not* to be interpreted as a requirement to show to the suspect, or to leave a copy of at the scene, the search warrant itself. (***People v. Calabrese*** (2002) 101 Cal.App.4th 79.)

***Medical Records*:** Aside from using a search warrant, there are statutory provisions for obtaining a Court Order to obtain medical records; i.e., **Pen. Code §§ 1543 et seq.**

Pen. Code § 1533: *Disclosure Provisions*:

(a) Records of the identity, diagnosis, prognosis, or treatment of any patient maintained by a health care facility which are not privileged records required to be secured by the special master procedure in **Section 1524**, or records required by law to be confidential, shall only be disclosed to law enforcement agencies pursuant to this section:

(1) In accordance with the prior written consent of the patient; *or*

(2) If authorized by an appropriate *order of a court* of competent jurisdiction in the county where the records are located, granted after application showing good cause therefor. In assessing good cause, the court:

(A) Shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services;

(B) Shall determine that there is a reasonable likelihood that the records in question will disclose material information or evidence of substantial value in connection with the investigation or prosecution; or

(3) By a search warrant obtained pursuant to **Section 1524**.

(b) The prohibitions of this section continue to apply to records concerning any individual who has been a patient, irrespective of whether or when he or she ceases to be a patient.

(c) Except where an extraordinary order under **Section 1544** is granted or a search warrant is obtained pursuant to **Section 1524**, any health care facility whose records are sought under this chapter shall be notified of the application and afforded an opportunity to appear and be heard thereon.

(d) Both disclosure and dissemination of any information from the records shall be limited under the terms of the order to assure that no information will be unnecessarily disclosed and that dissemination will be no wider than necessary.

> This chapter *shall not* apply to investigations of fraud in the provision or receipt of Medi-Cal benefits, investigations of insurance fraud performed by the Department of Insurance or the California Highway Patrol, investigations of workers' compensation insurance fraud performed by the Department of Corrections and conducted by peace officers specified in **paragraph (2)** of **subdivision (d)** of **Section 830.2**, and investigations and research regarding occupational health and safety performed by or under agreement with the Department of Industrial Relations. Access to medical records in these investigations shall be governed by all laws in effect at the time access is sought.

(e) Nothing in this chapter shall prohibit disclosure by a medical facility or medical provider of information contained in medical records where disclosure to specific agencies is mandated by statutes or regulations.

(f) This chapter *shall not* be construed to authorize disclosure of privileged records to law enforcement agencies by the procedure set forth in this chapter, where the privileged records are required to be secured by the special master procedure set forth in **subdivision (c)** of **Section 1524** or required by law to be confidential.

Pen Code § 1544: *Disclosure Without Notice*:

A law enforcement agency applying for disclosure of patient records under **Section 1543** may petition the court for an extraordinary order delaying the notice of the application to the health care facility required by **subdivision (f)** of **Section 1543** for a period of *30 days*, upon a showing of good cause to believe that notice would seriously impede the investigation.

Pen Code § 1545: *Definitions*:

For the purposes of this chapter:

(a) "*Health care facility*" means any clinic, health dispensary, or health facility, licensed pursuant to **Division 2** (commencing with **Section 1200**) of the **Health and Safety Code**, or any mental hospital, drug abuse clinic, or detoxification center.

(b) "*Law enforcement agency*" means the Attorney General of the State of California, every district attorney, and every agency of the State of California expressly authorized by statute to investigate or prosecute law violators.

***Sources of Information Establishing Probable Cause*:**

Other Police Officers: Suspect information or other criminal activity information received from other peace officers, either verbally, at pre-shift briefings, from department-originated notices, etc., or when communicated via radio through a police dispatcher, is considered reliable and generally establishes *probable cause* to arrest or search by itself. (***People v. Hill*** (1974) 12 Cal.3rd 731, 761; ***People v. Ramirez*** (1997) 59 Cal.App.4th 1548.)

This is sometimes referred to as having received information through "*official channels*," which refers to when it comes from any law enforcement source. (***People v. Lara*** (1967) 67 Cal.2nd 365, 371.) Examples:

- Police radio broadcasts.
- Pre-shift briefings.
- "A.P.B.s" (i.e., an "*All-Points Bulletin*") and "B.O.L.s" ("*Be On the Lookout*"), and similar law enforcement generated memos.

"An officer may arrest or detain a suspect 'based on information received through "official channels."' (Citations) If a 911 call 'has sufficient indicia of reliability . . . a dispatcher may alert other officers by radio, who may then rely on the report, [citation], even though they cannot vouch for it.'" (***People v. Brown*** (2015) 61 Cal.4th 968, 982-983.)

However: Eventually, law enforcement may be required in court to trace the information back to its source in order to disprove an accusation that the information establishing probable cause was "*manufactured in the police station*;" i.e., that it was the result of speculation or other unreliable source. (***People v. Orozco*** (1981) 114 Cal.App.3rd 435; ***People v. Brown***, *supra*.)

> This is sometimes referred to as the "***Harvey/Madden** rule*," based upon authority in ***People v. Harvey*** (1958) 156 Cal.App.2nd 516, and ***People v. Madden*** (1970) 2 Cal.3rd 1017, or an "***Ojeda** motion*," based upon ***Ojeda v. Superior Court*** (1970) 12 Cal.App.3rd 909.)

"An officer may arrest or detain a suspect 'based on information received through "official channels."'" (Citation) Upon proper objection, however, """"the People must prove that the source of the information is something other than the imagination of the officer who does not become a witness""" by offering evidence that the source has "'sufficient indicia of reliability.'" (***People v. Romeo*** (2015) 240 Cal.App.4th 931, 943; quoting ***People v. Brown**, supra,* at p. 983.)

> However, an exception to the "***Harvey/Madden** rule*" is generally found when the responding officers find the situation at the scene to be consistent with the substance of the radio call. When the source of the information is corroborated by what is found at the scene, there is no longer any purpose in further corroboration by calling as a witness the source of that information. (***In re Richard G.*** (2009) 173 Cal.App.4th 1252, 1258-1260; disagreeing with ***In re Eskiel S.*** (1993) 15 Cal.App.4th 1638, which required strict compliance with ***Harvey/Madden***.)
>
> > "When the reason for a rule ceases, so should the rule itself." (**Civ. Code § 3510)**
>
> "The ***Harvey/Madden*** rule, however, merely precludes the prosecution from relying on hearsay information communicated to the arresting officer that is not sufficiently specific and fact based to be considered reliable." (Quoting ***People v. Gomez*** (2004) 117 Cal..App.4th 531, 541.) The Appellate Court held that the hearsay exception that makes the officer's testimony concerned his prior knowledge of the residents of a house **Fourth** waiver status to be admissible is **Evidence Code § 1250(a)(1)**; the "state-of-mind" exception. The officer's testimony that he obtained information from the database was admissible to prove his receipt of information from an independent source. **Evidence Code § 1250(a)(1)** made admissible his testimony to prove his state of mind; i.e., his knowledge about the two residents' **Fourth** waiver status. So long as the officer's testimony had sufficient indicia of reliability, as can be inferred by the fact that the preliminary hearing magistrate overruled defendant's objections on this issue, it was admissible. (***People v. Romeo*** (2015) 240 Cal.App.4th 931, 944-949.)

Citizen Informants: Private persons motivated to provide law enforcement with information of criminal wrongdoing purely through a sense of good citizenship, without expecting any benefit or reward in return.

> "(I)f an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability—we have found rigorous scrutiny of the basis of his knowledge unnecessary." (***Illinois v. Gates*** (1983) 462 U.S. 213, 233-234 [76 L.Ed.2nd 527; 103 S.Ct. 2317].)
>
> > See also ***People v. Hogan*** (1969) 71 Cal.2nd 888, 890–891; and ***Humphrey v. Appellate Division*** (2002) 29 Cal.4th 569, 575–576.
>
> Information from a "*citizen informant*" establishes probable cause by itself, at least as to facts within the informant's personal knowledge, absent known or suspected facts or circumstances that cast doubt upon the reliability of the information provided. (***People v. Ramey*** (1976) 16 Cal.3rd 263, 269.)
>
> > *Note*: This assumes that the witness has the expertise necessary to interpret what it is he sees. E.g., a witness telling law enforcement that he has observed a person using a controlled substances would have to be able to establish that he has the training or experience to recognize what the controlled substance looks like.
>
> "It may . . . be stated as a general proposition that private citizens who are witnesses to or victims of a criminal act, absent some circumstances that would cast doubt upon their information, should be considered reliable." (***People v. Ramey***, *supra*, at pp. 268-269; see also ***People v. Duncan*** (1973) 9 Cal.3rd 218; and ***People v. Hogan*** (1969) 71 Cal.2nd 888, 890.)
>
> A justification for this presumption (of reliability) is that a private citizen who furnishes information exposes himself to possible action for malicious prosecution if his accusations are proved groundless. (***People v. Reed*** (1981) 121 Cal.App.3rd Supp. 26, 33.)
>
> "We have distinguished between those informants who 'are often criminally disposed or implicated, and supply their "tips" . . . in secret, and for pecuniary or other personal gain' and victims or chance witnesses of crime who 'volunteer their information fortuitously, openly, and through motives of good citizenship.' [Citation.] O. and J. (juvenile victims in this case) neither concealed their identity to shield themselves from liability for false statements nor offered information for any ulterior or pecuniary motive. . . . The trial court correctly deemed the children presumptively

reliable." (***Humphrey v. Appellate Division of the Superior Court*** (2002) 29 Cal.4th 569, 576.)

The *victim of a crime* will usually qualify. (***People v. Griffin*** (1967) 250 Cal.App.2nd 545, 550.)

> *However*; the Ninth Circuit Court of Appeal disagrees: "In establishing probable cause, officers may not solely rely on the claim of a citizen witness that [s]he was a victim of a crime, but must independently investigate the basis of the witness's knowledge or interview other witnesses." (*Citations omitted*; ***Hopkins v. Bonvicino*** (9th Cir. 2009) 573 F.3rd 752, 767; a questionable decision In light of all the overwhelming case law to the contrary.)
>
> See ***Gillan vs. City of San Marino*** (2007) 147 Cal.App.4th 1033, 1045; where the alleged victim of a crime was held to be *not* credible under the circumstances of this case, but then cites the general rule: "Typically, information from a victim or a witness to a crime, "absent some circumstance that would cast doubt upon their information," is enough to establish probable cause. Such a victim or witness is generally considered to be reliable. "Information provided by a crime victim or chance witness alone can establish probable cause if the information is sufficiently specific to cause a reasonable person to believe that a crime was committed and that the named suspect was the perpetrator. [Citation.] 'Neither a previous demonstration of reliability nor subsequent corroboration is ordinarily necessary when witnesses to or victims of criminal activities report their observations in detail to the authorities.' [Citation]"

The identity of the citizen informant need not always be disclosed, but sufficient facts for the magistrate to conclude that the informant does so qualify as a citizen informant must be made available. (***People v. Lombera*** (1989) 210 Cal.App.3rd 29, 32.)

Some involvement with criminal activity does not preclude one from being classified as a "*citizen informant*." (***People v. Schulle*** (1975) 51 Cal.App.3rd 809.) But the informant's *motivation* for providing the information must be examined.

Information that initially came to police from an anonymous informant was deemed to be reliable when the informant was contacted and readily admitted being the source of the anonymous information. Once contacted by law enforcement, he provided information without hesitation, expecting nothing in return. As such, he was a "*citizen informant*" even after

changing his story about how he came to know some of the information. Information from a citizen informant, as opposed to an informant who is looking for some reward of benefit for himself, and which is provided out of apparent good citizenship, is presumed to be reliable. (***People v. Scott*** (2011) 52 Cal.4th 452, 475-476.)

Also, other negative information known to a police officer which puts into question a victim's veracity may be enough to negate probable cause. (See ***Wesley v. Campbell*** (6th Cir. 2015) 779 F.3rd 421.)

Information obtained from the suspects themselves (e.g., through a lawful wiretap), absent some reason to believe the subjects were not telling the truth, is entitled to the same level of belief as that from a citizen informant, and will supply the probable cause necessary to justify a traffic stop and seizure of the vehicle. (***United States v. Magallon-Lopez*** (9th Cir. 2016) 817 F.3rd 671, 675-676.)

Although not using the label "citizen informant," the Ninth Circuit Court of Appeal has recognized the value of information coming from a "telephone tipster" who fully identifies himself by name, telephone number and address. (***United States v. Williams*** (9th Cir. 2017) 846 F.3rd 303, 308-310.)

The daughter of a murder victim, given her relationship with both the victim and the suspect (her step-father), which was "clearly set out in the affidavit," put her in a position where she "would naturally be knowledgeable about . . . (their) contentious divorce," thus justifying the conclusory allegation that her mother would have incriminating information on her laptop computer. This set of circumstances qualified the daughter as a "citizen informant," whose allegation were presumptively true. (***People v. Fayed*** (2020) 9 Cal.5th 147, 186.)

However, the information from a private citizen must be sufficieint to constitute at least a "reasonable suspicion" of criminal activity in order to justify a detention. Where the citizen, who readily identified herself, told officers that she had observed three black males in a motor vehicle parked on her block, who were engaged in "shady" activity, without any further explanation concerning what what that meant, the Court held that the responding officers did not have sufficient information upon which to base a detention of the occupants of that vehicle. (***In re Edgerrin J.*** (2020) 57 Cal.App.5th 752, 763-765.)

> The Court noted (at pg. 766), however, that there was nothing to prevent the officers from "consensually encountering" the defendants before elevating the contact into a detention, or from holding back and observing (or conducting other further

investigation) before making contact. The officers in this case, however, chose not to take it a little slower and further investigate the informant's vague accusation.

Reliable ("*Tested*") *Informants*: Informants who provide information with the expectation of some favor or personal gain from law enforcement in return, when he/she is known to have provided law enforcement with truthful information concerning criminal activity in the past.

The presumption is, absent some reason to disbelieve him, that such an informant is reliable. (See ***People v. Prewitt*** (1959) 52 Cal.2nd 330, 334-337; ***People v. Metzger*** (1971) 22 Cal.App.3rd 338, 345; ***People v. Dumas*** (1973) 9 Cal.3rd 871; ***People v. McFadin*** (1982) 127 Cal.App.3rd 751.)

Such an informant commonly has a criminal record, pending criminal case, and/or some present involvement in criminal activity.

The expected favor or personal gain is sometimes referred to as a "*benefit*." A "*benefit*" is defined as "any consideration or advantage the informant was offered, promised, or received in exchange for the information provided." Such a benefit includes, but is not necessarily limited to:

- Monetary payments of any kind, including, but not limited to, money, room and board, or use of an automobile.
- Leniency shown in arrest or booking, requesting appropriate bail, or contesting the source of the bail per **Pen. Code § 1275**.
- Leniency shown in filing appropriate charges or enhancements.
- Delay in arraignment or other court dates.
- Reduction of charges, period of custody or other condition of probation or sentence, including favorable input by a prosecutor or law enforcement officer.
- Relocation of the informant or the informant's family.
- Use immunity or transactional immunity, formal or informal.
- Favorable action with other governmental agencies, civil courts, or private interests (such as employers).

(*Source*: San Diego District Attorney "*Cooperating Individual and Immunity*" Manual, 1997, Chapter 1, p. 3.)

Such a person has a proven track record of giving reliable information in the past. A single prior incident may establish reliability (See ***People v. Gray*** (1976) 63 Cal.App.3rd 282, 288.), although in such a case, some corroboration of the informant's information may be necessary.

Having given some bad information in the past does not necessarily disqualify an informant from being labeled "*reliable*." (***People v. Barger*** (1974) 40 Cal.App.3rd 662; ***People v. Murphy*** (1974) 42 Cal.App.3rd 81.) However, facts showing why in this case the informant is to be believed may be necessary, or other corroboration of his/her information.

Practice Note: *In practice*, despite the favorable case law, police officers most often seek to corroborate even a reliable informant's information just because, being motivated by personal gain, common sense tells us that such a person's credibility is almost always something that should be substantiated before acting upon his or her information.

Unreliable ("*Untested*") *Informants*: A person who provides information with the expectation of receiving some favor or personal gain in return (i.e., a "*benefit*"), but either without the prior track record of having given truthful information, has provided untruthful information in the past, or as of yet, has not been used before as an informant.

Information from an untested or unreliable informant is *not* presumed to be credible in the absence of corroborating information. The information from such an individual must be corroborated before he/she can be used to establish probable cause. (***People v. Superior Court* [*Johnson*]** (1972) 6 Cal.3rd 704, 712; ***People v. Love*** (1985) 168 Cal.App.3rd 104.)

However, it has been held that *two* untested informants providing the same information, acting independently, may be sufficient to corroborate each other. (***People v. Balassy*** (1973) 30 Cal.App.3rd 614, 621.)

However, a search warrant affidavit was held to be insufficient to establish probable cause even though the affiant depended on three informants. Information from each of the informants was found to be conclusory only, and corroborated each other only as to "pedestrian facts" regarding defendant's residence and vehicle. (***People v. French*** (2011) 201 Cal.App.4th 1307, 1321-1323.)

See "*Corroboration*," below, under "*Anonymous Informants*."

Use in trial of an informant as a prosecution witness who knowingly provided perjured testimony may, if material, be a **Fifth** and **Fourteenth Amendment** "due process" violation and result in a reversal of a defendant's conviction. (***Maxwell v. Roe*** (9th Cir. 2010) 628 F.3rd 486.)

The fact that the government informant had engaged in past crimes did not raise due process concerns about the government's use of him as a confidential informant in its investigation, and the nature of his past crimes did not render the government's conduct outrageous. It is also not shocking that the informant was cooperating out of self-interest. (***United States v. Hullaby*** (9th Cir. 2013) 736 F.3rd 1260, 1262-1263.)

Anonymous Informants: One who provides information to law enforcement (often via a telephone call) while refusing to identify him or herself.

Rule:

Because it is impossible to determine the motivations or credibility of an anonymous informant, such information is not considered reliable by itself. (***Wilson v. Superior Court*** (1956) 46 Cal.2nd 291, 294.)

Anonymous information does not even establish a "*reasonable suspicion*" of criminal activity (***Alabama v. White*** (1990) 496 U.S. 325, 331 [110 S.Ct. 2412; 110 L.Ed.2nd 301, 309]; ***Florida v. J.L.*** (2000) 529 U.S. 266 [120 S.Ct. 1375; 146 L.Ed.2nd 254]; ***United States v. Morales*** (9th Cir. 2001) 252 F.3rd 1070.) unless corroborated by the circumstances. (***People v. Ramirez*** (1996) 41 Cal.App.4th 1608.)

"Information provided by an anonymous informant can constitute a sufficient basis for finding probable cause—but only when 'the informant's statement is reasonably corroborated.'" (***People v. Spencer*** (2018) 5 Cal.5th 642, 664, quoting (***Jones v. United States*** (1960) 362 U.S. 257, 269 [4 L.Ed.2nd 697, 80 S.Ct. 725].)

Anonymous information from at least two separate sources *might*, depending upon the circumstances, establish probable cause. (***People v. Coulombe*** (2001) 86 Cal.App.4th 52.)

Corroboration:

Rule: "Because unverified information from an untested or unreliable informant is ordinarily unreliable, it does not establish probable cause unless it is 'corroborated in essential respects by other facts, sources or circumstances.' [Citations.] For

corroboration to be adequate, it must pertain to the alleged criminal activity; accuracy of information regarding the suspect generally is insufficient. [Citation.] Courts take a dim view of the significance of 'pedestrian facts' such as a suspect's physical description, his residence and his vehicles. [Citation.] However, the corroboration is sufficient if police investigation has uncovered probative indications of criminal activity along the lines suggested by the informant. [Citation.] Even observations of seemingly innocent activity provide sufficient corroboration if the anonymous tip casts the activity in a suspicious light. [Citations.]" (***People v. Johnson*** (1990) 220 Cal.App.3rd 742, 749; ***People v. Gotfried*** (2003) 107 Cal.App.4th 254.)

> "In examining whether police obtained such reasonable corroboration of an informant's tip, we apply a totality of the circumstances determination in which an informant's "'veracity,'" "'reliability,'" and "'basis of knowledge'" are "'relevant considerations.'" (***Illinois v. Gates*** (1983) 462 U.S. 213, 230, 233 [76 L.Ed.2nd 527, 103 S.Ct. 2317] . . . An informant's veracity or reliability may be established by her having provided tips that proved true. (See, e.g., ***Draper v. United States*** (1959) 358 U.S. 307, 309 [3 L.Ed.2nd 327; 79 S.Ct. 329] . . . [noting that the informant Hereford "'from time to time gave information to [agent] Marsh regarding violations of the narcotic laws . . . [and] Marsh had always found the information given by Hereford to be accurate and reliable'"].) An informant's basis of knowledge—the grounds upon which the informant believes or knows something to be true—is also important, since the tip supplied is more trustworthy if the informant has first-hand knowledge of the criminal activity. (See, e.g., ***Gates***, *supra*, 462 U.S. at pp. 277–280 [discussing various cases where the court focused on whether the informant spoke with personal knowledge].) What the court in ***Gates*** clarified, however, is that "'veracity,'" "'reliability,'" and "'basis of knowledge'" are not rigid, "'independent requirements'" which must all be present. (***Id***. at p. 230.) The focus instead is on the "'overall reliability'" of the informant's tip. (***Id***. at p. 233.)" (***People v. Spencer*** (2018) 5 Cal.5th 642, 664-665.)

Examples: Corroboration comes in many forms. For example:

> Statements from an informant which are "against the informant's own '*penal interest*'" (i.e., potentially subjecting the informant to criminal liability) may be

sufficient corroboration. (***People v. Mardian*** (1975) 47 Cal.App.3rd 16, 33; ***Ming v. Superior Court*** (1970) 13 Cal.App.3rd 206, 214; ***United States v. Todhunter*** (9th Cir. 2002) 297 F.3rd 886, 890.)

Anonymous information corroborated by accurately predicting a suspect's future behavior may itself also establish probable cause. (See ***Illinois v. Gates*** (1983) 462 U.S. 213 [76 L.Ed.2nd 527; 103 S.Ct. 2317]; ***Alabama v. White*** (1990) 496 U.S. 325, 332 [110 S.Ct. 2412; 110 L.Ed.2nd 301].)

A suspect's innocent acts may provide corroboration: "As 'innocent behavior frequently will provide the basis for a showing of probable cause,' the pertinent question is not whether the activities corroborated by the police are criminal in nature but rather, 'the degree of suspicion that attaches to particular types of noncriminal acts.'" (***People v. Spencer*** (2018) 5 Cal.5th 642, 665; quoting ***Illinois v. Gates*** *supra*, 462 U.S. at p. 244, fn. 13.)

A student who was considered an "anonymous tipster" by the trial court, was determined to be a student who had seen social media depicting defendant showing a gun in a school classroom, described defendant by gender, race, and hairstyle, and was able to identify him from one of two possible students. Per the Court, "(t)hese circumstances evince far more than the 'moderate indicia of reliability' found lacking in ***J.L.***" (***In re K.J.*** (2018) 18 Cal.App.5th 1123, 1133-1135.)

See also; "*Anonymous Information*," under "*Detentions*" (Chapter 4), above.

Practice Notes:

> In a narcotics case, using the informant, a different informant, or an undercover law enforcement officer, to attempt to make a purchase of narcotics while under strict surveillance (i.e., a "*controlled buy*"), is a common method of corroborating the informant's information.
>
> Surveillance, records checks, and other forms of more traditional investigative work help to corroborate an informant's information.

Keeping Confidential Informants Confidential:

Problem: Whether classified as a "*Citizen Informant*," a "*Tested Informant*," or an "*Untested Informant*," law enforcement may seek to keep the informant's identity confidential. This is typically necessitated by the danger to the informant inherent in the practice of informing on criminal suspects.

Rule: An informant's identity, if the informant is used properly and when the case is charged appropriately (i.e., charging offenses to which the informant *is not* a percipient witness, only supplying information that helps establish probable cause), may often be kept confidential. (See **E.C. §§ 1041**, **1042(b)**, **(c)** and **(d)**)

> "It is well settled that California does not require disclosure of the identity of an informant who has supplied probable cause for the issuance of a search warrant where disclosure is sought merely to aid in attacking probable cause." (***Theodore v. Superior Court*** (1972) 8 Cal.3rd 77, 88.)

Restrictions: It is only when the court determines that there is a "*reasonable possibility*" that the informant can give evidence on the issue of guilt which might result in defendant's exoneration, that the informant's identity will have to be revealed. (***Honore v. Superior Court*** (1969) 70 Cal.2nd 162, 168.)

Revealing the Informant's Identity: In practice, an informant's identity will have to be revealed only:

- When he or she was an eyewitness to (i.e., a "*percipient witness*"), or an actual participant in, the crime or crimes charged; *or*

- When he or she might otherwise be able to provide evidence favorable to the defendant. (***People v. Goliday*** (1963) 8 Cal.3rd 771, 778-779; see also ***People v. Bradley*** (2017) 7 Cal.App.5th 607, 618-627.)

> Merely because an informant was a percipient witness does not mean that his identity must always be revealed. But an in camera hearing must be held in order to determine whether the informant's information, as a percipient witness, could be material to defendant's innocence. (***Davis v. Superior Court* [*People*]** (2010) 186 Cal.App.4th 1272, 1276-1278.)

Practice Note: In order to avoid having to reveal an informant's identity, we use his or her information only to establish probable cause. A search warrant is issued based upon that probable cause. Then, the suspect is charged only with the offenses revealed upon the search and/or arrest of the suspect; matters to which the informant *is not* a percipient witness.

Motions to Reveal the Identity of an Informant:

> "(**Evidence Code**) **Section 1041** grants a public entity a privilege not to disclose, and to prevent from being disclosed, the identity of a person who furnished information to a law enforcement officer 'purporting to disclose a violation of a law of the United States or of this state.' (**§ 1041**, **subd. (a)**.) The public entity may claim this privilege when disclosure is forbidden by federal or state statute, or, as the prosecution claimed here, when disclosure of the identity 'is against the public interest because the necessity for preserving the confidentiality of [the informer's] identity outweighs the necessity for disclosure in the interest of justice.' (**§ 1041, subd. (a)(2).**)" (***People v. Bradley*** (2017) 7 Cal.App.5th 607, 618-619.)
>
> It is the burden on the defendant to make a sufficient showing that the unnamed informer does in fact have information which would be material to the defendant's innocence. (***Price v. Superior Court*** (1970) 1 Cal.3rd 836, 843; ***Davis v. Superior Court* [*People*]** (2010) 186 Cal.App.4th 1272, 1276.)
>
> > In order to discharge his burden of proving the informant is a material witness, the defendant need not necessarily show what the informant would testify to, nor even that the informer could give testimony favorable to him. (***Price v. Superior Court***, *supra*.)
> >
> > However, bare speculation or unsupported conclusions that the informant is a "*material witness*" are insufficient to discharge a defendant's burden. The defendant must produce evidence or a declaration articulating the theory of his defense or demonstrating in what manner he would be benefited by disclosure of the informant's name. (***People v. McCoy*** (1970) 13 Cal.App.3rd 6, 12-13; ***People v. Thomas*** (1970) 12 Cal.App.3rd 1102, 1112-1113.)
> >
> > > A defense attorney's affidavit "*on information and belief*" is, as a matter of law, an insufficient factual showing, and is therefore not sufficient justification for divulging an informant's identity. (***People v. Oppel*** (1990) 222 Cal.App.3rd 1146, 1153.)

When the informant "merely pointed the finger of suspicion at the defendant," disclosure of the informant's identity is generally not required. (***People v. Wilks*** (1978) 21 Cal.3rd 460, 469; ***People v. McCoy***, *supra*, at p. 13.)

"***Luttenberger***" *Motions; Discovery re: An Informant's Background History*:

Upon a "*substantial preliminary showing*" of the need for discovery made by the defense, the court may order that the prosecution provide records and other background information concerning a confidential informant. (***People v. Luttenberger*** (1990) 50 Cal.3rd 1.)

However, in order to justify an in camera hearing on this issue, at which the court must review the informant's history and other relevant information related to credibility, the defendant need only raise a "*reasonable doubt*" concerning the informant's veracity. (***People v. Estrada*** (2003) 105 Cal.App.4th 783.)

If, after such an in camera review, the court finds the necessary "*substantial preliminary showing*" of information that tends to contradict material representations made in the affidavit, or constitutes material omissions from it, the court should then order the disclosure of the documents to the defendant. Based upon this information, a "***Franks*** *hearing*, per ***Franks v. Delaware*** (1978) 438 U.S. 154 [98 S.Ct. 2674; 57 L.Ed.2nd 667], may be appropriate. (See above.)

Note: The purpose is to challenge the reliability of the information obtained from a confidential informant, without necessarily revealing the informant's identity. The danger is in insuring that the court does not inadvertently give away too much information, affording the defense the opportunity to figure out who the informant is.

If the defense can meet its burden of showing some need for the information and some proof that there is something of some substance in existence (beyond merely speculating that some adverse information exists), the court should inspect the documents in camera, deleting any reference to the informant's identity before providing the information to the defense. (***People v. Luttenberger***, *supra*.)

An Informant Sworn Before a Magistrate; a "***Skelton*** *Warrant*:"

If an informant can give a "*factual*" (as opposed to a "*conclusory*") description of some on-going criminal activity, but does not fit within any of the preceding categories of reliable informants, and his information

cannot be corroborated, he may nevertheless be deemed reliable if he personally testifies and swears to the truth of his information before the issuing magistrate. (***Skelton v. Superior Court*** (1969) 1 Cal.3rd 144.)

> Sometimes referred to as a "***Skelton*** *warrant*," where the magistrate is allowed to observe the informant's demeanor and appearance, the magistrate can evaluate his credibility just as with any other witness.
>
> The informant's transcribed testimony (and the tape of that testimony) before the magistrate becomes the search warrant affidavit.

Pen. Code § 1111; *Accomplice Corroboration*:

> Per **Pen. Code § 1111**: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. . . ."
>
> "To corroborate the testimony of an accomplice, the prosecution must produce independent evidence which, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged. (***People* v. *Luker*** (1965) 63 Cal.2nd 464, 469) . . . 'The evidence need not corroborate the accomplice as to every fact to which he testifies but is sufficient if it does not require interpretation and direction from the testimony of the accomplice yet tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth; it must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged.' (***People v. Lyons*** (1958) 50 Cal.2nd 245, 257; see also ***People* v. *Luker***, *supra*, 63 Cal.2d 464, 469; ***People* v. *Holford*** (1965) 63 Cal.2nd 74, 82.) 'Although the corroborating evidence must do more than raise a conjecture or suspicion of guilt, it is sufficient if it tends in some degree to implicate the defendant.' (***People* v. *Santo*** (1954) 43 Cal.2nd 319, 327 '[The] corroborative evidence may be slight and entitled to little consideration when standing alone.' (***People* v. *Wade*** (1959) 53 Cal.2nd 322, 329.)" (***People v. Perry*** (1972) 7 Cal.3rd 756, 769.)

Pen. Code § 1111.5; *In-Custody Informants*: Neither a jury nor or a judge may convict a defendant, find a special circumstance true, nor use a fact in aggravation, based on the uncorroborated testimony of an *in-custody informant*.

However, an accomplice's testimony, which must also be corroborated in order to sustain a conviction (**Pen. Code § 1111**), may be used to corroborate the testimony of an in-custody informant, and vice versa. I.e., the two individuals may legally corroborate each other. (***People v. Huggins*** (2015) 235 Cal.App.4th 715, 718-720; "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

***Probable Cause Issues*:**

Anonymous Information, where sufficiently corroborated by accurately predicting a suspect's future behavior, may establish probable cause sufficient to obtain a search warrant. (***Illinois v. Gates*** (1983) 462 U.S. 213 [103 S.Ct. 2317; 76 L.Ed.2nd 527].)

See "*Anonymous Information*," under "*Detentions*" (Chapter 4), above, and "*Anonymous Informants*," above.

Searches of Residences:

Stolen Property: When property has been stolen by a defendant and has not yet been recovered, a fair probability exists that the property will be found at the defendant's home. A magistrate can reasonably conclude that a suspect's residence is a logical place to look for specific incriminating items where there exists probable cause to believe that the defendant stole them. (***People v. Carrington*** (2009) 47 Cal.4th 145, 161-164.)

See also ***People v. Lee*** (2015) 242 Cal.App.4th 161, 173, holding that upon proof that there are firearms registered to defendant, it is logical to assume that he possesses them in his home, even though he is only temporarily residing in that residence. "(I)t is no great leap to infer that the most likely place to keep a firearm is in one's home." But see ***People v. Superior Court* [*Corbett*]** (2017) 8 Cal.App.5th 670, 683, ignoring the rule of ***Lee*** to the effect that it is logical to assume that an owner of firearms would keep them in his home.

*The **Cleland** Warrant; Narcotics*:

Rule: The arrest of a person for selling narcotics, or for being in the possession of narcotics for purposes of sale, plus an experienced narcotics officer's expert opinion, has been held to be probable cause to believe he has evidence of this illegal activity *in his home*, justifying a search warrant for the home. (***People v.***

Cleland (1990) 225 Cal.App.3rd 388, 392-393; ***People v. Aho*** (1985) 166 Cal.App.3rd 984, 991-993; ***People v. Johnson*** (1971) 21 Cal.App.3rd 235, 242-246; ***United States v. Pitts*** (9th Cir. 1993) 6 F.3rd 1366, 1369; ***United States v. Terry*** (9th Cir. 1990) 911 F.2nd 272; ***United States v. Job*** (9th Cir. 2017) 871 F.3rd 852, 863-865; ***United States v. Johnson*** (9th Cir. 2019) 913 F.3rd 793, 802.)

Probable cause to believe defendant was a narcotics seller's source of supply and that he would have evidence of his crimes in his apartment was found where the defendant was at the scene during, or shortly before, three separate narcotics transactions and he was followed to his apartment as he used "*counter-surveillance* (driving) *techniques*" on one occasion. (***United States v. Chavez-Miranda*** (9th Cir. 2002) 306 F.3rd 973.)

See also ***United States v. Johnson*** (9th Cir. 2019) 913 F.3rd 793, 802, where it was noted that an officer observed defendant distribute cocaine twice in the 20 days preceding the warrant, including once within 10 days. The officer also averred that, after the buys, he observed defendant return to the address listed on the warrant application, which defendant entered and which he later told police was "his house." These facts—combined with the officer's expert description of how drug traffickers buy cocaine in bulk, sell in small amounts, and use their homes as store caches for the remainder—provided a substantial basis for issuance of a search warrant for defendant's home.

Exceptions:

While such circumstances provide the necessary probable cause to satisfy the **Fourth Amendment** search purposes, they do not provide an exigent circumstance excusing the lack of a search warrant. (***People v. Koch*** (1989) 209 Cal.App.3rd 770, 778-781.)

Also, *simple possession* of a controlled substance, without indications that the defendant is a drug dealer, will *not* likely be sufficient to justify a search warrant for the defendant's home, despite an expert officer's opinion to the contrary. (***People v. Pressey*** (2002) 102 Cal.App.4th 1178.)

And, knowing that a person is selling contraband *from a business*, when the seller is *not* an employee or owner of the business, *does not*, by itself, establish probable cause to

believe that more contraband will be found in the business. (***People v. Garcia*** (2003) 111 Cal.App.4th 715.)

Finding a small amount of marijuana on an arrestee's person, and observing him earlier with a single, semi-automatic pistol, were *insufficient* to support an allegation that "marijuana, heroin, and methamphetamine, or . . . evidence of gang membership," as well as "'[f]irearms, assault rifles, handguns of any caliber and shotguns of any caliber,' as well as ammunition for such firearms," would be found in defendant's home. Even discovery of his criminal history; i.e., that he'd been convicted of the illegal possession of a firearm and for being a felon in possession of a firearm, did not support a belief that multiple firearms might be found in his home. (***United States v. Nora*** (9th Cir. 2014) 765 F.3rd 1049, 1052-1060.)

Searches Authorized by Statute:

A Puerto Rico statute authorizing "police to search the luggage of any person arriving in Puerto Rico from the United States" was held to be unconstitutional because it failed to require either probable cause or a warrant. (***Torres v. Puerto Rico*** (1979) 442 U.S.465, 466-471 [99 S.Ct. 2425; 61 L.Ed.2nd 1].)

Trashcan Searches: Fresh marijuana stem and leaf cuttings found in a trashcan in front of a residence establishes probable cause justifying the issuance of a search warrant for the residence. (***People v. Thuss*** (2003) 107 Cal.App.4th 221.)

Having the trash collection company collect defendant's trash on his regular pickup day (i.e., a "trash pull"), segregating it from other trash, was constitutional and did not violate defendant's reasonable expectation of privacy. (***United States v. Thompson*** (8th Cir. S.D., 2018) 881 F.3rd 629.)

There is no reasonable expectation of privacy in the trash one places in trashcans out at the curb for pick up. (***California v. Greenwood*** (1988) 486 U.S. 35 [108 S.Ct. 1625; 100 L.Ed.2nd 30].)

Computer Searches:

Probable cause supporting the issuance of a search warrant may be based entirely upon circumstantial evidence together with reasonable inferences there from. Receipt of child pornography in numerous (e.g., nine) e-mails from various sources (e.g., two) to various screen names (e.g., two)

supports an inference of knowing possession of that pornography. (***United States v. Kelley*** (9th Cir. 2007) 482 F.3rd 1047.)

A properly qualified expert officer's opinion, connecting common characteristics of a child molester with known facts related to a child molest and the molester's act of hiding his computer, establishes probable cause supporting a search warrant for that computer. (***People v. Nicholls*** (2008) 159 Cal.App.4th 703.)

Where a search warrant specifies certain documents to be seized, and a computer is found under circumstances where it is reasonable to believe that the computer has been used to generate those documents or otherwise contain the information from which the documents came, then the computer may be seized (and probably searched) even though not mentioned in the search warrant. (***United States v. Giberson*** (9th Cir. 2008) 527 F.3rd 882, 886-889.)

A signal photograph of a nude minor (female child who is between 8 and 10 years old), by itself, is insufficient to establish probable cause for a search warrant. But a second such photo, under the "totality of the circumstances," is enough. (***United States v. Battershell*** (9th Cir. 2006) 457 F.3rd 1048.)

However, a single photograph of a nude minor (female of about 15 to 17 years of age), when combined with other suspicious circumstances (e.g., 15 computers in house found in complete disarray, with two minors not belonging to the defendant, where the defendant a civilian, is staying in military housing), *may* enough to justify the issuance of a search warrant. (***United States v. Krupa*** (9th Cir. 2011) 658 F.3rd 1174, 1177-1179; but see dissent, pp. 1180-1185.)

An Internet subscriber has no expectation of privacy in the subscriber information he supplies to his Internet provider. (***People v. Stipo*** (2011) 195 Cal.App.4th 664, 668-669.)

See ***People v. Rangel*** (2012) 206 Cal.App.4th 1310, 1316, likening defendant's "smartphone" to a computer, given its capability to store photographs, e-mail addresses, and other personal information.

A warrant authorizing an electronic search of all of defendant's computer equipment and digital storage devices was not overbroad, did not raise the risks inherent in over-seizing, and did not violate the **Fourth Amendment** because evidence showing that defendant possessed and distributed a child pornography video on a peer-to-peer file-sharing network provided probable cause to search defendant's entire computer system and his digital storage devices for any evidence of possession of or dealing in

child pornography. The government had no way of knowing which or how many illicit files there might be or where they might be stored, or of describing the items to be seized in a more precise manner. Because there was probable cause to believe that defendant was a child pornography collector, his entire computer system and his digital storage devices were suspect. (***United States v. Schesso*** (9th Cir. 2013) 730 F.3rd 1040, 1045-1047.)

Downloading video files with sexually suggestive titles after viewing non-pornographic files that had been found by the owner of a computer store on defendant's computer, and then viewing the downloaded videos without a warrant, held to be beyond the scope of the private search and illegal. (***People v. Michael E.*** (2014) 230 Cal.App.4th 261, 268-279.)

> The Court included a whole segment criticizing the current trend of referring to computers and cellphones as "*containers of information*." "'Since electronic storage is likely to contain a greater quantity and variety of information than any previous storage method, . . . '[r]elying on analogies to closed containers or file cabinets may lead courts to "oversimplify a complex area of Fourth Amendment doctrines and ignore the realities of massive modern computer storage."' [Citation.]" (Citing ***United States v. Carey*** (10th Cir. 1999) 172 F.3rd 1268, 1275.) Interestingly enough, however, most of the authority the Court cites here are container-search cases. (***Id.***, at pp. 276-277.)
>
> The United States Supreme Court agrees, at least as to cellphones, ruling that given the amount of personal information contained on the modern-day "smart phone," they are indeed entitled to greater protection from warrantless searches. (See ***Riley v. California*** (2014) 573 U.S. 373, 386 [134 S.Ct. 2473; 189 L.Ed.2nd 430].)
>
> See also ***United States v. Lara*** (9th Cir. 2016) 815 F.3rd 605, 610-611; declining to include defendant's cellphone under the category of a "*container*," in defendant's **Fourth** waiver search conditions.

The fact that the defendant may not have owned the computers that the affiant was asking to search at the time of the crime did not preclude the possibility that she had also transferred information or records—particularly photographs—to computers owned at the time of the search. (***People v. Lazarus*** (2015) 238 Cal.App.4th 734, 776; noting that personal computers often hold "diaries, calendars, files, and correspondence.")

Although defendant had met a false imprisonment victim through social media several months before the crime, a probation condition upon conviction that allows law enforcement unrestricted computer searches for

material prohibited by law was overbroad under the **Fourth Amendment**. Such a condition allows for searches of vast amounts of personal information unrelated to defendant's criminal conduct or his potential future criminality. A narrower means might include either requiring defendant o provide his social media account and passwords to his probation officer for monitoring, or restricting his use of, or access to, social media websites and applications without the prior approval of his probation officer. A condition requiring defendant not to delete his browser history was held to be valid, assuming a properly narrowed condition monitoring his use of social media can be fashioned. (***People v. Appleton*** (2016) 245 Cal.App.4th 717, 721-728.)

An "*administrative subpoena*" is all that is necessary in order to obtain the internet protocol (IP) address associated with the computer that accessed a particular website. (***United States v. Caira*** (7th Cir. Ill. 2016) 833 F.3rd 803.)

> *Note*: Administrative subpoenas are discouraged under California law due to the lack of any pre-execution judicial review. See "*Inspection* (*or Administrative*) *Warrants*," under "*Other Warrants*," below.)

The **Fourth Amendment** does not require suppression of evidence developed through use of software targeting peer-to-peer file-sharing networks to identify IP addresses associated with known digital files of child pornography. Defendant had no reasonable expectation of privacy in his shared folder, despite his measures to keep contents of computer private. **(*People v. Evensen*** (2016) 4 Cal.App.5th 1020.)

See "*Searches of High Tech Devices*" (Chapter 17), below.

Conspiracy:

A civil plaintiff's argument that the victim and a law enforcement officer conspired together to obtain an invalid search warrant and to execute it at a time when the plaintiff and victim's children were present, and to use excessive force in the execution of the warrant, with a goal of giving the victim an unfair advantage in the couple's custody proceedings, if supported by some evidence, must be evaluated by a civil jury. "'Conspiracy to violate a citizen's rights under the **Fourth Amendment** . . . is evidently as much a violation of an established constitutional right as the [underlying constitutional violation] itself." (***Cameron v. Craig*** (9th Cir. 2013) 713 F.3rd 1012, 1023-1024; citing ***Baldwin v. Placer County*** (9th Cir. 2005) 418 F.3rd 966, 971.)

***Use of a Search Warrant*:**

Rule: The use of a *search warrant* as a prerequisite to a lawful search is a constitutional requirement, pursuant to the **Fourth Amendment**.

> The **Fourth Amendment** prohibits all *unreasonable searches and seizures*, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the **Fourth Amendment**—subject only to a few specifically established and well-delineated exceptions." (***Katz v. United States*** (1967) 389 U.S. 347, 357 [88 S.Ct. 507; 19 L.Ed.2nd 576, 585]; ***Mincey v. Arizona*** (1978) 437 U.S. 385, 390 [57 L.Ed.2nd 290; 98 S.Ct. 2408]; ***People v. Ovieda*** (2019) 7 Cal.5th 1034, 1041; ***People v. Wilson*** (2020) 56 Cal.App.5th 128, 141, discussing the "*Private Search Doctrine*," and quoting ***Robey v. Superior Court*** (2013) 56 Cal.4th 1218, at p. 1224.)
>
> > "Such 'specifically established and well-delineated exceptions' include exigent circumstances, searches incident to arrest, vehicle searches, and border searches." (***United States v. Cano*** (9th Cir. 2019) 934 F.3rd 1002, 1011.)
> >
> > > And then there are exceptions to each of these exceptions. "*First*, any search conducted under an exception must be within the scope of the exception. *Second*, some searches, even when conducted within the scope of the exception, may be so intrusive that they require additional justification, up to and including probable cause and a search warrant." (***Ibid***.; Italics added.)
>
> "Evidence which is obtained as a direct result of an illegal search and seizure may not be used to establish probable cause for a subsequent search." (***United States v. Wanless*** (9th Cir. 1989) 882 F.2nd 1259, 1465.)
>
> > This includes "*verbal evidence*," (i.e., a suspect's admissions or confession), as well as physical evidence, when obtained as a direct product of an illegal detention, arrest or search. (See ***United States v. Crews*** (9th Cir. 2007) 502 F.3rd 1130, 1135.)

Exceptions: There are a limited number of such "*well-delineated exceptions*" to the general rule, however. For instance:

- "*Exigent Circumstances*" excuse the absence of a search warrant, at least up until when the "*exigency*" no longer exists. (***People v. Bacigalupo*** (1991) 1 Cal.4th 103, 122-123.)

"*Exigent Circumstances*:" Any instance where the officers have no opportunity to obtain a warrant without risking the loss or destruction of evidence, the fleeing of suspects, or the arming of a suspect. (See ***People v. Seaton*** (2001) 26 Cal.4th 598.)

See "*Exigent Circumstances*," under "*Warrantless Searches and Seizures*" (Chapter 9), below.

- "*Consent*:" A "*consent*" to search excuses the absence of a search warrant, or even probable cause. (***Florida v. Bostick*** (1991) 501 U.S. 429 [111 S.Ct. 2382; 115 L.Ed.2nd 389].)

  Such consent, however, must be "*freely and voluntarily*" obtained. (***Bumper v. North Carolina*** (1968) 391 U.S. 543, 548 [88 S.Ct. 1788; 20 L.Ed.2nd 797, 802]; ***People v. Ling*** (2017) 15 Cal.App.5th Supp. 1, 7.)

  See "*Consent Searches*" (Chapter 20), below.

- "*Probationary or Parole Fourth Waiver Searches*:"

  All *parolees*, and some *probationers*, are subject to what is commonly referred to as a "***Fourth** Waiver*;" i.e., where the subject has agreed, prior to the fact, to waive any objections to being subjected to searches and seizures without the necessity of the law enforcement officer meeting the standard **Fourth Amendment** requirements of *probable cause* and a *search warrant*. (See ***Vandenberg v. Superior Court*** (1970) 8 Cal.App.3rd 1048, 1053.)

  The same rules apply to probation searches under the "**Post-Release Community Supervision Act of 2011**," **P.C. §§ 3450 et seq.** (***People v. Douglas*** (2015) 240 Cal.App.4th 855, 863-873.)

  See "***Fourth** Waiver Searches*" (Chapter 19), below.

- "*Inevitable Discovery*:"

  The effects of an otherwise illegal warrantless search (i.e., suppression of the resulting evidence) may be offset in those instances where the evidence would have "*inevitably*" been found anyway through some source independent of the illegal search. (***Nix v. Williams*** (1984) 467 U.S. 431, 443 [104 S.Ct. 2501; 81 L.Ed.2nd 377, 387]; ***People v. Boyer*** (2006) 38 Cal.4th 412, 447-454.)

However, the "*inevitable discovery*" doctrine does not apply just because a search warrant could have been obtained had the searching officers asked for one. This argument would negate the need to ever seek a warrant, effectively repealing the **Fourth Amendment**. (***People v. Robles*** (1998) 64 Cal.App.4th 1286.)

The fact that the evidence would have inevitably been discovered anyway must be established by the People by "a preponderance of the evidence." (***United States v. Young*** (9th Cir. 2009) 573 F.3rd 711, 721-723; where it was not shown that the hotel where its employees discovered the defendant's firearm would not have merely stored the weapon and return it to defendant, as according to its policy. [See also the dissent, pp. 723-729, arguing that the inevitable discovery rule applied].)

Evidence lying under the deceased would have inevitably been found and given to the police when the Coroner's investigator took charge of the body and moved it. (***People v. Superior Court* [*Chapman*]** (2012) 204 Cal.App.4th 1004, 1021-1022; The Coroner may deliver any property or evidence related to the investigation or prosecution of a crime to the law enforcement agency or district attorney. (**Govt. Code § 27491.3(b)**)

See "*Doctrine of Inevitable Discovery*," under "*Searches and Seizures*" (Chapter 8), above.

- "*Searches of Vehicles*:"

  Probable cause to believe that a lawfully stopped vehicle contains contraband justifies a warrantless search of the vehicle, including the trunk, despite the absence of additional exigent circumstances. (***People v. Chavers*** (1983) 33 Cal.3rd 462; ***People v. Superior Court* [*Valdez*]** (1983) 35 Cal.3rd 11; ***People v. Varela*** (1985) 172 Cal.App.3rd 757.)

  The search may be as broad as could have been authorized by a search warrant, including any closed containers within the vehicle. (***United States v. Ross*** (1982) 456 U.S. 798 [102 S.Ct. 2157; 72 L.Ed.2nd 572]; ***California v. Acevedo*** (1991) 500 U.S. 565 [111 S.Ct. 1982; 114 L.Ed.2nd 619]; ***People v. Chavers***, *supra*.)

  See "*Searches of Vehicles*" (Chapter 12), below.

- "*Searches of Persons with Probable Cause*:"

  A person may be searched without a warrant any time the officer has "*probable cause*" to believe the person may have contraband or other sizable property on him. (***People v. Coleman*** (1991) 229 Cal.App.3rd 321.)

  See "*Searches of Persons*" (Chapter 11), below.

- "*Searches Incident to Arrest*:"

  An arrestee, and the area within his immediate reach when arrested (i.e., the "*lunging area*"), is subject to a warrantless search, so long as done contemporaneously in time and place with the arrest. (***Chimel v. California*** (1969) 395 U.S. 752 [89 S.Ct. 2034; 23 L.Ed.2nd 685]; ***United States v. Robinson*** (1973) 414 U.S. 218 [94 S.Ct. 467; 38 L.Ed.2nd 427]; ***People v. Sanchez*** (1985) 174 Cal.App.3rd 343; ***People v. Dennis*** (1985) 172 Cal.App.3rd 287; ***People v. Summers*** (1999) 73 Cal.App.4th 288.)

  This includes "'a relatively extensive exploration' of the areas within the arrestee's immediate control," including the arrestee's clothing and inside his pockets. (***United States v. Williams*** (9th Cir. 2017) 846 F.3rd 303, 312; citing ***United States v. Robinson***, *supra*, at p. 227, and ***United States v. Maddox*** (9th Cir. 2010) 614 F.3rd 1046, 1048.)

  When arrested in *or at* a vehicle (***New York v. Belton*** (1981) 453 U.S. 454 [101 S.Ct. 2860; 69 L.Ed.2nd 768]; ***People v. Stoffle*** (1992) 1 Cal.App.4th 1671.), or as a "*recent occupant*" of a vehicle (***Thornton v. United States*** (2004) 541 U.S. 615 [124 S.Ct. 2127; 158 L.Ed.2nd 905]; ***United States v. Osife*** (9th Cir. 2005) 398 F.3rd 1143), the entire passenger area of the vehicle may normally be searched without a warrant.

  However, see ***Arizona v. Gant*** (2009) 556 U.S. 332 [129 S.Ct. 1710; 173 L.Ed.2nd 485], severely limiting the ability to conduct a search incident to arrest in a vehicle, finding ***Belton*** to be inapplicable in the situation where the arrestee has already been removed from the vehicle and secured, thus negating any reasonable possibility that the arrestee could reach for a weapon or destroy evidence in the vehicle.

See "*Searches Incident to Arrest*," under "*Searches of Persons*" (Chapter 11), and under "*Searches of Vehicles*" (Chapter 12), below.

- "*Administrative/Regulatory Searches*:"

"*Pervasively*" or *"Closely Regulated Businesses*:" The courts have indicated that a warrant is *not* necessary in those cases where the place to be searched is commercial property, and the industry involved is one that is so "*pervasively regulated*" or "*closely regulated*" that warrantless inspections are necessary to insure proper, or legal, business practices. (***Donovan v. Dewey*** (1981) 452 US. 594, 598-599 [101 S.Ct. 2534; 69 L.Ed.2nd 262, 268-169]; ***New York v. Burger*** (1987) 482 U.S. 691, 700 [107 S.Ct. 2636; 96 L.Ed.2nd 601, 612-613]; ***People v. Paulson*** (1990) 216 Cal.App.3rd 1480, 1483-1484.)

See "*Administrative/Regulatory Searches*," below.

Crime Scene Searches: Generally, once any exigencies no longer justify an immediate entry, entering or re-entering a building to investigate a criminal offense, or even to continue a search already begun due to exigent circumstances, requires a search warrant. For example:

Murder Scene: ***Mincey v. Arizona*** (1978) 437 U.S. 385 [98 S.Ct. 2408; 57 L.Ed.2nd 290]; ***Flippo v. West Virginia*** (1999) 528 U.S. 11 [145 L.Ed.2nd 16].)

Arson Scene: ***Michigan v. Tyler*** (1978) 436 U.S. 499 [98 S.Ct. 1942; 56 L.Ed.2nd 486].)

However, arson investigations done immediately upon the extinguishing of a fire, before firefighters leave the scene and the home is secured, as an "administrative search," may be conducted without a warrant. Any later belated search, however, requires a search warrant. ***(Michigan v. Clifford*** (1984) 464 U.S. 287, 294 [104 S.Ct. 641; 78 L. Ed. 2nd 477].)

Bank Records: Otherwise private papers (i.e., records) turned over to a bank deprives the owner of the papers of any claim of privacy as to the contents of those records. (***United States v. Miller*** (1976) 425 U.S. 435, 440 [96 S.Ct. 1619; 48 L.Ed.2nd 71].)

Pursuant to California's **Right to Privacy Act** (**Gov't. Code §§ 7460-7493**), there are six (6) lawful methods of obtaining a criminal suspect's bank records:

- Customer Authorization: (**Gov't. Code § 7473**):

  The authorization must be in writing. Records sought must be very specifically identified and must include a phrase informing the customer that he/she has a right to withdraw consent.

- Administrative Subpoena or Summons (**Gov't. Code § 7474**):

  Requires notice to the customer and the bank. Customer has ten days to move to quash the subpoena.

- Search Warrant (**Gov't. Code § 7475**):

  The customer will be notified by the bank unless the search warrant contains an order that notice be delayed.

  The request to defer notice to the customer must be justified in the affidavit on the grounds that notification would impede the investigation, and the court finds this to be "*good cause*."

  The normal ten-day period for service and return of the warrant may be extended if the bank cannot reasonably make the records available within ten days.

  A search warrant for bank records was held to be valid in ***People v. Meyer*** (1986) 183 Cal.App.3rd 1150.

- Judicial Subpoena or Subpoena Duces Tecum (**Gov't. Code § 7476**):

  Notice must be given to the customer in most situations.

  May be used in NSF (i.e., "*non-sufficient funds*" cases). (See **Gov't. Code § 7476(c)**)

- Police Request (**Gov't. Code § 7480**):

  A police officer, sheriff's deputy, district attorney, or special agent with the Department of Justice, may obtain certain types of financial information (e.g., dishonored checks and overdrafts), from a bank, credit union, or savings association, upon certification to the financial institution, in writing, that the checks were used

fraudulently and that a crime report has been filed. (**Gov't. Code § 7480(b)**: The section provides for a statement of account and other records for 30 days before and after the alleged illegal act.)

Such information may also be provided by the bank to a county adult protective services office or to a long-term care ombudsman.

May also receive, upon request, information as to whether a person has an account and the account number. (**Gov't. Code § 7480(c)**)

- Victimized Financial Institution turns over Records (**Gov't. Code § 7470(d)**):

  When the bank is the victim of a crime committed by a customer, it may lawfully turn over the customer's bank records without the need of a court order. (***People v. Nosler*** (1984) 151 Cal.App.3rd 125; ***People v. Nece*** (1984) 160 Cal.App.3rd 285.)

  Note: The above listed requirements and provisions are not exclusive. The referenced **Government Code** sections must be consulted. (See also ***Burrows v. Superior Court*** (1974) 13 Cal.3rd 238; and ***People v. Blair*** (1979) 25 Cal.3rd 640, regarding constitutional limitations upon the seizure of financial records.)

Case Law:

"While investigating Miller for tax evasion, the Government subpoenaed his banks, seeking several months of canceled checks, deposit slips, and monthly statements. The Court rejected a **Fourth Amendment** challenge to the records collection. For one, Miller could 'assert neither ownership nor possession" of the documents; they were "business records of the banks.' . . . For another, the nature of those records confirmed Miller's limited expectation of privacy, because the checks were 'not confidential communications but negotiable instruments to be used in commercial transactions,' and the bank statements contained information 'exposed to [bank] employees in the ordinary course of business.' . . . The Court thus concluded that Miller had 'take[n] the risk, in revealing his affairs to another, that the information [would] be conveyed by that person to the Government.' . . ."

(***Carpenter v. United States*** (June 22, 2018) 585 U.S. __, __ [138 S.Ct. 2206, 2216; 201 L.Ed.2nd 507].)

The same principles apply in the context of information conveyed to a telephone company, per ***Smith v. Maryland*** (1979) 442 U.S. 735 [99 S.Ct. 2577; 61 L.Ed.2nd 220].

Mortgage Fraud Records:

Pen. Code § 532f(a): *Mortgage Fraud*: Intentionally using a misrepresentation, misstatement, or omission, in the mortgage lending process, or facilitating it's use, with the intent that it be relied upon by the lender, or receiving the funds as a result of the above, or filing with the county recorder any document in connection with a mortgage loan transaction knowing it contains a misrepresentation, misstatement, or omission, with a loss of over $400, is a felony (wobbler).

Subd. (c) contains provisions for a peace officer investigating mortgage fraud to obtain relevant real estate records via a court order, obtained upon the officer submitting an ex parte court application made under penalty of perjury, alleging that there is reasonable cause to believe that the records sought are material to an on-going investigation. Provisions are made for the sealing of such application and other procedures for obtaining the necessary records.

Subd. (g) provides for an affidavit from the custodian of records authenticating the records, laying the foundation to meet any hearsay objections to admission of the records into evidence.

Commercial Mail Receiving Agency Records:

Bus. & Prof. Code § 22780: Postal Service Form 1583:

(a) A commercial mail receiving agency shall not accept a Postal Service Form 1583 until positive identification has been established for the person filing the form. For purposes of this section, positive identification means any one of the following:

(1) Driver's license.
(2) State identification card.
(3) Armed forces identification card.
(4) Employment identification card which contains the bearer's signature and photograph.
(5) Any similar documentation which provides the agency with reasonable assurance of the identity of the filer.

(b) A commercial mail receiving agency shall maintain a copy of any Postal Service Form 1583 filed with the United States Postal Service. Upon the request of any law enforcement agency conducting an investigation, the commercial mail receiving agency shall make available to that law enforcement agency for purposes of that investigation and copying, its copy of the Postal Service Form 1583.

(c) A violation of this chapter is an infraction punishable by a fine of not less than one hundred dollars ($100) for the first offense, and a fine of not less than five hundred dollars ($500) for each subsequent offense.

Credit Card Information: Charges made by a credit card holder cannot be obtained except by search warrant or other judicial order. (***People v. Blair*** (1979) 25 Cal.3rd 640, 652.)

Exception: When the credit card company is the victim. (***People v. Nosler*** (1984) 151 Cal.App.3rd 125; ***People v. Nece*** (1984) 160 Cal.App.3rd 285.)

Telephone Records:

Unlisted Numbers: A search warrant is necessary in order to obtain the name and address of the holder of an *unlisted telephone number* from the telephone company. (***People v. Chapman*** (1984) 36 Cal.3rd 98.)

Note: Under federal constitutional standards, obtaining phone records *without* a warrant is *not* illegal. (***Smith v. Maryland*** (1979) 442 U.S. 735 [99 S.Ct. 2577; 61 L.Ed.2nd 220].) Therefore, although seizing such records without a warrant is in violation of California law, doing so will *not* result in the suppression of the records. (***People v. Bencomo*** (1985) 171 Cal.App.3rd 1005, 1015; ***People v. Martino*** (1985) 166 Cal.App.3rd 777, 786, fn. 3.)

The rule of ***Smith*** remains true "even if the information is revealed on the assumption that it will be used only for a limited purpose." (***United States v. Miller*** (1976) 425 U.S. 435, 443 [96 S.Ct. 1619; 48 L.Ed.2nd 71].)

Note: The continuing validity of ***Smith v. Maryland*** is assumed in ***Carpenter v. United States*** (June 22, 2018) 585 U.S. __ [138 S.Ct. 2206; 201 L.Ed.2nd 507], but differentiated on it facts. (See "*New and Developing Law Enforcement Tools and Technology*" (Chapter 14), below.

Telephone Calls Made: Telephone company records relating to *telephone calls made* are also protected and require a warrant. (***People v. McKunes*** (1975) 51 Cal.App.3rd 487.)

Note: Telephone toll records are maintained in "*billing rounds*," covering approximately 30 days, but not necessarily corresponding with a calendar month.

An affidavit should contain facts, information, and opinion justifying the time period for which toll call records are sought.

Certification for Non-Disclosure: Pursuant to **California Public Utilities Commission decision number 93361**, dated July 21, 1981, the telephone company must notify the customer of a search warrant issued for his telephone records unless there is a "*certification for non-disclosure*" contained on the face of the search warrant.

Provides for a *90-day* delay in notice, which can be extended another *90 days*.

The "*certification of non-disclosure*" is a statement that notification will impede the investigation of the offense being investigated.

Justification for the delayed notice must be included in the warrant affidavit.

Pen Registers and Trap and Trace Devices: Installation of a "*pen register*" and/or a "*trap and trace device*" may be accomplished by use of a search warrant or other court order, at least under state rules. (See ***People v. Larkin*** (1987) 194 Cal.App.3rd 650, 654, and newly enacted (effective *1/1/2016*) statutory rules, below.)

Pen. Code § 638.50: *Definitions:* For purposes of this chapter, the following terms have the following meanings:

(a) "*Wire communication*" and "*electronic communication*" have the meanings set forth in subdivision (a) of **Section 629.51**.

(b) "*Pen register*" means a device or process that records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, but not the contents of a communication. "*Pen register*" does *not* include a device or process used by a provider or customer of a wire or electronic

communication service for billing, or recording as an incident to billing, for communications services provided by such provider, or a device or process used by a provider or customer of a wire communication service for cost accounting or other similar purposes in the ordinary course of its business.

(c) "*Trap and trace device*" means a device or process that captures the incoming electronic or other impulses that identify the originating number or other dialing, routing, addressing, or signaling information reasonably likely to identify the source of a wire or electronic communication, but not the contents of a communication.

(d) "*Prohibited violation*" has the same meaning as that term is defined in **Section 629.51**.

Pen. Code § 638.51: *Prohibitions on Installation of Pen Registers and Trap & Trace Devices; Exceptions*:

(a) Except as provided in **subd. (b)**, a person may *not* install or use a pen register or a trap and trace device without first obtaining a court order pursuant to **P.C. §§ 638.52** or **638.53**.

(b) A provider of electronic or wire communication service may use a pen register or a trap and trace device for any of the following purposes:

(1) To operate, maintain, and test a wire or electronic communication service.
(2) To protect the rights or property of the provider.
(3) To protect users of the service from abuse of service or unlawful use of service.
(4) To record the fact that a wire or electronic communication was initiated or completed to protect the provider, another provider furnishing service toward the completion of the wire communication, or a user of that service, from fraudulent, unlawful, or abusive use of service.
(5) If the consent of the user of that service has been obtained.

(c) A violation of this section is punishable by a fine not exceeding $2,500, or by imprisonment in the county jail not exceeding one year, or by imprisonment pursuant to **P.C. § 1170(h)** (i.e., 16 months, 2 or 3 years in state prison or county jail), or by both that fine and imprisonment.

(d) A good faith reliance on an order issued pursuant to **P.C. § 1546.1**, or an authorization made pursuant to **P.C. § 638.53**, is a complete defense to a civil or criminal action brought under this section or under this chapter.

***Pen. Code § 638.52*:** *Court Orders*:

(a) A peace officer may make an application to a magistrate for an order or an extension of an order authorizing or approving the installation and use of a pen register or a trap and trace device. The application shall be in writing under oath or equivalent affirmation, and shall include the identity of the peace officer making the application and the identity of the law enforcement agency conducting the investigation. The applicant shall certify that the information likely to be obtained is relevant to an ongoing criminal investigation and shall include a statement of the offense to which the information likely to be obtained by the pen register or trap and trace device relates.

(b) The magistrate shall enter an ex parte order authorizing the installation and use of a pen register or a trap and trace device if the magistrate finds that the information likely to be obtained by the installation and use of a pen register or a trap and trace device is relevant to an ongoing investigation and that there is probable cause to believe that the pen register or trap and trace device will lead to any of the following:

(1) Recovery of stolen or embezzled property.

(2) Property or things used as the means of committing a felony.

(3) Property or things in the possession of a person with the intent to use them as a means of committing a public offense, or in the possession of another to whom they may have delivered them for the purpose of concealing them or preventing them from being discovered.

(4) Evidence that tends to show a felony has been committed, or tends to show that a particular person has committed or is committing a felony.

(5) Evidence that tends to show that sexual exploitation of a child, in violation of **Section 311.3**, or possession of matter

depicting sexual conduct of a person under *18 years of age*, in violation of **Section 311.11**, has occurred or is occurring.

(6) The location of a person who is unlawfully restrained or reasonably believed to be a witness in a criminal investigation or for whose arrest there is probable cause.

(7) Evidence that tends to show a violation of **Section 3700.5** of the **Labor Code**, or tends to show that a particular person has violated **Section 3700.5 of the Labor Code**.

(8) Evidence that does any of the following:

(A) Tends to show that a felony, a misdemeanor violation of the **Fish and Game Code**, or a misdemeanor violation of the **Public Resources Code**, has been committed or is being committed.

(B) Tends to show that a particular person has committed or is committing a felony, a misdemeanor violation of the **Fish and Game Code**, or a misdemeanor violation of the **Public Resources Code**.

(C) Will assist in locating an individual who has committed or is committing a felony, a misdemeanor violation of the **Fish and Game Code**, or a misdemeanor violation of the **Public Resources Code**.

(c) Information acquired solely pursuant to the authority for a pen register or a trap and trace device shall not include any information that may disclose the physical location of the subscriber, except to the extent that the location may be determined from the telephone number. Upon the request of the person seeking the pen register or trap and trace device, the magistrate may seal portions of the application pursuant to ***People v. Hobbs*** (1994) 7 Cal.4th 948, and **Sections 1040**, **1041**, and 1042 of the **Evidence Code**.

(d) An order issued pursuant to **subdivision (b)** *shall* specify all of the following:

(1) The identity, if known, of the person to whom is leased or in whose name is listed the telephone line to which the pen register or trap and trace device is to be attached.

(2) The identity, if known, of the person who is the subject of the criminal investigation.

(3) The number and, if known, physical location of the telephone line to which the pen register or trap and trace device is to be attached and, in the case of a trap and trace device, the geographic limits of the trap and trace order.

(4) A statement of the offense to which the information likely to be obtained by the pen register or trap and trace device relates.

(5) The order shall direct, if the applicant has requested, the furnishing of information, facilities, and technical assistance necessary to accomplish the installation of the pen register or trap and trace device.

(e) An order issued under this section shall authorize the installation and use of a pen register or a trap and trace device for a period not to exceed *60 days*.

(f) Extensions of the original order may be granted upon a new application for an order under **subdivisions (a)** and **(b)** if the officer shows that there is a continued probable cause that the information or items sought under this subdivision are likely to be obtained under the extension. The period of an extension shall not exceed *60 days*.

(g) An order or extension order authorizing or approving the installation and use of a pen register or a trap and trace device *shall* direct that the order be sealed until the order, including any extensions, expires, and that the person owning or leasing the line to which the pen register or trap and trace device is attached not disclose the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber or to any other person.

(h) Upon the presentation of an order, entered under **subdivisions (b)** or **(f)**, by a peace officer authorized to install and use a pen register, a provider of wire or electronic communication service, landlord, custodian, or other person shall immediately provide the peace officer all information, facilities, and technical assistance necessary to accomplish the installation of the pen register unobtrusively and with a minimum of interference with the

services provided to the party with respect to whom the installation and use is to take place, if the assistance is directed by the order.

(i) Upon the request of a peace officer authorized to receive the results of a trap and trace device, a provider of a wire or electronic communication service, landlord, custodian, or other person shall immediately install the device on the appropriate line and provide the peace officer all information, facilities, and technical assistance, including installation and operation of the device unobtrusively and with a minimum of interference with the services provided to the party with respect to whom the installation and use is to take place, if the installation and assistance is directed by the order.

(j) A provider of a wire or electronic communication service, landlord, custodian, or other person who provides facilities or technical assistance pursuant to this section shall be reasonably compensated by the requesting peace officer's law enforcement agency for the reasonable expenses incurred in providing the facilities and assistance.

(k) Unless otherwise ordered by the magistrate, the results of the pen register or trap and trace device shall be provided to the peace officer at reasonable intervals during regular business hours for the duration of the order.

(*l*) The magistrate, before issuing the order pursuant to **subdivision (b)**, may examine on oath the person seeking the pen register or the trap and trace device, and any witnesses the person may produce, and shall take their affidavit or their affidavits in writing, and cause the affidavit or affidavits to be subscribed by the parties making them.

(m) Notwithstanding any other provision in this section, no magistrate shall enter an ex parte order authorizing the installation and use of a pen register or a trap and trace device for the purpose of investigating or recovering evidence of a prohibited violation, as defined in **Section 629.51**.

Pen. Code § 638.53: *Emergency Court Orders*:

(a) Except as otherwise provided in this chapter, upon an oral application by a peace officer, a magistrate may grant oral approval for the installation and use of a pen register or a trap and trace device, without an order, if he or she determines all of the following:

(1) There are grounds upon which an order could be issued under **P.C. § 638.52**.

(2) There is probable cause to believe that an emergency situation exists with respect to the investigation of a crime.

(3) There is probable cause to believe that a substantial danger to life or limb exists justifying the authorization for immediate installation and use of a pen register or a trap and trace device before an order authorizing the installation and use can, with due diligence, be submitted and acted upon.

(b)

(1) By midnight of the second full court day after the pen register or trap and trace device is installed, a written application pursuant to **P.C. § 638.52** shall be submitted by the peace officer who made the oral application to the magistrate who orally approved the installation and use of a pen register or trap and trace device. If an order is issued pursuant to **P.C. § 638.52**, the order shall also recite the time of the oral approval under subdivision (a) and shall be retroactive to the time of the original oral approval.

(2) In the absence of an authorizing order pursuant to **para. (1)**, the use shall immediately terminate when the information sought is obtained, when the application for the order is denied, or by midnight of the second full court day after the pen register or trap and trace device is installed, whichever is earlier.

(c) A provider of a wire or electronic communication service, landlord, custodian, or other person who provides facilities or technical assistance pursuant to this section shall be reasonably compensated by the requesting peace officer's law enforcement agency for the reasonable expenses incurred in providing the facilities and assistance.

Pen. Code § 638.54: *Notice to Identified Targets; Order Delaying Unsealing of Order and Notification*:

(a) Except as otherwise provided in this section, a government entity that obtains information pursuant to **P.C. § 638.52**, or obtains information pursuant to oral authorization pursuant to **P.C.**

§ 638.53, shall serve upon, or deliver to by registered or first-class mail, electronic mail, or other means reasonably calculated to be effective, the identified targets of the order a notice that informs the recipient that information about the recipient has been compelled or requested and states with reasonable specificity the nature of the government investigation under which the information is sought. The notice shall include a copy of the order or a written statement setting forth facts giving rise to the emergency. The notice shall be provided no later than *30 days* after the termination of the period of the order, any extensions, or an emergency request.

(b)

(1) Prior to the expiration of the *30-day period* specified in **subdivision (a)**, the government entity may submit a request, supported by a sworn affidavit, for an order delaying unsealing of the order and notification and prohibiting the person owning or leasing the line to which the pen register or trap and trace device is attached from disclosing the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber or any other person. The court shall issue the order if the court determines that there is reason to believe that notification may have an adverse result, but only for the period of time that the court finds there is reason to believe that the notification may have that adverse result, and not to exceed *90 days*.

(2) The court may grant extensions of the delay of up to *90 days* each on the same grounds as provided in **paragraph (1)**.

(3) Upon expiration of the period of delay of the notification, the government entity shall serve upon, or deliver to by registered or first-class mail, electronic mail, or other means reasonably calculated to be effective as specified by the court issuing the order authorizing delayed notification, the identified targets of the order or emergency authorization a document that includes the information described in **subdivision (a)** and a copy of all electronic information obtained or a summary of that information, including, at a minimum, the number and types of records disclosed, the date and time when the earliest and latest records were created, and a statement of the grounds for the court's determination to grant a delay in notifying the

individual. The notice shall be provided no later than three days after the expiration of the period of delay of the notification.

(c) If there is no identified target of an order or emergency request at the time of its issuance, the government entity shall submit to the Department of Justice, no later than three days after the termination of the period of the order, any extensions, or an emergency request, all of the information required in **subdivision (a)**. If an order delaying notice is obtained pursuant to **subdivision (b)**, the government entity shall submit to the department, no later than three days after the expiration of the period of delay of the notification, all of the information required in **paragraph (3)** of **subdivision (b)**. The department shall publish all those reports on its Internet Web site within *90 days* of receipt. The department may redact names or other personal identifying information from the reports.

(d) For the purposes of this section, "*adverse result*" has the meaning set forth in **P.C. § 1546(a)**.

Pen. Code § 638.55: *Motion to Suppress; Civil Action by Attorney General to Compel Compliance; Petition to Void or Modify Warrant, Order, or Process, or for Destruction of Information*:

(a) Any person in a trial, hearing, or proceeding may move to suppress wire or electronic information obtained or retained in violation of the **Fourth Amendment** to the United States Constitution or of this chapter. The motion shall be made, determined, and be subject to review in accordance with the procedures set forth in **P.C. § 1538.5(b)** to **(q)**, inclusive.

(b) The Attorney General may commence a civil action to compel any government entity to comply with the provisions of this chapter.

(c) An individual whose information is targeted by a warrant, order, or other legal process that is not in compliance with this chapter, the California Constitution, or the United States Constitution, or a service provider or any other recipient of the warrant, order, or other legal process may petition the issuing court to void or modify the warrant, order, or process, or to order the destruction of any information obtained in violation of this chapter, the California Constitution, or the United States Constitution.

Pen. Code § 1546.1: *Search Warrants and Pen Registers and Trap and Trace Devices*:

> Pen register and trap and trace court orders (**P.C. §§ 638.50–638.55**) are added as **subdivisions (b)(5)** and **(c)(12)** to the list of warrants and orders authorized by the **CalECPA** for the obtaining of electronic communication information, so that it is clear that **P.C. §§ 638.50–638.55** are effective provisions and may be used by law enforcement without running afoul of the **CalECPA**.
>
> *Note*: Recent amendments to **P.C. § 1546.1(b)** and **(c)** permit a government entity to compel production of communication information from a service provider, to compel the production of or access to electronic device information from a person or entity other than the authorized possessor of the device, and to access electronic device information by means of physical interaction or electronic communication with the device, pursuant to an order for a pen register or trap and trace device, or both.

Federal Rules: Federally, use of a pen register is *not* considered to be a search, and therefore does not require a search warrant. (***Smith v. Maryland*** (1979) 442 U.S. 735, 745-746 [99 S.Ct. 2577; 61 L.Ed.2nd 220, 229-230].)

> *A* "*Mirror Port*:" The same rule is applicable to a "*mirror port*," which is similar to a pen register, but which allows the government to collect the "to" and "from" addresses of a person's e-mail messages, the IP addresses of the websites the person visits, and notes the total volume of information sent to or from the person's account. (***United States v. Forrester*** (9th Cir. 2008) 512 F.3rd 500.)
>
> ***18 U.S.C. § 3121***; *Expanded Definitions*: Amendment as a part of the "***Patriot Act***," **Pub. L. No. 107-56**, expanded the definitions to include processes that capture routing, addressing, or signaling information transmitted by an electronic communication facility, thus permitting the interception of information from computers and cells phones, as well as from land-line telephones.
>
> ***The Federal Electronic Communication Privacy Act*** (**18 U.S.C. §§ 3121-3127**) expressly authorizes a *state investigative or law enforcement officer* to apply for "*an order*," as opposed to a search warrant, or an extension of an order, authorizing the installation and use of either a *pen register* or a "*trap-and-trace*" device, when a request is made in writing, under oath, to a court of "competent jurisdiction" of the state, and is otherwise not prohibited by state law.

18 U.S.C. § 2123 requires the applicant to state that the information likely to be obtained is relevant to an ongoing criminal investigation (as opposed to the probable cause required for a warrant).

An order is good for no more than *60 days*. Extensions, for up to *60 days*, may be obtained upon making a separate application.

The order shall direct that it be sealed pending further order of the court.

Even if the procedures described in these statutes are violated, suppression of evidence is not an appropriate remedy. (***United States v. Forrester*** (9th Cir. 2007) 495 F.3rd 1041, 1051.)

The federal Second Circuit Court of Appeal joined the other circuits that have considered this issue and held that collecting IP address information, without content, is "constitutionally indistinguishable" from the use of pen registers and trap and trace devices to collect telephone dialing information. As a result, the court held that the pen register and trap and trace orders did not violate the **Fourth Amendment**. (***United States v. Ulbricht*** (2nd Cir. 2017) 858 F.3rd 71.)

Note: These rulings that have held that no search warrant is necessary is an application of the so-called "third party doctrine," where it is recognized that when a person willingly provides private information to a third party, he loses any reasonable expectation in his right to privacy as to that information.

The use of a pen register in an apartment complex's Internet system, showing what Internet connections defendant's computer made (defendant being a resident of the complex), was held not to be a **Fourth Amendment** violation, and lawful. In upholding the use of the pen register in this case, the Seventh Circuit Court of Appeals applied the third-party doctrine and held that an IP (Internet Protocol) pen register was analogous in all material respects to a traditional pen register. The court found that an IP address operates much like a phone number and, like telephone companies, internet service providers require that

identifying information be disclosed in order to make communication among electronic devices possible. The court added that while a person does not "dial" another's IP address in the ordinary sense, information was routed through a third-party to complete the connection between the computer in defendant's apartment unit and the destination IP address. The court concluded that defendant assumed the risk that, by connecting to his former employer's (W.W. Grainger, an industrial-supply company) servers, this information would be revealed to law enforcement. Consequently, the court held that defendant had no reasonable expectation of privacy in this data. (***United States v. Soybel*** (7th Cir. IL 2021) 13 F.4th 584.)

California's Stricter Rules:

Citing pre-**Proposition 8** authority (***People v. Blair*** (1979) 25 Cal.3rd 640.), which rejected the rationale of ***Smith v. Maryland***, *supra*, the California Attorney General is of the opinion that despite the lack of legal authority to suppress the resulting evidence (due to passage of **Proposition 8** in June, 1982), obtaining pen register or trap and trace information based upon an ex parte court order (as opposed to a search warrant), being in violation of the California Constitution (**Art. I**, **§ 13**, as well as **Art. I**, **§ 1**), is "*prohibited by state law*." The federal authorizing statutes, therefore, which allow for a court order obtained by state law enforcement officers "(*u*)*nless prohibited by State law*" (**18 U.S.C. § 3122(a)(2)**), do not apply to California because such a procedure *is* prohibited by state law. (86 ***Opinion of Attorney General Bill Lockyer*** 198 (2003); see also newly enacted (effective 1/1/2016) California statutory rules, **P.C. §§ 638.50 et seq.**, above.)

The California Attorney General, in this same opinion, also noted that **Gov't. Code § 11180** similarly does not allow for an "*Administrative Subpoena*" due to the lack of a prior judicial review as required by the California Constitution.

See also, 69 ***Ops. Cal. Atty. Gen.*** 55 (1986): A California magistrate may authorize the installation of a pen register by the issuance of a search warrant.

Because a search warrant, if used, is only good for 10 days (**P.C. § 1534**), a new warrant or an extension (see **P.C. § 638.52(a)**, **(f)** & **(g)**, above) must be obtained for each succeeding 10-day period.

Information received from a pen register and/or a trap and trace device, recording "call data content" (i.e., "CDC," data about call origination, length, and time of call), are not protected by the wiretap statutes. There is no expectation of privacy in such information, per ***Smith v. Maryland*** (1979) 442 U.S. 735 [99 S.Ct. 2577; 61 L.Ed.2nd 220]. (***United States v. Reed*** (9th Cir. 2009) 575 F.3rd 900, 914-917.)

Use of a pen register and trap and trace device, except maybe when combined with other forms of electronic surveillance, is *not* enough alone to establish the required "*necessity*" to justify the issuance of a wiretap warrant. (***United States v.*** (9th Cir. 2009) 585 F.3rd 1223, 1228, citing ***United States v. Gonzalez, Inc.*** (9th Cir. 2005) 412 F.3rd 1102, 1113.)

Marijuana Issues:

H&S Code § 11485: *Disposition of Personal Property Seized Pursuant to a Search Warrant and Used in Growing and Processing Cannabis Where no Prosecution Results*:

Any peace officer of this state who, incident to a search under a search warrant issued for a violation of **H&S § 11358** (i.e., *Planting, Cultivating, Harvesting, Drying, or Possessing Cannabis Plants*) with respect to which no prosecution of a defendant results, seizes personal property suspected of being used in the planting, cultivation, harvesting, drying, processing, or transporting of cannabis, shall, if the seized personal property is not being held for evidence or destroyed as contraband, and if the owner of the property is unknown or has not claimed the property, provide notice regarding the seizure and manner of reclamation of the property to any owner or tenant of real property on which the property was seized. In addition, this notice shall be posted at the location of seizure and shall be published at least once in a newspaper of general circulation in the county in which the property was seized. If, after 90 days following the first publication of the notice, no owner appears and proves his or her ownership, the seized personal property shall be deemed to be abandoned and may be disposed of by sale to the public at public auction as set forth in **Civ. Code §§ 2080 et seq.** (**Title 6**, **Division 3**, **Part 4**, **Chapter 4**), or may be disposed of by transfer to a government agency or community service organization. Any profit from the sale or transfer of the property shall be expended for investigative services with respect to crimes involving cannabis.

Validity of a Search Warrant:

Although **California's Compassionate Use Act** (**H&S §§ 11362.5 et seq.**) provides a defense at trial or a basis to move to set aside the indictment or information prior to trial, it does not shield a person suspected of possessing or cultivating marijuana from an investigation or arrest. Nor does it impose an affirmative duty on law enforcement officers to investigate a suspect's status as a qualified patient or primary caregiver prior to seeking a search warrant. A trial court, therefore, did not err in denying defendant's suppression motion upon determining that the affidavit in support of the search warrant established probable cause to search. (***People v. Clark*** (2014) 230 Cal.App.4th 490, 497-501.)

Where execution of a search warrant results in the recovery of marijuana pursuant to the order of the court, confiscation of the marijuana must be completed despite the suspect's claims that it's for valid medical purposes, pursuant to **Proposition 215**. (***People v. Fisher*** (2002) 96 Cal.App.4th 1147.)

Changes in the Marijuana Laws:

November 6, 1996: The "***Compassionate Use Act of 1996***" ("**CUA**," **Proposition 215**; **H&S § 11362.5**)

Summary: Provided protection for doctors recommending medical cannabis (then called "marijuana") as well as decriminalizing possession and cultivation of limited amounts of cannabis, based upon a doctor's recommendation.

January 1, 2004 (Amended June 27, 2017): The "***Medical Marijuana Program Act***" ("**MMPA**," **Stats. 2003, ch. 875, § 1**, **SB 420**; **H&S §§ 11362.7 et seq.**)

Summary: Created the voluntary ID card program and expanded immunity for patients and primary caregivers.

January 1, 2016: The "***Medical Cannabis Regulation and Safety Act***" ("**MCRSA"**) (Originally, the "***Medical Marijuana Regulation and Safety Act***") (**Stats 2015 ch 688 § 3, AB 243**; **Bus. & Prof. Code §§ 19300-19360**).

Summary: Created the state regulatory structure for cultivation, manufacturing, distribution, and retail sales of medical marijuana, but was repealed per **SB 94**, effective

June 27, 2017, and replaced by the "***Medicinal and Adult-Use Cannabis Regulation and Safety Act***."

November 8, 2016 (as amended June 27, 2017): The "***Control, Regulate and Tax Adult Use of Marijuana Act of 2016***" ("**AUMA**") (**Proposition 64**).

Summary: Legalized the adult use of marijuana for recreational purposes, but was repealed per **SB 94**, effective June 27, 2017, and replaced by the "***Medicinal and Adult-Use Cannabis Regulation and Safety Act***."

June 27, 2017: The "***Medicinal and Adult-Use Cannabis Regulation and Safety Act***" ("**MAUCRSA**;"); **SB 94**: **Bus. & Prof. Code §§ 26000 to 26231.2** (**Division 10**) and other codes.

Summary: Combined the "***Medical Cannabis Regulation and Safety Act***" and the "***Control, Regulate and Tax Adult Use of Marijuana Act***, as amended September 16, 2017 (**AB 133**).

Limitations on the Use of Search Warrants:

Newsroom Searches:

Pen. Code § 1524(g) provides that; "No warrant shall issue for any item described in **section 1070** of the **Evidence Code**."

Evid. Code § 1070 is the so-called "*newsman's privilege*" section and lists "*unpublished information*" such as "notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public" as privileged.

Therefore, such items may not be the subject of a search warrant.

This is not a federal constitutional requirement. Such searches are legal except as prohibited by state law. (***Zurcher v. The Stanford Daily*** (1978) 436 U.S. 547 [98 S.Ct. 1970; 56 L.Ed.2nd 525].)

This does *not* protect from search warrants *other* evidentiary items and contraband, as listed in **P.C. § 1524(a)(1)** through **(20)**, where there is probable cause to believe the item sought is in a newsroom.

Searches of, and on, Indian Tribal Property:

Search Warrants:

The Ninth Circuit Court of Appeal initially ruled that use of a search warrant to seize "*uniquely tribal property on tribal land*" is a violation of Indian sovereignty, in a civil suit filed pursuant to **42 U.S.C. § 1983**, and therefore illegal. (***Bishop Paiute Tribe v. County of Inyo*** (9th Cir. 2002) 291 F.3rd 549; Certiorari granted.)

The Ninth Circuit reasoned that seizure of Indian casino employee records in a welfare fraud case was *not* authorized by **Public Law 280** (**18 U.S.C. § 1162(a)**), which gave selected states (including California) jurisdiction over criminal offenses committed by or against individual Indians.

However, the United States Supreme Court vacated the decision in this case finding that an Indian tribe is not a "*person*," as required by **42 U.S.C. § 1983**, and thus could not legally file a civil suit alleging a violation of their civil rights under authority of this section. The case was remanded back for a determination whether there is some other legal basis for Indian tribes to challenge the execution of a search warrant on tribal property. (***Inyo County v. Paiute-Shone Indians*** (2003) 538 U.S. 701 [123 S.Ct. 1887; 155 L.Ed.2nd 933].)

*Applicability of the **Fourth Amendment***:

As for Indian reservations outside of California (i.e., Arizona in this case), it has been held that the **Fourth Amendment** *does not* directly govern the conduct of tribal governments. Rather, the "***Indian Civil Rights Act***" (i.e., "***ICRA***") applies instead. However, because the **ICRA** contains a provision regulating tribal law enforcement with language identical to that contained in the **Fourth Amendment** (see **25 U.S.C. § 1302(2)**), the same legal reasoning as used in enforcing the **Fourth Amendment** applies to Indian tribes as well. (***United States v. Becerra-Garcia*** (9th Cir. 2005) 397 F.3rd 1167.)

California Indian law, however, involves the so-called "**Public Law 280**," which calls for different

standards. Arguably, therefore, **Fourth Amendment** standards (in principle, if not in the letter of the law) are applicable. But, see below.

This same reasoning was used to find a search by California Indian tribal officers (Amador County) to be illegal and subject to an Exclusionary Rule. Although the **Fourth Amendment** did not apply to the Indian law enforcement officers, **25 U.S.C. § 1302(2)** and the **Fourteenth Amendment's** due process clause mandated the suppression of evidence which was the product of an unlawful search of a vehicle on an Indian reservation. (***People v. Ramirez*** (2007) 148 Cal.App.4th 1464.)

The district court properly granted a motion to suppress evidence by a defendant whose truck was twice searched by a tribal officer because the officer exceeded his jurisdictional authority and violated the **Fourth Amendment** counterpart to the **Indian Civil Rights Act of 1968, 25 U.S.C. § 1302**, so the exclusionary rule applied. The officer acted outside of his jurisdiction as a tribal officer because continuing to detain and searching a non-Indian without first attempting to ascertain his status was beyond the authority of a tribal officer on a public, nontribal highway crossing a reservation. Under the law of the founding era, the officer would not have had authority as a private citizen to seize and detain the defendant, as it was not obvious to that point that a crime had been or was being committed. (***United States v Cooley*** (9th Cir. 2019) 919 F.3rd 1135.)

Jurisdictional Issues:

The states have exclusive criminal jurisdiction over crimes committed on Indian land between non-Indians, as well as victimless crimes committed by non-Indians. (See ***United States v. McBratney*** (1882) 104 U.S. 621 [26 L.Ed. 869]; ***Oliphant v. Suquamish Indian Tribe*** (1978) 435 U.S. 191 [55 L.Ed.2nd 209]; see also ***People v. Ramirez*** (2007) 148 Cal.App.4th 1464, 1475, fn. 9.)

California has assumed exclusive jurisdiction over other crimes committed by or against Indians on Indian land. (***People v. Ramirez***, *supra*., at p. 1475, fn. 9; **18 U.S.C. § 1162**.)

See also ***United States v Cooley*** (9th Cir. 2019) 919 F.3rd 1135, above.

In a five-to-four decision, the U.S. Supreme Court held that the State of Oklahoma lacked jurisdiction to prosecute an enrolled member of the Seminole Nation whose crimes took place on the Creek Reservation. For purposes of the **Major Crimes Act**, land reserved for the Creek Nation since the 19th century remained Indian country under **18 U.S.C.S. § 1153(a)**, and only the federal government could prosecute Indians for major crimes committed in Indian country. Once a reservation was established, it retained that status until Congress explicitly indicates otherwise. Congress' actions during the allotment era did not end the Creek reservation. Nor were historical practices and demographics enough by themselves to prove disestablishment. (***McGirt v. Oklahoma*** (July 9, 2020) __ U.S. __ [140 S.Ct. 2452; 207 L.Ed.2nd 985]; see also ***Sharp v. Murphy*** (July 9, 2020) __ U.S. __ [140 S.Ct. 2412; 207 L.Ed.2nd 1043].)

Search of Unauthorized Cellphones Recovered at CDCR:

Pen. Code § 4576: CDCR (California Department of Corrections and Rehabilitation) is prohibited from accessing data or communications that have been captured using available technology from the *un*authorized use of a wireless communication device *except* after obtaining a search warrant.

Mechanics of Preparation:

Procedural Steps:

Collect all reports, necessary physical descriptions of the place to be searched and the property to be seized, photographs, exhibits, etc., prior to beginning the preparation.

Make sure all exhibits are labeled and attached to the warrant affidavit, and are "incorporated by reference" in the affidavit.

It is recommended that a law enforcement officer use a Deputy District Attorney, Assistant State Attorney General, or Assistant U.S. Attorney to review and approve a search warrant and affidavit "*for legal sufficiency*," if not to assist in the actual preparation.

Aside from the benefits of having someone else proofread the warrant and affidavit, this also adds to the "*good faith*" argument should the warrant later be found to be lacking in probable cause. (See ***People v. Camarella*** (1991) 54 Cal.3rd 592, 602-607; and ***Armstrong v. Asselin*** (9th Cir. 2013) 734 F.3rd 984, 994.)

The magistrate will ask the affiant(s) to swear to the truth of the affidavit.

The magistrate will sign the affidavit *and* the warrant.

Keep the warrant and affidavit *separate*.

The suspect(s) should later be allowed to read the warrant with a copy being left at the place searched, although this is not required by California state law. The affidavit is *not* shown to the suspect(s) nor left at the scene. (***People v. Calabrese*** (2002) 101 Cal.App.4th 79.)

Federal rules, as interpreted by the Ninth Circuit Court of Appeal, are to the contrary, mandating that a copy of the warrant be shown to, and left with, the subject whose property is being searched in all cases. (See ***Ramirez v. Butte Silver Bow County*** (9th Cir. 2002) 298 F.3rd 1022; and **Federal Rules of Criminal Procedure, Rule 41(d)**) (See "*Leaving a Copy of the Warrant, Affidavit, and/or Receipt and Inventory*," below)

Leave a copy of the "*Receipt and Inventory*" at the scene. (**Pen. Code § 1535**)

Case Law:

There is no duty on the part of the affiant to investigate the suspect's version of the events before obtaining a search warrant. (***Cameron v. Craig*** (9th Cir. 2013) 713 F.3rd 1012, 1019.)

Choosing to seek a search warrant from a state court magistrate instead of a federal magistrate in order avoid a federally imposed rule (See ***United States v. Comprehensive Drug Testing, Inc.*** (9th Cir. 2010) 621 F.3rd 1162, recommending a certain protocol for warrants involving computerized data), does not negate a finding of good faith so long as not done with the "knowledge . . . that the search was unconstitutional under the **Fourth Amendment**."

(***United States v. Schesso*** (9th Cir. 2013) 730 F.3rd 1040, 1050-1051.)

See also ***United States v. Artis*** (9th Cir. 2019) 919 F.3rd 1123, 1130, where it is noted that federal officers are not California peace officers, and thus violate the relevant California code sections requiring that state search warrants be executed by a "peace officer" when a federal officer executes a state warrant, it is *not* also a **Fourth Amendment** violation, and thus does not require the suppression of any resulting evidence, reversing the prior decision issued by a federal district court, reported at 315 F.Supp.3rd 1142 (U.S. Dist. Ct., ND Cal., 2018).

> The Ninth Circuit's authority for this conclusion is cited as ***United States v. Green*** (10th Cir. 1999) 178 F.3rd 1099, 1106; ***United States v. Gilbert*** (11th Cir. 1991) 942 F.2nd 1537, 1540-1541); and ***United States v. Freeman*** (8th Cir. 1990) 897 F.2nd 346, 348-349.

Because an application for a search warrant ordinarily would be presented ex parte, allowing no opportunity to contest issuance of the search warrant and no opportunity to peremptorily challenge the magistrate authorizing it, such ex parte determinations are not the result of a hearing upon a contested issue within the meaning of **Code Civ. Proc. § 170.6(a)(2)**, and a peremptory challenge as contemplated by **Pen. Code § 1538.5(b)**, to the magistrate who issued the search warrant therefore could lie. A peremptory challenge in this case was held to be timely made when it was made at least five days before the hearing because the application for a search warrant was not a hearing. The relevant hearing for purposes of determining timeliness was accordingly the hearing on the motion challenging the warrant. The peremptory challenge, therefore, was timely filed prior to that hearing. (***Los Angeles County Metropolitan Transportation Authority v. Superior Court*** (2021) 68 Cal.App.5th 920.)

See ***Snitko v. United States*** (9th Cir. 2024) 90 F.4th 1250, where FBI agents, in conjunction with the Drug Enforcement Agency (DEA) and the United States Postal Inspection Service (USPIS), put together a search protocol consisting of an "Operation Order Search Plan" document and separate document entitled "Supplemental Instructions on Box Inventory." This was all in addition to a traditional search warrant allowing for the search of some 700 private safe deposit boxes used by customers of a private company called US Private Vaults (USPV), a company the

government was investigating for various criminal activities, including money laundering.

Service and Return:

Who May Serve: A search warrant is directed to "*any peace officer*" for service. (**Pen. Code § 1529**)

Only a "*peace officer*" (with exceptions as noted below), as listed on the face of the warrant (i.e., "*any peace officer*"), may lawfully serve a search warrant, although the peace officer may be assisted by others. (**Pen. Code §§ 1529**, **1530**)

While the affiant need not necessarily be a sworn peace officer (***People v. Bell*** (1996) 45 Cal.App.4th 1030, 1054-1055.), the person executing the warrant must be.

See **Pen. Code § 1528**, providing a magistrate with the authority to issue a search warrant, "commanding" a "peace officer in his or her county" to execute the warrant.

See also ***United States v. Artis*** (9th Cir. 2019) 919 F.3rd 1123, 1130, where it is noted that federal officers are not California peace officers, and thus violate the relevant California code sections requiring that state search warrants be executed by a "peace officer" (see **Pen. Code §§ 1529, 1530**) when a federal officer executes a state warrant, it is *not* also a **Fourth Amendment** violation, and thus does not require the suppression of any resulting evidence, reversing the prior decision issued by a federal district court, reported at 315 F.Supp.3rd 1142 (U.S. Dist. Ct., ND Cal., 2018).

The Ninth Circuit's authority for this conclusion is cited as ***United States v. Green*** (10th Cir. 1999) 178 F.3rd 1099, 1106; ***United States v. Gilbert*** (11th Cir. 1991) 942 F.2nd 1537, 1540-1541); and ***United States v. Freeman*** (8th Cir. 1990) 897 F.2nd 346, 348-349.

Exceptions: There are some exceptions to the general rule that the person serving a search warrant must be a peace officer:

Pen. Code § 830.13: Persons listed below who are not "*peace officers*" may exercise the power to serve warrants as specified in **Pen. Code §§ 1523** & **1530**, and **830.11** during the course and within the scope of their

employment, *if* they receive a course in the exercise of that power pursuant to **Pen. Code § 832**.

Subd. (a)(1): Persons employed as investigators of an auditor-controller or director of finance of any county, or persons employed by a city and county who conduct investigations under the supervision of the controller of the city and county, who are regularly employed and paid in that capacity, provided that the primary duty of these persons shall be to engage in investigations related to the theft of funds or the misappropriation of funds or resources, or investigations related to the duties of the auditor-controller or finance director as set forth in **Gov't. Code §§ 26880 et seq.**, **26900 et seq.**, **26970 et seq.**, and **26980 et seq**.

Subd. (a)(2): Persons employed by the Department of Justice as investigative auditors, provided that the primary duty of these persons shall be to investigate financial crimes. Investigative auditors shall only serve warrants for the production of documentary evidence held by financial institutions, Internet service providers, telecommunications companies, and third parties who are not reasonably suspected of engaging or having engaged in criminal activity related to the documentary evidence for which the warrant is requested.

Veh. Code § 21100.4(a)(1): A "*designated local transportation officer*," for the purpose of seizing and causing the removal of a vehicle operated as a taxicab or other passenger vehicle for hire upon establishing in an affidavit reasonable cause to believe that said vehicle is being operated in violation of licensing requirements adopted by a local authority under **Veh. Code § 21100(b)**.

A "*designated local transportation officer*" means any local public officer employed by a local authority to investigate and enforce local taxicab and vehicle for hire laws and regulations.

Rules as to Others Who are Not California Peace Officers:

Federal Criminal Investigators and Federal Law Enforcement Officers are not California peace officers. (***United States v. Artis***

(9th Cir. 2019) 919 F.3rd 1123, 1130: See also **P.C. 830.8(a)**, and 80 ***Cal. Att'y Gen. Op.*** No. 97-505 (Oct. 24, 1997).)

> Although federal officers, as a rule, are not California peace officers, they "may assist a peace officer in executing a search warrant, provided the federal agent is acting "in aid of the officer on his requiring it, he being present and acting in its execution." (***United States v. Artis***, *supra*, at p. 1130, citing **Pen. Code § 1530**.)
>
> *Note*: The power of a federal agent to make arrests for a state violation, after completing a training course pursuant to **Pen. Code § 832**, as described in **Pen. Code § 830.8**, does not give a federal officer the power to execute a state search warrant.
>
> **Pen. Code § 830.85**: *Federal Officers and California Peace Officers*: Notwithstanding any other law, United States Immigration and Customs Enforcement (ICE) officers and United States Customs and Border Protection officers *are not* California peace officers.

Victims: It is permissible for a burglary victim to accompany the searching officers and point out items stolen from him. (***People v. Superior Court* [*Meyers*]** (1979) 25 Cal.3rd 67; ***People v. Superior Court* [*Moore*]** (1980) 104 Cal.App.3rd 1001.)

Police Dogs: It is also lawful to use a police dog trained to detect narcotics. (See ***People v. Russell*** (1987) 195 Cal.App.3rd 186.)

News Media, Etc.:

> Members of the *news media*, or any other third party not necessary to the execution of the warrant, must *not* be allowed to enter a suspect's private residence. To allow such persons to accompany the searching officers is a **Fourth Amendment** violation due to the heightened intrusion upon privacy interests caused by their unauthorized presence and non-law-enforcement purpose. (***Wilson v. Layne*** (1999) 526 U.S. 603, 614 [119 S.Ct. 1692; 143 L.Ed.2nd 818, 830]; ***Hanlon v. Berger*** (1999) 526 U.S. 808 [143 L.Ed.2nd 978].)
>
> But even though members of the news media are present, suppression is not called for where they do not discover or develop any of the evidence later used at trial. Where,

despite being led on tours through the crime scene, the media did not expand the scope of the search beyond a search warrant's dictates nor assist the police, or touch, move, handle or taint the admitted evidence in any way, the **Fourth Amendment** does not require the suppression of any evidence. (***United States v. Duenas*** (9th Cir. 2012) 691 F.3rd 1070, 1079-1083.)

See "*Third Parties Entering with Police*," under *Searches of Residences and Other Buildings*" (Chapter 13), below.

Necessity to Serve: A search warrant is not an *invitation* that officers can choose to accept or reject. It is an order of the court based on probable cause which must be executed. (***People v. Fisher*** (2002) 96 Cal.App.4th 1147; search warrant for marijuana executed despite defendant's presentation of proof at the scene that he was legally entitled to possess marijuana pursuant to **H&S § 11362.5**, California's "***Compassionate Use Act***;" **Proposition 215**.)

However, it is expected that officers will exercise some discretion in avoiding the taking of excessive, cumulative property, and unnecessary destructive behavior, in executing a search warrant. (***San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*** (9th Cir. 2005) 402 F.3rd 962.)

Night Service: Search warrants must be served between *7:00 a.m. and 10:00 p.m.*, absent an endorsement by the magistrate for night service. (**Pen. Code § 1533**)

"*Night service*" must be supported by "*good cause*," i.e., some articulable reason why service cannot wait until morning. (See "*Nighttime Searches*," above.)

Note: Although typically, night service becomes an issue when executing a search warrant at a residence, the statute does not limit the necessity for a night service endorsement to residences. When a search warrant specifies a *person*, *vehicle* or any other *container* to be searched, execution of such a warrant at night probably also must be justified in the affidavit and approved by the magistrate.

Executing a search warrant "at night" without authorization, at least if no one is home (i.e., no prejudice being shown), will *not* result in the suppression of any evidence. (***Tidwell v. Superior Court*** (1971) 17 Cal.App.3rd 780, 787.)

> The requirement of "good cause" for nighttime service of a search warrant was essentially a statutory requirement imposed by the Legislature and not a constitutional requirement. (***People v. Glass*** (1976), 56 Cal.App.3rd 368.)
>
> If exclusion of evidence seized in violation of night service is not compelled under federal law, which it appears not to be, then evidence in violation of **P.C. § 1533** should not be excluded if the search is otherwise reasonable in a constitutional sense. (***Rodriguez v. Superior Court*** (1988) 199 Cal.App.3rd 1453.)

Use of a Motorized Battering Ram: The California Supreme Court has determined in a case that has never been overruled that at least where a "motorized battering ram" is used to force entry into a building, prior judicial authorization in the search warrant is necessary. Failure to obtain such authorization is both a violation of the **California Constitution** and the **Fourth Amendment**. (***Langford v. Superior Court*** (1987) 43 Cal.3rd 21.)

> "We conclude therefore that the motorized battering ram may be used in executing searches or arrests only after the LAPD satisfies three preliminary requirements: i.e., it (1) obtains a warrant upon probable cause, (2) receives prior authorization to use the ram from a magistrate, and (3) at the time of entry determines there are exigent circumstances amounting to an immediate threat of injury to officers executing the warrant or reasonable grounds to suspect that evidence is being destroyed." (***Id***., p. 32.)
>
> "The magistrate should decide only whether the motorized battering ram could be used with relative safety against a particular building, if the need arises during execution of a search or arrest warrant." (***Id***., p. 31.)
>
> The same rule would apply to the use of a motorized battering ram in the execution of an arrest warrant. (***Id***., p. 33.)
>
> But such prior judicial authorization is not legally required where the issue is the use of some lesser, less dangerous, force, such as the use of "flashbangs." (***Id***., p. 28.)

In-County Service: A judge can issue a warrant to be served anywhere in the county in which he or she is sitting. (***People v. Smead*** (1985) 175 Cal.App.3rd 1101.)

Out-of-County Service: Search warrants may be issued for, and served, out-of-county so long as it relates to an offense that can be prosecuted in

the issuing magistrate's county. (***People v. Ruster*** (1976) 16 Cal.3rd 690; ***People v. Fleming*** (1981) 29 Cal.3rd 698, 707; ***People v. Easely*** (1983) 34 Cal.3rd 858, 869-870; ***People v. Ruiz*** (1990) 217 Cal.App.3rd 574; see also ***United States v. Artis*** (9th Cir. 2019) 919 F.3rd 1123, 1129, fn. 2, noting that the federal courts have yet to analyze this issue.)

> The issuing magistrate must merely have *probable cause* to believe that the case is triable in his or her county. (***People v. Easely***, *supra*.)
>
> **Pen. Code § 1524(j)** provides statutory authority for a magistrate to issue a search warrant to be executed in a different county where the alleged offense(s) include a violation of **Pen. Code § 530.5** (Identify Theft), and the victim resides in the issuing magistrate's county.
>
> Even though the issuing magistrate is later determined to *not* have jurisdiction over a crime for which he issues a warrant (i.e., it is later discovered that the alleged crime is *not* triable in the magistrate's county), "*good faith*" may save the improperly issued out-of-county warrant. (***People v. Ruiz***, *supra*; ***People v. Galvan*** (1992) 5 Cal.App.4th 866; ***People v. Dantzler*** (1988) 206 Cal.App.3rd 289.)

Out-of-State Crimes: A California judge may issue a search warrant for a location within his or her county to search for evidence located within the county relevant to a crime committed in another state. (***People v. Kraft*** (2000) 23 Cal.4th 978.)

> It is not a legal requirement that law enforcement authorities in the foreign state have requested, or even be aware of, the search warrant. (***Ibid***.)

Knock and Notice:

> *General Rule*: Any time a police officer makes entry into the residence of another *to arrest* (**Pen. Code § 844**), with or without an arrest warrant, or *to serve a search warrant* (**Pen. Code § 1531**), he must first:
>
> - Knock.
> - Identify him- or herself as a police officer.
> - State his or her purpose (e.g., "serving a warrant").
> - Demand Entry.

(***Richards v. Wisconsin*** (1997) 520 U.S. 385, 387–388 [137 L. Ed.2nd 615; 117 S. Ct. 1416]; ***People v. Schad*** (1971) 21 Cal.App.3rd 201, 207; ***People v. Murphy*** (2005) 37 Cal.4th 490, 495.)

Note: **Pen. Code § 844** is not limited to law enforcement officers, imposing these requirements on a *private person* as well, "*if the offense is a felony*."

Knock and notice requirements apply to *entries for* "*investigative purposes*" as well, although not coming within the provisions of **P.C. §§ 844** or **1531**. (***People v. Miller*** (1999) 69 Cal.App.4th 190, 201.)

Knock and notice requirements also apply to entries made for purposes of conducting a **Fourth** Waiver search. (***People v. Constancio*** (1974) 42 Cal.App.3rd 533, 542; ***People v. Lilienthal*** (1978) 22 Cal.3rd 891, 900; ***People v. Mays*** (1998) 67 Cal.App.4th 969, 973, fn. 4; and see ***People v. Murphy*** (2005) 37 Cal.4th 490.)

The federal equivalent, most often referred to as "*knock and announce*," is contained in **18 U.S.C. § 3109**.

***Pen. Code § 1531*:** "The officer may *break open any outer or inner door or window* of a house, or any part of a house or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance."

Purpose: The *primary purpose* of the rule is to *avoid violent confrontations* by giving the occupants the time and opportunity to peaceably open the door and admit the officers. (***People v. Peterson*** (1973) 9 Cal.3rd 717, 723; ***Duke v. Superior Court*** (1969) 1 Cal.3rd 314, 321.) There are other purposes, as well:

"The purposes and policies underlying **section 844** are fourfold: (1) the protection of the privacy of the individual in his home [citations]; (2) the protection of innocent persons who may also be present on the premises where an arrest is made [citation]; (3) the prevention of situations which are conducive to violent confrontations between the occupant and individuals who enter his home without proper notice [citations]; and (4) the protection of police who might be injured by a startled and fearful householder." (***People v. King*** (1971) 5 Cal.3rd 458, 464, fn. 3; ***People v. Murphy*** (2005) 37 Cal.4th 490, 496.)

When compliance does not serve to satisfy the purposes behind the knock and notice requirements, failing to comply with those requirements *may not* be a violation of the Constitution. (***Martin v. City of Oceanside*** (9th Cir. 2004) 360 F.3rd 1078, 1083-1084; noting that: "The prophylactic purpose of the rule is not served where the occupants of the home know that it is the police knocking at the door and simply leave the area and choose not to answer.")

Problem: Does this not also give the occupants an opportunity to destroy evidence, arm themselves, and/or escape? *Yes*! But, the Legislature and the courts, in balancing the interests, have determined that warning the occupants that it is law enforcement that is making entry, and allowing time for the occupants to open the door peaceably, is the safer alternative in most cases. (***Duke v. Superior Court***, *supra*.)

Exceptions:

Businesses: The rule does not apply to the entry of a business that is open to the public. (***People v. Lovett*** (1978) 82 Cal.App.3rd 527, 532.)

Inner doors of a business are also not protected, at least after the owners have been contacted and informed as to what the officers are doing. (***People v. Pompa*** (1989) 212 Cal.App.3rd 1308, 1312.)

An exception might be someone's locked inner office where a higher expectation of privacy is being exhibited. (***People v. Lee*** (1986) 186 Cal.App.3rd 743, 750.)

Inner Doors of a Residence: The majority rule is that the knock and notice rules *do not* apply to *inner doors* of a residence, whether or not the inner door is closed. (***People v. Livermore*** (1973) 30 Cal.App.3rd 1073; ***People v. Howard*** (1993) 18 Cal.App.4th 1544; ***People v. Aguilar*** (1996) 48 Cal.App.4th 632; ***People v. Mays*** (1998) 67 Cal.App.4th 969.)

But see ***People v. Webb*** (1973) 36 Cal.App.3rd 460, expressing the minority opinion that, so long as closed, the rule *does* apply to inner doors.

Refusal: If the occupants do not allow the officers to enter, the police may make a *forcible entry*.

Implied Refusal: "*Refusal*" need not necessarily be *express*. Waiting a reasonable time with no response will justify a forced entry. After a reasonable time, the officers may assume they are being denied entry and make a forcible entry. (***People v. Gallo*** (1981) 127 Cal.App.3rd 828, 838.)

Note that a refused entry is not one of the listed statutory prerequisites under **P.C. § 844**. Therefore, a refusal is not an element necessary to prove compliance with a warrantless entry done for the purpose of affecting an arrest. (***People v. Schmel*** (1975) 54 Cal.App.3rd 46, 50-51.)

In ***Schmel***, however, the officers and the occupants were staring at each other through a screen door. Waiting for a refusal, per the court, would have been fruitless. The purpose of knock and notice had been met when the occupants knew the officers were there and were demanding entry.

Reasonable Time: How long constitutes a "*reasonable time*" to wait until an officer can assume he is being denied entry depends upon the circumstances, (***People v. Trujillo*** (1990) 217 Cal.App.3rd 1219, 1226.), taking into consideration the size of the house, the time of day, any perceived exigencies, etc.

"'How many seconds' wait are too few? Our "reasonable wait time" standard [citation], is necessarily vague.' (Citation.) '[W]hat constituted a "reasonable wait time" in a particular case, [citation] (or, for that matter, how many seconds the police in fact waited), or whether there was "reasonable suspicion" of the sort that would invoke the ***Richards*** exceptions, is difficult for the trial court to determine and even more difficult for an appellate court to review.'" (***People v. Byers*** (2016) 6 Cal.App.5th 856, 863; referencing ***Richards v. Wisconsin*** (1997) 520 U.S. 385, 387–388 [137 L. Ed.2nd 615; 117 S. Ct. 1416].)

> In ***Byers***, it was noted that in a drug possession case, "the proper measure of a reasonable wait time in a drug case is 'how long it would take to dispose of the suspected drugs.'" (***People v. Byers***, *supra,* at p. 867; quoting ***Hudson v. Michigan*** (2006) 547 U.S. 586, 590 [126 S.Ct. 2159; 165 L.Ed.2nd 56].)

Rule of Thumb: For most homes, most courts are satisfied with approximately 30 seconds.

Five seconds is definitely *not* long enough. (***United States v. Granville*** (9th Cir. 2000) 222 F.3rd 1214.)

Fifteen to twenty seconds was not enough to satisfy the statute, under the circumstances of ***People v. Hoag*** (2000) 83 Cal.App.4th 1198, but was not so aggravated as to be a constitutional violation. (See below)

But twenty to thirty seconds was found to be enough when entering a small apartment (800 square feet) in the early evening, knowing three persons were home and having some reason to fear that defendant might be dangerous. (***United States v. Chavez-Miranda*** (9th Cir. 2002) 306 F.3rd 973.)

Most recently, the U.S. Supreme Court upheld a 15 to 20 second wait, noting that the more important factor is the nature of the exigency, as opposed to the size of the residence. Where the officers are concerned with the destruction of a controlled substance, which can be accomplished in a matter of seconds, officers need not wait as long as they might have to under circumstances where physical property is the subject of the search, or the time it takes a person to come to the door is of more concern. (***United States v. Banks*** (2003) 540 U.S. 31 [124 S.Ct. 521; 157 L.Ed.2nd 343].)

> The Court also held that the fact that property must be damaged (e.g., the door) to gain entry does not require a corresponding heightened exigency to justify a forced

entry. (***Id***., at p. 37; citing ***United States v Ramirez*** (1998) 523 U.S. 65, 70-71 [118 S.Ct. 992; 140 L.Ed.2nd 191].)

Officers were found to have waited long enough when 25 to 35 seconds passed before entering the garage, and another 30 second passed before entering the house, in a narcotics-related case, even though the entry was at 7:00 a.m. (***People v. Martinez*** (2005) 132 Cal.App.4th 233, 243-245.)

Exigent Circumstances:

Rule: If the officers hear noises or see movement from inside indicating that suspects are escaping, evidence is being destroyed, or the occupants are arming themselves, or any other circumstance which reasonably indicates to the officers that waiting for an occupant to open the door would be a futile act, will compromise the collection of evidence, or unnecessarily risk the safety of the officers or others, then an immediate forcible entry may be made. (***People v. Maddox*** (1956) 46 Cal.2nd 301, 306; hearing retreating footsteps inside.)

See also ***People v. Tribble*** (1971) 4 Cal.3rd 826, at p. 833: Failing to comply with the "knock and notice" rules is excused, "if the specific facts known to the officer before his entry are sufficient to support his good faith belief that compliance will increase his peril, frustrate the arrest, or permit the destruction of evidence."

Examples:

Exigent circumstances will be found under any one of three types of circumstances: When officers have a "*reasonable suspicion*" that knocking and announcing their presence, under the particular circumstances, it would:

- Be dangerous;
- Futile; *or*
- Inhibit the effective investigation of the crime, such as by allowing the destruction of evidence.

(***United States v. Peterson*** (9th Cir. 2003) 353 F.3rd 1045, 1048; citing ***Richards v. Wisconsin*** (1997) 520 U.S. 385, 394 [117 S.Ct. 1416; 137 L.Ed.2nd 615].)

Hearing retreating footsteps inside. (***People v. Maddox*** (1956) 46 Cal.2nd 301.)

An occupant is heard screaming. (***People v. Hall*** (1971) 3 Cal.3rd 922.)

An occupant opened the door before the officers were prepared to knock, noted the police uniforms, and slammed the door shut. (***United States v. Peterson*** (9th Cir. 2003) 353 F.3rd 1045.)

Occupants see the officers approaching, after which one of the occupants is seen attempting to jump from a window and sounds of a toilet flushing were heard. (***People v. Lopez*** (1969) 269 Cal.App.2nd 461, 469.)

Officers hear a door slamming and rapid footsteps inside. (***People v. Watson*** (1979) 89 Cal.App.3rd 376, 380.)

An officer smelled ether and observed occupants running. (***People v. Stegman*** (1985) 164 Cal.App.3rd 936, 946.)

Officers see one suspect attempting to dispose of narcotics and defendant slammed the door on the officers. (***People v. Newell*** (1969) 272 Cal.App.2nd 638, 644.)

When immediate entry is necessary to check the welfare of an occupant. (***People v. Miller*** (1999) 69 Cal.App.4th 190.)

Case Law:

It need only be shown that the officer had an articulable "*reasonable suspicion*" justifying such an exigent circumstance to excuse compliance with knock and notice. (***Richards v. Wisconsin*** (1997) 520 U.S. 385, 394 [117 S.Ct. 1416; 137 L.Ed.2nd

615].); ***Hudson v. Michigan*** (2006) 547 U.S. 586, 595-596 [126 S.Ct. 2159; 165 L.Ed.2nd 56].)

> However, a "*generalized fear*" that occupants of a residence may be armed, that suspects may be fleeing, or that evidence is being destroyed, absent articulable reasons for so believing, is probably insufficient to justify a finding of "*exigent circumstances*." At the very least, it is *not* sufficient cause to justify the issuance of a "*no-knock*" warrant. (***Richards v. Wisconsin***, *supra*; see "*No-Knock Search Warrants*," below.)

See also ***United States v. Banks*** (2003) 540 U.S. 31, 43 [124 S.Ct. 521; 157 L.Ed.2nd 343, 356]: "But in a case like this, where the officers knocked and announced their presence, and forcibly entered after a *reasonable suspicion* of exigency had ripened, their entry satisfied (**18 U.S.C. § 3109**) as well as the **Fourth Amendment**, even without refusal of admittance." (Italics added)

> California subscribes to the rule in ***Banks***. (***People v. Murphy*** (2005) 37 Cal.4th 490; Officers made entry without complying with knock and notice after "*loudly*" arresting someone outside, causing the officers to believe that the occupants would likely destroy narcotics known to be inside. See also ***People v. Flores*** (1982) 128 Cal.App.3rd 512, 521.)

Although prior knowledge of firearms being in the house, by itself, does not excuse the failure to comply with knock and notice (***United States v. Marts*** (8th Cir. 1993) 986 F.2nd 1216.), "the presence of a firearm coupled with evidence that a suspect is willing and able to use the weapon will often justify non-compliance with the knock and announce requirement." (***United States v. Bynum*** (9th Cir. 2004) 362 F.3rd 574, 581-582; defendant known to answer the door with a pistol in hand, and acted strangely [in the nude] when he did so.)

> Upon seeing an altercation taking place through the kitchen window, and being ignored when announcing their presence at the screen door, the uniformed officers were justified in making an immediate entry where a second announcement was made, quelling the disturbance**.** ***Brigham City v. Stuart*** (2006) 547 U.S. 398 [126 S.Ct. 1943; 164 L.Ed.2nd 650]; it "serv(ing) no purpose to require them to stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence." (At p. 407.)

Doctrine of Substantial Compliance: The courts do not generally require law enforcement officers to perform an idle act. (**Civ. Code § 3532**; "*Maxims of Jurisprudence*")

> "Substantial compliance means '*actual* compliance in respect to the substance essential to every reasonable objective of the statute,' as distinguished from 'mere technical imperfections of form. [Citation.] The essential inquiry is whether under the circumstances the policies underlying the knock-notice requirements were served. [Citation.]" (Italics in original; ***People v. Urziceanu*** (2005) 132 Cal.App.4th 747, 791; citing ***People v Hoag*** (2000) 83 Cal.App.4th 1198, 1208.)
>
> Therefore, it is not necessary to knock or identify one's self if the occupant is standing right there staring at the police uniform. (***People v. Uhler*** (1989) 208 Cal.App.3rd 766, 769-771.)
>
> "Where a criminal offense has just taken place within a room, the occupants may reasonably be expected to know the purpose of a police visit and an express statement may not be necessary. (***People v. Hall*** (1971) 3 Cal.3rd 992, 997; ***People v. Superior Court* [*Quinn*]** (1978) 83 Cal.App.3rd 609; ***People v. Lawrence*** (1972) 25 Cal.App.3rd 213; ***People v. Lee*** (1971) 20 Cal.App.3rd 982.)
>
> It is not necessary to explain why admittance is sought when the officers' intentions are reasonably apparent. (***People v. Hill*** (1974) 12 Cal.3rd 731, 758.)
>
> Knocking and announcing their presence at a door which was partially open, and then entering without demanding entry or stating their purpose, was found to be "*substantial*

compliance" when entry is made to check the welfare of occupants who might need assistance. (***People v. Miller*** (1999) 69 Cal.App.4th 190.)

"Substantial compliance is sometimes found even though officers have failed to state their purpose before entering. . . However, compliance does require, at the very least, that police officers identify themselves *prior* to entry." (***People v. Keogh*** (1975) 46 Cal. App.3rd 919, 927; identifying themselves *while* entering found to be insufficient.)

Failing to physically knock at the door was excused where announcement was made at the front of the house over a public address system for 30 seconds to a minute, and then repeated at the rear door, where entry was made, where a methamphetamine lab was suspected and there were indications that the occupants were in the process of cooking the meth at that time. (***United States v. Combs*** (9th Cir. 2005) 412 F.3rd 1020.)

Upon seeing an altercation taking place through the kitchen window, and being ignored when announcing their presence at the screen door, the uniformed officers were justified in making an immediate entry where a second announcement was made, quelling the disturbance**.** ***Brigham City v. Stuart*** (2006) 547 U.S. 398 [126 S.Ct. 1943; 164 L.Ed.2nd 650]; it "serv(ing) no purpose to require them to stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence." (At p. 407.)

"*No-Knock*" *Search Warrants*: Obtaining judicial authorization in the search warrant itself; justification for ignoring the knock and notice requirements being in the warrant affidavit.

California authority has yet to expressly recognize "*No-Knock Search Warrants*;" i.e., prior judicial authorization in the warrant allowing for an immediate entry without complying with the knock/notice requirements. (See ***Parsley v. Superior Court*** (1973) 9 Cal.3rd 934, 939-949; finding them in violation of the **Fourth Amendment**.)

However, the United States Supreme Court has ruled that no-knock warrants are *not* unconstitutional, and that they may be authorized by a magistrate on a case-by-case basis. (***Richards v. Wisconsin*** (1997) 520 U.S. 385 [117 S.Ct.

1416; 137 L.Ed.2nd 615]; see also ***United States v. Banks*** (2003) 540 U.S. 31, 36 [124 S.Ct. 521; 157 L.Ed.2nd 343].)

> However, *a blanket* no-knock authorization, just because a search warrant is for a specific type of case (e.g., narcotics cases), *is* unconstitutional. (***Richards v. Wisconsin***, *supra*.)

Because ***Parsley*** based its decision on California's interpretation of the **Fourth Amendment**, and because passage of **Proposition 8** in June, 1982, California's "*Truth in Evidence*" initiative, in effect negated California's stricter search and seizure rules, ***Richards*** and ***Banks*** should be interpreted as overruling the rule of ***Parsley***, even though neither case expressly refers to ***Parsley***.

"*No-knock*" *warrants* are justified when police officers have a "*reasonable suspicion*" that knocking and announcing their presence before entering would "be dangerous or futile, or . . . inhibit the effective investigation of the crime." (***Richards v. Wisconsin***, *supra*, at p. 394.)

The fact that property might be damaged or destroyed during the entry does not require a higher degree of exigency in order to justify the no-knock authorization. (***United States v. Ramirez*** (1998) 523 U.S. 65 [118 S.Ct. 992; 140 L.Ed.2nd 191; ***United States v. Banks*** (2003) 540 U.S. 31 [124 S.Ct. 521; 157 L.Ed.2nd 343]; ***United States v. Bynum*** (9th Cir. 2004) 362 F.3rd 574, 580.)

Note: The Ninth Circuit Court of Appeal talks in terms of a "*no-knock warrant*" in a case where the officers had the door slammed in their face at the front porch. (***United States v. Peterson*** (9th Cir. 2003) 353 F.3rd 1045.)

> ***Peterson***, however, is more of an "*exigent circumstance*" situation, which developed at the front door, and did not involve an attempt to get a "*no-knock*" authorization from the magistrate prior to the actual execution of the warrant.

The First Circuit Court of Appeal has held that a "no-knock" search warrant entry will be considered reasonable if the officers "have a reasonable suspicion that knocking and announcing their presence under the circumstances would be dangerous or futile, or that it would inhibit the

effective investigation of the crime by, for example, allowing the destruction of evidence." In ***United States v. Congo*** (1st Cir. 2021) 21 F.4th 29, the Court held that the affidavit to the search warrant contained facts that established the agents had reasonable suspicion to believe that knocking and announcing would be dangerous and could lead to the destruction of evidence. First, the affidavit contained information from two sources who claimed that defendant likely had a gun and had behaved violently, or bragged about doing so, in the past. Second, the agent who drafted the affidavit attested to the fact that, based on his training and experience, it was common for drug dealers to keep weapons in order to protect their drugs or the proceeds of drug sales. Third, when the agents executed the warrant, they did not know the identities of all of the apartment's residents. Therefore, they could not know if these individuals had criminal histories or possessed weapons. Finally, the affidavit established that the bedroom where defendant and his partner stayed was in close proximity to the bathroom, making destruction of evidence a concern.

An early morning raid by A team of forty-three Special Emergency Response Team officers, where the officers broke into the plaintiffs' home (which included two persons in their late 70's and their two adult sons, one of whom was alleged to be engaged in the sale of methamphetamine) without complying with the standard knock and notice requirements. Despite the occupants allegedly being cooperative, their forcible arrests resulted in the long-term injury of the four occupants; two of which required surgery. Following the raid, the family filed a suit in federal court alleging that the police violated their **Fourth Amendment** right to protection from unreasonable search and seizure, specifically with the police use of unnecessary force. Under the **Fourth Amendment**, while police are permitted to use force as necessary, they are also required to show reasonable restraint. Although the trial court granted the defendant officers qualified immunity, the Third Circuit Court of Appeal reversed, holding that that officers are only eligible for qualified immunity if (1) their actions were objectively reasonable and (2) they did not violate a clearly known law or right. In this case, the court opined that the officers did not meet either of these elements. The plaintiffs were not only plainly unarmed, substantially outnumbered, cooperative, and in their own home, and they (except for the one son) were not suspected of any criminal

wrongdoing or facing arrest. Accordingly, any reasonable officer in our case would have known that the officers' force was unlawful under this set of facts. (***Anglemeyer v. Ammons*** (3rd Cir. 2024) 92 F.4th 184.)

Entry by Ruse: One way to avoid the problems inherent in complying with the knock and notice statutes is to use a *ruse* to gain entry. As long as the officer has probable cause justifying an entry beforehand, the use of a ruse is lawful. (***People v. Reeves*** (1964) 61 Cal.2nd 268, 273.)

However, the entry must be supported by "*probable cause*" to be legal. Absent probable cause (and, absent exigent circumstances or a search warrant), it is illegal to use a ruse to make entry, or even to trick the suspect into opening his door, such a trick constituting a violation of the defendant's right to privacy. (***People v. Hudson*** (1964) 225 Cal.App.2nd 554; ***People v. Miller*** (1967) 248 Cal.App.2nd 731; ***United States v. Bosse*** (9th Cir. 1990) 898 F.2nd 113.)

It is equally illegal to trick a suspect out of his home, unless such the ruse is supported by probable cause to believe the suspect is engaged in illegal activity. (***People v. Reyes*** (2000) 83 Cal.App.4th 7.)

Also, officers must remember that either a warrant, or probable cause and exigent circumstances, will likely be required under the rule of ***People v. Ramey*** (1976) 16 Cal.3rd 263, 276; ***Payton v. New York*** (1980) 445 U.S. 573 [100 S.Ct. 1371; 63 L.Ed.2nd 639]. (See above)

When armed with a search warrant, officers may use a ruse to induce the occupants to open the door. This is not a violation of the knock and notice requirements. (***People v. Rudin*** (1978) 77 Cal.App.3rd 139; ***People v. McCarter*** (1981) 117 Cal.App.3rd 894, 906.)

Also, it is not illegal to use an undercover agent during a criminal investigation who makes entry upon the occupant's invitation, despite the lack of probable cause. Such a situation does not involve a need to avoid a violent confrontation. (***Hoffa v. United States*** (1966) 385 U.S. 293 [87 S.Ct. 408; 17 L.Ed.2nd 374].)

The **Fourth Amendment's** protections do not extend to information that a person voluntarily

> exposes to a government agent, including an undercover agent. A defendant generally has no privacy interest in that which he voluntarily reveals to a government agent. Therefore, a government agent may make an audio-video recording of a suspect's statements even in the suspect's own home, and those audio-video recordings, made with the consent of the government agent, do not require a warrant. (***United States v. Wahchumwah*** (9th Cir. 2013) 710 F.3rd 862, 866-868; an investigation involving the illegal sale of eagle feathers under the **Bald and Golden Eagle Protection Act** (**16 U.S.C § 668(a)** and the **Lacey Act (16 U.S.C. §§ 2271(a)(1)** & **3373(d)(1)(B)**,)

In a case out of Washington State, a state patrol officer identified himself as a law enforcement officer and requested a social security benefit applicant's assistance in a fictitious investigation, gaining entry into her home using a ruse. Because he lied to the resident about his real purpose of his entry into her residence—to conduct a civil investigation of her possible social security fraud—her consent to the officer's entry into her home was vitiated by his deception. By observing and videotaping the resident inside her home without her consent, the officer conducted a "search" within the meaning of the **Fourth Amendment**. However, even though the warrantless ruse-entry into the resident's home was an unreasonable search, it was not clearly established that the officer's conduct, in the context of a civil or administrative investigation related to a determination of benefits eligibility, was a search or was unreasonable. The officer, therefore, was entitled to qualified immunity. (***Whalen v. McMullen*** (9th Cir. 2018) 907 F.3rd 1139.)

Also note that the use of a ruse to trick defendant into coming to his home and bringing his car so that FBI agents could search the car and question defendant under authority of a search warrant for defendant's residence and vehicle was held to be in violation of the **Fourth Amendment** by the Ninth Circuit Court of Appeal in ***United States v. Ramirez*** (9th Cir. 2020) 976 F.3rd 946, 951-959, in a split, 2-to-1 decision.

> As noted by the majority at pg. 955: "(T)he ruse used here was not a permissible means to effect the

> search and seizure of Ramirez. The FBI agents posed as police officers and played on Ramirez's trust and reliance on their story that his home had been burglarized to bring Ramirez and his car within the ambit of the warrant, when they were not otherwise within its ambit. The FBI had no acceptable government interest in using this ruse. Thus, balancing the strong **Fourth Amendment** interest against the non-existent government interest, the FBI's conduct was plainly unreasonable under the **Fourth Amendment**."

Standing: *An Absent Tenant*: If the subject to be arrested, or the owner of a home which is to be searched, is not home at the time of the execution of the entry, whether or not he or she has "*standing*" to contest a failure to comply with the **P.C. §§ 844** or **1531** knock and notice requirements is subject to a split of opinion. (See ***Hart v. Superior Court*** (1971) 21 Cal.App.3rd 496, 500-504.)

> In discussing the knock and notice requirements pursuant to **Pen. Code § 1531** (serving a search warrant), it has been determined by at least one appellate court that the defendant did not need to be home to assert *standing* to challenge a knock and notice violation, in that defendant still had a privacy interest in his residence, and an interest in protecting his fiancée who was home at the time. (***People v. Hoag*** (2000) 83 Cal.App.4th 1198.)
>
> ***Hart v. Superior Court***, *supra*, at pp. 500-504, and federal authority (***United States v Silva*** (9th Cir. 2001) 247 F.3rd 1051, 1058-1059.), are all to the contrary.
>
> *However*, entering the house to arrest a subject without *probable cause* (or "*reasonable grounds*," see below) to believe the suspect is even home is a **Fourth Amendment** violation in itself. (***Hart v. Superior Court***, *supra*, at p. 502; "**Section 844** by its own terms provides that the entry can only be made if the person to be arrested is actually present or if the arrestor has reasonable grounds to believe he is present." See also ***People v. Jacobs*** (1987) 43 Cal.3rd 472, 478-479; and ***United States v. Gorman*** (2002) 314 F.3rd 1105; interpreting "*reasonable grounds*" or "*a reason to believe*" to be the equivalent of "*probable cause*." But also see ***People v. Downey*** (2011) 198 Cal.App.4th 652, 657-662, finding that less than probable cause is required.

Sanctions for Violations: When executing an otherwise lawfully issued search warrant on a residence, a knock and notice violation, even if a violation of state and federal statutes and the **Fourth Amendment** (see below), does not necessarily trigger the Exclusionary Rule. (***Hudson v. Michigan*** (2006) 547 U.S. 586 [126 S.Ct. 2159; 165 L.Ed.2nd 56]; ***People v. Byers*** (2016) 6 Cal.App.5th 856, 862-864.)

> "In part, this is because the exclusionary rule and the knock-notice requirement serve different purposes. The exclusionary rule protects against unlawful warrantless searches. (Citation.) The knock-notice requirement, in contrast, seeks to prevent violence (due to an inhabitant being taken by surprise), property destruction (e.g., of a door), and loss of an occupant's privacy and dignity (caused by an outsider's sudden entry)." (***Id.***, at pp. 863-864; noting that the failure to comply with California's knock and notice requirements is but "one factor" to consider in determining whether an entry into a residence was reasonable. Pg. 863.)
>
> Per ***Hudson***, the suppression of evidence is only necessary where the interests protected by the constitutional guarantee that has been violated would be served by suppressing the evidence thus obtained. The interests protected by the knock and notice rules include human life, because "an unannounced entry may provoke violence in supposed self-defense by the surprised resident." Property rights are also protected by providing residents an opportunity to prevent a forcible entry. And, "privacy and dignity" are protected by giving the occupants an opportunity to collect themselves before answering the door. (***Ibid***.)
>
> The Court also ruled in ***Hudson*** that because civil suits are more readily available than in 1914 when the exclusionary rule was first announced, and because law enforcement officers, being better educated, trained and supervised, can be subjected to departmental discipline, suppressing the product of a knock and notice violation is no longer a necessary remedy. (***Ibid***.)
>
> The fact that a "no-knock" warrant could have been obtained does not require a different finding. Also, the use of a battering ram on the door, rubber bullets to knock out windows, and "flash bang" devices (one of which seriously

injured defendant) to distract the occupants, even though possibly unreasonable under the circumstances, but where there is no "causal nexus" between the entry and the recovery of evidence in the home, does not require suppression of the evidence. (***United States v. Ankeny*** (9th Cir. 2007) 502 F.3rd 829, 835-838; a one to 1½-second delay between knocking and entering.)

> Note, however, that the use of a motorized battering ram may require a search warrant authorizing such use. (See ***Langford v. Superior Court*** (1987) 43 Cal.3rd 21.)

The rule as dictated by ***Hudson*** (a search warrant case) is applicable as well as in a warrantless, yet lawful, arrest case, pursuant to **P.C. § 844**. (***In re Frank S.*** (2006) 142 Cal.App.4th 145.)

Hudson is not to be interpreted to mean that the Exclusionary Rule is to be scrapped. Intentionally unlawful law enforcement actions will still be subject to the Exclusionary Rule where necessary to discourage future illegal police activities. (***People v. Rodriguez*** (2006) 143 Cal.App.4th 1137; case remanded for a determination whether police fabricated probable cause for a traffic stop, which led to the discovery of an outstanding arrest warrant, the search incident thereto resulting in recovery of controlled substances.)

See ***United States v. Weaver*** (D.C. Cir. 2015) 808 F.3rd 26, where the D.C. Court of Appeal rejected the applicability of ***Hudson v. Michigan***, *supra*, in an arrest warrant service situation, and held that federal agents violated the knock-and-announce rule by failing to announce their purpose before entering defendant's apartment. By knocking but failing to announce their purpose, the agents gave defendant no opportunity to protect the privacy of his home. The exclusionary rule was the appropriate remedy for knock-and-announce violations in the execution of arrest warrants at a person's home.

The Ninth Circuit Court of Appeal invented a so-called "*provocation rule*," holding that even when it is held that reasonable force is used by law enforcement, the officers using that force may still be civilly liable if they provoked the need to use force by violating some other constitutional

principle, at least when that earlier violation was done intentionally or recklessly. (***Billington v. Smith*** (9th Cir. 2001) 292 F.3rd 1177.) "The Ninth Circuit's provocation rule permits an excessive force claim under the **Fourth Amendment** "where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent **Fourth Amendment** violation." (***County of Los Angeles v. Mendez*** (2017) 582 U.S. 420, 426-427 [137 S.Ct. 1539; 198 L.Ed.2nd 52]; citing ***Billington***, at p. 1189, and overruling the Ninth Circuit on this issue where the lower court used this rule in ***Mendez v. County of Los Angeles*** (9th Cir. 2016) 815 F.3rd 1178; a knock and notice violation.)

On remand, the Ninth Circuit Court of Appeals affirmed in part and reversed in part the district court's judgment in an action under **42 U.S.C. § 1983** and state law because sheriff's deputies violated the **Fourth Amendment** by entering a home without a warrant, consent, or exigent circumstances while searching for a parole-at-large. The unlawful entry itself was the proximate cause of the homeowners being shot by the officers. The homeowner's action of moving a BB gun so that it was pointed in the officers' direction was held *not* to be a superseding or intervening cause. The officers were held to be negligent as their conduct in entering the residence on high alert, with guns drawn, and without announcing their presence, was reckless. They were not entitled to qualified immunity for their failure to knock and announce under California law. Lastly, immunity under **California Government Code §§ 821.6** and **820.2** did not apply. (***Mendez v. County of Los Angeles*** (9th Cir. 2018) 897 F.3rd 1067, 1074-1984.)

> On the issue of "*knock and announce*," the Court held that "the officers' failure to knock and announce is an especially dangerous omission. Under California (negligence) law, the officers here are not entitled to qualified immunity for that lapse. (Citations omitted) Under California (negligence) law, unlike under **42 U.S.C. § 1983**, the failure to knock and announce can be a basis of liability. The officers knew or should have known about the Mendezes' presence. Yet they decided to proceed without taking even simple and available precautions, including announcing their presence,

which could have protected the Mendezes from the severe harm that befell them." (***Id***., at p. 1083.)

However, it has been held that "a person in common ownership or control . . . who is not within the premises cannot give such consent to enter and search the premises as to excuse the police from complying with the (knock and notice) requirements . . . ." (Duke v. Superior Court (1969) 1 Cal.3rd 314, 322; see also ***People v. Byers*** (2016) 6 Cal.App.5th 856, 862.)

Not Necessarily a ***Fourth Amendment*** *Violation*: And in any case, a knock and notice violation, violating the terms of **P.C. § 844** and/or **P.C. § 1531**, does not necessarily also violate the **Fourth Amendment**. (***Wilson v. Arkansas*** (1995) 514 U.S. 927 [115 S.Ct. 1914; 131 L.Ed.2nd 976]; ***People v. Zabelle*** (1996) 50 Cal.App.4th 1282.)

Note: Where the line is between a constitutional knock and notice violation and a simple statutory knock and notice violation has not yet been specifically determined by either any California or United States Supreme Court decisions, and must await future cases for clarification. However, it has been held that the failure to comply with the statutory knock and notice requirements is one factor to consider when determining whether the entry into a residence was reasonable. (***People v. Byers*** (2016) 6 Cal.App.5th 856, 863; citing ***United States v. Banks*** (2003) 540 U.S. 31 [157 L. Ed.2nd 343; 124 S. Ct. 521].)

It is helpful to look for circumstances relevant to the purposes of the knock and notice requirements, such as the lessening of the likelihood of a violent confrontation. For instance: "Here, the potential for violence and peril to the officers would have been *increased* had the officers announced their presence at the door. The officers could not see defendant's hands and whether he might have a weapon or syringe that could be used against them. Officer Norvall limited the potential for violence by entering to a place where he could put his hands on defendant before waking him." (***People v. Zabelle***, *supra*, at p. 1287, where the officer's unannounced entry was made upon seeing the defendant asleep.)

And note ***People v. Hoag*** (2000) 83 Cal.App.4th 1198, where it was held that a 15-to-20 second wait was not

enough to satisfy the statute, but that it was only a "*technical violation*," not implicating the Constitution or requiring the suppression of any evidence.

However, failure to "knock and announce" an officer's intent to enter has, under more violent circumstances, been held to be a **Fourth Amendment** violation, although given the circumstances of this case (entering a shack behind the main residence) on which there is no definitive prior authority, the officers were entitled to qualified immunity. (***Mendez v. County of Los Angeles*** (9th Cir. 2018) 897 F.3rd 1067, 1077-1079.)

> The federal statutory "*knock and announce*" requirements, pursuant to **18 U.S.C. § 3109**, have been held to be judged by the same standards as is an alleged **Fourth Amendment** violation for entering without a proper announcement. (***United States v Bynum*** (9th Cir. 2004) 362 F.3rd 574, 579.)

A warrantless entry into defendant's apartment was justified under the **Fourth Amendment** when officers received the voluntary consent of defendant's housemate. The consent was not coerced even though the housemate was handcuffed and in custody outside the apartment. The officer credibly testified that the housemate admitted to having drugs and a gun in his bedroom and that no threats or promises were made to obtain consent to search his bedroom to retrieve these items. The trial court abused its discretion by excluding evidence on whether the officers waited long enough to comply with the knock-notice requirement when they entered the apartment, but the error was harmless because exclusion of evidence, the only relief requested, was not the proper remedy. (***People v. Byers*** (2016) 6 Cal.App.5th 856, 862-865; noting that "(w)hen the police obtain consent from a co-occupant who is off the premises, they must comply with the knock-and-announce rule." ***Id***., at pp. 862, 866.)

> "*However*, "when a search is conducted pursuant to an absent co-tenant's consent, the purposes of the knock-notice requirement (Citation.) do not include preventing law enforcement from seeing or seizing evidence pursuant to the consent exception," finding the failure to comply with knock and notice to be harmless error. (***Id***., at p. 864.)

Seizing Items not Listed in the Warrant: Those items listed in the warrant may be seized, along with any other items *reasonably identified as contraband or evidence of a crime*, observed in plain sight during the search. (***Skelton v. Superior Court*** (1969) 1 Cal.3rd 144, 157.)

> *Plain View Doctrine*: "Where an officer has a valid warrant to search for one item but merely a suspicion, not amounting to probable cause, concerning a second item, that second item is not immunized from seizure if found during a lawful search for the first item." (***People v. Bradford*** (1997) 15 Cal.4th 1229, 1294; citing ***Horton v. California*** (1990) 496 U.S. 128, 138-139 [110 S.Ct. 2301; 110 L.Ed.2nd 112, 124].), and noting that prior Supreme Court cases required "*probable cause*" to believe that the "second item" constitutes evidence of a crime. (***People v. Bradford***, *supra*, at p. 1290.)
>
> > Seizing the "second item" is based upon an application of the "*plain view doctrine*," allowing for seizure of items observed in plain sight from a position the discovering officer has a legal right to be. However; "(t)he officers lawfully must be in a position from which they can view a particular area; it must be immediately apparent to them that the items they are observing may be evidence of a crime, contraband, or otherwise subject to lawful seizure, and the officers must have a lawful right of access to the object. (Citation)" (***People v. Bradford***, *supra*, at p. 1295.)
> >
> > Items observed during the lawful execution of a search warrant which are identifiable as contraband or evidence of another crime are subject to seizure despite not being listed in the warrant itself. (***People v. Gallegos*** (2002) 96 Cal.App.4th 612.)
> >
> > "Items in plain view, but not described in the warrant, may be seized when their incriminating character is immediately apparent. [Citation.] The incriminating character of evidence in plain view is not immediately apparent if 'some further search of the object' is required." (***People v. Lenart*** (2004) 32 Cal.4th 1107, 119; citing ***Minnesota v. Dickerson*** (1993) 508 U.S. 366, 375 [113 S.Ct. 2130; 124 L.Ed.2nd 334]; see also ***United States v. Arredondo*** (8th Cir. 2021) 996 F.3rd 903, where a deputy sheriff believed that the vials laying on the couch "seem[ed] a little odd," the Court holding that something seeming "a little odd" is usually a hunch and not probable cause.)

As evidence of "*dominion and control*" over a residence, the seizure of a computer not specifically listed in the warrant should be upheld. (***People v. Varghese*** (2008) 162 Cal.App.4th 1084, 1100-1103; ***People v. Balint*** (2006) 138 Cal.App.4th 200.)

A capital murder defendant did not show that blanket suppression was warranted under the **Fourth Amendment** because the warrants, obtained in the context of a complex, rapidly evolving investigation, authorized particularized but broad seizures, and a detective testified that officers made a conscientious effort to seize only those items of evidence that were either listed or as for which there was probable cause. There was substantial evidence that items not specifically described in the warrant were in plain view. (***People v. Helzer*** (2024) 15 Cal.5th 622, 645-653.)

When a Second Warrant is Needed:

When evidence of *a different crime* is discovered during a lawful warrant search, the better procedure is to fall back and obtain a second search warrant for the new offense, thus specifically allowing for the search for more evidence related to the newly discovered crime (see ***People v. Carrington*** (2009) 47 Cal.4th 145, 160, 164-168.) and eliminating some difficult legal issues later in the inevitable suppression hearings. (See ***People v. Albritton*** (1982) 138 Cal.App.3rd 79.)

In ***People v. Carrington***, *supra,* officers from agency #2 accompanied officers from agency #1 who were executing a lawful search warrant in their own case. The officers from agency #2 were there for the purpose of making "plain sight" observations of evidence related to their agency's own investigation. Upon making such observations, this information was used to obtain a second warrant directed specifically at agency #2's investigation. This procedure was approved by the California Supreme Court.

"Even assuming the officers (from the agency #2) . . . hoped to find evidence of other offenses, their subjective state of mind would not render their conduct unlawful. . . . The existence of an ulterior

motivation does not invalidate an officer's legal justification to conduct a search." (***Id***., at p. 168; citing ***Whren v. United States*** (1996) 517 U.S. 806 [116 S.Ct. 1769; 135 L.Ed.2nd 89].)

This case (i.e., ***Carrington***), citing ***Whren v. United States*** for the proposition that an officer's "*subjective motivations*" are irrelevant, looking only at whether the officers, from an "*objective*" standpoint, were lawfully acting, in effect overrules ***People v. Albritton***, *supra*. ***Albritton*** stood for the theory that it is illegal to use one warrant to look for evidence related to a different crime, even if such evidence is found in plain sight.

Searching a computer for drug related documents, and discovering child pornography, *does not* authorize the officer to begin searching for more child pornography without first obtaining a second search warrant for the pornography. (***United States v. Carey*** (10th Cir. 1999) 172 F.3rd 1268, 1273; ***United States v. Giberson*** (9th Cir. 2008) 527 F.3rd 882, 890.)

And see ***United States v. Payton*** (9th Cir. 2009) 573 F.3rd 859, 861-864, where it was held that failure to include the magistrate's authorization to search defendant's computer, even though in the statement of probable cause the affiant indicated a desire to search any possible computers found in defendant's house, was a fatal omission. Searching defendant's computer, therefore, went beyond the scope of the warrant's authorization.

The fact that the issuing magistrate testified to an intent to allow for the search of defendant's computers, and that the warrant included authorization to search for certain listed records which might be found in a computer, was held to be irrelevant. (***Id***. at pp. 862-863.)

Problem of Overbreadth: "The **Fourth Amendment** requires that a warrant particularly describe both the place to be searched and the person or things to be seized. . . . The description must be specific enough to enable the person conducting the search reasonably to identify the things authorized to be seized. The purpose of the breadth requirement is to limit the scope of the warrant by the probable cause on which the warrant is based. . . ."

(***United States v. Fries*** (9th Cir. 2015) 781 F.3rd 1137, 1151; quoting ***United States v. Smith*** (9th Cir. 2005) 424 F.3rd 992, 1004.)

The wholesale seizure of more records (a "few dozen boxes") than was authorized by the search warrant, so long as not used, should not result in suppression of the records that were authorized by the warrant. (***United States v. Tamura*** (9th Cir. 1982) 694 F.2nd 591.)

So how does the Ninth Circuit suggest that such a situation be handled? At pp. 595-596, and fn. 3: "In the comparatively rare instances where documents are so intermingled that they cannot feasibly be sorted on site, we suggest that the Government and law enforcement officials generally can avoid violating **fourth amendment** rights by sealing and holding the documents pending approval by a magistrate of a further search, in accordance with the procedures set forth in the **American Law Institute's Model Code of Pre-Arraignment Procedure** (**Section SS 220.5**). If the need for transporting the documents is known to the officers prior to the search, they may apply for specific authorization for large-scale removal of material, which should be granted by the magistrate issuing the warrant only where on-site sorting is infeasible and no other practical alternative exists. (Citation) The essential safeguard required is that wholesale removal must be monitored by the judgment of a neutral, detached magistrate (fn. omitted)."

The Ninth Circuit expanded upon the ***Tamura*** decision in ***United States v. Comprehensive Drug Testing, Inc.*** (9th Cir. 2010) 621 F.3rd 1162, at pp. 1178-1180, where, in a non-binding concurring opinion, it was suggested that magistrates require as a condition of issuing a search warrant in such cases (i.e., where large amounts of documents or data are subject to being collected that may go beyond the probable cause authority of the warrant) that a "*search protocol*" be provided for in the affidavit that includes the following requirements:

1. Magistrate judges should insist that the government waive reliance upon the plain view doctrine in digital evidence cases.

2. Segregation and redaction of electronic data must be done either by specialized personnel or an independent third party. If the segregation is to be done by government computer personnel, the government must agree in the warrant application that the computer personnel will not disclose to the investigators any information other than that which is the target of the warrant.

3. Warrants and subpoenas must disclose the actual risks of destruction of information as well as prior efforts to seize that information in other judicial fora.

4. The government's search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents.

5. The government must destroy or, if the recipient may lawfully possess it, return non-responsive data, keeping the issuing magistrate informed about when it has done so and what it has kept.

Note: The ***Comprehensive Drug Testing, Inc.*** protocol is "*advisory only*," and not always necessary for upholding a search warrant for computerized data. (***United States v. Schesso*** (9th Cir. 2013) 730 F.3rd 1040, 1047-1050; where the warrant was property executed, and nothing for which there was not probable cause was seized.)

> It was pointed out that such a protocol is not a constitutional requirement, although "heeding this guidance will significantly increase the likelihood that the searches and seizures of electronic storage that they authorize will be deemed reasonable and lawful." (***Id***., at p. 1049.)

Also, the Ninth Circuit has disallowed the use of an affidavit and other attachments to expand upon the list of items to be searched for and seized as shown on the warrant itself, even though the attachments were properly

incorporated into the warrant. (***United States v. Sedaghaty*** (9th Cir. 2013) 728 F.3rd 885, 910-915.)

> It was noted by the Court in discussing the "curative effect" that an affidavit may have on a defective warrant, that it is error to use a "broad ranging" probable cause affidavit to serve to expand the express limitations imposed by a magistrate in issuing the warrant itself. (***Id.***, at pp 913-914.)

The Ninth Circuit Court of Appeals recognizes three factors relevant in analyzing the breadth of a warrant:

> (1) Whether probable cause existed to seize all items of a category described in the warrant;
>
> (2) Whether the warrant set forth objective standards by which executing officers could differentiate items subject to seizure from those which were not; *and*
>
> (3) Whether the government could have described the items more particularly in light of the information available.
>
> (***United States v. Flores*** (9th Cir. 2015) 802 F.3rd 1028, 1042-1046.); citing ***United States v. Lei Shi*** (9th Cir. 2008) 525 F.3rd 709, 731-732, where the seizure of 11,000 pages, covering five to six years of defendant's Facebook account, was excused when only two sets of Facebook information were used at trial, both from the same day as defendant's crimes.
>
> It was also noted in ***United States v. Flores*** that the warrant allowed the government to search only the Facebook account associated with defendant's name and email address, and authorized the government to seize only evidence of violations of **18 U.S.C. § 371** (Conspiracy) and **21 U.S.C. §§ 952** and **960** (Importation of a Controlled Substance). The warrant also established "*Procedures For Electronically Stored Information*," providing executing officers with sufficient "objective standards" for segregating responsive material from

> the rest of Flores's account, helping to minimize the overbreadth issue. (***Id***., at pp. 1044-1047.)
>
> The Ninth Circuit in ***Flores*** also employed the "*doctrine of severance*," which allows the reviewing court to strike from a warrant those portions that are invalid and preserve those portions that satisfy the **Fourth Amendment**. (***United States v. Flores***, *supra*, at pp. 1042-1046.)

Even though the search warrant did not specifically mention cellphones as items to be seized, the Eighth Circuit Court of Appeal held that cellphones were within the class of "*instrumentalities of criminal activity*" the warrant specifically described. As a result, the court held that officers lawfully seized defendant's cellphones. Also, the court held that the search of defendant's car was lawful even though not specifically listed in the warrant because the car was located in the driveway and the warrant authorized the officers to search "*the premises and curtilage area*." The court found that this allowed the officers to either search the vehicle parked in the curtilage, or to have a drug dog sniff the vehicle's exterior to confirm there was probable cause to search the vehicle for drugs. (***United States v. Coleman*** (8th Cir. AR 2018) 909 F.3rd 925.)

Inclusion in a warrant a request allowing agents "*to search and seize all digital devices at the Subject Premises*," and "*to compel 'any individual, who is found at the Subject Premises and reasonably believed by law enforcement to be a user of (a seized) device, to unlock the device using biometric features . . . .*'" was held to be overbroad in an investigation of just two individuals suspected of being involved in an extortion scheme. (***In re Search of a Residence in Oakland*** (N.D. Cal. 2019) 354 F.Supp.3rd 1010.)

"*Breadth*" deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based. (***United States v. SDI Future Health, Inc.*** (9th Cir. 2009) 568 F.3rd 684, 702. See also ***People v. Meza*** (2023) 90 Cal.App.5th 520, 539-543 [2023 Cal.App. LEXIS 282], dealing with the issue of a "geofence" search warrant, citing ***In re Grand Jury Subpoenas Dated Dec. 10, 1987*** (9th Cir. 1991) 926 F.2nd 847, 856-857.)

"This is distinct from the particularity requirement because it 'prevents the magistrate from making a mistaken authorization to search for particular objects in the first instance, no matter how well the objects are described.' (***United States v. Weber*** (9th Cir. 1990) 923 F.2nd 1338, 1342 [although rules regarding particularity and overbreadth 'serve the same ultimate purpose, they achieve the purpose in distinct ways']; see also ***United States v. Purcell*** (2nd Cir. 2020) 967 F.3rd 159, 179 ['A warrant that comports with the particularity requirements may, however, be defective due to overbreadth. "[B]readth and particularity are related but distinct concepts""].)" (***People v. Meza***, *supra*, at pp. 535-536.)

Pen. Code § 1542.5: *Seizure of a Restrained Person's Firearms During the Execution of a Search Warrant*: Notwithstanding any other law, with regards to a search warrant issued upon the grounds specified in **paragraph (14) of subdivision (a)** of **Section 1524**, the following shall apply:

Subd. (a) The law enforcement officer executing the warrant shall take custody of any firearm or ammunition that is in the restrained person's custody or control or possession or that is owned by the restrained person, which is discovered pursuant to a consensual or other lawful search.

Subd. (b)

(1) If the location to be searched during the execution of the warrant is jointly occupied by the restrained person and one or more other persons and a law enforcement officer executing the warrant finds a firearm or ammunition in the restrained person's custody or control or possession, but that is owned by a person other than the restrained person, the firearm or ammunition shall not be seized if both of the following conditions are satisfied:

(A) The firearm or ammunition is removed from the restrained person's custody or control or possession and stored in a manner that the restrained person does not have access to or control of the firearm or ammunition.

(B) There is no evidence of unlawful possession of the firearm or ammunition by the owner of the firearm or ammunition.

(2) If the location to be searched during the execution of the warrant is jointly occupied by the restrained person and one or more other persons and a locked gun safe is located that is owned by a person other than the restrained person, the contents of the gun safe shall not be searched except in the owner's presence, and with his or her consent or with a valid search warrant for the gun safe.

Note: This section relates to persons subject to a "*gun violence restraining order*," per **P.C. §§ 18100 et seq**.

Answering the Telephone: In some cases (e.g., bookmaking, narcotics, etc.), answering the suspect's telephone during service of the warrant may lead to valuable corroborative evidence. (***People v. Warner*** (1969) 270 Cal.App.2nd 900, 907; ***People v. Sandoval*** (1966) 65 Cal.2nd 303, 308; ***People v. Nealy*** (1991) 228 Cal.App.3rd 447, 452.)

A standard paragraph in the affidavit justifying the expectation of receiving incriminating evidence from callers, and inclusion in the warrant authorization to answer the phone, is advisable, although failure to do so should not preclude answering the phone. (See ***People v. Vanvalkenburgh*** (1983) 145 Cal.App.3rd 163, 167.)

Note: Justification for answering the telephone during execution of a warrant may also be premised upon the need to corroborate the occupant's possessory interest over the place being searched, as a form of oral "*dominion and control*" evidence.

The contents of a telephone call to a narcotics dealer's home asking to buy narcotics, answered by the police executing a search warrant, are admissible as a judicially created exception to the **Hearsay Rule**. (***People v. Morgan et al.*** (2005) 125 Cal.App.4th 935.)

The ***Morgan*** Court further determined that the telephone call was "*non-testimonial*," as described in ***Crawford v. Washington*** (2004) 541 U.S. 36 [124 S.Ct. 1354; 158 L.Ed.2nd 177], and thus admissible over a **Sixth Amendment**, "*right to confrontation*" objection. (***People v. Morgan et al***, *supra*, at pp. 946-947.)

Other courts have held that the contents of a telephone call are admissible as non-hearsay circumstantial evidence of the defendants' dope dealing. (***People v. Nealy*** (1991) 228 Cal.App.3rd 447; and ***People v. Ventura*** (1991) 1 Cal.App.4th 1515.)

Answering incoming calls did not exceed the scope of the relevant search warrant. (***United States v. Ordonez*** (9th Cir. 1984) 737 F.2nd 793, 810 (amended opinion), and ***United States v. Gallo*** (9th Cir. 1981) 659 F.2nd 110.)

Searching pursuant to the suspect's *consent*, unless specifically included in the consent, does *not* give the searching officers the right to answer the telephone. (***People v. Harwood*** (1977) 74 Cal.App.3rd 460, 465.)

But, with probable cause to believe that a robbery suspect might be calling, and the exigent circumstance of not being able to obtain a search warrant without losing the opportunity to receive the expected call from the suspect, thus compromising the officers' ability to quickly locate and apprehend him, answering the telephone without permission was held to be lawful. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 704.)

Detentions in a Residence During the Execution of a Search Warrant:

The occupants of a residence may be detained during the execution of a search warrant even though they did not match the description of the suspects (e.g., Caucasian instead of African-American) believed to be living there at the time. (***Los Angeles County v. Rettele*** (2007) 550 U.S. 609 [127 S.Ct. 1989; 167 L.Ed.2nd 974]; the court noting that until the rest of the house is checked for the suspects, other occupants may be detained.)

See "*Detention of Residents* (*or Non-Resident*) *During the Execution of a Search Warrant*," under "*Detentions*" (Chapter 4), above.

Time Limitations: The warrant must be served and returned within *ten* (10) *calendar days* of issuance or it is deemed to be "void." A warrant which is executed within the ten-day period shall be deemed to have been timely executed and no further showing of timeliness need be made. (**Pen. Code § 1534(a)**)

However, at least where the execution of the warrant is begun within the statutory time period, and absent any showing of bad

faith, failure to complete the execution of the warrant within the 10-day period is not a constitutional violation and will not result in the suppression of any evidence. (***People v. Superior Court* [*Nasmeh*]** (2007) 151 Cal.App.4th 85, 98-100; citing ***United States v. Gerber*** (11th Cir.1993) 994 F.2nd 1556, 1560.)

> However, the Court in ***Nasmeh*** specifically declined to discuss the implications of violating **P.C. § 1534** in that defendant had failed to raise the issue at the trial court level. (fn. 5.)

The day the warrant is signed by the magistrate is "*day zero*," with "*day one*" being the next day. Saturday, Sunday and holidays are *included* in the calculation. (***People v. Clayton*** (1993) 18 Cal.App.4th 440, 444-445.)

After service of the warrant, the officer "*must forthwith*" return the executed warrant to the magistrate with the "*receipt and inventory*" (referred to as the "*return*" by some jurisdictions). (**Pen. Code § 1537**)

> "The officer must forthwith return the warrant to the magistrate, and deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken, and of the applicant for the warrant, if they are present, verified by the affidavit of the officer at the foot of the inventory, and taken before the magistrate at the time, to the following effect: 'I, R. S., the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant.'"

Even if **Pen. Code § 1537** is violated by a return after the 10-day period, this defect does not require suppression of the evidence unless the defendant can show that he was prejudiced by the delay. (***People v. Couch*** (1979) 97 Cal.App.3rd 377; ***People v. Kirk*** (1979) 99 Cal.App.3rd 89, 94; ***People v. Head*** (1994) 30 Cal.App.4th 954; delay of one year!)

> A violation of ***Federal Rules of Criminal Procedure,* Rule 41's** provisions for filing of the return of inventory, by failing to file the return for two years, did not require the suppression of evidence in that the delayed filing was inadvertence rather than a deliberate or intentional

disregard of the rules. (***United States v. Beckmann*** (8th Cir. 2015) 786 F.3rd 672.)

See "Under **Rule 41** of the **Federal Rules of Criminal Procedure**," below.

Denying a motion to unseal search warrant affidavits under **Pen. Code § 1534(a)** was not an abuse of discretion because the trial court reasonably found the affidavits either contained official information under **Evid. Code § 1040(b)(2)**, or had to remain sealed to protect a confidential informant's identity under **Evid. Code § 1041**, and properly balanced those interests against the right of access to court records. **Cal. Rules of Court**, **rules 2.550, 2.551**, did not require unsealing because the affidavits were kept confidential by law. A **First Amendment** claim failed under a history and utility test because search warrant materials were not historically open to the public, nor would their disclosure benefit the public. **Cal. Const., art. I, §§ 2, 3, subd. (b)** did not mandate access because exceptions to disclosure applied. (***Electronic Frontier Foundation, Inc. v. Superior Court* (*San Bernardino County District Attorney's Office*)** (2022) 83 Cal.App.5th 407.)

The "*return package*" consists of the following:

- The original warrant.
- The original affidavit.
- An inventory (or "*return*" form) of all the items seized, upon which the officer who executed the warrant swears that the inventory is a true list of everything seized during the execution of the warrant, including items seized but which were not listed in the warrant.

Disposition of Seized Property:

The physical evidence seized is to be retained (i.e., "*impounded*") by the officer pending use of the evidence in court or other court ordered disposition. (**P.C. § 1536**)

Under **Rule 41** of the **Federal Rules of Criminal Procedure**, the execution period specified in a search warrant applies to the time the government has to seize a digital device or to conduct on-site copying of information from the device. This deadline does not apply to the time required to analyze and investigate the contents

of the device off-site. Under **Rule 41**, the Sixth Circuit Court of Appeal held that where a warrant for the contents of defendant's cellphone set an execution deadline of November 27, that that represented the date by which the government had to seize the physical cellphone itself. Consequently, the court held that execution of the warrant occurred on November 9, 2015, when defendant's cellphone was removed from the evidence vault and shipped to the data extraction laboratory, which occurred before the deadline of November 27 as specified in the warrant. The fact that the information in the cellphone was not extracted until December 21st is irrelevant. (***United States v. Cleveland*** (6th Cir. OH 2018) 907 F.3rd 423.)

Digital Evidence Obtained by Search Warrant and Sought to be used in a Separate Unrelated Prosecution:

Digital evidence seized by local state authority during the execution of a state-issued search warrant from defendant's cellphone, but not necessary to the prosecution of the state case, cannot be turned over to a federal agency for use in a separate federal prosecution absent a second search warrant seeking the evidence related to the pending federal charges. Citing ***Riley v. California*** (2014) 573 U.S. 373, 403 [134 S.Ct. 2473; 189 L.Ed.2nd 430, 452], the South Dakota federal District Court noted that the High Court has held that "because cell phones contain immense amounts of personal information about people's lives, they are unique, and law enforcement officers must generally secure a warrant before conducting such a search." Thus, in this case, a federal agent who sought digital evidence from defendant's cellphone collected, but not used in the state prosecution, it was held that the federal ATF agent "should have applied for and obtained a second warrant [that] would have authorized him to search Mr. Hulscher's cell phone data for evidence of (the federal) firearms offenses." (***United States v. Hulscher*** (Dist. of So. Dakota, S. Div. 2017) 2017 U.S. Dist. LEXIS 22874; rejecting the Government's argument that; "law enforcement agencies can permanently save all unresponsive data collected from a cell phone after a search for future prosecutions on unrelated charges." (Pg. 7.)

The Court also rejected the Government's argument that the "plain view" exception applied under these circumstances (Pgs. 8-9.), or that there was insufficient "deterrence" to justify the suppression of the resulting evidence (Pg. 9), as held in ***Herring v. United States***

(2009) 155 U.S. 135, 141 [129 S.Ct. 695; 172 L.Ed.2nd 496].

Note: This case is specifically limited to digital evidence that might be contained in a cellphone. However, the Court further notes that for an officer to obtain warrantless access to information retrieved under the authority of a separate warrant that was limited to another unrelated prosecution makes it a "general warrant," which is prohibited under the **Fourth Amendment**. (Pg. 6.)

One Continuous Search: If officers complete the execution of a warrant, and leave the scene, a second search warrant must be obtained in order to return and renew the search. However, so long as at least one officer remains on the scene between searches, reasonable breaks to accomplish other police activity (e.g., transporting the suspect to jail), do not necessarily mean that a renewed search requires a new warrant. (***People v. James*** (1990) 219 Cal.App.3rd 414.)

The Courts tend to be a bit flexible on this rule. In ***United States v. Kaplan*** (9th Cir. 1990) 895 F.2nd 618, after defendant's arrest, his office was searched by FBI agents with a search warrant authorizing the seizure of certain files. Leaving the scene with the files thus obtained, the agents later discovered that they had not received all the files that were authorized by the warrant. Two hours and ten minutes after the initial execution of the warrant, agents returned and seized the remaining files. The Court noted that the issue was whether the second search was really no more than a continuation of the first. The Court decided that it was, citing the fact that the files seized on the second trip were listed in the warrant.

Leaving a Copy of the Warrant, Affidavit and/or Receipt and Inventory: There is no state statutory nor constitutional rule requiring that searching officers show the suspects the warrant, the affidavit to the warrant, or a copy of either, or that a copy of either be left at the scene after the search. (***People v. Calabrese*** (2002) 101 Cal.App.4th 79.)

California Rule: Only a copy of the "*receipt and inventory*" (or "*return*") must be left with the occupants or at the scene. (**Pen. Code § 1535**)

Pen. Code § 1535: "When the officer takes property under the warrant, he must give a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or, in

> the absence of any person, he must leave it in the place where he found the property."
>
> There's no requirement that officers advise defendants, at the time items are taken, what it is that is being taken, so long as they ultimately comply with the return requirements of **P.C. § 1535** by leaving a receipt for the items taken from the scene. (***People v. Reed*** (1981) 121 Cal.App.3rd Supp. 26, 35.)

Fed. Rules of Criminal Procedure, Rule 41(d), applying only to the execution of a federal search warrant, requires that the occupant be given a copy of the warrant *and* a receipt for property taken in the search, or that these documents be left at the scene.

The Ninth Circuit's Opinion: The Ninth Circuit Court of Appeal is of the belief that failure to provide to an occupant a copy of a warrant, properly describing the place to be searched and the property to be seized, may be a **Fourth Amendment** violation (See ***Ramirez v. Butte Silver Bow County*** (9th Cir. 2002) 298 F.3rd 1022.), thus creating some potential federal civil liability for state officers who choose to follow the state rule.

> However, the Ninth Circuit has also noted that only a "*fundamental*" violation of **Rule 41(d)** will mandate suppression of evidence. Where the agent was not aware of this rule, and otherwise insured that defendant was aware of why they were in his home and what they were looking for, suppression of evidence was not a proper remedy. (***United States v. Williamson*** (9th Cir. 2006) 439 F.3rd 1125; discussing the difference between "*intentionally*," but not "*deliberately*," failing to provide defendant with a copy of the warrant prior to searching his house.)
>
> See also ***United States v. Welch*** (8th Cir. 2016) 811 F.3rd 275: Although notice to defendant of a Network Investigative Technique warrant did not comport with **Fed. Rules of Criminal Procedure, Rule 41**, there was no **Fourth Amendment** violation because it appeared that the delay was a good-faith application of the warrant and not reckless disregard of proper procedure.
>
> *And see* ***United States v. Celestine*** (9th Cir. 2003) 324 F.3rd 1095, 1105-1108, describing "the policies that underlie the warrant requirement: providing the property owner

assurance of the lawful authority of the executing officer, his need to search, and the limits of his power to search."

However, where the occupant tells the searching officers that he does not understand English, and the officers take immediate steps to find a Spanish-speaking interpreter, the **Fourth Amendment** is *not* violated when the officers commence the search before the occupant can be read, in his own language, the contents of the warrant. (***United States v. Martinez-Garcia*** (9th Cir. 2005) 397 F.3rd 1205.)

Note: Therefore, despite not being required by state law, it is probably *good practice* for a *state law enforcement officer* to show the occupants a copy of the search warrant (but not the affidavit), or, if no one is home, leave a copy of the search warrant at the scene. There is no harm in doing this, and brings the state execution of a search warrant in compliance with the federal rules.

See also ***United States v. Vesikuru*** (9th Cir. 2002) 314 F.3rd 1116, 1123-1124.), requiring that the warrant describe the place to be searched and property to be seized with "*particularity*," thus serving two important purposes. It:

- Limits the discretion of the officers executing the warrant; *and*

- By showing it to the property owner or resident, it gives notice of the proper scope of the search.

  In order to accomplish these purposes, the warrant must therefore be brought to the scene of the search and shown to the occupants. (***Ibid***.)

The United States Supreme Court has recently ruled that the Ninth Circuit's belief that a copy of the search warrant must be given to the occupants of the place being searched *at the initiation* of the search (see ***United States v. Williamson*** (9th Cir. 2006) 439 F.3rd 1125, above), is simply *wrong*. (***United States v. Grubbs*** (2006) 547 U.S. 90, 98-99 [126 S.Ct. 1494; 164 L.Ed.2nd 195].)

> But see the concurring opinion in ***Grubbs*** (p. 101), noting that it has yet to be decided whether there is a constitutional requirement to show the property owner a copy of the warrant if he demands to see it.

In ***United States v. Hector*** (9th Cir. 2007) 474 F.3rd 1150, 1154, the Ninth Circuit noted that it is not clear whether ***Grubbs*** overruled their cases to the contrary, but found that under authority of ***Hudson v. Michigan*** (2006) 547 U.S. 586 [126 S.Ct. 2159; 165 L.Ed.2nd 56] (ruling that suppression of evidence is not an appropriate remedy for a constitutional violation that was not the "unattenuated but-for cause" of obtaining the disputed evidence), suppressing evidence is not required where law enforcement's mistake was nothing more than a failure to present a person with a copy of the search warrant.

But then in ***United States v. SDI Future Health, Inc.*** (9th Cir. 2009) 568 F.3rd 684, 701, the Ninth Circuit finally conceded that ***Grubbs*** overrules any prior cases that might have previously held that the occupant must be given a copy of the warrant affidavit.

The Ninth Circuit Court of Appeal affirmed the district court's denial of defendant's pretrial motion to suppress evidence, where defendant asserted that FBI agents executing a search warrant at his residence deliberately violated **Fed. R. Crim. P. 41(f)(1)(C)** by failing to supply a complete copy of the warrant. The government conceded that the agents violated **Rule 41(f)(1)(C)** by delivering only the face page of the warrant rather than a complete copy. However, suppression is automatic only for "*fundamental*" violations of **Rule 41**, at least without any applicable exception to the exclusionary rule. The issue was whether the district court correctly concluded that the agents' failure to deliver a complete copy of the warrant at the completion of the search was merely negligent, rather than the product of a deliberate disregard of the rule. Defendant failed to show that the FBI deliberately disregarded of the rule. (***United States v. Manaku*** (9th Cir. 2022) 36 F.4th 1186.)

Property In the Residence Belonging to a Third Person:

When a third person is present and his or her personal property is searched during the execution of a search warrant issued for a residence, the issue is whether the warrant can be used as authority to search the third person's personal property. The Eighth Circuit Court of Appeal held that "a visitor's privacy interest is complicated when the visitor is connected to the illegal activity at the location" to be searched. In the execution of a search warrant

where the warrant was for evidence of drug use and distribution, and a third party—defendant—was found sleeping on the couch, and there was a meth pipe and a closed Brink's metal box lying next to her, the Court held that this gave the officers "particularized suspicion" that defendant was connected to the illicit activity that provided the basis for the warrant. Consequently, the court held that defendant's personal belongings, including the Brink's box, would be subject to the warrant, especially because the warrant included all "locked containers." The court added that while defendant had a reasonable expectation of privacy in the Brink's box, officers had probable cause that she was involved in the criminal activity that formed the basis for the warrant. As a result, the court held that defendant's Brink's box fell within the scope of the warrant and searching it was lawful. (***United States v. Simmermaker*** (8th Cir. 2021) 998 F.3rd 1008; where drugs and a scale were recovered from the Brink's box.)

Destruction of Property in the Execution of a Search Warrant:

Officers are expected to use some discretion in the execution of a warrant to avoid the taking of unnecessarily excessive (i.e., "cumulative") property and engaging in unnecessarily destructive behavior. (***San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*** (9th Cir. 2005) 402 F.3rd 962; damaging property in the taking of "truckloads" of "indicia of affiliation" property, plus the shooting of several dogs without having considered alternative methods of controlling the dogs.)

However, the fact that property might be damaged or destroyed during the entry does not require a higher degree of exigency in order to justify the no-knock authorization when applying for a search warrant. (***United States v. Ramirez*** (1998) 523 U.S. 65 [118 S.Ct. 992; 140 L.Ed.2nd 191; ***United States v. Banks***, *supra,* at p. 37 [124 S.Ct. 521; 157 L.Ed.2nd at p. 355]; ***United States v. Bynum*** (9th Cir. 2004) 362 F.3rd 574, 580.)

It was not illegal to use a battering ram to gain access to defendant's residence when the fiancée, who was locked out, expressly consented to the use of such a method to gain entry. (***United States v. Moore*** (9th Cir. 2014) 770 F.3rd 809, 814.)

The California Supreme Court has determined in a case that has never been overruled that at least where a "motorized battering ram" is used to force entry into a building, prior judicial authorization in the search or arrest warrant *is* necessary. Failure to obtain such authorization is both a violation of the **California**

Constitution and the **Fourth Amendment**. (***Langford v. Superior Court*** (1987) 43 Cal.3rd 21.)

> "We conclude therefore that the motorized battering ram may be used in executing searches or arrests only after the LAPD satisfies three preliminary requirements: i.e., it (1) obtains a warrant upon probable cause, (2) receives prior authorization to use the ram from a magistrate, and (3) at the time of entry determines there are exigent circumstances amounting to an immediate threat of injury to officers executing the warrant or reasonable grounds to suspect that evidence is being destroyed." (***Id***., pg. 32.)
>
> "The magistrate should decide only whether the motorized battering ram could be used with relative safety against a particular building, if the need arises during execution of a search or arrest warrant." (***Id***., pg. 31.)
>
> The same rule would apply to the use of a motorized battering ram in the execution of an arrest warrant. (***Id***., pg. 33.)
>
> But such prior judicial authorization is *not* legally required where the issue is the use of some lesser, less dangerous, force, such as the use of "flashbangs." (***Id***., pg. 28.)

The use of a battering ram on the door, rubber bullets to knock out windows, and "flash bang" devices (one of which seriously injured defendant) to distract the occupants, even though possibly unreasonable under the circumstances, but where there is no "causal nexus" between the entry and the recovery of evidence in the home, does not require suppression of the evidence. (***United States v. Ankeny*** (9th Cir. 2007) 502 F.3rd 829, 835-838; a one to 1½ second delay between knocking and entering.)

The Ninth Circuit Court of Appeal has expressly noted that "officers executing a search warrant occasionally 'must damage property in order to perform their duty.'" (***West v. City of Caldwell*** (9th Cir. 2019) 831 F.3rd 978, 986, quoting ***Liston v. County of Riverside*** (9th Cir. 1997) 120 F.3rd 965, 979; which in turn quotes ***Dalia v. United States*** (1979) 441 U.S. 238, 258 [99 S.Ct. 1682; 60 L.Ed.2nd 177].)

> In ***West v. City of Caldwell***, *supra*, it was noted that officers, who damaged plaintiff's home by shooting tear gas through its windows, "reasonably believed

(beforehand) that (a subject for whom they had an arrest warrant) was in the house, that he was high on meth, that he possessed what had been described as a BB gun, that he was suicidal, and that he owned a .32 caliber pistol. They also knew that he was a gang member with outstanding felony arrest warrants for violent crimes and that he had (recently) aggressively tried to run down a patrol car during a recent high-speed chase." Assuming without deciding that such destructive force was unreasonable under the circumstances, the Court held that the defendant officers were entitled to qualified immunity due to the lack of any prior case authority on the issue of the officers' potential civil liability.

The dissent in ***West*** cites (at pg. 990, fn. 2) cases from four other circuits that determined that a general consent to search does not permit intentional damage to personal property. I.e.; ***United States v. Garrido-Santana*** (6th Cir. 2004) 360 F.3rd 565, 576; ***United States v. Torres*** (7th Cir. 1994) 32 F.3rd 225, 231-232; ***United States v. Zamora-Garcia*** (8th Cir. 2016) 831 F.3rd 979, 983; and ***United States v. Strickland*** (11th Cir. 1990) 902 F.2nd 937, 942.

> The dissent also noted (***Ibid.***) that the Third, Tenth, and D.C. Circuits have similarly suggested that although a general consent to search a place or item may permit the police to dismantle or temporarily modify that property, the consent does not give the police authorization to destroy that property or otherwise "*render it useless*." (See ***United States v. Kim*** (3rd Cir. 1994) 27 F.3rd 947, 956-957; quoting ***United States v. Springs*** (D.C. Cir. 1991) 936 F.2nd 1330, 1334-1335, 290 U.S. App. D.C. 273); *see also* ***United States v. Osage*** (10th Cir. 2000) 235 F.3rd 518, 521, 522 fn. 2.)

Qualified immunity was appropriately denied for officers who were "*unnecessarily destructive*" while searching a home. In this case, the officers broke down two doors that were already unlocked, and the occupant of the home saw one officer kicking the open patio door while declaring: "*I like to destroy these kind of materials, it's cool*." The Court noted that while destroying property during a search "does not necessarily violate the **Fourth Amendment**," it is a different story where the "Defendants appear to have damaged Plaintiffs' property in a way that was 'not

reasonably necessary to execute the search warrant.'" (***Mena v. City of Simi Valley*** (9th Cir. 2000) 226 F.3rd 1031.)

Practice Note: It is just a good idea for officers executing a search warrant *not* to be any more destructive than absolutely necessary. Juries are prone to penalizing (even if subjectively) officers who unnecessary destroy a defendant's personal property.

Sealing the Warrant Affidavit; i.e., *the* "***Hobbs** Warrant*:"

The Problem:

"(T)he contents of a search warrant, including any supporting affidavits setting forth the facts establishing probable cause for the search, become a public record once the warrant is executed." (***People v. Hobbs*** (1994) 7 Cal.4th 948, 962; citing P.C. § **1534(a)**, and ***People v. Seibel*** (1990)219 Cal.App.3rd 1279, 1291.)

The Solution:

To avoid unnecessarily revealing confidential informant information, all or part of the warrant affidavit may be ordered sealed by the court if necessary to protect the identity of the informant. (***People v. Hobbs***, *supra*; see also ***People v. Sanchez*** (1972) 24 Cal.App.3rd 664, 678; (***People v. Galland*** (2008) 45 Cal.4th 354, 363-365.)

No Right to Public Access: There are two categories of documents that are *not* covered by the common law right to public access to records of judicial proceedings and records; (1) grand jury transcripts; and (2) warrant materials in the midst of a pre-indictment investigation. (***Times Mirror Co. v. United States*** (9th Cir. 1989) 873 F.2nd 1210, 1219.)

The same is *not* true for *post-investigation* warrant materials. (***United States v. The Business of the Custer Battlefield Museum*** (9th Cir. 2011) 658 F.3rd 1188; see "*Post-Investigation Disposition of Warrant Application and Supporting Affidavits*," below.

How Accomplished: This is done by obtaining the signature of a judge on a separate affidavit (describing the need for sealing) and order, requesting the sealing of a search warrant affidavit.

The warrant itself must contain a corresponding order by the court sealing the warrant affidavit, or a portion thereof: E.g.:

> "GOOD CAUSE appearing therefore, IT IS HEREBY ORDERED that the attached affidavit (and attachments thereto) be sealed pending further order of the court. IT IS SO ORDERED." (Dated and signed by the magistrate)

When Warrants May be Sealed: Search warrant affidavits are not uncommonly sealed when necessary to protect the identity of a confidential informant either because his or her safety could be jeopardized, and/or because he or she is being used in other investigations that might be compromised if it is known who he or she is. (***United States v. Napier*** (9th Cir. 2006) 436 F.3rd 1133.)

However, despite the lack of any case authority, there is no reason why sealing an affidavit must necessarily be restricted to protecting confidential informants. While this procedure should not be used unless actually necessary, there may be other legitimate reasons for requiring an affidavit to be sealed. (e.g.; to avoid news media publicity compromising an investigation-in-progress.)

> There is as of yet no case authority on the issue as to whether this, or any other purpose other than to protect informant confidentiality, justifies the sealing of a warrant affidavit.
>
> But see ***Electronic Frontier Foundation, Inc. v. Superior Court (San Bernardino County District Attorney's Office)*** (2022) 83 Cal.App.5th 407, denying a motion to unseal search warrant affidavits under **Pen. Code § 1534(a)** was not an abuse of discretion because the trial court reasonably found the affidavits either contained official information under **Evid. Code § 1040(b)(2)**, or had to remain sealed to protect a confidential informant's identity under **Evid. Code § 1041**, and properly balanced those interests against the right of access to court records. **Cal. Rules of Court**, **rules 2.550, 2.551**, did not require unsealing because the affidavits were kept confidential by law. A **First Amendment** claim failed under a history and utility

> test because search warrant materials were not historically open to the public, nor would their disclosure benefit the public. **Cal. Const., art. I, §§ 2, 3, subd. (b)** did not mandate access because exceptions to disclosure applied.

The justification behind the ***Hobbs*** decision had a lot to do with the importance of encouraging the use of, and protecting the confidentiality of the identities of, informants. (***People v. Hobbs***, *supra*, at p. 958, citing ***McCray v. Illinois*** (1967) 386 U.S. 300, 308-309 [18 L.Ed.2nd 62, 69; 87 S.Ct. 1056].)

> "We therefore conclude that, taken together, the informant's privilege (**E.C. § 1041**), the long-standing rule extending coverage of that privilege to *information* furnished by the informant which, if disclosed, might reveal his or her identity, and the codified rule that disclosure of an informant's identity is not required to establish the legality of a search pursuant to a warrant is valid on its face (**Evid. Code § 1042(b)**) compel a conclusion that all or any part of a search warrant affidavit may be sealed if necessary to implement the privilege and protect the identity of a confidential informant." (***People v. Hobbs***, *supra*, at p. 971.)

> While a criminal defendant's due process rights (to be treated fairly) at trial are substantial, they "are less elaborate and demanding" in a motion to suppress. The purpose of a trial is to find the truth. The purpose of a suppression motion is "to avoid the truth." "The very purpose of a motion to suppress is to escape the inculpatory thrust of evidence in hand, ..." (***United States v. Napier***, *supra*, at p. 1137; quoting ***McCray v. Illinois***, *supra*., at p. 307.)

The Court in ***People v. Camel*** (2017) 8 Cal.App.5th 989, at pg. 1009, approved of the sealing of two attachments to a wiretap warrant.

Criticism of the Procedure: The practice of sealing warrant affidavits is not without its critics, in that a defendant's **Sixth Amendment** right to confront his accusers is arguably compromised.

The ***Hobbs*** sealing was upheld in ***People v. Theilen*** (1998) 64 Cal.App.4th 326 (ordered depublished, Dec. 2, 1998; 1998 Cal. LEXIS 5960), but in doing so, the procedure for doing so was criticized by the author of the opinion who felt that federal authority (***Waller v. Georgia*** (1984) 467 U.S. 39 [104 S.Ct. 2210; 81 L.Ed.2nd 31], which involved the closure of a suppression motion to the public.) required the prosecution to demonstrate an "*overriding interest*," and that prosecution is likely to be prejudiced, before allowing the sealing of an affidavit.

Court Procedures: When testing the validity of a sealed warrant affidavit, the following court procedures should be followed (See ***People v. Martinez*** (2005) 132 Cal.App.4th 233.):

- The defense must file a properly noticed motion seeking to *quash* and/or *traverse* the search warrant.

- The trial court should conduct an in camera hearing pursuant to **E.C. § 915(b)** and ***People v. Luttenberger*** (1990) 50 Cal.3rd 1, 20-21.

  The prosecution and police officer may be present.

  Defendant and his/her counsel are to be excluded, although defense counsel should be allowed to submit questions for the magistrate to ask any witnesses present at the in camera hearing.

  Failure to conduct an in camera hearing, reviewing the sealed portions of the affidavit to determine whether there are any litigable issues, is an abuse of discretion. (See ***People v. Galland*** (2008) 45 Cal.4th 354, 372, citing ***People v. Galland*** (2004) 116 Cal.App.4th 489, at pp. 492-494.)

- The trial court should determine whether sufficient grounds exist for maintaining the confidentiality of the informant's identity.

- The trial court then determines whether the entirety of the affidavit or any portion thereof is properly sealed; i.e., whether the extent of the sealing is necessary to avoid revealing the informant's identity.

- In a *traversal* motion:

  The trial court must scrutinize the affidavit and other materials the magistrate determines are necessary for a fair determination of the issue, such as police reports and information regarding the informant.

  The trial court should consider examining the affiant, the informant, or any other witness whose testimony it deems necessary.

  If the affidavit is found to have been properly sealed, the court must then determine, based upon the general allegations made by defendant in his/her motion, and in considering the public and sealed portions of the affidavit, whether there are any intentional or reckless misstatements or omissions in the affidavit, as with any such motion. (See ***Franks v. Delaware*** (1978) 438 US 154, 155-156 [98 S.Ct. 2674; 57 L.Ed.2nd 667, 672].)

  If it is determined that defendant's allegations are *not* supported by the information before the court, defendant's motion should be denied.

  If it is determined that there *is* a "*reasonable probability*" that defendant would prevail on the motion to traverse, the District Attorney must be afforded the option of:

    Consenting to disclosure of the sealed materials and proceeding with the motion to traverse after full disclosure to the defense; *or*

    Suffering the granting of defendant's motion to traverse.

- In a motion to *quash*: If the affidavit is found to have been properly sealed, the trial court should:

  Determine whether the affidavit (public and sealed portions) establishes *probable cause* (i.e., whether there was a "*fair probability*") that contraband or

evidence would be found in the place searched pursuant to the warrant.

If yes, defendant's motion should be denied.

If the court determines, considering the public and sealed portions, that there is a "*reasonable probability*" the defendant would prevail, then again, the District Attorney must be given the option of:

> Consenting to disclosure of the sealed materials and proceeding with the motion to quash after full disclosure to the defense; *or*
>
> Suffering a granting of defendant's motion to quash. (***People v. Hobbs***, *supra*, at pp. 971-975.)

Retention of the Documents: A sealed affidavit should generally be retained by the court, but may, upon a five-part showing, be held by a law enforcement agency:

(1) The disclosure would impair further investigation of criminal conduct, or endanger the safety of a confidential informant or the informant's family;

(2) Security procedures at the court clerk's office are inadequate to protect the affidavit against disclosure;

(3) The security procedures at the law enforcement agency are sufficient to protect the affidavit against disclosure;

(4) The law enforcement agency has procedures to ensure the affidavit is retained for 10 years (permanently in capital cases) after the final disposition of the case, pending further order of the court (see **Gov't. Code § 68152(j)(18)**); *and*

(5) The magistrate has made a sufficient record of the documents reviewed, including the sealed materials, to permit identification of the original sealed affidavit or to permit reconstruction of the affidavit.

(***People v. Galland*** (2008) 45 Cal.4th 354, 368; also finding that the loss of the affidavit did not invalidate the warrant

when "other evidence may be presented to establish the fact that an affidavit was presented, as well as its contents.")

Wiretap Case: The trial court denied discovery of the unredacted supporting wiretap affidavits that were sealed pursuant to ***People v. Hobbs*** (1994) 7 Cal.4th 948, in a wiretap case, and then refused to suppress the wiretap evidence. The Appellate Court found that the privileges and procedures of **E.C. §§ 1040-1042** (Official Information Privilege) apply to wiretap affidavits. Defendants failed to demonstrate that the trial court abused its discretion by ruling that defendants' rights were adequately protected with respect to their requests for disclosure of privileged documentation, and to their challenges to the sufficiency of the wiretap authorization orders in this case. (***People v. Acevedo*** (2012) 209 Cal.App.4th 1040, 1047-1050.)

Post-Investigation Disposition of Warrant Application and Supporting Affidavits:

The public has a qualified common law right of access to warrant materials after an investigation has been terminated. The concerns about suspects destroying evidence, coordinating their stories before testifying, or fleeing the jurisdiction are no longer present once an investigation has been terminated. Absent a compelling reason or factual basis for limiting and restricting the use of such documents, a court may not do so. (***United States v. The Business of the Custer Battlefield Museum*** (9th Cir. 2011) 658 F.3rd 1188.)

Delays in Obtaining a Search Warrant for Detained/Seized Property:

Rule: The standard to be applied when evaluating the legality of the length of time a suspect is deprived of his property pending a search is one of "*reasonableness*," taking into account the "totality of the circumstances," and not necessarily requiring that the Government pursue the least intrusive course of action. Determining reasonableness requires a "balancing test," balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." (Citations omitted; ***United States v. Sullivan*** (9th Cir. 2015) 797 F.3rd 623, 633; finding *21 days* to be reasonable during which time the defendant's laptop was in law enforcement custody in that defendant was in custody at the time so he couldn't use it anyway, he was subject to a **Fourth** waiver, where defendant gave consent to the laptop's seizure, and where the computer had to be transferred to a different agency to conduct the necessary forensic search.)

Case Law:

Delays of between seven and twenty-three days in obtaining search warrants to search hundreds of packages that were seized *without* a warrant at a post office in Hawaii was held to be unreasonable. (***United States v. Dass*** (9th Cir 1988) 849 F.2nd 414.)

A three-day delay in a police department's unsuccessful attempt to download the contents of defendant's cellphone was held to be reasonable, as well as a one-year delay in obtaining a search warrant for a more thorough forensic search of the cellphone. (***United States v. Johnson*** (9th Cir. 2017) 875 F.3rd 1265, 1276.)

Officers who took 26½ hours to obtain a search warrant for a residence while the residence was "detained" (i.e., the occupant was kept from reentering), failing to recognize that they were required to act with due diligence and to expedite the process. The resulting evidence, therefore, was subject to exclusion. (***United States v. Cha*** (9th Cir. 2010) 597 F.3rd 995, 1004-1006.)

A 20-day delay in obtaining a search warrant to search an already lawfully seized laptop computer, although unreasonable, was not grounds for suppression of the laptop's contents. "(I)n another category of cases, police misconduct effectively bears no 'fruit.' . . . Unreasonable delays fall into this latter category." (***United States v. Jobe***, (9th Cir. 2019) 933 F.3rd 1074, 1078-1079; citing ***United States v. Cha***, *supra*, and comparing the differences in the relevant officers' actions.

Three days upheld as reasonable, comparing it with the 90-minutes defendant's luggage was detained at an airport as described in United States v. Place (1983) 462 U.S. 696 [103 S.Ct. 2637; 77 L.Ed.2nd 110], noting "(t)hat seizure did not disrupt Tran's travel plans because a dashboard camera clearly is not as integral to the necessities of travel as luggage containing clothes, toiletries, and other travel essentials." (***People v. Tran*** (2019) 42 Cal.App.5th 1, 13-14.)

Defendant argued that the investigators' retention of his laptop for *fifteen days* before seeking a warrant to search it was unreasonable under the **Fourth Amendment**. The Court recognized that while the initial, warrantless seizure of property may be reasonable, the duration of the seizure pending the issuance of a search warrant must also be reasonable. In this case, the Court held that while several factors weighed in defendant's favor, the fifteen-day delay between the seizure of the laptop and the issuance of the search

warrant was reasonable under the circumstances. The Court based its holding primarily on the fact that several different investigative teams were working a complex investigation related to two distinct crimes: fraud and sex trafficking. In addition, the court noted the considerable effort it took to prepare the affidavit supporting the warrant application, as the affidavit was eighteen pages long and included seven pages of specific information about defendant's alleged conduct learned by each of the four investigative teams during their respective investigations. (***United States v. Mays*** (8th Cir. 2021) 993 F.3rd 607.)

Fifteen-day delay between the seizure of defendant's cellphone and the eventual obtaining of a search warrant to search it was not unreasonable. (***People v. Tousant*** (2021) 64 Cal.App.5th 804, 816-817; balancing the length of the delay with the "substantial interest" the police had in extracting information from defendant's cellphone.)

> Also, the Court noted that the "delay in obtaining a warrant did not adversely affect possessory interests where the defendant did not seek return of property and failed to allege or prove the delay 'adversely affected legitimate interests protected by the **Fourth Amendment**.'" (***Ibid***.)

The delay of some 24 days between the seizure of defendant's cellphone an the obtaining of a search warrant to search it was not unreasonable under the circumstances. In this case, the Court reasoned that because smartphones "retain data for long periods of time," delay between the time a cellphone is seized and when it is searched is not likely to cause stored personal data to be lost, or data of potential evidentiary relevance to become stale. In addition, the court added that the defendant (from whom the cellphone was seized) was in police custody for the entire twenty-four-day period, and there was no evidence that either he or anyone acting on his behalf made a request or demand for the cellphone's return, or even inquired about it. The Court concluded that when defendants do not seek the return of seized property, they cannot establish that the delay affected legitimate interests protected by the **Fourth Amendment**. (***United States v. Bragg*** (8th Cir. 2022) 44 F.3rd 1067.)

See also "*Staleness*," under "*The* '*Reasonable Particularity*' *Requirement* (**Pen. Code §§ 1525**, **1529**); *The Persons, Places, Things and Vehicles to be Searched*," above.

Return of Property:

Rule: Property seized by search warrant may only be released by *court order*:

Pen. Code § 1536: All *property taken by warrant* is to be retained by the officer "*subject to the order of the court*."

Pen. Code § 1540: The *magistrate has the authority* to release property seized by warrant.

Stolen or Embezzled Property: Stolen or embezzled property in cases where a complaint has been filed should be released by a magistrate after notice to anyone claiming an interest in the property. (**Pen. Code §§ 1408**, **1410**, **1413(c)**)

Otherwise, property may be returned to the lawful owner by the seizing law enforcement officer, but only after notice is given to the person from whom the property was seized. (**Pen. Code § 1413(b)**)

Unclaimed Property:

If, after termination of any related prosecution, or if no case has been filed, and the owner fails to claim the property and no one else has claimed it, it "*may*" be delivered to the county for disposal pursuant to the procedures set out in **Pen. Code § 1411(a)**.

The section was amended, effective 1/1/2014, to provide in new **subd. (b)** that the section does *not* govern the disposition of property held by a pawnbroker and placed on hold by a peace officer pursuant to **B&P § 21647** unless the licensed pawnbroker or secondhand dealer refuses to consent to a **B&P § 21647** hold on the property, or a search warrant for the business of the licensed pawnbroker or secondhand dealer has resulted in the seizure of the property.

Note: Special provisions cover the disposition of *firearms* **(Pen. Code § 12028**) and *money* (**Pen. Code §§ 1420 et seq.**)

Case Law:

It is *not* legally necessary for officers executing a search warrant to give a person from whom property has been seized any notice of the applicable statutes or the means by which that person may seek

the return of his or her property. (***City of West Covina v. Perkins*** (1999) 525 U.S. 234 [119 S.Ct. 678; 142 L.Ed.2nd 636]; reversing a Ninth Circuit Court of Appeal opinion to the contrary.)

In determining the amount of restitution under **P.C. § 1202.4(f)**, for defendant's theft of copper wire, the trial court did not abuse its discretion when it ordered defendant to pay the full replacement cost while also permitting the victim to retain pieces of wire that the police had returned to the victim because the trial court reasonably concluded that the victim was receiving no windfall, in light of evidence that the returned pieces of wire could not be spliced and were therefore useless in the victim's business operations. It could not be said that the restitution order placed the victim in a better position than before the theft occurred because the copper wire was part of a functioning system before the theft, the victim was in a far less favorable condition after the theft, and further hearings would have burdened and inconvenienced the victim. (***People v. Erickson*** (2018) 30 Cal.App.5th 243.)

The proper avenue of redress for denial of a defendant's nonstatutory motion to return seized property is through a petition for writ of mandate. (***Smith v. Superior Court* (*San Francisco Police Department*)** (2018) 28 Cal.App.5th Supp. 1; a marijuana case, citing ***People v. Hopkins*** (2009) 171 Cal.App.4th 305, 308.)

Federal Rules:

Federally, **Federal Rule of Criminal Procedure 41(g)** provides a mechanism by which any person may seek to recover property seized by federal agents. The rule states that if a motion to return property is granted, "the court must return the property to the movant."

> A provisional arrest warrant was issued for appellee Ramsden at the request of the British government. Appellee was arrested in the hallway outside his hotel room. Appellee was allowed to reenter his room in order to change clothes. The marshals escorted appellee inside and seized various documents in appellee's room. Appellee sought to have the seized documents returned to him pursuant to **Fed. R. Crim. P. 41(e)**. The lower court granted appellee's motion and ordered the documents returned to appellee without giving the government an opportunity to copy them. The government challenged this ruling on appeal. The Ninth Circuit ruled that the lower court did not abuse its discretion in deciding to exercise

equitable jurisdiction in the case. The government's continued retention of the original documents was unreasonable, and the lower court did not err in ordering the documents returned to appellee. However, in light of the policy of compromise underlying **Fed. R. Crim. P. 41(e)**, the most appropriate outcome was to allow appellee to retain the original documents, but to ensure that the government was afforded copies of the documents. Thus, it was error to preclude the government from reviewing or copying the documents. (***Ramsden v. United States*** (9th Cir. 1993) 2 F.3rd 322.)

> The Court used a balancing test in ***Ramsden*** it obtained from the Fifth Circuit;
>
> > (1.) Whether the Government displayed a callous disregard for the constitutional rights of the movant;
> > (2.) Whether the movant has an individual interest in and need for the property he wants returned;
> > (3.) Whether the movant would be irreparably injured by denying return of the property; *and*
> > (4.) Whether the movant has an adequate remedy at law for the redress of his grievance.
> >
> > (See ***Richey v. Smith*** (5th Cir. 1975) 515 F.2nd 1239, 1243-1244. See also ***Snitko v. United States*** (2024) 90 F.4th 1250, 1259, and fn. 8, below, and ***United States v. Comprehensive Drug Testing, Inc.*** (9th Cir. 2010) 621 F.3rd 1162, 1173.)

Where the subject property has been lost or destroyed, **Rule 41(g)** is silent as to what alternative relief, if any, the movant may seek. The Ninth Circuit Court of Appeal has held that even when it results in a wrong without a remedy, the federal courts are without jurisdiction to award money damages against the government. Equitable considerations standing alone cannot waive the government's immunity from suit. (***Ordonez v. United States*** (9th Cir. 2012) 680 F.3rd 1135.)

The United States Supreme Court has granted certiorari in a case out of the Eleventh Circuit Court of Appeal reviewing the Appellate Court's decision holding that **Rule 41(g)** does not allow for the return of firearms to a convicted felon even though the felon intended to transfer ownership of the firearm to an unrelated person to whom the felon had already sold all his property interest. (See ***Henderson v. United States*** (11th Cir. 2014) 555 Fed. Appx. 851.)

See ***Snitko v. United States*** (2024) 90 F.4th 1250, where FBI agents, in conjunction with the Drug Enforcement Agency (DEA) and the United States Postal Inspection Service (USPIS), put together a search protocol consisting of an "Operation Order Search Plan" document and separate document entitled "Supplemental Instructions on Box Inventory." This was all in addition to a traditional search warrant allowing for the search of some 700 private safe deposit boxes used by customers of a private company called US Private Vaults (USPV), a company the government was investigating for various criminal activities, including money laundering.

Burden of Proof when the Return of Property is Contested:

"'When a motion for return of property is made before an indictment is filed (but a criminal investigation is pending), the movant bears the burden of proving both that the seizure was illegal and that he or she is entitled to lawful possession of the property.' ***United States v. Martinson***, 809 F.2nd 1364, 1369 (9th Cir.1987) (citations omitted). 'However, when the property in question is no longer needed for evidentiary purposes, either because trial is complete, the defendant has pleaded guilty, or . . . the government has abandoned its investigation, the burden of proof changes. The person from whom the property is seized is presumed to have a right to its return, and the government has the burden of demonstrating that it has a legitimate reason to retain the property.' ***Id.*** (footnotes and citations omitted). The 'government must justify its continued possession of the property by demonstrating that it is contraband or subject to forfeiture.' ***Id***." (***United States v. Harrell*** (9th Cir. 2008) 530 F.3rd 1051, 1057.)

It is the government's (i.e., the prosecution's) burden to prove that defendant's non-contraband evidence should not be returned to him upon filing of a motion under **Fed. R. Crim. Pro. 41(g)**. Failure to submit any evidence to show the difficulty and cost of segregating defendant's requested data from pornographic

material, claiming such difficulty and cost to be a "legitimate reason" for refusing to return the non-contraband materials to him, required the remand of the case for a reconsideration of this issue. (***United States v. Gladding*** (9th Cir. 2014) 775 F.3rd 1149, 1151-1154.)

The federal district court did not err in denying appellant's motion under **Fed. R. Crim. Proc. 41(g)** to obtain funds that the government had seized from him because the government successfully rebutted his claim of ownership by establishing that the money was stolen property and contraband. However, the Government *did not* establish its right to the money because the Government could not sidestep the forfeiture statutes, including **18 U.S.C.S. § 981(a)(1)(C)**, and their accompanying procedural protections, by way of a **Rule 41(g)** proceeding. The government had not perfected title in the seized property and therefore it could not retain or distribute the money. (***United States v. Wright*** (9th Cir. 2023) 49 F.4th 1221.)

Marijuana Cases:

H&S Code § 11473.5: *Destruction of Property in Absence of Conviction*:

Subd. (a) All seizures of controlled substances, instruments, or paraphernalia used for unlawfully using or administering a controlled substance which are in possession of any city, county, or state official as found property, or as the result of a case in which no trial was had or which has been disposed of by way of dismissal or otherwise than by way of conviction, shall be destroyed by order of the court, unless the court finds that the controlled substances, instruments, or paraphernalia were lawfully possessed by the defendant.

(b) If the court finds that the property was not lawfully possessed by the defendant, law enforcement may request of the court that certain uncontaminated instruments or paraphernalia be relinquished to a school or school district for science classroom education in lieu of destruction.

Note: See **H&S Code §§ 11470 et seq.** for statutes dealing with the confiscation, forfeiture, destruction, or other disposition, of controlled substances, including marijuana (now called "*cannabis*"), in the possession of law enforcement or the court.

Case Law:

As an affirmative defense, a defendant found in possession of excessive amounts of marijuana is precluded from asking for a certain amount to be returned to him for medicinal purposes. There is no statutory authority for the court to return some of the marijuana to him after his admission that he possessed more than legally allowed. (***Chavez v. Superior Court* [*Orange County*]** (2004) 123 Cal.App.4th 104.)

However, in those cases where the marijuana is determined to be possessed in accordance with state law, the court has the authority (despite the contrary federal law) to order the law enforcement agency to return any confiscated marijuana to the person. (***City of Garden Grove v. Superior Court* [*Kha*]** (2007) 157 Cal.App.4th 355.)

Taking or destroying a person's lawful medical marijuana may provide the patient with a cause of action in civil court for the unlawful taking. (See ***County of Butte v. Superior Court* [*Williams*]** (2009) 175 Cal.App.4th 729.)

If the trial court does not return the marijuana to the defendant (i.e., after dismissal of the case), there can be no appeal from the court's refusal to return it. There is no statutory procedure for such an appeal. The proper remedy is through a petition to the appellate court for a writ of mandate. (***People v. Hopkins*** (2009) 171 Cal.App.4th 305.)

After the granting of a non-statutory motion to return property following dismissal of criminal charges, 21.8 grams of recreational marijuana should have been returned to the owner under **H&S Code § 11473.5** because at the time the marijuana was seized, the petitioner lawfully possessed the marijuana under California law in that he was over 21 years of age and the amount was less than 28.6 grams. There is no positive conflict between California law and the federal **Controlled Substances Act** (**21 U.S.C. §§ 801 et seq.**) such that the two cannot consistently stand together. The San Francisco Police Department is immune from federal prosecution under the **Controlled Substances Act** when complying with California's return provisions. (***Smith v. Superior Court* (*San Francisco Police Department*)** (2018) 28 Cal.App.5th Supp. 1; "A controlled

substance is 'lawfully possessed' under this section if it is lawfully possessed under California law." (pgs. 4-5, citing ***City of Garden Grove v. Superior Court* [*Kha*]** (2007) 157 Cal.App.4th 355, 380.)

Extensions:

Search warrants must be served within *ten* (10) *calendar days* of issuance. (**Pen. Code § 1534**)

The sole exception provided for by statute is for bank records. If a bank cannot reasonably retrieve the requested records within ten days, the affiant may request for some time period longer than ten days. (**Gov't. Code § 7475**)

So long as served within the 10-day limit, no further evidence of timeliness need be shown. (***Cave v. Superior Court***) 1968) 267 Cal.App.2nd 517.)

If, during the 10-day period, it becomes apparent that the warrant cannot, or will not, be served, the officer may do either of the following:

- Submit a new warrant and affidavit, with an added explanation in the affidavit for why the warrant was not executed on time and listing any facts relevant to a possible change in probable cause or why it is believed the property to be seized will still be in the placed to be searched; *or*

- Take the original warrant, with a supplemental affidavit incorporating by reference the entire original affidavit, back to the issuing magistrate to "*revalidate and reissue*" the same warrant (***People v. Sanchez*** (1972) 24 Cal.App.4th 664.) upon a showing that the probable cause has not become stale.

  Note: "**Penal Code section 1534** makes a warrant void if not executed within 10 days of issuance." (***People v. Brocard*** (1985) 170 Cal.App.3rd 239, 242.)

Special Masters:

Rule: Per **Pen. Code § 1524(c)**, search warrants for documentary evidence in the possession of, or under the control of, a . . .

Lawyer,
Doctor,
Psychotherapist, or

Clergyman,

. . . who is *not* him or herself reasonably suspected of engaging or having engaged in criminal activity related to the *documentary evidence* for which a warrant is requested, are invalid unless certain statutory requirements relating to obtaining the assistance of a "*special master*" are first met. (See ***Deukmejian v. Superior Court*** (1980) 103 Cal.App.3rd 253.)

When Not Applicable:

This special master system is specifically *not* available for evidence coming within the so-called "*newsman's privilege*," as described in **Evid. Code § 1070**. (**Pen. Code § 1524(g)**)

A special master is not necessary if the attorney, etc., is him or herself reasonably suspected of the criminal activity about which the documentary evidence is sought. (***People v. Blasquez*** (1985) 165 Cal.App.3rd 408.)

However, this does not preclude an attorney, etc., from obtaining an order from the court sealing the seized files pending an in camera determination of the applicability of any privilege. (***People v. Superior Court* [*Bauman & Rose*]** (1995) 37 Cal.App.4th 1757.)

The search of a Deputy District Attorney's (DDA) home, when the DDA was the target of the criminal investigation, did not require a special master, while the search of the DDA's office, where there might be confidential material belonging to the District Attorney (as opposed to the DDA himself) *did* require the services of a special master. (***People ex rel. Lockyer v. Superior Court*** (2000) 83 Cal.App.4th 387.)

The Special Master: A "*special master*" must first be appointed by the court, who must then accompany the officers serving the warrant. A "*special master*" is an attorney licensed to practice law, in good standing, in California, to be selected from a list of qualified attorneys maintained by the State Bar for the purpose of conducting such searches. (**Pen. Code § 1524(d)**)

"*Documentary evidence*" includes, but is not limited to, writings, documents, blueprints, drawings, photographs, computer printouts, microfilms, x-rays, files, diagrams, ledgers, books, tapes, audio and video

recordings, films or papers of any type or description. (**Pen. Code § 1524(f)**)

Procedure (**Pen. Code § 1524(c)-(f)**):

> The special master must inform the person in possession of the specific items being sought and allow the party in possession of the documents to voluntarily provide the items requested.
>
> If, in the judgment of the special master, the party fails to provide the items requested, the special master shall conduct the search for the items in the areas designated in the search warrant.
>
> Potentially privileged documents must be sealed.
>
> The documents sealed by the special master *cannot* be:
>
> > Unsealed and/or turned over to the investigating agency (or to the prosecutor) without notice being given to the person from whom they were seized (i.e., the attorney, physician, psychotherapist, or clergyman); *nor*
> >
> > Returned to the person from whom they were seized without notice to the person executing the warrant (or, alternatively, to the investigating agency or the prosecutor). (***Gordon v. Superior Court*** (1997) 55 Cal.App.4th 1546.)

The Court Hearing (**Pen. Code § 1524(c)(2)**): If the party indicates that the items seized should not be disclosed (e.g., due to "*privilege*" issues), the special master must seal them and deliver them to the court for a hearing on the issue.

> The court will review the material in camera if a privilege (e.g., attorney-client, or work product, etc., privilege) is claimed. (***PSC Geothermal Services Co. v. Superior Court*** (1994) 25 Cal.App.4th 1697, 1711-1712; ***Geilim v. Superior Court*** (1991) 234 Cal.App.3rd 166, 171.)
>
> The Court has a duty to hear and determine the applicability of a claim of privilege, but lacks the statutory or inherent power to require the parties to bear the cost of a special master's services. (***People v. Superior Court* [*Laff*]** (2001) 25 Cal.4th 703.)
>
> A special master *may not* release even an inventory of the items seized to a police officer after a privilege is invoked. (***Magill v. Superior Court*** (2001) 86 Cal.App.4th 61.)

The hearing will resolve issues related to:

- Suppression issues pursuant to **Pen. Code § 1538.5** (i.e., a "*motion to suppress evidence*.")

- Claims of "*privilege*," pursuant to **E.C. §§ 900 et seq.**

The hearing must be held in Superior Court within *three* (3) *days* of the service of the warrant, or as soon as possible if three days is impracticable.

> Although the statute is silent on the issue, it has been held that the special master should determine whether a hearing is required and give notice to the parties concerning when and where such hearing is to be held. (***Gordon v. Superior Court***, (1997) 55 Cal.App.4th 1546.)

Other Warrant Service Conditions:

Execution of the search warrant must be done during business hours if possible. (**Pen. Code § 1524(c)(3)**)

The search warrant must be served on the person who appears to have possession or control of the documents sought. If no such person can be found, the special master is responsible for sealing and returning to the court any items that appear to be privileged. (**Pen. Code § 1524(c)(3)**)

Police officers may accompany the special master during the search, but shall not participate in the search nor shall they examine any of the items being seized except upon agreement of the party upon whom the warrant has been served. (**Pen. Code § 1524(e)**)

*Special Masters and The **Electronic Communications Privacy Act:***

Special Masters may also be appointed under authority of **P.C. § 1546.1(e)(1)** of the **Electronic Communications Privacy Act** upon seeking electronic information obtained through the execution of a warrant or court order. (See "**Pen. Code § 1546.1**: *Search Warrants and Pen Registers and Trap and Trace Devices*," above.)

***Other Warrants*:**

Inspection (or *Administrative*) *Warrants*: Enforcement of some codes, such as *building, fire, health, safety, health, plumbing, electrical, labor* or *zoning codes,* require the periodic inspections of some buildings. (See ***Dawson v. City of Seattle*** (9th Cir. 2006) 435 F.3rd 1054.)

A Regulatory Scheme: California has enacted a regulatory scheme for what are referred to as "*inspection warrants*," for obtaining search warrants for regulatory inspections "required or authorized by state or local or regulation relating to building, fire (etc.)," code compliance. (**Code of Civil Proc. §§ 1822.50 et seq.**)

***Code of Civ. Pro. §§ 1822.50*:** "An inspection warrant is an order, in writing, in the name of the people, signed by a judge of a court of record, directed to a state or local official, commanding him to conduct any inspection required or authorized by state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, labor, or zoning."

***Code of Civ. Pro. § 1822.51*:** Consent to search is to be requested first.

If Consent is Refused: "An inspection warrant shall be issued upon cause, unless some other provision of state or federal law makes another standard applicable. An inspection warrant shall be supported by an affidavit, particularly describing the place, dwelling, structure, premises, or vehicle to be inspected and the purpose for which the inspection is made. In addition, the affidavit shall contain either a statement that consent to inspect has been sought and refused or facts or circumstances reasonably justifying the failure to seek such consent."

Necessary Showing:

If consent is refused, then a warrant is needed, but may be obtained on less than the traditional probable cause. (See ***Salwasser Manufacturing Co. v. Occupational Safety & Heath Appeals Board*** (1989) 214 Cal.App.3rd 625.)

A warrant may be obtained upon a showing that the area is blighted, non-discriminatory searches are conducted on a regular basis, and/or areas are picked at random for inspection.

"*Cause*" needed to obtain a warrant, when consent is refused, is "deemed to exist if either reasonable legislative

or administrative standards for conducting a routine or area inspection are satisfied with respect to the particular place, dwelling, structure, premises, or vehicle, or there is reason to believe that a condition of nonconformity exists with respect to the particular place, dwelling, structure, premises, or vehicle." (**CCP § 1822.52**)

Examples:

Residences:

A city ordinance gave city building inspectors the right to enter any building at reasonable times in furtherance of their code enforcement duties. The occupant (appellant) of the ground-floor quarters which he leased for residential use of which allegedly violated the apartment building's occupancy permit, denied entrance to building inspectors on three separate occasions, each time demanding that they first obtain a warrant. He was prosecuted under another ordinance that made it a crime to refuse to comply with the inspectors' requests. He claimed the warrantless search requested by the building inspectors violated his **Fourth Amendment** rights. The U.S. Supreme Court agreed, overruling its prior decision in ***Frank v. Maryland*** (1959) 359 U.S. 360 [79 S.Ct. 804; 3 L.Ed.2nd 877], to the extent that it permitted warrantless administrative searches. The Court held that the administrative search was not peripheral to the occupant's **Fourth Amendment** interests because a criminal prosecution could and did result from his refusal to submit. The Court held that probable cause would still be required for issuance of a warrant for an administrative search, but the standard was lower than for issuance of a warrant in criminal cases. The standard would be met by a reasonableness showing, in light of the reasonable goals of code enforcement. (***Camara v. Municipal Court of the City and County of San Francisco*** (1967) 387 U.S. 523 [87 S.Ct. 1727; 18 L.Ed.2nd 930].)

Where law enforcement officers were asked to assist in the execution of an administrative warrant authorizing the inspection of a private residence for

city code violations, they violated the **Fourth Amendment** because their primary purpose in executing the warrant was to gather evidence in support of a criminal investigation, and, accordingly, defendant was entitled to suppression of evidence obtained during the search. Although law enforcement had initiated a criminal investigation of defendant before the administrative search, it had concluded that it did not have probable cause to arrest defendant or obtain a search warrant for his home, but it knew that a city was going to obtain an inspection warrant for defendant's home and to request assistance at the inspection, and while accompanying the city on its inspection, law enforcement officers photographed incriminating evidence. (***United States v. Grey*** (9th Cir. 2020) 959 F.3rd 1166.)

Commercial Areas:

Appellant appealed his conviction for violating Seattle, Washington **Fire Code § 8.01.050**, arising from his refusing to permit a fire inspector to conduct a warrantless search of appellant's locked commercial warehouse. On certiorari, the U.S. Supreme Court reversed. The Court ruled that appellant's prosecution for refusing to permit the warrantless search of his commercial premises was barred by the **Fourth Amendment**. Specifically, the Court ruled that administrative entry, without consent, upon the portions of commercial premises which were not open to the public could only be compelled through prosecution or physical force within the framework of a warrant procedure. The Court held that the basic component of a reasonable search under the **Fourth Amendment**, that it not be enforced without a suitable warrant procedure, was applicable to business as well as to residential premises. Consequently, appellant was improperly prosecuted for exercising his constitutional right to insist that a warrant be obtained authorizing entry upon his locked warehouse. (***See v. City of Seattle*** (1967) 387 U.S. 541 [87 S.Ct. 1737; 18 L.Ed.2nd 943].)

The Court concluded that sufficient probable cause exists "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling," employing a "flexible standard of reasonableness." (***Id.***, at pp. 545, 553.)

***Code of Civ. Pro. § 1822.53*:** *Examination of Witnesses*: "Before issuing an inspection warrant, the judge may examine on oath the applicant and any other witness, and shall satisfy himself of the existence of grounds for granting such application."

***Code of Civ. Pro. § 1822.54*:** *Issuance and Contents of Warrant*: "If the judge is satisfied that the proper standard for issuance of the warrant has been met, he or she shall issue the warrant particularly describing each place, dwelling, structure, premises, or vehicle to be inspected and designating on the warrant the purpose and limitations of the inspection, including the limitations required by this title."

***Code of Civ. Pro. § 1822.55*:** *Duration, Extension or Renewal of Warrant*; *Execution and Return*: "An inspection warrant shall be effective for the time specified therein, but not for a period of more than 14 days, unless extended or renewed by the judge who signed and issued the original warrant, upon satisfying himself that such extension or renewal is in the public interest. Such inspection warrant must be executed and returned to the judge by whom it was issued within the time specified in the warrant or within the extended or renewed time. After the expiration of such time, the warrant, unless executed, is void."

***Code of Civ. Pro. § 1822.56*:** *Manner of Inspection*; *Notice*: "An inspection pursuant to this warrant may not be made between 6:00 p.m. of any day and 8:00 a.m. of the succeeding day, nor in the absence of an owner or occupant of the particular place, dwelling, structure, premises, or vehicle unless specifically authorized by the judge upon a showing that such authority is reasonably necessary to effectuate the purpose of the regulation being enforced. An inspection pursuant to a warrant shall not be made by means of forcible entry, except that the judge may expressly authorize a forcible entry where facts are shown sufficient to create a reasonable suspicion of a violation of a state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, labor, or zoning, which, if such violation existed, would be an immediate threat to health or safety, or where facts are shown establishing that reasonable attempts to serve a previous warrant have been unsuccessful. Where prior consent has been sought and refused, notice that a warrant has been issued must be given at least 24 hours before the warrant is executed, unless the

judge finds that immediate execution is reasonably necessary in the circumstances shown."

> Reasonable force may be used to insure everyone's safety, including the temporary detention of a resident's occupants if necessary under the circumstances. (***Dawson v. City of Seattle*** (9th Cir. 2006) 435 F.3rd 1054, 1065-1070.)

Code of Civ. Pro. § 1822.57**:** *Punishment*: "Any person who willfully refuses to permit an inspection lawfully authorized by warrant issued pursuant to this title is guilty of a misdemeanor."

Code of Civ. Pro. § 1822.58**:** *Inspections by Personnel of Fish and Game Department*: "A warrant may be issued under the requirements of this title to authorize personnel of the Department of Fish and Game to conduct inspections of locations where fish, amphibia, or aquatic plants are held or stored under (**Fish & Game Code §§ 15000 et seq.** (**Div. 12**).)."

Code of Civ. Pro. § 1822.59**:** *Inspections for Purpose of Animal or Plant Pest or Disease Eradication*:

> **(a)** Notwithstanding the provisions of **Section 1822.54**, for purposes of an animal or plant pest or disease eradication effort pursuant to (**Food & Agri. Code §§ 5001 et seq.** (**Div. 4**)) or (**Food & Agri. Code §§ 9101 et seq.** (**Div. 5**)), the judge may issue a warrant under the requirements of this title describing a specified geographic area to be inspected by authorized personnel of the Department of Food and Agriculture.
>
> **(b)** A warrant issued pursuant to this section may only authorize the inspection of the exterior of places, dwellings, structures, premises or vehicles, and only in areas urban in character. The warrant shall state the geographical area which it covers and the purpose of and limitations on the inspection.
>
> **(c)** A warrant may be issued pursuant to this section whether or not the property owners in the area have refused to consent to the inspection. A peace officer may use reasonable force to enter a property to be inspected if so authorized by the warrant.

Code of Civ. Pro. § 1822.60**:** *Warrant for DOJ Inspections*: "A warrant may be issued under the requirements of this title to authorize personnel of the Department of Justice to conduct inspections as provided in (**B&P Code § 19827(a)**)."

B&P Code § 19827(a) deals with DOJ's powers with respect to investigations.

Hotels and Motels: Hotels and motels do *not* qualify as closely regulated businesses, although an administrative subpoena or warrant is all that is necessary for the inspection of the business' guest registry records. (***City of Los Angeles v. Patel*** (2015) 576 U.S. 409, 424-428 [135 S.Ct. 2443; 192 L.Ed.2nd 435].)

Entry to Make Arrests: Use of an administrative, or "*inspection*" warrant, issued by a court for the purpose of regulating building, fire, safety, plumbing, electrical, health, labor or zoning codes, does not justify an entry by police to make an arrest given the lesser proof standards needed to obtain an administrative warrant. If an entry is effected for the purpose of arresting the occupant, an arrest warrant must first be obtained. (***Alexander v. City and County of San Francisco*** (9th Cir. 1994) 29 F.3rd 1355.)

Rendition (or *Extradition*):

Article IV, § 2, Clause 2 *of the* ***United States Constitution*** states that: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

Note: The term "*rendition*," literally translated as "*to surrender*," refers to what is more commonly known as "*extradition*."

The Implementing Statute, **18 U.S.C. § 3182**, provides in substance that, on a proper demand of the executive of one state upon the executive of another, it is the duty of the latter to have the fugitive arrested and delivered to the agent of the demanding state.

The federal statute and constitutional provisions provide the basis for the interstate extradition of fugitives.

The "*asylum*" state has a duty to release to the "*demanding*" state one who has allegedly violated the laws of the later. It is for the demanding state alone, and not the asylum state, to determine the offending party's innocence or guilt. (***In re Golden*** (1977) 65 Cal.App.3rd 789, 796.)

Upon receipt of the defendant in the "*demanding state*," his return to the "*asylum state*" prior to a determination of guilt will result in dismissal of the charges in the demanding state, under the terms of

the ***Interstate Agreement on Detainers***. (***Alabama v Bozeman*** (2001) 533 U.S. 146 [121 S.Ct. 2079; 150 L.Ed.2nd 188].)

International extraditions are the subject of treaties between the United States and other individual countries.

E.g.: The district court properly denied petitioner's habeas petition challenging an order certifying him as extraditable to the Czech Republic so he could serve a sentence for a Czech conviction for attempted extortion. **18 U.S.C.S. § 3196** did not amend or conflict with the **Treaty Concerning the Mutual Extradition of Fugitive Criminals**, July 2, 1925, U.S.-Czech., **44 Stat. 2367** (U.S.T. Mar. 29, 1926). Petitioner's Czech conviction for attempted extortion qualified as an extraditable offense as it was an extraditable offense under the Treaty, petitioner's alleged conduct would be punishable in the United States as attempted extortion under **18 U.S.C.S. § 1951**, and attempted extortion in the United States and Czech Republic were substantially analogous and there was dual criminality in petitioner's case. (***United States v. Knotek*** (9th Cir. 2019) 925 F.3rd 1118.)

Extradition by the States: All fifty states have supplemented the federal provisions through the adoption of the "**Uniform Criminal Extradition Act**." California adopted the **Act** in 1937. (See **P.C. §§ 1548 et seq.**)

Pen. Code § 1548.1; the Governor's Duty: "Subject to the provisions of this chapter, the Constitution of the United States, and the laws of the United States, it is the duty of the Governor of this State to have arrested and delivered up to the executive authority of any other State any person charged in that State with treason, felony, or other crime, who has fled from justice and is found in this State."

Under the **Uniform Act for Out-of-State Probationer or Parolee Supervision** (**P.C. §§ 11175 et seq.**), a paroled prisoner or probationer may be arrested and brought back from another state, on revocation of his parole or probation, without invoking the more difficult extradition procedure.

If the defendant has a case pending in this state, he may be held here until he is tried and discharged or convicted and has served his sentence. (**P.C. § 1551.1**).

Procedure:

Pen. Code § 1548.2: *The Demand*: The demand must be in writing and accompanied by:

A copy, certified as authentic by the executive, of an indictment, information, or affidavit before a magistrate in the demanding state, charging the commission of a crime under the laws of that state; *and*

A copy of any warrant issued thereon; *or*

A copy of a judgment of conviction or sentence imposed, with a statement that the person claimed has escaped or violated his bail, probation or parole.

Pen. Code § 1548.3: *Investigating the Demand*: The governor of the asylum state may then call upon the Attorney General or any District Attorney to *Investigate the Demand* and report on whether the person should be surrendered.

It is not supposed to be an issue in the asylum state whether or not the defendant is guilty. The only issue to be resolved by the asylum state is whether the defendant in custody is the same person demanded by the other state. (**Pen. Code §§ 1550.1**. **1553.2**)

However, despite the fact that the **Uniform Act** is worded in mandatory terms, it has been held that while a court may force the governor to make a decision, courts *do not* have the power to make a governor make a *specific* decision; i.e., the governor cannot be forced to honor another state's request for extradition. (***South Dakota v. Brown*** (1978) 20 Cal.3rd 765.)

A 30-year delay in extraditing a California resident, nor the defendant's ill health, do not justify an exception to the extradition requirements. (***In re Walton*** (2002) 99 Cal.App.4th 934.)

A probationer who flees California may be ordered to pay the costs of his extradition back to California.

(***People v. Washington*** (2002) 100 Cal.App.4th 590.)

Pen. Code §§ 1547 et seq.: The Governor's Warrant: When the decision is made to surrender the defendant, a "*Governor's Warrant of Extradition*" is issued which authorizes the arrest and delivery of an accused to the agent of the demanding state.

Pen. Code § 1554.2: This is the relevant statute for requesting the return to California of a fugitive found/detained in other state. The statute specifically states that the person must be "charged with a crime in this state" (**subd. (a)**), and that the application must be "accompanied by . . . the verified complaint made to the magistrate stating the offense with which the accused is charged" (**subd. (c)**).

Note: Based upon the wording of this statute, it is arguable that a fugitive must be actually charged by a complaint, information, or indictment, before extradition can proceed. The state cannot issue a Requisition to another state demanding the return of a fugitive from that state until charges are actually filed. As a result, a ***Ramey*** warrant (i.e., an affidavit made for the issuance of that warrant; see "***Ramey*** *Warrant*," under "Arrests" (Chapter 5), above.) is not enough by itself for the Governor to order the extradition of a fugitive, in that the person is not charged with a crime until a charging document is filed with the court.

Waiver of Extradition; **Pen. Code § 1555.2**: A person may be required to give a prior waiver of extradition as a condition of his or her release from custody, or as a part of a plea bargain, on the original charge which later becomes the subject of the extradition from the asylum state. (Overruling a prior court decision to the contrary, ***In re Klock*** (1982) 133 Cal.App.3rd 726.)

Circumventing an Extradition Treaty: Prosecution of a defendant is not precluded merely because a defendant is abducted abroad for the purpose of prosecution, even if done in violation of an extradition treaty, such as when U.S. law enforcement agents forcibly abduct a foreign national in Mexico and bring him to the United States for prosecution. (***United States v. Alvarez-Machain*** (1992) 504 U.S. 655 [112 S.Ct. 2188; 119 L.Ed.2nd 441]; see also

Ker v. Illinois (1886) 119 U.S. 436 [7 S.Ct. 225; 30 L.Ed. 421]; ***People v. Salcido*** (2008) 44 Cal.4th 93, 119-126.)

Unlawful Flight to Avoid Prosecution ("***UFAP***"): **18 U.S.C. § 1073**; **The Fugitive Felon Act**:

Scope: This federal statute provides criminal penalties for unlawful flight to avoid prosecution, confinement, giving of testimony, or to avoid service of process. ($5,000 fine and/or 5 years in prison.)

The primary purpose of the statute is to give the federal government the jurisdiction to assist in the location and apprehension of fugitives from state justice, through the use of a "***UFAP*** *Warrant*."

Procedure:

- A federal complaint for unlawful flight to avoid prosecution is appropriate where there is probable cause to believe that the fugitive has fled and that his flight was for the purpose of avoiding prosecution and that he has moved or traveled in interstate or foreign commerce.

  The mere absence from the state without evidence of an intent to avoid prosecution is *not* sufficient. (***In re King*** (1970) 3 Cal.3rd 226, 236, fn. 8.)

- Although not legally required, state prosecution should have been commenced by complaint, warrant, indictment, or information, prior to issuance of the federal complaint.

  However, it is not necessary that the flight itself occur prior to the initiation of the prosecution. (***Lupino v. United States*** (8th Cir. 1959) 268 F.2nd 799.)

- Certified copies of the charging documents should be delivered to the Unites States Attorney's Office.

UFAP specifically applies as well to "*parental kidnappings*" and interstate or international flight to avoid prosecution for that crime.

The Department of Justice has established guidelines for issuing warrants in these cases which require independent

and credible information that the kidnapped child is in a condition of abuse or neglect.

UFAP also covers flight for the purpose of *avoiding custody or confinement.*

Applies to inmates of jails and prisons as well as those on conditional liberty; i.e., probation or parole.

Evidence should be available indicating that a probationer or parolee knew or believed that his conditional liberty was about to be revoked or was at least in jeopardy.

A complaint may also be authorized where a witness has fled the state to *avoid giving testimony* in a criminal proceeding which involves a felony.

The criminal proceedings must actually have been initiated in state court. (***Durbin v. United States*** (D.C. Cir. 1954) 221 F.2nd 520.)

There should be substantial evidence to indicate that the intent was to flee in order to avoid the giving of testimony.

UFAP prohibits interstate flight "to *avoid service of*, or contempt proceedings for alleged disobedience of, *lawful process*, requiring attendance and the giving of testimony or the production of documentary evidence before an agency of a state empowered by the law of such state to conduct investigations of alleged criminal activities."

UFAP does *not* supersede, nor is it intended to provide an alternative for, *state extradition* proceedings.

Note: The *federal complaint* charging unlawful flight will generally be *dismissed* once a fugitive has been apprehended and turned over to state authorities to await interstate extradition.

Wiretaps and Eavesdropping:

Wiretaps vs. Right to Privacy: Both the federal Congress and California's Legislature, expressing concern over the potential for violating privacy rights (see ***Alderman v. United States*** (1969) 394 U.S. 165 [89 S.Ct. 961; 22 L.Ed.2nd 176].), have enacted statutes controlling the use of wiretaps by law enforcement.

Federal rules are contained, for the most part, in the ***Omnibus Crime Control and Safe Streets Act of 1968*** (**Title III, 18 U.S.C. §§ 2510 et seq**.). However, in that California's state statutes are more restrictive (see ***People v. Jones*** (1973) 30 Cal.App.3rd 852.), it is generally accepted that if a police officer acts in compliance with **Pen. Code §§ 629.50 et seq.**, he or she will also be in compliance with the federal requirements.

> ***Alderman v. United States***, *supra*: The **Fourth Amendment** rights of homeowners are implicated by the use of a surreptitiously planted listening device to monitor third-party conversations that occurred within their home.
>
> The federal ***Omnibus Crime Control and Safe Streets Act of 1968*** authorizes the states to enact their own wiretap laws only if the provisions of those laws are at least as restrictive as the federal requirements for a wiretap set out in **Title III**. (***People v. Jackson*** (2005) 129 Cal.App.4th 129, 146-147; ***People v. Otto*** (1992) 2 Cal.4th 1088, 1098.)
>
> The federal District Court denied defendant's motion to suppress evidence obtained from a series of surveillance orders that authorized the interception of communications over cellular phones pursuant to the **Omnibus Crime Control and Safe Streets Act of 1968**, associated with defendant and his co-conspirators. Defendant claimed that the surveillance orders authorized the government to transform the cellular phones into roving electronic bugs by using sophisticated eavesdropping technology. The Ninth Circuit disagreed, sustaining the district court's ruling, noting that if the government seeks authorization for the use of new technology to convert cellular phones into roving bugs, it must specifically request that authority. In this case, however, the surveillance orders were intended only to authorize standard interception techniques and the government only utilized standard interception techniques. (***United States v. Oliva*** (9th Cir. 2012) 705 F.3rd 390, 395-401.)
>
> In a case involving federal wiretap statutes, the Ninth Circuit Court of Appeal vacated the district court's judgment dismissing Lyudmyla Pyankovska's claims against John Jones as barred under the ***Noerr-Pennington*** doctrine, and entering default judgment against Sean Abid in a wiretap case. Pyankovska had alleged federal and wiretap violations and state common law claims against Abid, her ex-husband, and Jones, his attorney. She alleged that during a child custody proceeding in Nevada state court, Abid had secretly recorded conversations between her and their child, and that Jones had filed selectively edited transcripts of the

illegally recorded conversations on the state court's public docket. The district court concluded that Jones's alleged conduct involved **First Amendment** petitioning activity, which is protected by the ***Noerr-Pennington*** doctrine. The district court entered default judgment against Abid on the grounds that his responses to various discovery requests were knowingly inaccurate and that he had proceeded in bad faith. The district court awarded Pyankovska $10,000 in statutory damages under the **Federal Wiretap Act**, but it did not award punitive damages or litigation costs, nor did it discuss or award other categories of damages ostensibly available on her Nevada common-law claims. On appeal, the Court held that Jones violated the **Federal Wiretap Act**, and it agreed with the district court that the vicarious-consent doctrine did not apply and that Jones's conduct was not protected under ***Bartnicki v. Vopper*** (2001) 532 U.S. 514 [121 S.Ct. 1753; 149 L.Ed.2nd 787, which carved out a narrow **First Amendment** exception to the **Federal Wiretap Act** for matters of public importance. The Court further held, however, that Jones's conduct was not protected under the ***Noerr-Pennington*** doctrine. The Court concluded that Pyankovska's lawsuit did not impose a burden on petitioning rights because Abid prevailed in the state court custody case, and Jones had no petitioning "right" to use the transcripts. The Court also held that filing illegally obtained evidence on a public court docket is conduct not immunized under ***Noerr-Pennington***, and the **Federal Wiretap Act** unambiguously applied to Jone"s conduct. Lastly, the Court held that the district court incorrectly computed statutory damages under the **Federal Wiretap Act** because it did not consider whether Abid violated the statute for more than 100 days, which would render the amount of damages greater than $10,000. In addition, the district court failed to adequately address other categories of damages to which Pyankovska might be entitled, including punitive damages, attorney's fees, and damages on Nevada common-law claims. (***Pyankovska v. Abid*** (9th Cir. 2023) 65 F.4th 1067.)

> ***Note***: The ***Noerr-Pennington*** doctrine, derived from two Supreme Court cases, requires courts to construe ambiguous statutes to avoid burdening petitioning activity protected by the **First Amendment**. (*See* ***United States v. Koziol*** (9th Cir. 2021) 993 F.3rd 1160, 1171.)

See also the **Federal Intelligence Surveillance Act** (i.e., "**FISA**"), codified at **50 U.S.C. § 1810**:

> In an action alleging covert surveillance of Muslims, alleged to be based solely on their religious identity, plaintiffs' complaint

alleged a **FISA** claim against FBI agents for recordings made by devices planted by FBI agents in a house and office. As to all other categories of surveillance, the agent defendants either did not violate **FISA**, were entitled to qualified immunity on the **FISA** claim because plaintiffs' reasonable expectation of privacy was not clearly established, or were not plausibly alleged in the complaint to have committed any **FISA** violation that may have occurred. Reversing in part, and affirming in part, the Ninth Circuit held that the district court erred in determining sua sponte that **Fourth Amendment** and **FISA** claims warranted dismissal under the state secrets privilege because the Government expressly did not request dismissal of the claims based on the state secrets privilege. (***Fazaga v. Federal Bureau of Investigation*** (9th Cir. 2020) 965 F.3rd 1015.)

The Ninth Circuit Court of Appeals affirmed the convictions of four members of the Somali diaspora (i.e., Somalis who were born in Greater Somalia and reside in areas of the world that they were not born in.) for sending, or conspiring to send, $10,900 to Somalia to support a foreign terrorist organization, but questioned the U.S. government's authority to collect bulk data about its citizens' activities under the auspices of a foreign intelligence investigation, as well as the rights of criminal defendants when the prosecution uses information derived from foreign intelligence surveillance. The Court held that the government may have violated the **Fourth Amendment** when it collected the telephony metadata of millions of Americans, including at least one of the defendants, pursuant to the **Foreign Intelligence Surveillance Act** (**FISA**), but that suppression is not warranted on the facts of this case. Having carefully reviewed the classified **FISA** applications and all related classified information, the panel was convinced that under established **Fourth Amendment** standards, the metadata collection, even if unconstitutional, did not taint the evidence introduced by the government at trial, holding that to the extent the public statements of government officials created a contrary impression, that impression is inconsistent with the contents of the classified record. The Court rejected the government's argument that the defendants lacked standing to pursue their statutory challenge to the (subsequently discontinued) metadata collection program. On the merits, the Court held that the metadata collection exceeded the scope of Congress's authorization in **50 U.S.C. § 1861**, which required the government to make a showing of relevance to a particular authorized investigation before collecting the records, and that the program therefore violated that section of **FISA**. The Court held that suppression is not clearly contemplated by **section 1861**, and there is no statutory basis for suppressing the

metadata itself. The Court's review of the classified record confirmed that the metadata did not and was not necessary to support the requisite probable cause showing for the **FISA Subchapter I** warrant application in this case, and that even if it were to apply a "fruit of the poisonous tree" analysis, it would conclude that evidence from the government's wiretap of defendant's phone was not the fruit of the unlawful metadata collection. Lastly, The Court confirmed that the **Fourth Amendment** requires notice to a criminal defendant when the prosecution intends to enter into evidence or otherwise use or disclose information obtained or derived from the surveillance of that defendant conducted pursuant to the government's foreign intelligence authorities. The Court did not decide whether the government failed to prove any required notice in this case because the lack of such notice did not prejudice the defendants. (***United States v. Moalin*** (9th Cir. 2020) 973 F.3rd 977.)

Pen. Code § 630: *Statement of Legislative Purpose*: Recognizing the advances in science and technology that have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and the resulting invasion of privacy involved, the Legislature enacted the following statutes for the purpose of protecting the *right of privacy* of the people of this state.

> It is *not* the intent of the Legislature, however, to place greater restraints on the use of listening devices and techniques by law enforcement agencies than existed prior to the effective date (i.e., January 2, 1968) of this Chapter. (***Ibid***.)
>
> This section pertaining to wiretapping and other electronic devices is a general provision declaring a broad legislative purpose; **P.C. § 633** is the specific section dealing with the classes exempted from the two preceding sections prohibiting wiretapping and it is only the officers named in the latter section who are exempt from the sanctions imposed by **§§ 631** and **632**. (55 ***Op.Cal.Atty.Gen.*** 151 (1972))

***Pen. Code § 631*: *Unauthorized Wiretaps*:**

> **(a)** Any person who, by means of any machine, instrument, or contrivance, or in any other manner, intentionally taps, or makes any unauthorized connection, whether physically, electrically, acoustically, inductively, or otherwise, with any telegraph or telephone wire, line, cable, or instrument, including the wire, line, cable, or instrument of any internal telephonic communication system, or who willfully and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the

contents or meaning of any message, report, or communication while the same is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place within this state; or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained, or who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things mentioned above in this section, is punishable by a fine not exceeding *two thousand five hundred dollars* ($2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment pursuant to **subdivision (h)** of **Section 1170**, or by both a fine and imprisonment in the county jail or pursuant to **subdivision (h)** of **Section 1170**. If the person has previously been convicted of a violation of this section or **Section 632**, **632.5**, **632.6**, **632.7**, or **636**, the offense is punishable by a fine not exceeding *ten thousand dollars* ($10,000), or by imprisonment in the county jail not exceeding one year, or by imprisonment pursuant to **subdivision (h)** of **Section 1170**, or by both that fine and imprisonment.

Case Law: Violation of wiretapping statutes may also be a **Fourth Amendment** violation if the illegal wiretap also violates a person's legitimate expectation of privacy. (***United States v. Shrylock*** (9th Cir. 2003) 342 F.3rd 948, 978.)

Note, however, that a similar statute in the state of Oregon, prohibiting the recording of a conversation unless all parties to that conversation know that they're being recorded, has been held by the Ninth Circuit Court of Appeal as unconstitutional, and in violation of the First **Amendment**. (See ***Project Veritas v. Schmidt*** (9th Cir. 2023) 72 F.4th 1043, holding that **Or. Rev. Stat. § 165.540(1)(c)**, which prohibited making audio and visual recordings unless all participants in the conversation were informed of the recording, violated the **First Amendment**, as it was a content-based restriction in that it restricted some subject matters and not others. The Court further held that it a failed strict scrutiny review because it was not narrowly tailored to achieving a compelling governmental interest in protecting conversational privacy with respect to each activity within the proscription's scope and there were other ways for Oregon to achieve its interests, such as invasion of privacy and defamation actions. Because the statute did not leave open ample alternative channels for communication, the Court held that it was not a valid "time, place, or manner restriction," so it could not be "saved" through severability by striking its exceptions.

(b) This section *shall not* apply to any of the following:

(1) Any public utility, or telephone company, engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited herein are for the purpose of construction, maintenance, conduct or operation of the services and facilities of the public utility or telephone company.

(2) The use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of a public utility.

(3) Any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility.

Case law: *Prison Visitors*: A phone used during a physical visitation by a prisoner and his or her visitor does *not* meet the requirements of a "*wire communication*," not using a line in interstate or foreign commerce. It is therefore not subject to the wiretap restrictions of **P.C. § 631**. (***People v. Santos*** (1972) 26 Cal.App.3rd 397, 402.)

(c) For purposes of this section, "*telephone company*" is defined in **paragraph (3)** of **subdivision (c)** of **Section 638**.

(d) Except as proof in an action or prosecution for violation of this section, no evidence obtained in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding.

Case Law:

A "*Controlled Telephone Call*" made by a victim or witness to a suspect for the purpose of obtaining incriminating statements from the suspect, at law enforcement's request (See **P.C. §§ 632**, **633**), is *not* a privacy violation or an illegal **Fourth Amendment** search. (See ***United States v. White*** (1971) 401 U.S. 745 [91 S.Ct. 1122; 28 L.Ed.2nd 453].)

See also ***People v. Nakai*** (2010) 183 Cal. App. 4th 499, 517-518: Incriminating online chat with a minor is not a confidential communication per **P.C. § 632** that requires suppression.

Federal law also has its own version of the wiretap statutes; **18 U.S.C. §§ 2510-2523**. (See ***Bliss v. Corecivic, Inc.*** (9th

Cir. 2020) 978 F.3rd 1144; noting that each separate illegal interception is a violation, and that the two-year statute of limitations begins when the target of the violation first had a reasonable opportunity to discover that her phone calls were being tapped.)

"**Title III** of the federal **Omnibus Crime Control and Safe Streets Act of 1968** (**Title III**) (**18 U.S.C. §§ 2510–2520**) 'provides a "comprehensive scheme for the regulation of wiretapping and electronic surveillance."' [Citation.] As we have previously observed, **Title III** 'establishes minimum standards for the admissibility of evidence procured through electronic surveillance; state law cannot be less protective of privacy than the federal Act.' (***People v. Leon*** (2007) 40 Cal.4th 376, 384 . . . .); see ***Villa v. Maricopa County*** (9th Cir. 2017) 865 F.3d 1224, 1230 . . .) ["States may choose to enact wiretapping statutes imposing more stringent requirements, or … choose to forego state-authorized wiretapping altogether"].)" (***People v. Gonzalez*** (2021) 12 Cal.5th 367, 392.)

Note: *Similar restrictions* are contained in:

Pen. Code § 632: Electronic eavesdropping, in general.

Pen. Code § 632.5: Cellular radio telephone communications.

Pen. Code § 632.6: Cordless telephone communications.

Pen. Code § 632.7: Recording communications between cellular radio telephones and cordless telephones, or between these and a landline telephone.

Pen. Code § 632*: *Eavesdropping *or Recording Confidential Communications*:

Subd. (a): Every person who, intentionally and without the consent of *all parties* to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. If the person has previously been convicted of a violation of this section or **Section 631**, **632.5**, **632.6**,

632.7, or **636**, the person shall be punished by a fine not exceeding ten thousand dollars ($10,000), by imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

> "The text of **Penal Code section 632** plainly requires proof of '*intentional* conduct' to establish a statutory violation and to invoke the evidentiary sanction set forth in **subdivision (d)**. (***Marich*** (***v. MGM/UA Telecommunications, Inc.*** (2003)) 113 Cal.App.4th (415), at p. 421.) Under the statute, 'the recording of a confidential conversation is intentional if the person using the recording equipment does so with the purpose or desire of recording a confidential conversation, or with the knowledge to a substantial certainty that his use of the equipment will result in the recordation of a confidential conversation.'" (***Lozano v. City of Los Angeles*** (2022) 73 Cal.App.5th 711, 727; quoting ***People v. Superior Court (Smith)*** (1969) 70 Cal.2nd 123, 134.)
>
> > The Court in ***Lozano*** (at p. 728) further defines the term "intentional," quoting the California Supreme Court: "This court held that 'intentionally' in [the invasion of privacy] statute required an intent to bring about the proscribed result rather than an intent merely to do an act which unintentionally brought about that result. Thus, the [***Smith***] court concluded that the Penal Code section required an intent *to record a confidential communication*, rather than simply an intent to turn on a recording apparatus which *happened to record a confidential communication*." (Italics in original; quoting ***Estate of Kramme*** (1978) 20 Cal.3rd 567, 572, fn. 5; and citing ***People v. Superior Court* (*Smith*)** (1969) 70 Cal.2nd 123.)

In a civil suit alleging a violation of **Pen. Code §§ 632(a)** and **632.7(a)**, the plaintiff must prove that the recording of confidential telephone conversations was done intentionally. (***Rojas v. HSBC Card Services, Inc.*** (2018) 20 Cal.App.5th 427; holding that the intentional recording of confidential communications may be proved circumstantially, noting that there was nothing inadvertent or momentary about the defendant company purposely recording 317 telephone calls. Under such circumstances, defendant did not meet its burden of establishing as a matter of law that it did not have knowledge to a substantial certainty that its use of recording equipment would result in the recordation of a confidential conversation of an employee and a third party such as plaintiff.

Claims under the **California Invasion of Privacy Act**, **Pen. Code §§ 630 et seq.**, alleging that a company had recorded phone conversations between its sales representatives and prospective clients (although recording the sales rep only) without the knowledge or consent of the prospective client, raised triable issues of fact because the prohibition in **Pen. Code §§ 632, 632.7**, against recording communications without the consent of all parties applied to one-way recordings, and thus the company's undisputed evidence that it recorded only its representatives' voices and not the prospective client's voice did not entitle the company to summary adjudication. Also, because the company's statement that it used "*Voice over Internet Protocol*" (i.e., "VoIP") technology did not establish what type of phone or device VoIP was, further factual development was necessary before a ruling could be made as to whether **§ 632.7** applied to VoIP. (***Gruber v. Yelp Inc.*** (2020) 55 Cal.App.5th 591, 605-613.)

Note: Unlike **Pen. Code § 632**, **§ 632.7** does not require the communication to have been "confidential." (***Id.***, at p. 606.)

Subd. (b): The term "*person*" includes an individual, business association, partnership, corporation, limited liability company, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, but excludes an individual known by all parties to a confidential communication to be overhearing or recording the communication.

Subd. (c): The term "*confidential communication*" includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

General Rules:

"[U]nder **section 632** 'confidentiality' appears to require nothing more than the existence of a reasonable expectation by one of the parties that no one is 'listening in' or overhearing the conversation. (Citation) Thus, the court concluded, 'a conversation is confidential under **section 632** if a party to that conversation has an objectively reasonable expectation that the conversation is not being

overheard or recorded.'" *(**Flanagan v. Flanagan*** (2002) 27 Cal.4th 766, 772-773, 776-777.)

"The term 'confidential communication' has been interpreted to include communication by conduct in addition to oral or written dialogue. (See ***People v. Drennan*** (2000) 84 Cal.App.4th 1349, 1353, 1356 . . . ['confidential communication' under **§ 632** addresses the recording of sound-based or symbol-based communications, not still, timed photographs without accompanying sound]; (People v.) ***Gibbons*** ((1989) . . . 215 Cal.App.3rd at p. 1209 ['confidential communication' under **§ 632** encompasses communication by conduct, including sexual relations].) (Footnote omitted)." (***People v. Lyon*** (2021) 61 Cal.App.5th 237, 235-246.)

> In the omitted footnote (fn. 3, at pg. 246), it was recognized that the ***Drennan*** court disagreed with the conclusion in ***Gibbons*** that the term "confidential communication" under **section 632** includes communication by conduct. The ***Lyon*** Court concluded that it need not take sides on this issue while holding that the video recordings in this case that formed the basis of the **section 632** charges captured *both* words and real time images.
>
> "'The test of confidentiality is objective. [A party's] subjective intent is irrelevant. [Citation.] "A communication must be protected if *either* party reasonably expects the communication to be confined to the parties."' (***Coulter v. Bank of America*** (1994) 28 Cal.App.4th 923, 929 . . . .) Whether a party had an objectively reasonable expectation that a communication was not being overheard or recorded is generally a question of fact based on the circumstances presented. (***Hataishi v. First American Home Buyers Protection Corp.*** (2014) 223 Cal.App.4th 1454, 1466 . . . . However, if the undisputed material facts show no reasonable expectation of privacy, the question of whether a party's privacy has been invaded may be determined as a matter of law. (***Santa Ana Police Officers Assn. v. City of Santa Ana*** (2017) 13 Cal.App.5th 317, 325.)" (People v. Lyon, supra, at

p. 246. See also ***People v. Wyrick*** (1978) 77 Cal.App.3rd 903.)

In People v. Drennan, supra, a school superintendent who installed a hidden video camera in a high school principal's office to determine if someone was taking or reading confidential documents was improperly convicted of violating **Pen. Code § 632(a)**, since the photographing for a purpose and in a manner which did not reveal the content of any conversation was not an intentional act of recording a "confidential communication" as those terms are used in **§ 632**. The taking of timed, still photographs of two or more people carrying on a confidential conversation, without accompanying sound, does not constitute the recording of a confidential communication under the statute. Nor does **§ 632** protect a general right of privacy from unconsented videotaping. Such a right enforced by penal sanctions is found in **Pen. Code § 647(k)**.

A confidential communication, for purposes of **Pen. Code § 632**, need not fall within an evidentiary privilege. Rather, the term includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties, but excludes a communication made in a public gathering or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." (**Pen. Code § 632(c)**.) The test of confidentiality is an objective one, but does not depend on a reasonable expectation the contents of the communication will remain confidential to the parties. Rather, a conversation is confidential for purposes of **Pen Code § 632** if the circumstances objectively indicate that any participant reasonably expects and desires that the conversation itself will not be directly overheard by a nonparticipant or recorded by any person, participant or nonparticipant. While one who imparts private information risks the betrayal of his confidence by the other party, a substantial distinction has been recognized between the secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or a mechanical device. Such secret

monitoring denies the speaker an important aspect of privacy of communication; i.e., the right to control the nature and extent of the firsthand dissemination of his statements. (***Shulman v. Group W Productions, Inc.*** (1998) 18 Cal.4th 200.)

Where it is shown that at least one of the parties to a conversation had a reasonable expectation of privacy, then it is indeed a violation of **P.C. § 632** to record such a conversation. (***Turnbull v. ABC*** (C.D. Cal. 2004) 2004 U.S. Dist. LEXIS 23351, at pg. 32.)

Not Confidential, Examples:

Communications between officers during the execution of a search warrant *do not* qualify as "*confidential*." (***Santa Ana Police Officers Assn. v. City of Santa Ana*** (2017) 13 Cal.App.5th 317, 325-326.)

It was held that a gas station manager had no reasonable expectation of privacy in a videotaped confrontation between himself and the owners of the gas station, recorded by a hidden camera in the manager's office, and therefore the communications during that confrontation were not "confidential communications" within the meaning of **section 632**. (***People v. Nazary*** (2010) 191 Cal.App.4th 727.)

While under arrest in the back seat of a patrol car (***People v Newton*** (1974) 42 Cal.App.3rd 292), at least where defendant and his accomplice were under arrest, handcuffed and seated in the back of a police car at the time the recording was taken, and that they had been advised of the charges against them, and where the defendant testified that at the time of the conversation with his accomplice he knew it was being recorded. (***People v. Chandler*** (1968), 262 Cal.App.2nd 350.)

While a prisoner in a jail (except when talking with one's attorney). (***People v. Lopez*** (1963) 60 Cal.2nd 223, 248; ***People v. Apodaca*** (1967) 252 Cal.App.2nd 656, 658-659; ***People v. Blair*** (1969) 2 Cal.App.3rd 249; ***People v. Estrada*** (1979) 93 Cal.App.3rd 76.)

Where a former state correctional facility inmate sued a correctional facility officer under **42 U.S.C. § 1983**,

alleging that the officer[s screening of, and intermittent checking in on, his telephone conversations with his attorney, who was *not* representing the inmate in a criminal matter (but rather a civil matter), violated his **Fourth Amendment** rights (i.e., illegal wiretapping), the officer was entitled to qualified immunity because she did not violate any **Fourth Amendment** right that was clearly established at the time of the challenged conduct. The claimed **Fourth Amendment** right was not clearly established at the time of the underlying conduct because there was no precedent that placed the right beyond debate, particularly as there was no U.S. Supreme Court or applicable circuit court of appeals case considering this issue that placed this **Fourth Amendment** question beyond debate at the time of the officer's challenged conduct. (***Evans v. Skolnik*** (9th Cir. 2021) 997 F.3rd 1060; but declining to consider the merits of the plaintiff's **Fourth Amendment** claims, leaving the core issue undecided.)

> *Note*: This case also comes under the title of "***Witherow v. Baker***," using the names of the primary litigants.

A tape recording of a conversation between a juvenile murder suspect and his uncle which took place in an interrogation room in a police station, and which was surreptitiously monitored and recorded, was properly admitted into evidence under the general rule that persons within a jail or police facility have no reasonable expectation of privacy as to conversations, where the parties had no recognized privileged relationship; where there was no evidence that the police made any representation of confidentiality or that the uncle was acting as a police agent. (***In re Joseph A.*** (1973) 30 Cal.App.3rd 880.)

In a prosecution of defendant for embezzlement from his partnership, a tape recording of a conversation between defendant and some general partners was *not* a confidential communication made inadmissible under **Pen Code § 632**, and the trial court properly admitted it into evidence. Whether a communications is confidential is a preliminary question of fact, and there was substantial evidence to support the trial court's finding that the recorded conversation was *not* a confidential communication where the nature of the meeting and the manner in which it was

carried was such that the trial court could reasonably conclude that it was no different than other business meetings of the parties that were not confidential. (***People v. Pedersen*** (1978) 86 Cal.App.3rd 987.)

Telephone bomb threats to state university police made by defendant did not constitute confidential communications within the meaning of **Pen. Code § 632**, prohibiting the recording of such conversations, and thus the trial court, in defendant's subsequent prosecution for possession of a destructive device or explosive in a public place, properly denied defendant's motion to suppress evidence seized as a result of tape recordings of the telephone conversations. (***People v. Suite*** (1980), 101 Cal.App.3rd 680.)

In a personal injury civil action arising out of a motorcycle accident in which plaintiff did not file his lawsuit until a year and eight days after the accident, beyond the normal statute of limitations, a telephone conversation between plaintiff's investigator and defendant was held *not* to be a confidential communication within the meaning of **Pen. Code § 632**, so as to bar its use in evidence. In order to determine if plaintiff could claim that the one-year limitations period was tolled while defendant was out of the state (per **CCP § 351**), the investigator had used the ruse that defendant would be eligible to win money if he answered some questions relative to him leaving the state for more than eight days during that period, thus tolling the statute for that time period. Under the circumstances, defendant could not have had an objectively reasonable expectation of confidentiality. Thus, the trial court erred in finding that a transcript of the conversation, which was secretly taped by the investigator, was excluded under **Pen. Code § 632**, which, in addition to making it a crime to intentionally record a confidential communication without the consent of all the parties, bars the use of any evidence so obtained. (***O'Laskey v. Sortino*** (1990) 224 Cal.App.3rd 241.)

Video-taping a prostitute's sex acts with defendant at defendant's home is not legal in that the prostitutes acts and comments do not qualify as confidential communications under **Pen. Code § 632(a)** and **(c)**. (***People v. Lyon*** (2021) 61 Cal.App.5th 237.)

> The ***Lyon*** Court notes, however (at p. 249.) that another jurisdiction (i.e., Maine) has held that there is no expectation of privacy in a place where prostitutes carry on their trade, such as the prostitute's residence, studio, or place of business. (Citing ***State v. Strong*** (2013) 2013 ME 21.)

Where producers of a television show responded to plaintiffs' advertisement for investors and met with one of plaintiffs' salespersons without revealing their association with the television show, a videotaping of the meeting, part of which was later shown on the show, did not violate the Penal Code's prohibition against eavesdropping on or recording confidential communications. It was essential that plaintiffs prove that the taped conversation was "confidential." Here, the meeting was held at a busy restaurant, waiters frequently came to the table, and the information divulged by the salesperson was not secret and had been divulged to many other potential investors. (***Wilkins v. National Broadcasting Co.*** (1999), 71 Cal.App.4th 1066.)

Ed. Code § 51512, prohibiting surreptitious videotaping in a classroom, and **Pen. Code § 632**, prohibiting the recording of confidential communications, read together, do *not* prohibit the use of videotape recordings obtained in violation of **§ 51512** in disciplinary proceedings against a teacher. While **§ 51512** provides sanctions against violators, it does not specifically prohibit entities such as the Board of Education or a school district from using such a recording, nor does it imply an exclusionary rule. **Section 632**, by its terms, is applicable only to confidential communications. (***Evens v. Superior Court*** (1999) 77 Cal.App.4th 320.)

Because defendant could not reasonably have expected that his conversations with a stranger in an Internet chat room would be kept confidential, the conversations he had with a minor were not confidential communications within the meaning of **Pen. Code § 632(c)**. Defendant, therefore, was *not* entitled under **§ 632(d)** to suppress evidence of sexually explicit conversations with a person who had identified herself as a minor. (***People v. Nakai*** (2010) 183 Cal.App.4th 499.)

Dismissal of a consumer's putative class action against his home security provider was proper because his allegation that he called to dispute a charge did *not* lead to the conclusion that he had an objectively reasonable expectation that he was not being recorded in violation of **Pen. Code § 632**. (***Faulkner v. ADT Sec. Servs.*** (9th Cir. 2013), 706 F.3rd 1017.)

Confidential, Examples:

Employees who work in a shared or solo office, and who perform work or personal activities in relative seclusion there, would not reasonably expect to be the subject of secret filming by their employer. (***Hernandez v. Hillsides, Inc.*** (2009) 47 Cal.4th 272, 291.)

In addressing the range of potential intrusions on privacy, the Court explained that at one end of the spectrum are "settings in which work or business is conducted in an open and accessible space, within the sight and hearing not only of coworkers and supervisors, but also of customers, visitors, and the general public." (***Id.***, at p. 290 [e.g., secret videotaping of lunch meeting on crowded outdoor patio of public restaurant, employee in common, open, and exposed area of workplace].) At the other end of the spectrum are places where employees maintain privacy interests, such as "areas in the workplace subject to restricted access and limited view, and reserved exclusively for performing bodily functions or other inherently personal acts." (***Ibid.***, e.g., secret videotaping of locker room in basement of police station, restroom at workplace, designated area for models and dancers to change clothes at workplace.

Communications reflecting an intent to violate the law are *not necessarily* outside of the legal definition of "confidential communication" of **Pen. C § 632(c)**. (***In re Berman*** (1989) 48 Cal.3rd 517; the issue not decided in an attorney disbarment proceeding, given the weight of the other evidence showing that petitioner, an attorney, had discussed with an undercover F.B.I. agent over the telephone the illegal transportation of drugs.)

The trial court properly granted summary adjudication in favor of a bank and 11 of its employees (plaintiffs) in their action against another bank employee (defendant) under the **Privacy Act** (**Pen. Code §§ 630 et seq.**), for secretly recording private conversations. The test of confidentiality is objective, and defendant's subjective intent was irrelevant. Each plaintiff submitted declarations detailing the circumstances surrounding the conversations, the topics discussed, and their own belief and expectation that the conversations were confidential. Defendant's asserted expectation that the subject matter of the conversations would be repeated to other bank employees did not remove them from statutory protection. It was sufficient that the bank employees who were secretly recorded expected the conversations to be private. "Confidentiality" requires nothing more than the existence of a reasonable expectation by one of the parties that no one is "listening in" or overhearing the conversation. There was thus no material issue regarding confidentiality. Also, it was immaterial that defendant never disclosed the tapes to a third party. (***Coulter v. Bank of America*** (1994) 28 Cal.App.4th 923.)

An attorney had an objectively reasonable expectation that conversations between counsel involving litigation matters would not be divulged and were confidential communications under **Pen. Code § 632(c)**. Even though the attorney was put "on notice" that the conversations were "subject to being recorded," the attorney maintained an objectively reasonable expectation of privacy by explicitly withholding consent for tape recording. (***Nissan Motor Co. v. Nissan Computer Corp.*** (2002) 180 F. Supp.2nd 1089.)

In a plaintiff's opposition to an Anti-SLAPP motion to strike, the mere fact that a secretly recorded conversation with defendant took place in a public restaurant does not mean plaintiff failed to advance a prima facie case for a violation of **Pen. Code § 632(a)**; i.e., that their conversation was intended to be in confidence. (***Safari Club Int'l v. Rudolph*** (9th Cir. 2017) 845 F.3rd 1250; noting that privacy is relative and, depending on the circumstances, one can harbor an objectively reasonable expectation of privacy in a public location.)

In a case in which plaintiff alleged that defendant violated the **Invasion of Privacy Act**, **Pen. Code §§ 630 et seq.**, by

recording her confidential conversations with her daughter, who was defendant's employee, defendant did not meet its initial burden of establishing, as a matter of law, that it lacked the requisite intent to trigger a violation of **Pen. Code § 632(a)**, or **Pen. Code § 632.7(a)**. Defendant knew that it was recording all of the calls, having previously told its employees that they were authorized to use defendant's telephones for personal use and that their personal calls might be recorded. (***Rojas v. HSBC Card Services Inc.*** (2018) 20 Cal.App.5th 427.)

Subd. (d): Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding.

Where in a child sexual abuse case, the California Supreme Court held that the state constitutional right to truth in evidence under **Cal. Const., art. I, § 28, subd. (f)(2)**, abrogated the prohibition in **Pen. Code § 632(d)**, against the admission of secretly recorded conversations in criminal proceedings. The statute did not fit within any express exception and the right to privacy under **Cal. Const., art. I, § 1**, was not affected. The exclusionary remedy was not revived just because of reenactments and amendments to **§ 632(d)**. Such changes did not address the exclusionary remedy. Also, **Gov't. Code § 9605** (Effect of Amendment on Time of Enactment; Presumption that Statute Enacted Last Prevails) provides that reenactment under **Cal. Const., art. IV, § 9**, has no effect on the unchanged portions of an amended statute. Because the exclusionary provision remained abrogated in criminal proceedings, a surreptitious recording was properly admitted into evidence in defendant's trial for committing a lewd and lascivious act upon a child. (***People v. Guzman*** (2019) 8 Cal.5th 673.)

In a disciplinary proceeding of two police officers, the admission of a recording from the digital in-car video system (DICVS) that captured the officers' act of failing to assist a commanding officer's response to a robbery in progress and playing a mobile phone game, "the Pokémon Go video game." was not precluded by **Pen. Code § 632**, as there was no evidence to show who activated the system and thus that a person intentionally recorded a confidential communication. (***Lozano v. City of Los Angeles*** (2022) 73 Cal.App.5th 711, 727-728.)

Subd. (e): This section does not apply (1) to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited by this section are for the purpose of construction, maintenance, conduct or operation of the services and facilities of the public utility, or (2) to the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of a public utility, or (3) to any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility.

Subd. (f): This section does not apply to the use of hearing aids and similar devices, by persons afflicted with impaired hearing, for the purpose of overcoming the impairment to permit the hearing of sounds ordinarily audible to the human ear.

Note: Under federal **Title III**; "(I)t shall not be unlawful . . . for a person acting under color of law to intercept a wire, oral, or electronic communication where . . . *one of the parties* to the communication has given prior consent to such interception." (Italics added; **18 U.S.C. § 2511(2)(c)**, **(d)**)

> Note **Pen. Code § 632(a)**, above, specifying that under California law, "*all parties*" to a "confidential communication" must be aware that they are being recorded or otherwise eavesdropped upon, a violation of which is a felony offense.

Although **Pen. Code §§ 631** and **632**, which prohibit "*wiretapping*" and "*eavesdropping*," respectively, envision and describe the use of same or similar equipment to intercept communications, the manner in which such equipment is used is clearly distinguished and mutually exclusive: "*Wiretapping*" is intercepting communications by an unauthorized connection to the transmission line whereas "*eavesdropping*" is interception of communications by the use of equipment which is not connected to any transmission line. (***People v. Ratekin*** (1989) 212 Cal.App.3rd 1165.)

Pen. Code § 632.01: *Disclosure or Distribution of Confidential Communications with a Health Care Provider*:

(a) It is a felony to intentionally disclose or distribute, in any manner, including but not limited to, Internet Web sites and social media, or for any purpose, the contents of a confidential communication with a health care provider, that was obtained in violation of **Pen. Code § 632(a)** (i.e., by using an electronic amplifying or recording device to eavesdrop upon or record a confidential communication without the consent of all parties).

In order for aiding and abetting principles to apply, the aider/abettor must violate or aid and abet both **Pen. Code §§ 632.01** *and* **632**.

(c) "*Health care provider*" is defined as any of the following:

(1) A person licensed or certified pursuant to **Bus. & Prof. Code §§ 500 et seq.**

(2) A person licensed pursuant to the **Osteopathic Initiative Act** or the **Chiropractic Initiative Act**.

(3) A person certified pursuant to **H&S Code §§ 1797 et seq**.

(4) A clinic, health dispensary, or health facility licensed or exempt from licensure pursuant to **H&S Code §§ 1200 et seq**.

(5) An employee, volunteer, or contracted agent of any group practice prepayment health care service plan regulated pursuant to the **Knox-Keene Health Care Service Plan Act of 1975**; **H&S Code §§ 1340 et seq**.

(6) An employee, volunteer, independent contractor, or professional student of a clinic, health dispensary, or health care facility or health care provider described in this subdivision.

(7) A professional organization that represents any of the other health care providers described in this subdivision.

(d)(1) The recording/overhearing exceptions that already exist for **P.C. § 632** in current law apply. (E.g., Per **P.C. § 633** [general law enforcement exceptions], **P.C. § 633.02** [body-worn cameras or investigating sexual assault], **P.C. § 633.05** [city attorneys], **P.C. § 633.1** [incoming calls to airport law enforcement], **P.C. § 633.5** [obtaining evidence of specified crimes; i.e., extortion, kidnapping, bribery, **P.C. § 653m** telephone harassment, any felony involving violence against the person, and human trafficking], **P.C. § 633.6** [recording by domestic violence victim with judicial permission], and **P.C. § 633.8** [hostage or barricade situations; see below].)

(d)(2) This section does not affect the admissibility of any evidence that would otherwise be admissible pursuant to the authority of any section specified in **paragraph (d)(1)**.

Punishment: *Felony*; 16 months, 2 or 3 years in prison, and/or a fine of up to $2,500 per violation, or up to $10,000 per violation with a prior conviction for the same offense. (**Subd. (b)**)

Note: This legislation, effective *1/1/2017*, was a knee-jerk reaction to the highly publicized "Planned Parenthood" eavesdropping case where defendants surreptitiously recorded a conversation with plaintiffs concerning their handling of aborted fetuses.

Pen. Code § 632.7: *Eavesdropping On, and Recording of, Communications Transmitted Between Cellular or Cordless Telephones; Punishment*:

(a) Every person who, without the consent of all of the parties to a communication, intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone, shall be punished by a fine not exceeding *two thousand five hundred dollars* ($2,500), or by imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. If the person has been convicted previously of a violation of this section or of **Section 631**, **632**, **632.5**, **632.6**, or **636**, the person shall be punished by a fine not exceeding *ten thousand dollars* ($10,000), by imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

(b) This section *shall not* apply to any of the following:

(1) Any public utility, or telephone company, engaged in the business of providing communications services and facilities, or to the officers, employees, or agents thereof, where the acts otherwise prohibited are for the purpose of construction, maintenance, conduct, or operation of the services and facilities of the public utility or telephone company.

(2) The use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of the public utility.

(3) Any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility.

(c) For purposes of this section, "*telephone company*" is defined in paragraph (3) of subdivision (c) of Section 638.

(d) As used in this section, each of the following terms have the following meaning:

> **(1)** "*Cellular radio telephone*" means a wireless telephone authorized by the Federal Communications Commission to operate in the frequency bandwidth reserved for cellular radio telephones.
>
> **(2)** "*Cordless telephone*" means a two-way, low power communication system consisting of two parts, a "base" unit which connects to the public switched telephone network and a handset or "remote" unit, that are connected by a radio link and authorized by the Federal Communications Commission to operate in the frequency bandwidths reserved for cordless telephones.
>
> **(3)** "*Communication*" includes, but is not limited to, communications transmitted by voice, data, or image, including facsimile.

Case Law:

> Because **Pen. Code § 632.7(a)** prohibits parties as well as nonparties from intentionally recording a communication transmitted between a cellular or cordless telephone and another device without the consent of all parties to the communication, the Court of Appeal erred when it held that only parties to the communication were protected. Although **§ 632.7** does not apply when all parties to a communication use landline phones, no absurdity resulted because **Pen. Code § 632** often would apply to such a conversation and some portion of the statutory scheme would provide for liability, regardless of the type of telephone used to receive a call, so long as at least one end of the conversation was on a cellular or cordless telephone. The rule of lenity did not apply because legislative intent was not uncertain. (***Smith v. LoanMe, Inc.*** (2021) 11 Cal.5th 183.)
>
> > *Note*: The so-called "*rule of lenity*" generally requires that "ambiguity in a criminal statute should be resolved in favor of lenity, giving the defendant the benefit of every reasonable doubt on questions of interpretation." (Citing ***People v. Nuckles*** (2013) 56 Cal.4th 601, 611.) "But '[t]he rule of lenity does not apply every time there are two or more reasonable interpretations of a penal statute.'" (Citing ***People v. Manzo*** (2012) 53 Cal.4th 880, 889.) "On the contrary, this principle applies only 'when "two reasonable interpretations of the same provision stand in relative equipoise."'" (***Id***., at p. 201.)

Pen. Code § 633: *Exceptions; Law Enforcement*:

Nothing in **Section 631**, **632**, **632.5**, **632.6**, or **632.7** prohibits the Attorney General, any district attorney, or any assistant, deputy, or investigator of the Attorney General or any district attorney, any officer of the California Highway Patrol, any chief of police, assistant chief of police, or police officer of a city or city and county, any sheriff, undersheriff, or deputy sheriff regularly employed and paid in that capacity by a county, police officer of the County of Los Angeles, peace officers of CDCR's Office of Internal Affairs, or any person acting pursuant to the direction of one of these law enforcement officers acting within the scope of his or her authority, from overhearing or recording any communication that they could lawfully overhear or record prior to the effective date of this chapter.

Nothing in **Section 631**, **632**, **632.5**, **632.6**, or **632.7** renders inadmissible any evidence obtained by the above-named persons by means of overhearing or recording any communication that they could lawfully overhear or record prior to the effective date of this chapter.

Case Law:

A participant in a telephone conversation, which otherwise would have been in violation of **P.C. § 632**, may properly record a telephone conversation at the direction of a law enforcement officer, acting within the course and scope of his or her authority, in the course of a criminal investigation. (***Telish v. State Personnel Board* [*California Dept. of Justice*]** (2015) 234 Cal.App.4th 1479, 1487-1494.)

In finding that having an informant secretly record telephone conversations with the defendant, the Court ruled that "the looseness of law enforcement direction to [the informant] in making the tape recordings properly goes to the weight given to those recordings and not their initial admissibility." (***People v. Towery*** (1985) 174 Cal.App.3rd 1114, 1129; see also ***People v. Clark*** 63 Cal.4th 522, 595.)

Both the **California Invasion of Privacy Act** and the **Omnibus Crime Control and Safe Streets Act of 1968** (**18 U.S.C. §§ 2510-2522.)** proscribe only *intentional*, as opposed to inadvertent, overhearing or intercepting of communications. (***People v. Buchanan*** (1972) 26 Cal.App.3rd 274.)

The restrictions on eavesdropping apply for the benefit of a person

outside the state as well, so long as one party to a telephone conversation is in California. (***Kearney v. Salomon Smith Barney, Inc.*** (2006) 39 Cal.4th 95.)

Plaintiff employee of the National City Police Department was accused of sexually harassing another employee. In order to obtain evidence of plaintiff's acts, his "flirtatious" conversation with the employee was secretly recorded. Plaintiff was subsequently terminated from his job. Suing the City of National City, plaintiff's allegation that he had been illegally recorded was dismissed as a result of a summary judgment motion, the district (trial) court relying upon **§ 633**, and ruling that because police supervisors could secretly record the private conversations of their employees by "wiring" one party to the conversation prior to the enactment of **§ 633**, the actions of plaintiff's supervisors did not run afoul of **§ 632** in this case. The Ninth Circuit Court of Appeal disagreed. The legislative history of **§ 633** and the dictates of the California Constitution compel a conclusion that **§ 633** protects only electronic recording and eavesdropping "in the course of criminal investigations," and *not* police recordings of their own employees as a matter of internal discipline. (***Rattray v. City of National City*** (9th Cir. 1994) 51 F.3rd 793, 796-798.)

In evaluating the language of this section, where it says; "*or any person acting pursuant to the direction of one of these law enforcement officers acting within the scope of his or her authority*," the California Attorney General has rendered an opinion to the effect that although inspectors for the Bureau of Food and Drug Inspections are law enforcement officers, they are *not* listed among those law enforcement officers in **Pen. Code § 633** who exempted from the prohibitions imposed by **Pen. Code §§ 631** and **632**. However, they can still use electronic devices when acting under the direction of the law enforcement officers designated in this section. (55 ***Op.Atty.Gen.*** 151, April 7, 1972.)

Pen. Code § 633.5*: Exception; Recording by Party to the Communication for the Purpose of Obtaining Evidence*:

Sections 631, **632**, **632.5**, **632.6**, and **632.7** do not prohibit one party to a confidential communication from recording the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of *extortion, kidnapping, bribery,* any felony involving *violence against the person,* including, but not limited to, *human trafficking,* as defined in **Section 236.1**, or a violation of **Section 653m**, or *domestic violence* as defined in **Section 13700**. **Sections 631**, **632**, **632.5**, **632.6**, and **632.7** do

*no*t render any evidence so obtained inadmissible in a prosecution for *extortion*, *kidnapping*, *bribery*, any felony involving *violence against the person*, including, but not limited to, *human trafficking*, as defined in **Section 236.1**, a violation of **Section 653m**, or *domestic violence* as defined in **Section 13700**, or any crime in connection therewith.

A juvenile child molest victim may be a party to a telephone conversation with her adult molester when the consent to recording the telephone call is given by the minor's parent. (***People v. Trever P.*** (2017) 14 Cal.App.5th 486.)

A person may initiate and tape record a telephone call in an attempt to gain evidence of child molestation alleged to have been committed by the person called. Such evidence would be admissible in a subsequent civil or criminal proceeding. (82 ***Ops. Cal. Atty. Gen.*** 148.)

Pen. Code § 13700(b) defines "*domestic violence*," as follows: "*Domestic violence*" means abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. For purposes of this subdivision, "cohabitant" means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) whether the parties hold themselves out as spouses, (5) the continuity of the relationship, and (6) the length of the relationship.

Note: The **Family Code** has a slightly different definition of "domestic violence" at **section 6211**.

Jail and Prison Inmates: The Recording of *prisoner telephone conversations*, even when made between the jail and the outside world, would fall within the restrictions of both the federal and state wiretap statutes *unless* the inmate is put on notice that his conversations may be monitored and/or recorded.

Under **Title III**; "(I)t shall not be unlawful . . . for a person acting under color of law to intercept a wire, oral, or electronic communication where . . . *one of the parties* to the communication has given prior consent to such interception." (Italics added; **18 U.S.C. § 2511(2)(c)**, **(d)**)

Based upon this, it has been held that where a sign has been posted indicating that "*telephone calls may be monitored and recorded*," inmates are on notice, and his or her "decision to engage in conversations over those phones constitutes implied consent to that monitoring and takes any wiretap outside the prohibitions of **Title III**." (***People v. Kelly*** (2002) 103 Cal.App.4th 853, 858; warrantless recording of defendant's telephone conversations to parties on the outside approved.)

Such warning signs also take such telephone calls outside the search warrant provisions of California's wiretap statutes (**P.C. §§ 629.50 et seq.**) as well. (***Id***., at pp. 859-860.)

Wiretap Procedures and Restrictions**:** ***Pen. Code §§ 629.50*** *through* ***629.98*** regulate the implementation of "*wiretaps*" and the use of information obtained thereby, including derivative evidence, and are listed in detail below. (See ***People v. Jackson*** (2005) 129 Cal.App.4th 129, 144-159.)

Pen. Code § 629.50: *Requirements for a Wiretap Order*:

An *application for a wiretap order* authorizing the interception of a wire, electronic pager, or electronic cellular telephone communication *shall*:

- Be made in writing upon the personal oath or affirmation of:

  The Attorney General,

  Chief Deputy Attorney General,

  Chief Assistant Attorney General, Criminal Law Division, *or*

  A District Attorney, or the person designated to act as District Attorney in the District Attorney's absence.

  The language "*the principal prosecuting attorney*," found in **18 U.S.C. § 2516(2)**, may include a state assistant district attorney who had been duly designated to act in the absence of the elected district attorney. Compliance with **18 U.S.C. § 2516(2)** necessarily requires an analysis of the applicable state wiretap statute, i.e., **P.C. § 629.50**. The attorney designated to act in the district attorney's absence, as specified in **P.C. § 629.50**, must be acting in the district attorney's absence not just as an assistant district attorney designate with the limited authority to apply for a wiretap order,

but as an assistant district attorney duly designed to act for all purposes as the district attorney of the political subdivision. (***United States v. Perez-Valencia*** (9th Cir. 2013) 727 F.3rd 852, 854-855.)

> Upon remand for a determination of the assistant district attorney's duties and responsibilities at the time he requested the instant wiretap order, it was found that the assistant district attorney did in fact meet the necessary requirements to bring him within the dictates of **18 U.S.C. § 2516(2)** and **P.C. § 629.50**. (***United States v. Perez-Valencia*** (9th Cir. 2014) 744 F.3rd 600.)

> **P.C § 629.50(a)** does not require that the application describe the circumstances of the district attorney's absence. Had the Legislature intended to impose such a requirement, compelling the application to include a "full and complete statement of the facts" confirming the circumstances of the district attorney's absence, it could have directed as much. But that is not what the Legislature did. Instead, it required only that the application must "be made in writing upon the personal oath or affirmation of . . . a district attorney, or the person designated to act as district attorney in the district attorney's absence." The express provisions of the wiretap statute require nothing more. (***People v. Gonzalez*** (2021) 12 Cal.5th 367, 393-394.)

- Be made to:

  The presiding judge of the Superior Court, *or*

  Another judge designated by the presiding judge, *or*

  The highest judge listed on an "*ordered list*" of additional judges, upon a determination that none of the above judges are available.

  > The fact that the application was made to a "*successor judge*" designated by the presiding judge

to hear applications if the first-named judge is unavailable did not violate the requirements under this section. (***People v. Munoz*** (2001) 87 Cal.App.4th 239, 242.)

Federal statutes limit federal wiretap orders to the interception of communications to "only within the territorial jurisdiction of the court in which the judge is sitting." (**18 U.S.C. § 2518(c)**) The fact that a federal judge purported to authorize the interception of communications outside the judge's jurisdiction, at least where the improperly obtained communications are not used by the Government, does not invalidate the entire wiretap order pursuant to **18 U.S.C. §2518(10)(a)(ii)**. (***Dahda v. United States*** (2018) 584 U.S. 440 [138 S.Ct. 1491; 200 L.Ed.2nd 842].)

- Include all of the following information:

The identity of the investigative or law enforcement officer making the application,

The apparent discrepancy between the person who prepared the government's application for a wiretap and the person who signed it did not render the interception of the wire communications unlawful under **18 U.S.C. § 2518** because misidentification of the authorizing officer in the wiretap application is not a technical deficiency that requires suppression. (***United States v. Fowlkes*** (9th Cir. 2015) 804 F.3rd 954, 968-969.)

The identity of the investigative or law enforcement officer authorizing the application,

Failure to identify the authorizing official should not invalidate the subsequent wiretap order. (See ***United States v. Callum*** (9th Cir. 2005) 410 F.3rd 571, discussing the corresponding federal statute; **18 U.S.C. § 2518(4)(d)**.)

But where the failure to include information identifying the Department of Justice as authorizing a wiretap application makes it impossible for a judge to conclude from the face of the application

that it had been in fact so authorized, will invalidate the warrant. (***United States v. Staffeldt*** (9th Cir. 2006) 451 F.3rd 578; an attached memorandum purportedly identifying the Department of Justice as authorizing the wiretap application was, due to human error, the wrong memorandum.)

See also ***United States v. Scurry*** (D.C. Cir. 2016) 821 F.3rd 1; finding that failure to identify the "high-level Justice Department official who approved the wiretap application," as required by **18 U.S.C. § 2518(4)(d)**, was sufficient to invalidate the wiretap order.

The identity of the law enforcement agency that is to execute the order,

A statement attesting to a review of the application and the circumstances in support thereof by the chief executive officer or his or her designee (who must be identified by name) of the law enforcement agency making the application,

A full and complete statement of the facts and circumstances relied upon by the applicant to justify his or her belief that an order should be issued, including:

Details as to the particular offense that has been, is being, or is about to be committed,

The fact that conventional investigative techniques have been tried and were unsuccessful, or why they reasonably appear to be unlikely to succeed or to be too dangerous,

A particular description of the nature and location of the facilities from which, or the place where the communication is to be intercepted,

A particular description of the type of communication sought to be intercepted, *and*

The identity, if known, of the person committing the offense and whose communications are to be intercepted, or if that person's identity is not known,

then the information relating to the person's identity that is known to the applicant.

> Wiretap authority is tied to specific communications facilities or locations (including a specific telephone or cellphone), and not individual suspects. So when a previously unknown coconspirator is identified, it is not necessary to cease the eavesdropping nor make application to the court for a new order. (***United States v. Reed*** (9th Cir. 2009) 575 F.3rd 900, 910-912.)
>
> In the context of a motion to suppress wiretap evidence, the district court judge was held to have erred in applying an "abuse of discretion" standard to both determinations made by the issuing judge; i.e., (1) whether the affidavit contained a full and complete statement of facts under **18 U.S.C. § 2518(1)(c)**, and (2) the ultimate decision that it was necessary to authorize the wiretap, under **§ 2518(3)(c)**. However, the error was harmless in that the wiretap affidavits adequately explained why the interception of wire communications was necessary to investigate the conspiracy and the target subjects, and they contained a full and complete statement of facts to establish necessity under **18 U.S.C. § 2518(1)(c)**. (***United States v. Rodriguez*** (9th Cir. 2017) 851 F.3rd 931, 937-944.)
>
> Failing to discuss the availability of state wiretaps was not a material omission because there was no meaningful difference in the level of intrusiveness. The affidavits disclosed that an informant had cooperated with the Government previously in a limited way, and gave specific reasons why using the informant as to the current conspiracy generally was not a viable option going forward. The district court did not abuse its discretion in concluding that using the informant was unlikely to result in the

> successful prosecution of each and every member of the conspiracy where the affidavit gave very specific reasons why the informant was unlikely to work particularly well. (***United States v. Estrada*** (9th Cir. 2018) 904 F.3rd 854, 861-865.)

A statement of the period of time for which the interception is required to be maintained:

> And if the nature of the interception is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of the facts establishing probable cause to believe that additional communications of the same type will occur thereafter, *and*
>
> A full and complete statement of the facts concerning all previous applications known to the individual authorizing and to the individual making the application, to have been made to any judge of a state or federal court for authorization to intercept wire, electronic pager, or wire or electronic communication involving any of the same persons, facilities, or places specified in the application, and the action taken by the judge on each of those applications.
>
> This requirement may be satisfied by making inquiry of the California Attorney General and the United States Department of Justice and reporting the results of these inquiries in the application.
>
> *Note*: Use of a wiretap to combat a large conspiracy, given the greater threat to society, allows for the use of greater discretion by the courts to allow the government to use wiretaps. (***United States v. McGuire*** (9th Cir. 2002) 307 F.3rd 1192, 1198.)

Failure to show that all traditional investigative methods have been tried and determined to be inadequate will result in a suppression of any evidence obtained from the resulting wiretaps. (***United States v. Gonzalez, Inc.*** (9th Cir. 2006) 437 F.3rd 854; see **18 U.S.C. § 2518**.)

However, law enforcement officials need not exhaust every conceivable investigative technique before seeking a wiretap order. (***United States v. Lococo*** (9th Cir. 2008) 514 F.3rd 860; see also ***United States v. Rivera*** (9th Cir. 2008) 527 F.3rd 891; ***United States v. Reed*** (9th Cir. 2009) 575 F.3rd 900, 908-910.)

> "The necessity for the wiretap is evaluated in light of the government's need not merely to collect some evidence, but to 'develop an effective case against those involved in the conspiracy.'" (***Id***., at p. 909, quoting ***United States v. Rivera***, *supra*, at p. 902, and ***United States v. Decoud***, *infra*, at pg. 1007.)

The fact that a pen register could have been used, with its limited value in collecting necessary information, does not mean that the necessity for a wiretap had not been established. "The necessity for the wiretap is evaluated in light of the government's need not merely to collect some evidence, but to 'develop an effective case against those involved in the conspiracy." (***United States v. Decoud*** (9th Cir. 2006) 456 F.3rd 996, 1006-1007; the fact that the informant had been sent to prison, and that a surveillance had been detected, helped to establish the need for a wiretap.)

If the application is for the extension of an order, a statement setting forth the number of communications intercepted pursuant to the original order, and the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain results.

An application for a modification of the original order may be made when there is "*probable cause*" to believe that the target of a wiretap is using a facility or device that is not subject to the original order.

The modified order is only good for that period that applied to the original order. The application must provide all the information required of the original order and a statement of the results thus far obtained from the interception, or a reasonable explanation for the failure to obtain results.

The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

A judge must accept a facsimile copy of the signature that is required on an application for a wiretap order.

The original signed document is to be sealed and kept with the application.

Case Law:

The three defendants were found guilty of conspiracy to distribute controlled substances. In a consolidated appeal, defendants raised numerous challenges to the admission of wiretap evidence. The Eighth Circuit of Appeal held that the defendants' motion to suppress evidence from the wiretaps was properly denied. In regards to defendants' argument that the district court erred in admitting the wiretap evidence, the court found that the district court did not clearly err in determining that the Government had satisfied the necessity requirement. The court reasoned that the affidavits explained in great detail how these conventional methods had failed—and would have likely continued to fail—to reveal the full extent of the organization's drug-trafficking activities and membership because, among other reasons, and that defendant and their associates utilized various and frequently changing residences and vehicles. Further, the orders authorizing the wiretaps expressly required minimization, providing that interception "must immediately terminate when it is determined that the conversation is unrelated to communications subject to interception." (***United States v. Armstrong*** (8th Cir. 2023) 60 F.4th 1151.)

Pen. Code § 629.51: *Definitions*:

(a) For the purposes of this chapter, the following terms have the following meanings:

(1) "*Wire communication*" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of a like connection in a switching station), furnished or operated by any person engaged in providing or operating these facilities for the transmission of communications.

(2) "*Electronic communication*" means any transfer of signs, signals, writings, images, sounds, data, or intelligence of any

nature in whole or in part by a wire, radio, electromagnetic, photoelectric, or photo-optical system, but does not include any of the following:

(A) Any wire communication defined in **paragraph (1)**.

(B) Any communication made through a tone-only paging device.

(C) Any communication from a tracking device.

(D) Electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.

(3) "*Tracking device*" means an electronic or mechanical device that permits the tracking of the movement of a person or object.

(4) "*Aural transfer*" means a transfer containing the human voice at any point between and including the point of origin and the point of reception.

(5)

(A) "*Prohibited violation*" means any violation of law that creates liability for, or arising out of, either of the following:

(i) Providing, facilitating, or obtaining an abortion that is lawful under California law.

(ii) Intending or attempting to provide, facilitate, or obtain an abortion that is lawful under California law.

(B) As used in this paragraph, "f*acilitating*" or "*facilitate*" means assisting, directly or indirectly in any way, with the obtaining of an abortion that is lawful under California law.

(b) This chapter applies to the interceptions of wire and electronic communications. It does not apply to stored communications or stored content.

(c) The act that added this subdivision is not intended to change the law as to stored communications or stored content.

Case Law:

See ***People v. Von Villas*** (1992) 11 Cal.App.4th 175, at p. 224, defining "*wire communication*" as "any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign commerce . . . ."

A phone used during a physical visitation by a prisoner and his or her visitor does not meet the requirements of a "*wire communication*," not using a line in interstate or foreign commerce. It is therefore not subject to the wiretap restrictions of **P.C. § 631**. (***People v. Santos*** (1972) 26 Cal.App.3rd 397, 402.)

But cloned cellphones *are* included. (***United States v. Staves*** (2004) 383 F.3rd 977.)

The audio portion of a videotape would seem to fall within this definition. (***United States v. Shrylock*** (9th Cir. 2003) 342 F.3rd 948, 977; "The videotapes contained both video and audio portions. The audio portions are governed by the federal wiretap statute, **18 U.S.C. §§ 2510 et seq.**")

Pen. Code § 629.52: *Authority to Issue a Wiretap Order*:

Upon application made under **Section 629.50**, the judge may enter an ex parte order, as requested or modified, authorizing interception of wire or electronic communications initially intercepted within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines, on the basis of the facts submitted by the applicant, all of the following:

(a) There is probable cause to believe that an individual is committing, has committed, or is about to commit, one of the following offenses:

(1) Importation, possession for sale, transportation, manufacture, or sale of controlled substances in violation of **Section 11351**, **11351.5**, **11352**, **11370.6**, **11378**, **11378.5**, **11379**, **11379.5**, or **11379.6** of the **Health and Safety Code** with respect to a substance containing heroin, cocaine, PCP, methamphetamine, fentanyl, or their

precursors or analogs where the substance exceeds *10 gallons* by liquid volume or three pounds of solid substance by weight.
(2) Murder, solicitation to commit murder, a violation of **Section 209**, or the commission of a felony involving a destructive device in violation of **Section 18710**, **18715**, **18720**, **18725**, **18730**, **18740**, **18745**, **18750**, or **18755**.
(3) A felony violation of **Section 186.22**.
(4) A felony violation of **Section 11418**, relating to weapons of mass destruction, **Section 11418.5**, relating to threats to use weapons of mass destruction, or Section 11419, relating to restricted biological agents.
(5) A violation of **Section 236.1**.
(6) An attempt or conspiracy to commit any of the above-mentioned crimes.

Note: The equivalent under the federal statutes is **18 U.S.C. § 2518(3)(a)**.

(b) There is probable cause to believe that particular communications concerning the illegal activities will be obtained through that interception, including, but not limited to, communications that may be utilized for locating or rescuing a kidnap victim.

(c) There is probable cause to believe that the facilities from which, or the place where, the wire or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of the offense, or are leased to, listed in the name of, or commonly used by the person whose communications are to be intercepted.

(d) Normal investigative procedures have been tried and have failed or reasonably appear either unlikely to succeed if tried or too dangerous.

Note: The equivalent under the federal statutes is **18 U.S.C. § 2518(3)(c)**.

(e) Notwithstanding any other provision in this section, no magistrate shall enter an ex parte order authorizing interception of wire or electronic communications for the purpose of investigating or recovering evidence of a prohibited violation, as defined in **Section 629.51**.

Case Law:

"The requirement of necessity is designed to ensure that wiretapping is neither 'routinely employed as the initial step in criminal investigation' (***United States v. Giordano*** (1974) 416 U.S. 505, 515, 94 S.Ct. 1820, 40 L.Ed.2nd 341) nor 'resorted to in situations where traditional investigative techniques would suffice to expose the crime.' (***United States v. Kahn*** (1974) 415 U.S. 143, 153, fn. 12.)" (***People v. Leon*** (2007) 40 Cal.4th 376, 385.)

> "(I)t is not necessary that law enforcement officials exhaust every conceivable alternative before seeking a wiretap." (***Ibid***.)

The necessity requirement of **subdivision (d)** of this section (and the similar federal requirement under **18 U.S.C. § 2518(1)(c)** & **(3)(c)**) was met based upon the trial court's finding that the evidence against the defendant was purely circumstantial, witnesses against the defendant wished to remain anonymous, questioning of the defendant was not likely to produce any additional evidence, and that the defendant was likely to call friends from his jail cell and have them destroy evidence if he discovered that he was the focus of the new murder investigation. (***People v. Zepeda*** (2001) 87 Cal.App.4th 1183, 1205.)

Similarly, where a dangerous conspiracy is being investigated (e.g., the "*Montana Freemen*"), where infiltration would be dangerous and difficult, and informants were generally uncooperative, this requirement is met. (***United States v. McGuire*** (9th Cir. 2002) 307 F.3rd 1192, 1197.)

> But see ***United States v. Blackmon*** (9th Cir 2001) 273 F.3rd 1204, citing ***United States v. Carneiro*** (9th Cir. 1988) 861 F.2nd 1171, 1181, for the proposition that a conspiracy *does not* loosen the standard of proof on this issue.

And even when informants are used, a finding that such informants "could not possibly reveal the full nature and extent of the enterprise and it's countless, and at times disjointed, criminal tentacles," satisfied this requirement. (***United States v. Shrylock*** (9th Cir. 2003) 342 F.3rd 948, 975-976; see also ***United States v. Gomez*** (9th Cir. 2004) 358 F.3rd 1221.)

It is not necessary that the government prove that it pursued "to the bitter end . . . every non-electronic device." (Citation). "(T)he adequacy of the showing concerning other investigative techniques is 'to be tested in a practical and common sense fashion [citation] that does not 'hamper unduly the investigative powers of law enforcement agents.'" (***People v. Leon*** (2007) 40 Cal.4th 376, 392.)

It was not necessary that investigators have attempted to provide cloned cellphones for defendant's use as a prerequisite to applying for a wiretap warrant in that monitoring cloned cellphones itself would require a wiretap order to be lawful. (***United States v. Staves*** (9th Cir. 2004) 383 F.3rd 977.)

The necessity for a wiretap is evaluated in light of the government's need not merely to collect some evidence, but to develop an effective case against the defendants. An "*effective case*" means "*proof beyond a reasonable doubt*," not merely to get an indictment. Where the investigation of a drug-distribution conspiracy was stalled at information obtained from a pen register and trap and trace device, obtaining a series (i.e., 4) of wiretaps was held to be lawful. (***United States v. Garcia-Villalba*** (9th Cir. 2009) 585 F.3rd 1223, 1227-1234; rejecting defendant's argument that by the time a wiretap for a fourth cellphone was obtained, law enforcement was relying upon an impermissible "*cascading theory of necessity*.") Examples of factors used to establish a necessity for a wiretap (pp. 1228-1230):

- Pen register and trap and trace device does not reveal the contents of the defendants' conversations.
- Physical surveillance was impossible due to main defendant living in a rural location.
- Defendants used counter-surveillance techniques.
- A trash search was impossible due to main defendant living in a rural location.
- Search warrants, subpoenas, interviews and arrests would have terminated the investigation before all the coconspirators were found.
- Confidential informants could not be developed.

Note: Use of pen registers and trap and trace devices, except maybe when combined with other forms of electronic surveillance, is *not* enough alone to establish

necessity for a wiretap. (***United States v. Garcia-Villalba***, *supra*., at p. 1228, citing ***United States v. Gonzalez, Inc.,*** (9th Cir. 2005) 412 F.3rd 1102, 1113.)

It is where the intercepted communications were first heard by federal government agents that determines which federal court has jurisdiction for purposes of filing the resulting criminal prosecution, at least under the federal rules; i.e., **18 U.S.C. § 2518(3)**. (***United States v. Luong*** (9th Cir. 2006) 471 F.3rd 1107.)

The first question to be answered in analyzing a motion to suppress wiretap evidence is whether the defendant established a violation of the Wiretap Act. If the defendant did not establish a violation of the Wiretap Act, there can be no constitutional violation and no suppression. (***People v. Camel*** (2017) 8 Cal.App.5th 989, 1001.)

> The Court in Camel rejected defendant's argument that in determining probable cause, a court is to use the old ***Aguilar-Spinelli*** test (***Aguilar v. Texas*** (1964) 378 U.S. 108 [12 L.Ed.2nd 723; 84 S. Ct. 1509]; ***Spinelli v. United States*** (1969) 393 U.S. 410 [21 L.Ed.2nd 637; 89 S. Ct. 584]), holding instead that the totality-of-the-circumstances test (per ***Illinois v. Gates*** (1983) 462 U.S. 213 [76 L.Ed.2nd 527; 103 S. Ct. 2317].) is to be used since passage of Proposition 8 (the Truth in Evidence Proposition) in June of 1982. (Id., at pp. 1004-1010.)
>
> The Court in Camel further approved of the sealing of two attachments to the warrant affidavit under authority of ***People v. Hobbs*** (1994) 7 Cal.4th 948. (Id., at pp. 1009.)

In a challenge to the trial court's finding of (1) probable cause and (2) necessity supporting the issuance of a wiretap warrant, the Ninth Circuit upheld the lower court's rulings. (***United States v. Motley*** (9th Cir. 2023) 89 F.4th 777, 781-782, 787-789.)

> "To authorize a federal wiretap warrant under **18 U.S.C. § 2516**, the judge must find, as relevant here, that "there is probable cause for belief that an individual is committing, has committed, or is about

to commit" certain offenses. **18 U.S.C. § 2518(3)(a)**." "The wiretap affidavit established that Motley and several others, who were in frequent contact with Motley, were all obtaining large amounts of prescription opioids from the same physician; that Motley was buying the prescriptions for himself and others; and that Motley and at least one other coconspirator were selling the prescribed pills. This evidence provided a 'substantial basis' for the district court's finding that there was probable cause that Motley was engaged in a conspiracy to illegally distribute prescription opioids." (***Id.***, at p. 787.)

"Turning to necessity, the affidavit explained, in specific detail, law enforcement's investigative methods, why those methods had been exhausted, and why other methods would likely be ineffective in identifying the members and scope of the conspiracy." That fact that some of the co-conspirators were already identified did not preclude efforts to identify all of them, the Court noting that the cases have "consistently upheld findings of necessity where traditional investigative techniques lead only to apprehension and prosecution of the main conspirators, but not to apprehension and prosecution of . . . other satellite conspirators." (***Id.***, at p. 787, citing ***United States v. Torres*** (9th Cir. 1990) 908 F.2nd 1417, 1422.)

Pen. Code § 629.53: *Judicial Guidelines*: The Judicial Council may establish guidelines for judges to follow in granting an order authorizing the interception of any wire, electronic pager, or electronic communication.

Pen. Code § 629.54: *Contents of the Wiretap Order*:

> An order authorizing the interception of any wire, electronic digital pager, or electronic cellular telephone communication *shall* specify *all of the following*:
>
> - The identity, if known, of the person whose communications are to be intercepted, or if the identity is not known, then that information relating to the person's identity known to the applicant,
>
> - The nature and location of the communication facilities as to which, or the place where, authority to intercept is granted,

- A particular description of the type of communication sought to be intercepted, and a statement of the illegal activities to which it relates,

- The identity of the agency authorized to intercept the communications and of the persons making the application, *and*

- The period of time during which the interception is authorized including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

Pen. Code § 629.56: Oral Approval in Lieu of Court Order:

Upon the informal application by the Attorney General, Chief Deputy Attorney General, Chief Assistant Attorney General, Criminal Division, or a District Attorney, or a person to act as District Attorney in the District Attorney's absence, the presiding judge of the Superior Court, or the first available judge designated as provided in **P.C. § 629.50**, may grant oral approval for an interception, without a court order, if he or she determines *all of the following*:

- There are grounds upon which an order could be issued under this chapter, *and*

- There is *probable cause* to believe that an emergency situation exists with respect to the investigation of an offense enumerated in **Pen. Code § 629.52**, *and*

- There is *probable cause* to believe that *a substantial danger to life or limb* exists justifying the authorization for immediate interception of a private wire, electronic digital pager, or electronic cellular telephone communication before an application for an order could with due diligence be submitted and acted upon.

Approval for an interception under this section *shall* be conditioned upon filing with the judge by midnight of the second full court day after the oral approval, a written application for an order which, if granted consistent with this chapter, shall also recite the oral approval under this subdivision and be retroactive to the time of the oral approval.

Pen. Code § 629.58: Duration of a Wiretap Order:

No order entered under this chapter shall authorize the interception of any wire, electronic pager, or electronic cellular telephone, or electronic communication for a period longer than:

- Necessary to achieve the objective of the authorization, *nor in any event*,

- *Thirty* (*30*) days.

The *30-day* limit on a wiretap begins on the day of the initial interception, or *10 days* after the issuance of the wiretap order, whichever comes first.

Extensions of an order may be granted in accordance with **Pen. Code § 629.50** and upon the court making the findings required by **Pen. Code § 629.52**.

The period of extension *shall* be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event longer than *thirty (30) days*.

Every order and extension thereof *shall* contain a provision that the authorization to intercept *shall*:

- Be executed as soon as practicable,

- Be conducted so as to minimize the interception of communications not otherwise subject to interception under this chapter, *and*

- Terminate upon attainment of the authorized objective, or in any event at the time expiration of the term designated in the order or any extensions.

> Where the target of the wiretap order is discovered to be using an alias, and changes his name during the life of the order, agents did not fail to "minimize" the interception of conversations not related to the investigation by continuing to eavesdrop on the target while he uses the new name. (***United States v. Fernandez*** (9th Cir. 2008) 527 F.3rd 1247.)

In the event the intercepted communication is in a *foreign language*, an interpreter of that foreign language may assist peace officers in executing the authorization provided in this chapter, provided that:

- The interpreter has had the same training as any other interceptor authorized under this chapter, *and*

- The interception shall be conducted so as to minimize the interception of communications not otherwise subject to interception under this chapter.

Pen. Code § 629.60: Progress Reports:

Whenever an order authorizing an interception is entered, the order *shall* require reports in writing or otherwise to be made to the judge who issued the order:

- Showing the number of communications intercepted pursuant to the original order; *and*

- A statement setting forth what progress has been made towards achievement of the authorized objective, *or*

- A satisfactory explanation for its lack of progress, and the need for continued interception.

The judge *shall* order that the interception immediately terminate *if* he or she finds that:

- Progress has not been made, *and*

- The explanation for its lack of progress is not satisfactory, *or*

- No need exists for continued interception.

The reports *shall*:

- Be filed with the court at least every ten (10) days, or more frequently if ordered by the court; *and*

- Be made by any reasonable and reliable means, as determined by the judge.

When a defendant moved to suppress evidence on the grounds the reports required under **Pen. Code § 629.60** were inadequate or untimely, the State had the burden to show there was no error. However, the violation did not contravene a central purpose of **California's Presley-Felando-Eaves Wiretap Act of 1988**, **Pen. Code §§ 629.50 et seq.,** or the purpose of the provision was achieved despite any error. Under that framework, the trial

court did not err in denying defendants' motion to suppress wiretap evidence because the wiretaps were obtained legally and minimized. (***People v. Roberts et al.*** (2010) 184 Cal.App.4th 1149.)

See ***Price v. Superior Court*** (2023) 93 Cal.App.5th 13, 60-62, for an analysis of the ***Roberts*** decision, describing the similar circumstances under the suppression authorization, but not requirement, under **California's Electronic Communications Privacy Act** (**CalECPA**).

Pen. Code § 629.61: Report to Attorney General:

A court order authorizing an interception shall require a report in writing or otherwise to be made to the Attorney General, showing:

- What persons, facilities, places or any combination of these, are to be intercepted; *and*

- The action taken by the judge on each application.

The report shall be made at the interval that the order may require, but not less than *ten* (*10*) *days* after the order was issued.

The report shall be made by any reasonable and reliable means, as determined by the Attorney General.

The Attorney General may issue regulations prescribing the collection and dissemination of information collected.

The Attorney General shall, upon the request of an individual making an application for an interception order, provide any information known as a result of these reporting requirements, as required by **Pen. Code § 629.50(a)(6)**.

Pen. Code § 629.62: Annual Report to the Legislature, etc.:

The Attorney General *shall* prepare and submit an annual report to the Legislature, the Judicial Council, and the Director of the Administrative Office of the United States Court on interceptions conducted under the authority of this chapter during the preceding year.

Information for this report shall be provided to the Attorney General by any prosecutorial agency seeking an order pursuant to this chapter.

The report *shall* include *all* of the following data:

- The number of orders or extensions applied for,
- The kinds of orders or extension applied for,
- The fact that the order or extension was granted as applied for, was modified, or was denied,
- The number of wire, electronic pager, and electronic cellular telephone devices that are the subject of each order granted,
- The period of interceptions authorized by the order, and the number and duration of any extensions of the order,
- The offense specified in the order or application, or extension of any order,
- The identity of the applying law enforcement officer and agency making the application and the person authorizing the application,
- The nature of the facilities from which, or the place where communications were to be intercepted,
- A general description of the interceptions made under the order or extension, including:

    The number of persons whose communications were intercepted.

    The number of communications intercepted.

    The percentage of incriminating communications intercepted.

    The percentage of other communications intercepted, *and*

    The approximate nature, amount, and costs of the manpower and other resources used in the interceptions,

- The number of arrests resulting from interceptions made under the order or extension, and the offenses for which arrests were made,
- The number of trials resulting from the interceptions,
- The number of motions to suppress made with respect to the interceptions, and the number granted or denied,

- The number of convictions resulting from the interceptions and the offenses for which the convictions were obtained, and a general assessment of the importance of the interceptions,

- Except with regard to the initial report required by this section, the information required by the preceding five (5) paragraphs (excluding the immediately preceding paragraph about the number of convictions) with respect to orders or extensions obtained in a preceding calendar year,

- The date of the order for service of inventory made pursuant to **Pen. Code § 629.68**, confirmation of compliance with the order, and the number of notices sent.

- Other data that the Legislature, the Judicial Council, or the Director of the Administrative Office shall require.

The annual report shall include a summary analysis of the above. The Attorney General may issue regulations prescribing the content and form of the reports required to be filed by a prosecutorial agency.

The Attorney General's annual report shall be filed no later than April of each year.

The Attorney General shall, upon the request of an individual making an application for an interception order, provide any information known as a result of these reporting requirements that would enable the individual making an application to comply with the requirements of **Pen. Code § 629.50(a)(6)**.

Pen. Code § 629.64: Recording, Sealing and Retaining Intercepted Communications:

The contents of any wire or electronic communication intercepted by any means authorized by this chapter *shall*, if possible, be recorded on any recording media.

The recording of the contents of any wire or electronic cellular telephone communication *shall* be done in a way that:

- Will protect the recording from editing or other alterations, *and*

- Will ensure that the audiotape recording can be immediately verified as to its authenticity and originality, *and*

- Any alteration can be immediately detected.

The monitoring or recording device used *shall* be of a type, and *shall* be installed, to preclude any interruption or monitoring of the interception by any unauthorized means.

Immediately upon the expiration of the period of the order, or extensions thereof, the recordings *shall* be made available to the judge issuing the order.

The recording *shall* be sealed under the direction of the judge. The presence of the seal, or a satisfactory explanation for the absence of the seal, *shall* be a prerequisite for the use or disclosure of the contents of any wire or electronic cellular telephone communication or evidence derived therefrom under **Pen. Code § 629.78**, below.

> See ***United States v. McGuire*** (9th Cir. 2002) 307 F.3rd 1192, 1201-1205, where the FBI in a federal wiretap provided satisfactory reasons for delaying the sealing where they had the court's permission, the judge was in another district, and they took steps to protect the recordings pending the sealing.
>
> Information received from a pen register and/or a trap and trace device, recording "call data content" (i.e., "CDC," data about call origination, length, and time of call), are not protected by the wiretap statutes. There is no expectation of privacy in such information, per ***Smith v. Maryland*** (1979) 442 U.S. 735 [99 S.Ct. 2577; 61 L.Ed.2nd 220]. (***United States v. Reed*** (9th Cir. 2009) 575 F.3rd 900, 914-917.)

Custody of the recordings *shall* be where the judge orders.

Recordings *shall* be retained for a minimum of *ten* (*10*) *years*, and shall be destroyed thereafter only upon an order of the issuing or denying judge.

Duplicate recordings may be made for use or disclosure pursuant to **Pen. Code §§ 629.74** and **629.76** (below) for investigations.

The sealing order may be oral or written, and the physical sealing of the tapes need not be done in the judge's presence. (***People v. Superior Court* [*Westbrook*]** (1993) 15 Cal.App.4th 41, 47-51; discussing former **Pen. Code § 629.14**, now **§ 629.64**.)

Pen. Code § 629.66: Application and Orders to be Sealed:

The application and orders made pursuant to this chapter *shall* be:

- Sealed by the judge.
- Kept where the judge orders.
- Disclosed only upon a showing of *good cause* before a judge.
- May be made to the defendant and at trial.
- Retained for *ten* (*10*) *years*, and thereafter destroyed only upon order of the issuing or denying judge.

See ***People v. Hobbs*** (1994) 7 Cal.4th 948, re; sealing warrant affidavits.

Pen. Code § 629.68: Notice to Parties to Intercepted Communications:

Within a reasonable time, but no later than ninety (90) days:

- After termination of the period of an order or extensions thereof; *or*

- After filing of an application for an order of approval under **Pen. Code § 629.56** which has been denied;

The issuing judge *shall* issue an order that *shall* require the requesting agency to serve:

- Persons named in the order or application, *and*

- Other known parties to intercepted communications;

An inventory which *shall* include notice of all of the following:

- The fact of the entry of the order, *and*

- The date of the entry and the period of authorized interception, *and*

- The fact that during the period wire, electronic digital pager, or electronic communication, cellular telephone communications were or were not intercepted.

Upon the filing of a motion, the judge *may*, in his or her discretion, make available to the person or his or her counsel for inspection the portions of the intercepted communications, applications and orders that the judge determines to be in the interest of justice.

On an ex parte showing of *good cause* to a judge, the serving of the inventory required by this section may be postponed.

The period of postponement shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted.

Case law:

The "*interest of justice*" standard under **Pen. Code § 629.68**, applies to a wiretap target's motion for inspection of wiretap materials and did not require a showing of good cause because the presumption against disclosure to the general public, as reflected in the "good cause" standard of **Pen. Code § 629.66**, did not apply when the person seeking wiretap materials was the target of that wiretap. Because the interest of justice standard required balancing the interests of the movant, the government, non-movants, and the public, a wiretap target's desire to pursue a lawsuit under **Pen. Code § 629.86**, could suffice to demonstrate that inspection would be in the interests of justice. The presumption of regularity in **Evid. Code § 664** was inapplicable because the Legislature gave individuals an opportunity to litigate the issue of the propriety of government action. (***Guerrero v. Hestrin*** (2020) 56 Cal.App.5th 172.)

Pen. Code § 629.70: Discovery Prerequisite to Use in Evidence:

A criminal defendant shall be notified that he or she was identified as the result of an interception, such notice being before a plea of guilty or at least *ten (10) days* before trial, hearing or proceeding in the case other than an arraignment or grand jury proceeding.

The defendant is also entitled to a copy of all recorded interceptions, a copy of the court order, and accompanying application and monitoring logs, at least *ten (10) days* before trial, hearing or proceeding in the case other than a grand jury proceeding.

As a prerequisite to admissibility into evidence or other disclosure in any trial, hearing, or other proceeding, except a grand jury proceeding, of the contents of any intercepted wire, electronic pager, or electronic cellular telephone communication, *or a*ny evidence derived there from, each party *shall* be furnished not less than *ten (10) days* before such trial, hearing, or proceeding, with:

- A transcript of the contents of the interception, *and*
- A copy of all recorded interceptions, *and*

- A copy of the court order, accompanying application, and monitoring logs.

The *ten* (*10*) *day* period may be waived by the judge if he or she finds that it was not possible to furnish the party with the above information ten days before trial, hearing or proceeding, and that the party will not be prejudiced by the delay in receiving that information.

The court may issue an order limiting disclosure to the parties upon a showing of good cause.

> The trial court denied discovery of the unredacted supporting wiretap affidavits that were sealed pursuant to ***People v. Hobbs*** (1994) 7 Cal.4th 948, and then refused to suppress the wiretap evidence. The Appellate Court found that the privileges and procedures of **E.C. §§ 1040-1042** (Official Information Privilege) applies to wiretap affidavits. Defendants failed to demonstrate that the trial court abused its discretion by ruling that defendants' rights were adequately protected with respect to their requests for disclosure of privileged documentation, and to their challenges to the sufficiency of the wiretap authorization orders in this case. (***People v. Acevedo*** (2012) 209 Cal.App.4th 1040, 1047-1050.)

Pen. Code § 629.72: Motions to Suppress:

Any person in any trial, hearing or proceeding may move to suppress:

- Some or all of the contents of any intercepted wire, electronic pager, or electronic communication, *or*

- Any evidence derived there from;

Only on the basis that the contents or evidence were obtained in violation of:

- The **Fourth Amendment**, *or*

- The terms of this Chapter.

> This Chapter, having been enacted subsequent (1995-1996) to the passage of **Proposition 8** (June, 1982), and by a two/thirds vote of the Legislature, makes effective this statutory exclusionary rule. (***People v. Leon*** (2005) 131 Cal.App.4th 966, 977-978.)

A suppression motion *shall* be made, determined, and subject to review in accordance with the procedures set forth in **Pen. Code § 1538.5**.

Case law:

> As such, in order to warrant an evidentiary hearing and the cross-examining of the affiant to a wiretap search warrant, the defendant must first meet the requirements of ***Franks v. Delaware*** (1978) 438 U.S. 154 [98 S.Ct. 2674; 57 L.Ed.2nd 667]. I.e., defendant must first make a substantial preliminary showing that a false statement was deliberately or recklessly included in the affidavit submitted in support of the wiretap application, and that such false statement was material to the court's finding of necessity. (***United States v. Shrylock*** (9th Cir. 2003) 342 F.3rd 948, 976-977.)
>
> "Evidence obtained from an unlawful wiretap may only be suppressed if the wiretap violated the United States Constitution or a procedure intended to play a central role in the legislative scheme and the purpose of that procedure was not achieved in some other manner." (***People v. Jackson*** (2005) 129 Cal.App.4th 129, 148-153; finding also that California's Truth in Evidence provisions (i.e., **Proposition 8**) do not prevent the suppression of evidence obtained in violation of the wiretap statutes that were enacted subsequent to the passage of **Proposition 8** by at least a two-thirds majority. Pgs. 152-153.)
>
> > An officer's "*good faith*" is not grounds for denying a defendant's motion to suppress based on a violation of the wiretap statutes. (***People v. Jackson***, *supra*, at pp. 153-160.)
>
> Failure to raise a search issue or one dealing with compliance with the statutory requirements of a wiretap waive (i.e., "forfeit") that issue for purposes of appeal. (***People v. Davis*** (2008) 168 Cal.App.4th 617, 625-632.)

Pen. Code § 629.74: Disclosure to Other Law Enforcement Agencies:

> The Attorney General, any Deputy Attorney General, District Attorney, Deputy District Attorney, or any peace officer, who by any means authorized by this Chapter has obtained knowledge of the contents of any wire, electronic digital pager, or electronic cellular telephone communication, or evidence derived therefrom, *may* disclose the contents to:
>
> - Anyone referred to in this section (above),

- Any investigative or law enforcement officer defined in **18 U.S.C. § 2510(7)**, *or*

- Any judge or magistrate;

To the extent disclosure is:

- Permitted per **Pen. Code § 629.82**, *and*

- Appropriate to the proper performance of the official duties of the individual making or receiving the disclosure.

No other disclosure, except to a grand jury, of intercepted information is permitted prior to a public court hearing by any person regardless of how the person may have come into possession thereof.

Pen. Code § 629.76: Use of Intercepted Information:

The Attorney General, any Deputy Attorney General, District Attorney, Deputy District Attorney, or any peace officer or federal law enforcement officer;

Who, by means authorized by this Chapter, has obtained knowledge of the contents of any wire, electronic pager, or electronic cellular communication, or evidence derived there from;

May use the contents or evidence to the extent the use:

- Is appropriate to the proper performance of his or her official duties; *and*

- Is permitted by **Pen. Code § 629.82**.

Pen. Code § 629.78: Disclosure of Intercepted Information in Testimony:

Any person who has received, by any means authorized by this chapter, any information concerning a wire or electronic communication, or evidence derived therefrom, intercepted in accordance with the provisions of this chapter;

May, per **Pen. Code § 629.82**, disclose the contents of that communication or derivative evidence;

While giving testimony under oath or affirmation in any criminal court proceeding or in any grand jury proceeding, or in an administrative or disciplinary hearing involving the employment of a peace officer.

Pen. Code § 629.80: Privileged Communications:

No otherwise privileged communication intercepted in accordance with this Chapter shall lose its privileged character.

Note: See **Evid. Code, §§ 900 et seq.** for the statutory privileges.

When a peace officer or federal law enforcement officer, while engaged in the intercepting of wire, electronic pager, or electronic communication pursuant to this Chapter, intercepts a privileged communication;

- He or she *shall* immediately cease the interception for at least *two* (*2*) minutes.

- After *two* (2) minutes, interception may be resumed for up to thirty (30) seconds during which time the officer shall determine if the nature of the communication is still privileged.

- If still privileged, the officer *shall* again cease interception for at least *two* (*2*) minutes.

- After *two* (*2*) minutes, the officer may again resume interception for up to *thirty* (*30*) seconds to redetermine the nature of the communication.

- The officer shall continue to go online and offline in this manner until the time that the communication is no longer privileged or the communication ends.

The recording device shall be metered so as to authenticate upon review that interruptions occurred as set for in this section.

See ***People v. Reyes*** (2009) 172 Cal.App.4th 671, 681-687, noting the minimization requirements under **18 U.S.C. § 2518(5)** and discussing the "*standing*" of one of the defendants to raise the issue even though it was not her phone that was tapped, and ***United States v. McGuire*** (9th Cir. 2002) 307 F.3rd 1192, 1199-1203, discussing the "*minimization*" of intercepted fax communications under the federal statutes.

> What is required in the way of "minimization" depends upon the circumstances. The minimization requirement is lessened when

there is uncertainty as to the scope of the conspiracy, or when co-conspirators are talking. (***People v. Reyes***, *supra*.)

***Pen. Code § 629.82*:** Interception of Communications Relating to Crimes *Other Than* Those Specified in the Authorization Order:

(a) If a peace officer or federal law enforcement officer, while engaged in intercepting wire or electronic communications in the manner authorized by this chapter, intercepts wire or electronic communications relating to crimes other than those specified in the order of authorization, but that are enumerated in **subdivision (a)** of **Section 629.52**, grand theft involving a firearm, a violation of **Section 18750** or **18755**, or a violent felony as defined in **subdivision (c)** of **Section 667.5**,

(1) the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in **Sections 629.74** and **629.76** *and*

(2) the contents and any evidence derived therefrom may be used under **Section 629.78** when authorized by a judge if the judge finds, upon subsequent application, that the contents were otherwise intercepted in accordance with the provisions of this chapter. The application shall be made as soon as practicable.

(b) If a peace officer or federal law enforcement officer, while engaged in intercepting wire or electronic communications in the manner authorized by this chapter, intercepts wire or electronic communications relating *to crimes other than those specified in* ***subdivision (a)***, the contents thereof, and evidence derived therefrom, may not be disclosed or used as provided in **Sections 629.74** and **629.76**, except to prevent the commission of a public offense. The contents and any evidence derived therefrom may not be used under **Section 629.78**, except where the evidence was obtained through an independent source or inevitably would have been discovered, and the use is authorized by a judge who finds that the contents were intercepted in accordance with this chapter.

(c) The use of the contents of an intercepted wire or electronic communication relating to crimes other than those specified in the order of authorization to obtain a search or arrest warrant entitles the person named in the warrant to *notice* of the intercepted wire or electronic communication and a copy of the contents thereof that were used to obtain the warrant.

(d) Applicability of the "*plain view*" (or "*plain hearing*" doctrine to wiretaps; Restrictions

(1) If a peace officer or federal law enforcement officer, while engaged in intercepting wire or electronic communications in the manner authorized by this chapter, intercepts wire or electronic communications relating to crimes, other than those specified in **subdivision (a)**, and involving the employment of a peace officer, the contents thereof, and evidence derived therefrom, *may not be disclosed or used* as provided in **Sections 629.74** and **629.76**, except to prevent the commission of a public offense or in an administrative or disciplinary hearing involving the employment of a peace officer. The contents and any evidence derived therefrom *may not be used* under **Section 629.78**, except if the evidence was obtained through an independent source or inevitably would have been discovered, and the use is authorized by a judge who finds that the contents were intercepted in accordance with this chapter.

(2) This section does *not* authorize the use of an intercepted wire or electronic communication involving acts that only involve a violation of a departmental rule or guideline that is not a public offense under California law.

(3) If an agency employing peace officers utilizes evidence obtained pursuant to this subdivision in an administrative or disciplinary proceeding, the agency shall, on an annual basis, report both of the following to the Attorney General:

> **(A)** The number of administrative or disciplinary proceedings involving the employment of a peace officer in which the agency utilized evidence obtained pursuant to this subdivision.
>
> **(B)** The specific offenses for which evidence obtained pursuant to this subdivision was used in those administrative or disciplinary proceedings.

(4)

> **(A)** The Attorney General may issue regulations prescribing the form of the reports required to be filed pursuant to **paragraph (3)** by an agency utilizing intercepted wire or electronic communications in an administrative or disciplinary proceeding against a peace officer.
>
> **(B)** The Attorney General shall include information received pursuant to **paragraph (3)** in its annual report made pursuant to **Section 629.62**.

Case Law:

Section 629.82(a) extends the "*plain view*" doctrine to information communicated by someone other than the person identified in the wiretap order about a crime other than the one which justified the tap. (***People v. Jackson*** (2005) 129 Cal.App.4th 129, 145.)

See also ***United States v. Carey*** (9th Cir. 2016) 836 F.3rd 1092, holding that evidence obtained in "*plain hearing*," when overhearing speakers unrelated to the target conspiracy while listening pursuant to a valid wiretap, is admissible.

Pen. Code § 629.84: Criminal Punishment for Violations:

Any violation of this Chapter is punishable by:

- A fine not exceeding two thousand five hundred dollars ($2,500.00), *or*
- Imprisonment in the county jail not exceeding one year, *or*
- Imprisonment in the state prison or county jail, pursuant to **P.C. § 1170(h)**, for 16 months, 2 or 3 years (see **P.C. § 18**), *or*
- Both the above fine *and* the county jail or state prison imprisonment.

Pen. Code § 629.86: Civil Remedies for Unauthorized Interceptions:

Any person whose wire, electronic pager, or electronic cellular telephone communication is intercepted, disclosed, or used in violation of this Chapter *shall* have the following civil remedies:

- A civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use the communications.
- Be entitled to recover, in that action, all of the following:
    - Actual damages, but not less than liquidated damages computed at the rate of one hundred dollars ($100.00) a day for each day of violation, or one thousand ($1,000.00), whichever is greater; *and*
    - Punitive damages; *and*

- Reasonable attorney's fees and other litigation costs reasonably incurred.

A good faith reliance on a court order is a complete defense to any civil or criminal action brought under this Chapter, or under **Chapter 1.5** (**Pen. Code §§ 630 et seq.**; Eavesdropping), or any other law.

Case law:

> The "*interest of justice*" standard under **Pen. Code § 629.68**, applies to a wiretap target's motion for inspection of wiretap materials and did not require a showing of good cause because the presumption against disclosure to the general public, as reflected in the "good cause" standard of **Pen. Code § 629.66**, did not apply when the person seeking wiretap materials was the target of that wiretap. Because the interest of justice standard required balancing the interests of the movant, the government, non-movants, and the public, a wiretap target's desire to pursue a lawsuit under **Pen. Code § 629.86**, could suffice to demonstrate that inspection would be in the interests of justice. The presumption of regularity in **Evid. Code § 664** was inapplicable because the Legislature gave individuals an opportunity to litigate the issue of the propriety of government action. (***Guerrero v. Hestrin*** (2020) 56 Cal.App.5th 172.)

Pen. Code § 629.88: Effects of Other Statutes:

Nothing in **P.C. §§ 631** (Wiretapping), **632.5** (Intercepting or Receiving Cellular Radio Telephone Communications), **632.6** (Intercepting or receiving Cordless Telephone Communications), or **632.7** (Recording Communications Via Cellular Radio, Cordless, or Landline Telephone Without Consent of All Parties) shall be construed as:

- Prohibiting any peace officer or federal law enforcement officer from intercepting of any wire, electronic digital pager, or electronic cellular telephone communication pursuant to an order issued in accordance with the provisions of this Chapter, *or*

- Rendering inadmissible in any criminal proceeding in any court or before any grand jury any evidence obtained by means of an order issued in accordance with the provisions of this Chapter.

Nothing in **Pen. Code § 637** (Wrongful disclosure of Telegraphic or Telephonic Communication) shall be construed as prohibiting the disclosure of the contents of any wire, electronic pager, or electronic

cellular telephone communication obtained by any means authorized by this Chapter.

Nothing in this Chapter shall apply to any conduct authorized by **Pen. Code § 633** (Exceptions for Law Enforcement; Eavesdropping).

Pen. Code § 629.89: Covert Residential Entries Prohibited:

No order issued pursuant to this Chapter *shall* either directly or indirectly authorize entry into or upon the premises of a residential dwelling, hotel room, or motel room, for installation or removal of any interception device or for any other purpose.

Notwithstanding that this entry is otherwise prohibited by any other section or code, this Chapter *expressly prohibits* covert entry of a residential dwelling, hotel room, or motel room to facilitate an order to intercept a wire, electronic digital pager, or electronic communication.

Pen. Code § 629.90: Order for Cooperation of Public Utilities, Landlords, Custodians and Others:

An order authorizing the interception of wire, electronic pager, or electronic cellular telephone communication shall direct, upon request of the applicant, that:

- A public utility engaged in the business of providing communications services and facilities, *or*
- A landlord, *or*
- A custodian, *or*
- Any other person;

Furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services the person or entity is providing the person whose communications are to be intercepted.

Any such person or entity furnishing facilities or technical assistance shall be fully compensated by the applicant for the reasonable costs of furnishing the facilities and technical assistance.

Pen. Code § 629.91: Civil or Criminal Liability; Reliance Upon a Court Order:

A good faith reliance on a court order issued in accordance with this Chapter by any public utility, landlord, custodian, or any other person furnishing information, facilities, and technical assistance as directed by the order;

Is a complete defense to any civil or criminal action brought under this Chapter, or Chapter 1.5 (**P.C. §§ 630 et seq.**), or any other law.

Pen. Code § 629.92: Authority to Conform Proceedings and Order to Constitutional Requirements:

Notwithstanding any other provision of law, *any court* to which an application is made in accordance with this Chapter *may* take any evidence, make any finding, or issue any order required to conform the proceedings or the issuance of any order of authorization or approval to the provisions of:

- The Constitution of the United States, o*r*
- Any law of the United States, *or*
- This Chapter.

Pen. Code § 629.94: Training and Certification of Law Enforcement Officers:

The Commission on "Peace Officer Standards and Training" ("POST"), in consultation with the Attorney General, shall establish a course of training in the legal, practical, and technical aspects of the interception of private wire, electronic pager, or electronic communication and related investigativ*e techniques.*

The Attorney General *shall* set minimum standards for certification and periodic recertification* of the following persons as eligible to apply for orders authorizing the interception of private wire, electronic digital pagers, or electronic communication, to conduct the interceptions, and to use the communications or evidence derived from them in official proceedings:

- Investigative or law enforcement officers; *and*

- Other persons, when necessary, to provide linguistic interpretation who are designated by the Attorney General, Chief Deputy Attorney General, or Chief Assistant Attorney General, Criminal Law Division, or the District Attorney or the district attorney's designee, and are supervised by an investigative or law enforcement officer.

POST (Peace Officer Standards and Training) may charge a reasonable enrollment fee for those students who are employed by an agency not eligible for reimbursement by the Commission to offset the costs of the training.

The Attorney General may charge a reasonable fee to offset the costs of certification.

**Note*: Recertification has been set for every five (5) years.

***Pen. Code § 629.96*:** Severability:

If any provision of this Chapter, or the application thereof to any person or circumstances, is held invalid, the remainder of the Chapter, and the application of its provisions to other persons or circumstances, shall not be affected thereby.

***Pen. Code § 629.98*:** Automatic Repeal:

This Chapter shall remain in effect only until *January 1, 2030*, and as of that date is repealed.

***Pen. Code § 632*:** *Eavesdropping, Compared*: Separate from, and in addition to, the restrictions on wiretapping, is the issue of "*eavesdropping*" on the "*confidential communications*" of others (effective 11/8/67).

(a) A person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500) per violation, or imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. If the person has previously been convicted of a violation of this section or **Section 631**, **632.5**, **632.6**, **632.7**, or **636**, the person shall be punished by a fine not exceeding ten thousand dollars ($10,000) per violation, by imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

(b) For the purposes of this section, "*person*" means an individual, business association, partnership, corporation, limited liability company, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, but excludes an individual known by all parties to a confidential communication to be overhearing or recording the communication.

(c) For the purposes of this section, "*confidential communication*" means any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public

gathering or in any legislative, judicial, executive, or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

(d) Except as proof in an action or prosecution for violation of this section, evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section is not admissible in any judicial, administrative, legislative, or other proceeding.

(e) This section *does not apply* **(1)** to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees, or agents thereof, if the acts otherwise prohibited by this section are for the purpose of construction, maintenance, conduct, or operation of the services and facilities of the public utility, **(2)** to the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of a public utility, or **(3)** to any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility.

(f) This section does not apply to the use of hearing aids and similar devices, by persons afflicted with impaired hearing, for the purpose of overcoming the impairment to permit the hearing of sounds ordinarily audible to the human ear.

Case law:

> See ***People v. Ratekin*** (1989) 212 Cal.App.3rd 1165: Although **Pen. Code §§ 631** and **632**, which prohibit wiretapping and eavesdropping, respectively, envision and describe the use of same or similar equipment to intercept communications, the manner in which such equipment is used is clearly distinguished and mutually exclusive: "*Wiretapping*" is intercepting communications by an unauthorized connection to the transmission line whereas "*eavesdropping*" is interception of communications by the use of equipment which is not connected to any transmission line.
>
> However, see ***People v. Guzman*** (2019) 8 Cal.5th 673, where in a child sexual abuse case, the California Supreme Court held that the state constitutional right to truth in evidence under **Cal. Const., art. I, § 28, subd. (f)(2)**, abrogated the prohibition in **Pen. Code § 632(d)**, against the admission into evidence of secretly recorded conversations in criminal proceedings. The statute did not fit within any express exception and the right to privacy under **Cal. Const., art. I, § 1**, was not affected. The exclusionary remedy was not revived just because of reenactments and amendments to **§**

632(d). Such changes did not address the exclusionary remedy. Also, **Gov't. Code § 9605** (Effect of Amendment on Time of Enactment; Presumption that Statute Enacted Last Prevails) provides that reenactment under **Cal. Const., art. IV, § 9**, has no effect on the unchanged portions of an amended statute. Because the exclusionary provision remained abrogated in criminal proceedings, a surreptitious recording was properly admitted into evidence in defendant's trial for committing a lewd and lascivious act upon a child.

Pen. Code § 633.8: *Eavesdropping in Hostage or Barricading Situations*:

(a) Legislative Intent: To allow peace officers to eavesdrop and record confidential oral communications in hostage and barricading situations.

(b) A peace officer may use an electronic amplifying or recording device to eavesdrop on and/or record, any oral communication within a particular location in response to the taking of a hostage or the barricading of a location if:

(1) The officer reasonably determines that an emergency situation exists involving the immediate danger of death or serious physical injury to any person;

(2) The officer reasonably determines that the emergency situation requires that eavesdropping occur immediately; *and*

(3) There are grounds upon which an order could be obtained pursuant to **18 U.S.C. § 2516(2)** for the offenses specified in it.

Note: **18 U.S.C. § 2516(2)** permits the interception of wire, oral, or electronic communications when the interception may provide evidence of the commission of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marijuana or other dangerous drugs, or other crimes dangerous to life, limb, or property, and is punishable by imprisonment for more than one year.

(c) Only a peace officer who has been designated by either a district attorney or by the Attorney General may make the three determinations listed above.

(d) A peace officer is not required to knock or announce his or her presence before entering or before installing or using any electronic amplifying or recording devices.

(e) An application for an order approving eavesdropping must be made within 48 hours *after* the eavesdropping has begun.

> Compliance with **P.C. § 629.50** (setting forth the requirements of a wiretap application) is required.

(f) Any oral communications overheard must be recorded, and in such a manner as to protect the recording from alterations.

(g) A "*barricading*" occurs when a person refuses to come out from a covered or enclosed position, or when a person is held against his or her will and the captor has not made a demand.

(h) A "*hostage situation*" occurs when a person is held against his or her will and the captor has made a demand.

(i) A judge is prohibited from granting an eavesdropping application in anticipation of an emergency situation.

> A judge is required to grant the application in a barricade or hostage situation where there is probable cause to believe that an individual is committing, has committed, or is about to commit an offense listed in **18 U.S.C. § 2516(2)** (see *Note* above) and only if the peace officer has fully complied with the requirements of this section.

(j) A peace officer who makes the decision to use an eavesdropping device is *not* required to undergo wiretap training pursuant to **Pen. Code § 629.94**.

(k) A peace officer is required to stop using an eavesdropping device when the barricade or hostage situation ends, or upon the denial by a judge for an order approving eavesdropping, whichever occurs first.

(*l*) Nothing in this new section is intended to affect the admissibility or inadmissibility of evidence.

***Chapter 11*:**

Searches of Persons:

General Rule*:** "Warrantless searches and seizures (of persons) are presumed to be unreasonable, 'subject only to a few specifically established and well-delineated exceptions.'" (People v. Thomas*** (2018) 29 Cal.App.5th 1107, 1113; citing ***People v. Diaz*** (2011) 51 Cal.4th 84, 90.)

> "Such 'specifically established and well-delineated exceptions' include exigent circumstances, searches incident to arrest, vehicle searches, and border searches." (***United States v. Cano*** (9th Cir. 2019) 934 F.3rd 1002, 1011.)
>
> > And then there are exceptions to each of these exceptions. "*First*, any search conducted under an exception must be within the scope of the exception. *Second*, some searches, even when conducted within the scope of the exception, may be so intrusive that they require additional justification, up to and including probable cause and a search warrant." (***Ibid***.; Italics added.)
>
> Of all the areas where a person has a legitimate "*reasonable expectation of privacy*" protecting the person from governmental intrusions, none, perhaps, is greater than that person's own body. (See ***Winston v. Lee*** (1985) 470 U.S. 753, 759 [105 S.Ct. 1611; 84 L.Ed.2nd 662]: "A compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable;' even if likely to produce evidence of a crime.")
>
> > *Note*: Although not mentioned specifically anywhere in the **U.S. Constitution**, one's "*right to privacy*" is inferred from a reading of the Constitution itself, and its amendments, which provide a "*penumbra*" (i.e., "umbrella") effect of privacy. (See ***Griswold v. Connecticut*** (1965) 381 U.S. 479 [85 S.Ct. 1678; 14 L.Ed.2nd 510].)

Need for a Warrant?

> Given the relative "*mobility*" of one's person, with sufficient cause, a warrantless search of a person may generally be justified, with the exception of intrusions below the skin level; e.g., blood tests. (See ***Missouri v. McNeely*** (2013) 569 U.S. 141 [133 S.Ct. 1552; 185 L.Ed.2nd 696].)
>
> See also ***United States v. Fowlkes*** (9th Cir. 2015) 804 F.3rd 954, 960-968; the physical extraction of a plastic baggie by police officers during a jail strip search of a baggie from defendant's rectum without a warrant or persons with proper medical training held to be a **Fourth Amendment** violation.

And see ***Birchfield v. North Dakota*** (2016) 579 U.S. 438, 461-479 [136 S.Ct. 2160; 195 L.Ed.2nd 560], and ***Missouri v. McNeely*** (2013) 569 U.S. 141 [133 S.Ct. 1552; 185 L.Ed.2nd 696], restricting the taking of a blood sample in DUI cases to when an actual consent is obtained, or exigent circumstances are present. (See "*Blood Samples in DUI Cases*," and "*Driving Under the Influence Cases*," respectively, below.)

***Three Legal Justifications for Warrantless Searches of a Person*:** Where lawful, warrantless searches of a person are justifiable under one or more of the following legal theories:

- *Searches Incident to Arrest*
- *Searches with Probable Cause*
- *Searches with Less Than Probable Cause*

Searches Incident to Arrest: A warrantless search of a person and the area within his/her immediate reach incident to that person's custodial arrest, *with or without any probable cause* to believe there is any contraband or evidence subject to seizure on the person, is lawful, and is justified by the need to keep contraband and weapons out of jail, to preserve any possible evidence, and to protect the officer. (***Chimel v. California*** (1969) 395 U.S. 752 [89 S.Ct. 2034; 23 L.Ed.2nd 685]; ***New York v. Belton*** (1981) 453 U.S. 454 [101 S.Ct. 2860; 69 L.Ed.2nd 768]; ***United States v. Robinson*** (1973) 414 U.S. 218, 224 [94 S.Ct. 467; 38 L.Ed.2nd 427]; ***People v. Macabeo*** (2016) 1 Cal.5th 1206, 1213; ***United States v. Johnson*** (9th Cir. 2019) 913 F.3rd 793, 805; ***In re T.F.-G.*** (2023) 94 Cal.App.5th 893, 899-904.)

History Behind the Rule: See ***Birchfield v. North Dakota*** (2016) 579 U.S. 438, 458-461 [136 S.Ct. 2160; 195 L.Ed.2nd 560], for a description of the history behind the rule, dating back from the 18th century.

Legal Justification: "The rule allowing contemporaneous searches (incident to arrest) is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control." (***United States v. Ventresca*** (1965) 380 U.S. 102, 107 [85 S.Ct. 741; 13 L.Ed.2nd 684, 688]; see also ***Cupp v. Murphy*** (1973) 412 U.S. 291, 296 [93 S.Ct. 2000; 36 L.Ed.2nd 900]; ***Riley v. California*** (2014) 573 U.S. 373, 383 [134 S.Ct. 2473, 2483; 189 L.Ed.2nd 430]; ***United States v. Camou*** (9th Cir. 2014) 773 F.3rd 932, 937-938; ***Birchfield v. North Dakota***, *supra*.)

> "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, and we hold that in the case of a lawful custodial arrest a full search of the person

is not only an exception to the warrant requirement of the **Fourth Amendment**, but is also a 'reasonable' search under that Amendment." (***United States v. Robinson*** (1973) 414 U.S. 218, 235 [94 S.Ct. 467; 38 L.Ed.2nd 427]; ***People v. Macabeo*** (2016) 1 Cal.5th 1206, 1213.)

"A person detained for investigation has no constitutional right to dispose of evidence." (***People v. Quick*** (2016) 5 Cal.App.5th 1006, 1008; citing ***People v. Bracamonte*** (1975) 15 Cal.3rd 394, 405, fn. 6; and ***People v. Maddox*** (1956) 46 Cal.2nd 301, 306.)

A warrantless "*search incident to arrest*" may be made of an arrestee and the area within her immediate reach even though the arrestee has been handcuffed and can no longer lunge for weapons or evidence. (***People v. Rege*** (2005) 130 Cal.App.4th 1584; but see below.)

> Per ***Arizona v. Gant*** (2009) 556 U.S. 332 [129 S.Ct. 1710; 173 L.Ed.2nd 485], this rule does not generally apply to arrests within a vehicle once the subject has been secured. See "*Searches Incident to Arrest*," under "*Searches of Vehicles*" (Chapter 10), below.

Establishing the rule as a blanket rule, and *not* an issue that is to be decided on a case by case basis, the U.S. Supreme Court eventually held that: "The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." The mere "fact of the lawful arrest" justifies "a full search of the person." (***United States v. Robinson*** (1973) 414 U.S. 218, 235-236 [94 S.Ct. 467; 38 L.Ed.2nd 427].)

Such a search has traditionally been justified by the need to search "for weapons, instruments of escape, and evidence of crime" upon performing a custodial arrest. (***People v. Diaz*** (2011) 51 Cal.4th 84.)

See also the concurring, minority opinion in ***People v. Summers*** (1999) 73 Cal.App.4th 288; for an excellent description of the legal reasoning behind searches incident to arrest, and why (at least as the argument went at that time prior to the decision in ***Arizona v. Gant***, *infra*.) it is irrelevant that the person arrested had already been moved from the immediate location where the arrest is first made.

Blood vs. Breath Tests in DUI Cases:

Being arrested for driving while under the influence of alcohol, taken alone, justifies warrantless *breath tests* but *not blood tests*, since breath tests are less intrusive, just as informative, and (in the case of conscious

suspects) readily available. (***Birchfield v. North Dakota*** (2016) 579 U.S. 438, 444-450 [136 S.Ct. 2160; 195 L.Ed.2nd 560]; see also ***Mitchell v. Wisconsin*** (June 27, 2019) 588 U.S.__, __ [139 S.Ct. 2525; 204 L.Ed.2nd 1040].)

See "*Blood Samples in DUI Cases*," below.

Exceptions:

Cellphones: The "incident to arrest" rule, however, has been held *not* to apply to cellphones in that cellphones do not pose a danger to officers and once seized, it is unlikely any evidence contained in the phone is going to be destroyed. When balanced with the large amount of personal information likely to be found in cellphones, a warrantless intrusion into the phone is not justified under the **Fourth Amendment** absent exigent circumstances. (***Riley v. California*** (2014) 573 U.S. 373, 393-397 [134 S.Ct. 2473, 2489-2491; 189 L.Ed.2nd 430].)

See "*Searches of High Tech Devices*" (Chapter 17), below.

Blood Samples in DUI Cases: Nor does the "*incident to arrest*" rule apply to the extraction of a blood sample from the person of an arrestee in DUI (Driving while Under the Influence) cases (noting that the significantly lesser bodily intrusion of a breath test may be administered incident to arrest without consent or a search warrant). (***Birchfield v. North Dakota*** (2016) 579 U.S. 438 [136 S.Ct. 2160; 195 L.Ed.2nd 560].)

The majority of the Supreme Court rejected the dissenting justices' use of ***Missouri v. McNeely*** (2013) 569 U.S. 141 [133 S.Ct. 1552; 185 L.Ed.2nd 696], dealing with exigent circumstances, in this context, noting that ***McNeely*** is an "*exigent circumstance*" case, while the issue here is a "*search incident to arrest*." (136 S.Ct. at p. 2180.)

See "***V.C. § 13353****: Blood or Breath Tests for D.U.I. Arrestees*," under "*Warrantless Searches and Seizures*" (Chapter 9), above.

Physical Body Cavity Searches:

The fact that the offense for which the defendant was arrested is classified as a felony does not mean that a strip search is constitutional. The seriousness of the offense must be balanced with all the other factors. (***Kennedy v. Los Angeles*** (9th Cir. 1989) 901 F.2nd 702, 710-716; arrest for grand theft did not warrant a visual strip search, under the circumstances.)

Being arrested for possession of marijuana does not justify a physical body cavity search at the side of the road. (See ***Hamilton v. Kindred*** (5th Cir. 2017) 845 F.3rd 659; holding that it was clearly established in the Fifth Circuit that an officer could be liable as a bystander in a civil case involving excessive force (referring to the physical body cavity search) if he knew a constitutional violation was taking place and he had a reasonable opportunity to prevent the harm.)

In Memphis, two police officers were accused of doing a body cavity search of the plaintiff by bending him over a police car, pulling down his pants, and one officer putting his finger up the plaintiff's anus to "the second knuckle joint." Plaintiff missed the statute of limitations deadline by five days as (it was alleged) the police department "slow-walked" the investigation in an alleged attempt to avoid a lawsuit. The Court, in a 2-to-1 ruling, held that plaintiff was to be excused for missing the statute of limitations and allowed the lawsuit to proceed. (***Billingsly v. Doe*** (6th Cir. 2022) 2022 U.S.App. LEXIS 25198.)

Note: The Memphis Police Department denies the officers committed the alleged act, apparently acknowledging that if proven to be true, the officers' actions were improper.

(See "*Strip Searches Restricted*," under "*Strip Searches of Prisoners*," below.)

Legal Justification for Searches Incident to Arrest Under Debate:

The Ninth Circuit Court noted in ***United States v. Weaver*** (9th Cir. 2006) 433 F.3rd 1104, at page 1107, that *searches incident to arrest* have gone well beyond the "*rational underpinnings*" of the Supreme Court's original approval of such searches in ***New York v. Belton***, *supra*. More specifically, the Court noted how "officer safety and preservation of evidence" (see ***Chimel v. California***, *supra*.) are no longer a major concern when the arrestee is handcuffed and put into a nearby patrol car. And the Court quoted Supreme Court Justice O'Conner who is noted to have said that, "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of ***Chimel*** . . . [This is] a direct consequence of ***Belton's*** shaky foundation." (Concurring opinion in ***Thornton v. United States*** (2004) 541 U.S. 615, 624 [124 S.Ct. 2127; 158 L.Ed.2nd 905].)

Note that the U.S. Supreme Court decided in ***Arizona v. Gant*** (2009) 556 U.S. 332 [129 S.Ct. 1710; 173 L.Ed.2nd 485], that a

warrantless search of a vehicle incident to arrest is lawful *only* when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.

Although the United States Supreme Court has indicated that ***Gant*** is limited to "circumstances unique to the vehicle context" (see ***Riley v. California*** (2014) 573 U.S. 373, 398-399 [134 S.Ct. 2473; 189 L.Ed.2nd 430], citing ***Gant*** at p. 343.), at least one California court has applied it to the residential situation. (See ***People v. Leal*** (2009) 178 Cal.App.4th 1051; arrest in a residence.)

See "*Incident to Arrest*," under "*Searches of Vehicles*" (Chapter 12), below.

Then, in ***United States v. Maddox*** (9th Cir. 2010) 614 F.3rd 1046, at pages 1048-1049, the Ninth Circuit found that a search of a metal vial on the defendant's key chain was unlawful where, although under defendant's control when he was physically arrested, it was no longer within reach and was beyond defendant's ability to conceal or destroy evidence by the time it was searched because defendant had been handcuffed and put into a patrol car.

However, with the metal vial in ***Maddox*** being taken from defendant's hand as he was being arrested, an argument can be made that pursuant to the subsequent California Supreme Court decision of ***People v. Diaz*** (2011) 51 Cal.4th 84, where it was held that containers "*immediately associated with the person*" are still subject to a search incident to arrest, even though the suspect has been arrested and secured, and even if the container is not searched until later. (See below.)

Despite the above debate, the United States Supreme Court reiterated the need for a "*categorical rule*" in ***Birchfield v. North Dakota*** (2016) 579 U.S. 438, 466 [136 S.Ct. 2160; 195 L.Ed.2nd 560], reaffirming that warrantless searches incident to arrest of the person of the arrestee and the area within his immediate reach are lawful; applying this rule to breath tests in DUI cases.

Transportation of an Arrestee; *the* "*Custodial Arrest*" *Requirement*:

Rule: Anyone who is arrested and is to be *transported* to jail, the police station, a detoxification center, home, etc. (i.e., a "*custodial arrest*"), may be fully searched prior to the transportation. (***United States v. Robinson*** (1973) 414 U.S. 218 [94 S.Ct. 467; 38 L.Ed.2nd 427].)

Robinson involved an arrest for driving on a revoked license where the arrestee was transported to the police station. In the decision, the Court referred to it as a "*full custodial arrest*" which, in turn, was "defined at (sic) one where an officer 'would arrest a subject and subsequently transport him to a police facility for booking,' . . . ." (pg. 223, fn. 2.)

Other than this brief comment (above), and in noting that Robinson had been subjected to a "*full custodial arrest*," the issue of whether or not an actual transportation of the arrestee was a legal prerequisite to a "*search incident to that arrest*" was not discussed.

A misdemeanor cite and release at the scene of the contact (i.e., a "*non-custodial arrest*"), *absent probable cause* to believe the arrestee has evidence or contraband on him, would *not* be subject to a search incident to arrest for the simple reason he is *not* to be transported; i.e., it is *not* a "*custodial arrest*." (See ***People v. Brisendine*** (1975) 13 Cal.3rd 528; ***United States v. Moto*** (9th Cir. 1993) 982 F.2nd 1384.)

> ***Brisendine*** found a search incident to arrest to be illegal where the person was to be cited at the scene and released for a misdemeanor fire code (i.e., an illegal campfire) violation. Although ***Brisendine*** was based upon a pre-Proposition 8 interpretation of the California Constitution, the Court did note at page 548, fn. 15: "We also accept the (United States Supreme Court's) view (in ***Robinson*** and ***Gustafson***; see below) that transportation in a police vehicle per se justifies a limited weapons search, regardless of the likelihood that a particular arrestee is armed."
>
> Although the California Supreme Court in ***Brisendine*** limited searches incident to a "*custodial arrest*" to looking for weapons, interpreting the more restrictive California Constitution, it still preconditioned such a search upon the transportation of the arrestee.
>
> In ***United States v. Moto***, *supra*., the Ninth Circuit Court of Appeal found the defendants' custodial arrest for an infraction, where they were transported to the police station, to be contrary to the provisions of **P.C. § 853.5** mandating the release of the subject on his written promise to appear absent an exception to the rule, as provided for in the statute. Assuming without discussing the issue that a cite and release is *not* a custodial arrest, the Court here

found the "*search incident to arrest*" to be a **Fourth Amendment** violation.

Moto is questionable authority in light of more recent pronouncements from both the United States and California Supreme Courts (See ***Atwater v. City of Lago Vista*** (2001) 532 U.S. 318 [121 S.Ct. 1536; 149 L.Ed.2nd 549]; ***Virginia v. Moore*** (2008) 553 U.S. 164 [128 S.Ct. 1598; 170 L.Ed.2nd 559]; ***People v. McKay*** (2002) 27 Cal.4th 601, 607; and see also ***United States v. McFadden*** (2nd Cir. 2001) 238 F.3rd 198, 204; ***People v. Gomez*** (2004) 117 Cal.App.4th 531.) have ruled that transporting and even booking a person for a fine-only offense, even if contrary to state law, is *not* a **Fourth Amendment** violation and thus does not subject the resulting evidence to suppression. However, the Court's assumption is still valid that a "*custodial arrest*," involving the transportation of the arrestee to a police station, is a necessary prerequisite to a lawful "*search incident to arrest*."

Pen. Code § 853.5 has been held to provide the exclusive grounds for a custodial arrest for an infraction. (***Edgerly v. City and County of San Francisco*** (9th Cir. 2013) 713 F.3rd 976, 981-985; citing ***In re Rottanak K.*** (1995) 37 Cal.App.4th 260, and ***People v. Williams*** (1992) 3 Cal.App.4th 1100.)

In order to justify a search incident to arrest, the subject must have actually been subjected to a custodial arrest. Absent such an actual arrest and transportation, the rule that a search incident to a citation not being lawful, per ***Knowles v. Iowa*** (1998) 525 U.S. 113 [119 S.Ct. 484; 142 L.Ed.2nd 492], applies. (***People v. Macabeo*** (2016) 1 Cal.5th 1206, 1216-1219; ***In re D.W.*** (2017) 13 Cal.App.5th 1249, 1253.)

Taking a person into "*protective custody*," where, for instance, he is acting irrationally (e.g., intoxicated, in this case), allows for a patdown for weapons only, prior to transporting him. (***United States v. Gilmore*** (10th Cir.) 776 F.3rd 765.)

Search Incident To a Citation:

There is no such thing as a "*search incident to a citation*," because of the lack of a physical transportation of the subject from the

scene of the "arrest" (i.e., citation). (***Knowles v. Iowa*** (1998) 525 U.S. 113 [119 S.Ct. 484; 142 L.Ed.2nd 492]; see also ***People v. Brisendine*** (1975) 13 Cal.3rd 528, 538-552; ***People v. Macabeo*** (2016) 1 Cal.5th 1206, 1218; ***In re D.W.*** (2017) 13 Cal.App.5th1249, 1253.)

> In ***Knowles***, the Court noted that the officer, under Iowa law, had the option of physically arresting or only citing the driver for a speeding violation. The officer chose to do the later. Therefore, no transportation of the defendant was contemplated. The Supreme Court, in discussing the differences between a *cite and release* situation (albeit for an infraction) when compared to a "*custodial arrest*" where the subject is transported to a police station, noted the following significant factor:
>
> > "We have recognized that . . . officer safety . . . is 'both legitimate and weighty,' [Citations]. The threat to officer safety from issuing a traffic citation, however, is a good deal less than in the case of a custodial arrest. In ***Robinson***, we stated that a custodial arrest involves 'danger to an officer' because of 'the extended exposure *which follows the taking of a suspect into custody and transporting him to the police station*.' (Italics added) 414 U.S., at 234-235 . . . . We recognized that '[t]he danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest.' ***Id***., at 234, n. 5 . . . . A routine traffic stop, on the other hand, is a relatively brief encounter and 'is more analogous to a so-called "***Terry*** stop" . . . than to a formal arrest.' [Citations] ("Where there is no formal arrest ... a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence"). (Parenthesis in original; pgs. 487-488.)

An notable exception to this rule is when there is probable cause to search for illegally possessed marijuana. The fact that the illegal simple possession of marijuana is a citable offense only, does not preclude officers from doing a probable cause vehicle search for illegally possessed marijuana, such as when the occupants of the vehicle are all under the age of 21. (See (***People v. Castro*** (2022) 86 Cal.App.5th 314; finding the "automobile exception" to the

warrant requirement applicable to a search of a vehicle for marijuana, and noting (at p. 320) that "[w]here such probable cause exists, a law enforcement officer may search the vehicle 'irrespective of whether [the offense] is an infraction and not an arrestable offense.'" Quoting from ***People v. McGee*** (2020) 53 Cal.App.5th 796, 805; and ***People v. Fews*** (2018) 27 Cal.App.5th 553, 564.)

Note: See "*Search Incident to a Citation*," under "*Other Requirements and Limitations*," below.

Note also that the **California Penal Code** dictates that misdemeanor-related laws apply equally to infractions. (**Pen. Code § 19.7**)

Officer's Intent to Transport:

Although there has to be a transportation of the suspect in order to justify a search incident to arrest, the physical arrest *does not need* to be for *an offense for which custody* (as opposed to a citation) *is mandatory*. (***Gustafson v. Florida*** (1973) 414 U.S. 260 [94 S.Ct. 488; 38 L.Ed.2nd 456].)

In ***Gustafson***, defendant was lawfully arrested for driving without a valid license in his possession and searched incident to that arrest. The officer had planned to transport the defendant to the police station prior to the search; a lawful procedure under Florida law. The search was upheld as a lawful search incident to this "*lawful custodial arrest*."

At page 265, the ***Gustafson*** Court notes that: "Though the officer here was not required to take the petitioner into custody by police regulations as he was in ***Robinson***, and there did not exist a departmental policy establishing the conditions under which a full-scale body search should be conducted, we do not find these differences determinative of the constitutional issue. [Citation] It is sufficient that the officer had probable cause to arrest the petitioner and that he lawfully effectuated the arrest, and placed the petitioner in custody."

This comment, which is not further explained, seems to recognize a difference between a "*full custodial arrest*" (as it is referred to in ***Robinson***) and the mere citation and release at the scene.

> Also, in footnote 3 (***Id.***, at p. 266), again inferring a difference between citing and releasing at the scene and the taking of the suspect into "*custody*" for transportation, the Court notes that: "Smith (the officer) testified that he wrote about eight to ten traffic citations per week, and that about three or four out of every 10 persons he arrested for the offense of driving without a license were taken into custody (and transported) to the police station. Smith indicated that an offender is more likely to be taken into custody if he does not reside in the city of Eau Gallie. Finally, Smith testified that after making a custodial arrest, he always searches the arrestee before placing him into the patrol car."
>
> > *Note*: It therefore is helpful if the officer is able to honestly testify to some objective standard he or she uses for determining when a person arrested for such an offense is to be transported, minimizing the argument that the officer only decided, *after the search*, to transport the arrestee.

Transporting an arrested minor (even if for only a "*status offense*" such as a curfew violation or truancy), whether the minor is to be transported home (***In re Demetrius A.*** (1989) 208 Cal.App.3rd 1245; prowling.) or to a police station (***In re Charles C.*** (1999) 76 Cal.App.4th 420; curfew.), justifies a search incident to arrest. (See also ***In re Humberto O.*** (2000) 80 Cal.App.4th 237; truancy.)

> In ***Humberto O.***, the juvenile was taken into custody for a truancy violation. However, it was noted in the decision that "the officers planned to cuff defendant's hands behind his back, put him in the patrol car, and transport him to school." (pg. 240.) **Education Code §§ 48264** and **48265** require that the minor be transported to his parents or to school (among other choices). (***Id***., at p. 241, fn. 2.) "The limited nature of a **section 48264** arrest requires that the minor be transported to school, as the officers here planned to do." (***Id***., at p. 244.) Searching the backpack he was carrying incident to this custodial arrest was upheld.
>
> In ***In re Demetrius A.***, *supra*, without discussing the issue of the necessity for a transportation, it was noted that the minor was arrested for prowling and was going to be transported home. A search incident to such a custodial arrest was lawful.

In ***In re Charles C.***, *supra*, the minor was "*taken into temporary custody*" (i.e., "*arrested*," see ***Id.***, at p. 425, fn. 3.) and transported to the police station where he was searched "*incident to the arrest*." The search was upheld, holding that it was irrelevant that the search was not conducted until after the transportation. (But see "*Contemporaneous in Time and Place*" requirement, below.) Without further discussing the issue, the Court did note that citing (albeit for an infraction) at the scene and releasing the subject *does not* justify a search incident to such a citation. (***Id.***, at p. 424, fn. 2, citing ***Knowles v. Iowa*** (1998) 525 U.S. 113 [119 S.Ct. 484; 142 L.Ed.2nd 492].)

Contemporaneous in Time and Place:

General Rule: The "*search incident to arrest*" theory is, as a general rule, only applicable if the search is conducted "*contemporaneous in time and place*:" I.e., the search must be conducted at the time and location of the arrest. Searching after transportation to another location cannot be justified under this theory, absent some practical necessity for moving the person first. (***Chimel v. California*** (1969) 395 U.S. 752 [89 S.Ct. 2034; 23 L.Ed.2nd 685]; see also ***People v. Ingham*** (1992) 5 Cal.App.4th 326; ***People v. Johnson*** (2018) 21 Cal.App.5th 1026, 1037.)

"(The) 'justifications (for allowing a search incident to arrest) are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.'" (***United States v. Ventresca*** (1965) 380 U.S. 102, 107 [85 S.Ct. 741; 13 L.Ed.2nd 684, 688]; quoting ***Preston v. United States*** (1964) 376 U.S. 364, 367 [84 S.Ct. 881; 11 L.Ed.2nd 777, 780-781].)

See also ***United States v. McLaughlin*** (9th Cir. 1999) 170 F.3rd 889, where the search was conducted five minutes after the arrest, where the officer first drove the defendant from the scene. "The relevant distinction turns not upon the moment of arrest versus the moment of the search but upon whether the arrest and search are so separated in time or by intervening acts that the latter cannot be said to have been incident to the former." (***Id.***, at p. 893, quoting ***United States v. Abdul-Saboor*** (D.C. Cir. 1996) 85 F.3rd 664, 668; see also ***United States v. Hudson*** (9th Cir. 1996) 100 F.3rd 1409; search three minutes after the arrest valid as a search incident to arrest.)

"In evaluating the reasonableness of a search incident to arrest, we have examined not only whether the area searched was within the

arrestee's 'immediate control,' but also whether any event occurred after the arrest that rendered the search unreasonable. (***United States v.***) ***Maddox***, 614 F.3rd (1046) at 1048. While '[t]here is no fixed outer limit for the number of minutes that may pass between an arrest and a valid, warrantless search,' (***United States v. McLaughlin***, 170 F.3rd 889, 892 (9th Cir. 1999), we have said that the search must be 'spatially and temporally incident to the arrest,' ***United States v. Camou***, 773 F.3rd 932, 937 (9th Cir. 2014). *See also* ***United States v. Smith***, 389 F.3rd 944, 951 (9th Cir. 2004) (per curiam) (interpreting the temporal requirement to mean that the search must be 'roughly contemporaneous with the arrest'); ***United States v. Monclavo-Cruz***, 662 F.2nd 1285, 1288 (9th Cir. 1981) (holding that the search of the purse of an arrestee 'more than an hour after her arrest at the station house' was not valid incident to arrest)." (***United States v. Cook*** (9th Cir. 2015) 808 F.3rd 1195, 1198-1200; upholding the search of defendant's backpack immediately upon his arrest despite him being handcuffed at the time, differentiating the facts from ***Arizona v. Gant*** (2009) 556 U.S. 332 [129 S.Ct. 1710; 173 L.Ed.2nd 485], where the defendant was fully secured by being not only handcuffed, but also locked inside a patrol car.)

> But see ***United States v. Davis*** (4th Cir. 2021) 997 F.3rd 191, where the Fourth Circuit Court of Appeal applied the theory of ***Gant*** (above) to an arrestee's backpack that he dropped on the ground upon being arrested following a foot pursuit, and which was searched after he was arrested and handcuffed.

A search of a cellphone made an hour and twenty minutes after the defendant's arrest, with a string of intervening acts occurring between the arrest and the eventual search, is too far removed from the arrest to be considered a search incident to the defendant's arrest. (***United States v. Camou*** (9th Cir. 2014) 773 F.3rd 932, 937-939.)

However, see ***United States v. Edwards*** (1974) 415 U.S. 800 [94 S.Ct. 1234; 39 L.Ed.2nd 771], where it was held that police could seize the defendant's clothing and conduct tests for evidence incident to an arrest that had occurred 10 hours earlier. *Edwards* noted that officers were authorized to seize the defendant's clothing immediately upon arrest, but they delayed because "it was late at night; no substitute clothing was then available." (***Id***. at p. 805.) The Court in ***Edwards*** reasoned: "This was no more than taking from respondent the effects in his immediate possession that constituted evidence of crime. This was and is a normal incident of

a custodial arrest, and reasonable delay in effectuating it does not change the fact that Edwards was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention." (***Ibid***.)

Where defendant's car was searched after his arrest, when the arrest took place two blocks from his car and necessitated that he be transported back to his car before it was searched, it was held that the search "did not take place 'when and where' he was lawfully arrested," resulting in a finding that the "search incident to arrest" theory did not apply. (***People v. Johnson*** (2018) 21 Cal.App.5th 1026, 1035-1037.)

Search Before or After Arrest:

Where there is preexisting probable cause to arrest, it is irrelevant whether the search occurs before or after the formal act of arrest. (***In re Lennies H.*** (2005) 126 Cal.App.4th 1232, 1239-1240; ***United States v. Smith*** (9th Cir. 2005) 389 F.3rd 944.)

"An officer with probable cause to arrest can search incident to the arrest before making the arrest. (***Rawlings v. Kentucky*** (1980) 448 U.S. 98, 111; 100 S.Ct. 2556; 65 L.Ed.2nd 633; ***People v. Adams*** (1985) 175 Cal.App.3rd 855, 861 . . .) (***People v. Limon*** (1993) 17 Cal.App.4th 524, 538, . . .) The fact that a defendant is not formally arrested until after the search does not invalidate the search if probable cause to arrest existed prior to the search and the search was substantially contemporaneous with the arrest. (***Rawlings v. Kentucky***, *supra*, 448 U.S. at p. 111; ***People v. Adams***, *supra*, 175 Cal.App.3rd at p. 961, . . .)" (***In re Lennies H.***, *supra*. See also ***People v. Sims*** (2021) 59 Cal.App.5th 943, 954, fn. 5.)

Note: These are "*probable cause*" cases, and cannot be used to justify a pre-arrest search conducted solely on a "*search incident to arrest*" theory.

See also "*Order of Search & Arrest*," under "*Searches with Probable Cause*," below.

Exceptions:

A search of a container (e.g., a purse or a backpack) that was lawfully searched incident to arrest, may again be searched at a later time (e.g., at the police station) without a warrant in that with the first incident-to-arrest search, the suspect's expectation of

privacy has been reduced to the point where the later warrantless search is then reasonable. (***United States v. Burnette*** (9th Cir. 1983) 698 F.2nd 1038, 1049; see also ***United States v. Cook*** (9th Cir. 2015) 808 F.3rd 1195, 1198-1200; ***United States v. Lustig*** (9th Cir. 2016) 830 F.3rd 1075, 1085.)

However, probable cause to cite a person for a traffic offense is not the equivalent of having probable cause to arrest. Search incident to a citation is not lawful. (***People v. Macabeo*** (2016) 1 Cal.5th 1206, 1216-1219; citing ***Knowles v. Iowa*** (1989) 525 U.S. 113 [119 S.Ct. 484; 142 L.Ed.2nd 492.)

See "*Search Incident to a Citation*," under "*Detentions*" (Chapter 4), above, and under "*Other Requirements and Limitations*," immediately below.

Other Requirements and Limitations:

Search Incident to a Citation: There is no such thing as a "*search incident to a citation*," because of the lack of the right to physically transport the subject. (***Knowles v. Iowa*** (1998) 525 U.S. 113 [119 S.Ct. 484; 142 L.Ed.2nd 492]; see also ***People v. Brisendine*** (1975) 13 Cal.3rd 528, 538-552.)

However, it is not unconstitutional to make a custodial arrest (i.e., transporting to jail or court) of a person arrested for a minor misdemeanor (***Atwater v. City of Lago Vista*** (2001) 532 U.S. 318 [121 S.Ct. 1536; 149 L.Ed.2nd 549]; ***Virginia v. Moore*** (2008) 553 U.S. 164 [128 S.Ct. 1598; 170 L.Ed.2nd 559].); or even for a fine-only, infraction. (***People v. McKay*** (2002) 27 Cal.4th 601, 607; see also ***United States v. McFadden*** (2nd Cir. 2001) 238 F.3rd 198, 204.)

In order to justify a search incident to arrest, however, the subject must have actually been subjected to a custodial arrest. Absent such an actual arrest and transportation, the rule that a search incident to a citation not being lawful, per ***Knowles v. Iowa*** (1998) 525 U.S. 113 [119 S.Ct. 484; 142 L.Ed.2nd 492], applies. (***People v. Macabeo*** (2016) 1 Cal.5th 1206, 1216-1219; ***In re D.W.*** (2017) 13 Cal.App.5th1249, 1253.)

California's statutory provisions require the release of misdemeanor arrestees in most circumstances. (E.g., see **P.C. §§ 853.5**, **853.6**, **V.C. §§ 40303**, **40500**) However, violation of these statutory requirements is not a constitutional violation and, therefore, *should not* result in suppression of any evidence

recovered as a result of such an arrest. (***People v. McKay***, *supra*, at pp. 607-619, a violation of **V.C. § 21650.1** (riding a bicycle in the wrong direction); ***People v. Gomez*** (2004) 117 Cal.App.4th 531, 538-540, seat belt violation (**V.C. § 27315(d)(1)**), citing: ***Atwater v. City of Lago Vista***, *supra*; see also ***People v. Bennett*** (2011) 197 Cal.App.4th 907, 918.)

> See "*Sanctions for Violations*," "*Misdemeanors and Infractions*," under "*Arrests*" (Chapter 5), above.
>
> See also "*Search Incident to a Citation*," under "*Transportation of an Arrestee*; *the* '*Custodial Arrest*' *Requirement*," above.

An notable exception to this rule is when there is probable cause to search for marijuana. The fact that the illegal simple possession of marijuana is a citable offense only, does not preclude officers from doing a probable cause vehicle search for illegally possessed marijuana. (See (***People v. Castro*** (2022) 86 Cal.App.5th 314; finding the "automobile exception" to the warrant requirement applicable to a search of a vehicle for marijuana, and noting (at p. 320) that "[w]here such probable cause exists, a law enforcement officer may search the vehicle 'irrespective of whether [the offense] is an infraction and not an arrestable offense.'" Quoting from ***People v. McGee*** (2020) 53 Cal.App.5th 796, 805; and ***People v. Fews*** (2018) 27 Cal.App.5th 553, 564.)

Searches of Containers: Such a search includes any containers found within the area of the defendant's arrest. (***New York v. Belton*** (1981) 453 U.S 454 [101 S.Ct. 2860; 69 L.Ed.2nd 768]; ***People v. Gutierrez*** (1984) 163 Cal.App.3rd 332; ***United States v. Robinson*** (1973) 414 U.S. 218 [94 S.Ct. 467; 38 L.Ed.2nd 427]; cigarette package found on defendant's person.)

> A few years after ***Robinson***, the Supreme Court clarified that the "search incident to arrest" exception was limited to "personal property . . . immediately associated with the person of the arrestee." (***United States v. Chadwick*** (1977) 433 U.S. 1 [97 S.Ct. 2476; 53 L.Ed.2nd 538].)
>
> It matters not that the container searched did not belong to the person arrested, so long as it was found within the arrested defendant's "*lunging area*." (***People v. Prance*** (1991) 226 Cal.App.3rd 1525; ***People v. Mitchell*** (1995) 36 Cal.App.4th 672.)

But see ***Arizona v. Gant*** (2009) 556 U.S. 332 [129 S.Ct. 1710; 173 L.Ed.2nd 485], below, severely limiting the search incident to an arrest where the suspect has already been secured.

And see ***Riley v. California*** ((2014) 573 U.S. 373[134 S.Ct. 2473; 189 L.Ed.2nd 430], holding that cellphones found on an arrestee may not be searched absent a search warrant.

Cellphones are not containers for purposes of the vehicle exception to the search warrant requirement. (***United States v. Camou*** (9th Cir. 2014) 773 F.3rd 932, 941-943.)

See also ***United States v. Lara*** (9th Cir. 2016) 815 F.3rd 605, 610-611; declining to include defendant's cellphone under the category of a "container," in defendant's **Fourth** waiver search conditions.

In ***United States v. Davis*** (4th Cir. 2021) 997 F.3rd 191, The Fourth Circuit Court of Appeal applied the theory of ***Gant*** (above) to an arrestee's backpack that he dropped on the ground upon being arrested following a foot pursuit, and which was searched after he was arrested and handcuffed.

Property of Booked Person: Property in the possession or under the control *of a subject who is booked* into custody is subject to search: "Once articles have lawfully fallen into the hands of the police they may examine them to see if they have been stolen, test them to see if they have been used in the commission of a crime, return them to the prisoner on his release, or preserve them for use as evidence at the time of trial. (***People v. Robertson*** (1966) 240 Cal.App.2nd 99, 105-106 . . . .) During their period of police custody an arrested person's personal effects, like his person itself, are subject to reasonable inspection, examination, and test. (***People v. Chaigles*** (1923) 237 N.Y. 193 [142 N.E. 583, 32 A.L.R. 676], Cardozo, J.)" (***People v. Rogers*** (1966) 241 Cal.App.2nd 384, 389.)

But see ***Arizona v. Gant*** (2009) 556 U.S. 332 [129 S.Ct. 1710; 173 L.Ed.2nd 485], discussed below.

And see ***People v. Diaz*** (2011) 51 Cal.4th 84, allowing a search incident to arrest of items *"immediately associated with the person*," even if not done until sometime after the suspect's arrest.

Also see ***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430], below, holding that cellphones, seized incident to arrest, may not be searched without a search warrant.

Note: By inference, ***Riley*** overrules ***People v. Diaz***, *supra*, in so far as it relates to cellphones. (See ***People v. Macabeo*** (2016) 1 Cal.5th 1206, 1212-1226.)

Seizure and Search of Children:

As with adults, children also possess a **Fourth Amendment** right to be secure in their persons against unreasonable searches and seizures. Medical examinations that are at least partially investigatory are well within the ambit of the **Fourth Amendment**. Searches conducted without a warrant are per se unreasonable under the **Fourth Amendment**, subject only to a few specifically established and well-delineated exceptions. (***Mann v. County of San Diego*** (9th Cir. 2018) 907 F.3rd 1154, 1164-1167; none of such exceptions applying in this case.)

The parents' **Fourteenth Amendment** due process rights are violated by the warrantless taking as well, with the performance of medical examinations on their children without notice to the parents and absent exigent circumstances or a court order. (***Id.***, at pp. 1160-1164.)

A minor (14 years old) was seized without sufficient probable cause when a detective interviewed him at school concerning a four-year-old's allegations of child molest, when the victim's account of the facts were inconsistent and conflicting. Further investigation should have been conducted given the problems with the minor's story. (***Stoot v. City of Everett*** (9th Cir. 2009) 582 F.3rd 910, 918-921; but qualified immunity supported summary judgment in the officer's favor.)

Arrest in the Home: A person arrested in his home is subject to search as is the area within his immediate reach. (***People v. Summers*** (1999) 73 Cal.App.4th 288; see the concurring, minority opinion for an excellent description of the legal reasoning behind searches incident to arrest, and why it is irrelevant that the person arrested had already been moved from the immediate location where the arrest is first made.)

However, the U.S. Supreme Court recently restricted searches incident to arrest when searching a vehicle in ***Arizona v. Gant*** (2009) 556 U.S. 332 [129 S.Ct. 1710; 173 L.Ed.2nd 485]. In ***Gant***, it was held that a warrantless search of a vehicle incident to arrest is lawful *only* when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.

The theory of ***Gant*** may not be restricted to vehicle searches. The same theory, disallowing a search incident to arrest when the suspect has already been secured, has been held to be applicable as well to an arrest within one's residence. (***People v. Leal*** (2009) 178 Cal.App.4th 1051.)

The ***Leal*** court, citing ***Summers*** and ***Gant***, noted that there are limitations to this rule: "A different rule of reasonableness applies when the police have a degree of control over the suspect but do not have control of the entire situation. In such circumstances—e.g., in which third parties known to be nearby are unaccounted for, or in which a suspect has not yet been fully secured and retains a degree of ability to overpower police or destroy evidence—the **Fourth Amendment** does not bar the police from searching the immediate area of the suspect's arrest as a search incident to an arrest." (***Id***., at p. 1060.)

It was also noted in ***Leal*** that the law was sufficiently settled prior to ***Gant*** that "good faith" reliance upon prior authority did not allow for the admissibility of the evidence recovered in this case. (***Id***., at pp. 1065-1066.)

Arrests in a Vehicle: The same applies to a *person arrested in his vehicle*; the person and the passenger area (as the "lunging area") of that vehicle may be searched incident to that arrest. (***New York v. Belton*** (1981) 453 U.S 454 [101 S.Ct. 2860; 69 L.Ed.2nd 768].)

But see ***Arizona v. Gant*** (2009) 556 U.S. 332 [129 S.Ct. 1710; 173 L.Ed.2nd 485], above, and "*Searches of Vehicles*" (Chapter 12), below.

Exceptions:

Strip Searches: A search incident to arrest does *not* include the right to conduct a "*strip search*," which, as a "*serious intrusion upon personal rights*" and "*an invasion of personal rights of the first magnitude*" (***Chapman v. Nichols*** (10th Cir. 1993) 989 F.2nd 393, 395-396.), is generally not allowed prior to booking. (***Foote v. Spiegel*** (Utah 1995) 903 F.Supp. 1463.)

See "*Strip Searches of Prisoners*," below.

Cellphones Found on the Person: A warrantless search incident to arrest also does *not* include cellphones found on the person at the time of his

arrest. (***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430].)

However, the Supreme Court also noted (134 S.Ct. at p. 2494) that the lack of a warrant may be excused where "exigent circumstances" are found, to include:

- The need to prevent the imminent destruction of evidence;
- To pursue a fleeing suspect; *and*
- To assist persons who are seriously injured or are threatened with imminent injury.

Cellphones are not containers for purposes of the vehicle exception to the search warrant requirement. (***United States v. Camou*** (9th Cir. 2014) 773 F.3rd 932, 941-943.)

See also ***United States v. Lara*** (9th Cir. 2016) 815 F.3rd 605, 610-611; declining to include defendant's cellphone under the category of a "container," in defendant's **Fourth** waiver search conditions.

The "*Inevitable Discovery*" doctrine also applies, excusing an illegal search of one's cellphone incident to his arrest, where it is shown by a preponderance of the evidence that law enforcement would have inevitably recovered the same information by lawful means. (***People v. Fayed*** (2020) 9 Cal.5th 147, 182-184; conceding that a warrantless search of defendant's cellphone incident to his arrest, recovering only his cellphone number, was illegal under ***Riley***, but where the same number had also been lawfully recovered from his wife's (the murder victim) phone and from several other sources, it was held that the "inevitable discovery" rule applied.)

See "*Doctrine of Inevitable Discovery*," under "*Searches and Seizures*" (Chapter 8), above.

See "*Seizures and Searches of High Tech Devices*" (Chapter 17), below.

Searches with Probable Cause:

Rule: A person may also be searched without a search warrant any time a law enforcement officer has "*probable cause*" to believe the person has contraband or other seizeable property on him. (***People v. Coleman*** (1991) 229 Cal.App.3rd 321.)

The "*Exigency*" excusing the need for a search warrant, obviously, is the fact that when probable cause develops to believe that the a person possesses contraband or evidence of a crime, there will not be an opportunity to obtain a search warrant without risking the loss or destruction of the items sought. (See below)

Probable Cause may be found *from the defendant's own admissions* which, without independent evidence of the corpus of the crime, would not be admissible in court. The likelihood of conviction is not relevant in establishing probable cause to arrest. (***People v. Rios*** (1956) 46 Cal.2nd 297; defendant's admission that he had injected drugs two weeks earlier sufficient to establish probable cause for the past possession of a controlled substance. Search incident to the arrest was therefore lawful.)

When defendant refused to empty his pockets on the hood of a federal law enforcement officer's car, there was no search. But after defendant admitted to possessing marijuana, and was then asked a second time to empty his pockets, this time complying, doing so constituted a search. But with defendant's admission to possessing marijuana, the search was based upon probable cause and lawful. (***United States v. Pope*** (9th Cir. 2012) 686 F.3rd 1078, 1080-1084.)

Pen. Code § 833; *Authority to Search*: By statute, in California, peace officers are authorized to search any person the officer has "*legal cause to arrest*" for "*dangerous weapons*," and then seize such weapon pending the determination whether the person will continue to be arrested.

Note: In that most of the rules on "*searches incident to arrest*" are constitutionally-based case decisions, anywhere they might differ from the language of this statute (e.g., the need to transport the arrested person as a condition of a search incident to arrest; see above), the case law is likely to take precedence.

See "*Frisks*" below.

Order of Search & Arrest: It is irrelevant whether the officer, with probable cause to believe a subject possesses contraband or some other tangible evidence of a crime, searches first and then arrests, or arrests first and then searches incident to that arrest (***Rawlings v. Kentucky*** (1980) 448 U.S. 98, 110 [100 S.Ct. 2556; 65 L.Ed.2nd 633, 645]; ***People v. Gonzales*** (1989) 216 Cal.App.3rd 1185, 1189; ***People v. Avila*** (1997) 58 Cal.App.4th 1069.), so long as the search is "*substantially contemporaneous*" with the arrest. (See ***People v. Cockrell*** (1965) 63 Cal.2nd 659, 666; ***People v. Nieto*** (1990) 219 Cal.App.3rd 1275, 1277; see also ***United States v. Anchondo*** (10th Cir. 1998) 156 F.3rd 1043, 1045-1046.)

A search of a vehicle incident to arrest is lawful where there exists probable cause to arrest before the search is conducted, even if, in the sequence of events, the search takes place *before* the actual physical arrest of the defendant, so long as the search is "*roughly contemporaneous*" with the arrest. (***United States v. Smith*** (9th Cir. 2005) 389 F.3rd 944; see also ***United States v. Lugo*** (10th Cir. 1999) 170 F.3rd 996.)

> But see ***Arizona v. Gant*** (2009) 556 U.S. 332 [129 S.Ct. 1710; 173 L.Ed.2nd 485], below, under "*Searches of Vehicles*" (Chapter 12), severely limiting the "search incident to arrest" theory, at least in vehicles.

The old California rule of requiring a valid arrest, even of an unconscious suspect, prior to the extraction of a blood sample (See ***People v. Superior Court* [*Hawkins*]** (1972) 6 Cal.3rd 757, 762.), was abrogated by passage of **Proposition 8**, in June, 1982. Now, so long as probable cause exists to believe that the defendant was driving while intoxicated, a formal arrest is not a prerequisite to a warrantless seizure of a blood sample. (***People v. Trotman*** (1989) 214 Cal.App.3rd 430, 435; ***People v. Deltoro*** (1989) 214 Cal.App.3rd 1417, 1422, 1425.)

> But see ***Missouri v. McNeely*** (2013) 569 U.S. 141 [133 S.Ct. 1552; 185 L.Ed.2nd 696], requiring a search warrant prior to the blood draw except in exigent circumstances.
>
> The implied consent provisions under **Veh. Code § 23612(a)(5)**, where, by statute, blood may be drawn from an unconscious or dead DUI suspect, does not overcome the need for a search warrant without a showing of exigent circumstances. (***People v. Arredondo*** (2016) 245 Cal.App.4th 186, 193-205; no exigency found, pp. 205-206.)
>
> > *Note*: Petition for Review was dismissed and the case remanded in light of the decision in ***Mitchell v. Wisconsin*** (June 27, 2019) 588 U.S.__, __ [139 S.Ct. 2525; 204 L.Ed.2nd 1040], where the U.S. Supreme Court held that when a DUI arrestee is unconscious, this fact alone will "*almost always*" constitute an exigency, allowing for a warrantless blood draw. However, this "almost always" language should not be taken too literally. There still has to be shown to be an exigency, necessitating a warrantless blood draw. (See ***People v. Alvarez*** (2023) 98 Cal.App.5th 531, 541-551.)

Knowles v. Iowa (1998) 525 U.S. 113 [119 S.Ct. 484; 142 L.Ed.2nd 492], does not prevent a search incident to a lawful arrest from occurring before

the arrest itself, even if the crime of arrest was different from the crime for which probable cause existed. The smell of fresh and burnt marijuana in defendant's car, along with plastic baggies in the glove compartment and defendant's unusual search of the glove compartment, indicated a fair probability that he had committed, was committing, or was about to commit the offense of marijuana transportation, per **H&S § 11360**. Thus, the search prior to arrest was supported by probable cause. (***United States v. Johnson*** (9th Cir. 2019) 913 F.3rd 793, 799-801.)

> Per the Court: "(A) search, incident to a lawful arrest, does not necessarily need to follow the arrest to comport with the Fourth Amendment. ***United States v. Smith***, 389 F.3rd 944, 951 (9th Cir. 2004) (citing ***Rawlings v. Kentucky***, 448 U.S. 98, 111, 100 S.Ct. 2556, 65 L.Ed.2nd 633 (1980)). Instead, probable cause to arrest must exist at the time of the search, and the arrest must follow 'during a continuous sequence of events.' ***Id***. If these conditions are satisfied, the fact that the arrest occurred shortly after the search does not affect the search's legality." (Pg. 799.)

Intrusions into the Human Body: Of all the areas where a person has a legitimate "*reasonable expectation of privacy*" protecting the person from governmental intrusions, none, perhaps, is greater than that person's own body. (See ***Winston v. Lee*** (1985) 470 U.S. 753, 759 [105 S.Ct. 1611; 84 L.Ed.2nd 662]; "A compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable;' even if likely to produce evidence of a crime.")

> *Substantial Justification*: "A body search . . . requires 'a more *substantial justification*' than other searches." (Italics added; ***George v. Edholm*** (9th Cir. 2014) 752 F.3rd 1206, 1217-1220; citing ***Winston v. Lee***, *supra*, at p. 767.)
>
> "*The Interests in Human Dignity and Privacy*" forbid intrusions into the human body "on the mere chance that desired evidence might be obtained." (***Schmerber v. California*** (1966) 384 U.S. 757, 768 [86 S.Ct. 1826; 16 L.Ed.2nd 908, 918]; ***People v. Bracamonte*** (1975) 15 Cal.3rd 394, 402-405.)
>
> *Shocking the Conscience*: Searches which "*shock the conscience*," or which are unreasonable under the circumstances, are not allowed. (***Rochin v. California*** (1952) 342 U.S 165 [72 S.Ct. 205; 96 L.Ed. 183]; ***Winston v. Lee***, *supra*, at pp. 760-763 [84 L.Ed.2nd at pp. 668-671].)
>
> > Although the ***Rochin*** case was determined under the **Fourteenth Amendment** "due process" clause, the Supreme Court has since determined that this type of issue is to be viewed under the scrutiny

of the reasonableness of the search under the **Fourth Amendment**. (***County of Sacramento v. Lewis*** (1998) 523 U.S. 833, 849 [140 L.Ed.2nd 1043]; ***George v. Edholm***, *supra*, at p. 1217; ***Mann v. County of San Diego*** (9th Cir. 2018) 907 F.3rd 1154, 1160, fn. 8.)

Factors to Consider: In determining the lawfulness of such an intrusion, including the forced extraction of blood, the court will consider:

- The degree of resistance by the suspect.
- The severity of the crime at issue.
- Whether the suspect posed an immediate threat to the safety of the officers or others.
- Whether the police refused to respect a reasonable request to undergo a different form of testing.
- The degree of the authorities' need for the evidence.

(***Hammer v. Gross*** (9th Cir. 1991) 932 F.2nd 842.)

The Supreme Court in ***Winston*** **(**at pp. 761-762) has identified three other factors to consider:

(1) The extent to which the procedure may threaten the safety or health of the individual,

(2) The extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity, *and*

(3) The community's interest in fairly and accurately determining guilt or innocence.

(See also ***George v. Edholm*** (9th Cir. 2014) 752 F.3rd 1206, at pp. 1217-1220.)

Driving Under the Influence Cases:

Urine Samples: Routine urine screens taken by state agents constitute searches within the meaning of the **Fourth Amendment** whether or not the results are reported to the police. (***Mann v. County of San Diego*** (9th Cir. 2018) 907 F.3rd 1154, 1164; citing ***Ferguson v. City of Charleston*** (2001) 532 U.S. 67, 76 fn.9 [121 S.Ct. 1281; 149 L.Ed.2nd 205].)

Blood Extractions: "The extraction of blood or other materials from a person's body for purposes of chemical testing constitutes a search and seizure for purposes of this guarantee." (i.e., the **Fourth Amendment**). (***People v. Arredondo*** (2016) 245 Cal.App.4th 186, 193; citing ***People v. Robinson*** (2010) 47 Cal.4th 1104, 1119; see also ***Birchfield v. North Dakota*** (2016) 579 U.S. 438 [136 S.Ct. 2160; 195 L.Ed.2nd 560]; ***People v. Nault*** (2021) 72 Cal.App.5th 1144, 1148.)

Note: Petition for Review was dismissed in ***People v. Arredondo*** and the case remanded in light of the decision in ***Mitchell v. Wisconsin*** (June 27, 2019) 588 U.S.__, __ [139 S.Ct. 2525; 204 L.Ed.2nd 1040], where the U.S. Supreme Court held that when a DUI arrestee is unconscious, this fact alone will "*almost always*" constitute an exigency, allowing for a warrantless blood draw.

"The **Fourth Amendment** provides in relevant part that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.' Our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception. See, e.g., ***United States v. Robinson***, 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2nd 427 (1973). That principle applies to the type of search at issue in this case, which involved a compelled physical intrusions beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.' ***Winston v. Lee***, 470 U.S. 753, 760, 105 S.Ct. 1161, 84 L.Ed.2nd 662 (1985); see also ***Skinner* v. *Railway Labor Executives' Assn.***, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2nd 639 (1989)." (***Missouri v. McNeely*** (2013) 569 U.S. 141, 148 [133 S.Ct. 1552; 185 L.Ed.2nd 696].)

See also ***People v. Meza*** (2018) 23 Cal.App.5th 604, 610; "A blood draw is a search under the **Fourth Amendment**."

"A blood draw is a search of the person." (***People v. Lopez*** (2020) 46 Cal.App.5th 317, 324, citing ***Birchfield v. North Dakota*** (2016) 579 U.S. 438 [195 L.Ed.2nd 560; 136 S.Ct. 2160]. See also ***People v. Alvarez*** (2023) 98 Cal.App.5th 531, 546-551.)

Blood vs. Breath Tests: ***Birchfield v. North Dakota***, *supra*, at pp. 460-464 [136 S.Ct. at pp. 2176-2178]:

> Blood tests are a "*significant intrusion*:"
>
> - They require a "piercing of the skin."
>
> - "(U)nlike a breath test, (a blood test) places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC (blood-alcohol concentration) reading."
>
> A breath test, on the other hand, while also a "search," constitutes a relatively minor intrusion (i.e., "does not "implicat[e] significant privacy concerns") in that:
>
> - It "'do(es) not require piercing the skin' and entail(s) 'a minimum of inconvenience.'"
>
> - "(B)reath tests are capable of revealing only one bit of information, the amount of alcohol in the subject's breath. . . . No sample of anything is left in the possession of the police."
>
> - "(P)articipation in a breath test is not an experience that is likely to cause any great enhancement in the embarrassment that is inherent in any arrest."

Lesser Intrusions: Lesser warrantless intrusions into a human body may, under some circumstances such as driving under the influence cases, be upheld with a sufficient exigency. (***Schmerber v. California*** (1966) 384 U.S. 757, 768 [86 S.Ct. 1826; 16 L.Ed.2nd 908, 918]; e.g., blood withdrawal.)

> It is recognized by the courts that the "'delay necessary to procure a warrant . . . may result in the destruction of valuable evidence,' 'blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible.'" (***People v. Thompson*** (2006) 38 Cal.4th 811, 825; quoting Skinner v. Railway Labor Executives' Assn. (1989) 489 U.S. 602, 623 [103 L.Ed.2nd 639]; see also ***People v. Toure*** (2015) 232 Cal.App.4th 1096, 1103-1104.)

> "Invasions of the body, including nonconsensual extractions of an incarcerated felon's blood for DNA profiling, are searches entitled to the protections of the **Fourth Amendment**. (***Skinner v. Railway Labor Executives' Assn.*** (1989) 489 U.S. 602, 616–617 [103 L.Ed.2nd 639; 109 S.Ct. 1402].) 'As the text of the **Fourth Amendment** indicates, the ultimate measure of the constitutionality of a governmental search is "reasonableness."' (***Vernonia School Dist. 47J v. Acton*** (1995) 515 U.S. 646, 652 [132 L.Ed.2nd 564; 115 S.Ct. 2386].)" (***People v. Robinson*** (2010) 47 Cal.4th 1104, 1119-1120.)

Missouri v. McNeely *and* ***Schmerber v. California***:

Schmerber v. California, *supra*, was limited to its circumstances (i.e., with a traffic accident to investigate and the defendant hospitalized) by ***Missouri v. McNeely*** (2013) 569 U.S. 141 [133 S.Ct. 1552; 185 L.Ed.2nd 696], where the Supreme Court held that being arrested for driving while under the influence did not allow for a non-consensual warrantless blood test absent exigent circumstances beyond the fact that the blood was metabolizing at a normal rate.

> "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the **Fourth Amendment** mandates that they do so." (***Id.*** at p. 152.)

Schmerber was not overruled by ***McNeely***, but merely differentiated on its facts. (***Birchfield v. North Dakota*** (2016) 579 U.S. 438, 482-485 [136 S.Ct. 2160; 195 L.Ed.2nd 560].)

> In ***Schmerber***, the defendant had been in a traffic collision and had to be transported to the hospital due to his injuries. The Court in ***McNeely*** pointed out "that where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant." (Citation) 'Given these special facts,' we found that it was appropriate

> for the police to act without a warrant. (Citation)" (***Missouri v. McNeely***, *supra*, at p. 151.)

However, when otherwise lawful, ***Schmerber*** requires no more than that blood be drawn in a constitutionally reasonable manner, which is not necessarily limited to being by a physician and in a hospital. Drawing blood by someone qualified to do so, and even in a jail or a police station, will normally meet the requirement that it be done in a "medically approved manner." Also, it is reasonable for the officer himself, observing the blood-draw procedure, as opposed to an expert, to provide the necessary testimony to meet this standard. (***People v. Cuevas*** (2013) 218 Cal.App.4th 1278, 1283-1286; ***People v. Harris*** (2015) 234 Cal.App.4th 671, 692-697.)

Also, where actual consent is found (e.g., by signing a consent form), the rule of ***McNeely*** is irrelevant. An officer's testimony, which the trial court, in its discretion, found to be credible, to the effect that the defendant expressly consented, is sufficieint to allow for a warrantless blood draw. (***People v. Elder*** (2017) 11 Cal.App.5th 123, 130-131.)

In determining whether or not exigent circumstances apply to relieve an officer of the necessity of first obtaining a search warrant, a court is to consider the "*totality of the circumstances*." (***People v. Meza*** (2018) 23 Cal.App.5th 604, 610-612; citing ***Missouri v. McNeely***, *supra*, at p. 149, and noting that "*technological advances*" in the expeditious obtaining of search warrants must be considered, and declining to establish a bright line rule that DUI cases involving traffic accidents are exempt in all cases from the warrant requirement.)

> In ***Meza***, it was held that defendant's blood-alcohol level evidence should have been suppressed due to the failure of the arresting officer to obtain a search warrant, but that the error was harmless in light of evidence of an earlier blood sample obtained by the hospital, and for which there was testimony that although the hospital was not licensed for forensic testing, it was licensed by the State Department of Public Health and accredited by the College of American Pathologists as a clinical laboratory, and that treating physicians rely on the results of its tests

> to be accurate. (***People v. Meza***, supra, at pp. 612-613.)
>
> The fact that one's blood-alcohol level evidence disappears only "gradually and relatively predictably" must be considered as a part of the totality of the circumstances. (***Id.***, at pp. 610-611.)
>
> Another factor that should be considered is the number of officers involved in the investigation. (***Ibid***.)

Exigent circumstances existed to justify a warrantless blood draw where defendant, suspected of being a drunk driver, created an exigency by injuring himself badly, such that he was unconscious and had to be helicoptered to a hospital where surgery was performed almost immediately. This left no time in which to obtain a search warrant. (***People v. Nault*** (2021) 72 Cal.App.5th 1144.)

> "Circumstances are exigent when blood-alcohol evidence is dissipating, as it always is, and a pressing health, safety, or law enforcement need takes priority over a warrant application." (***Id.*** at p. 1148; citing (***Mitchell v. Wisconsin*** (2019) 588 U.S. __, __ [204 L.Ed.2nd 1040; 139 S.Ct. 2525, 2537]; and ***Schmerber v. California*** (1966) 384 U.S. 757, 770–771 [16 L.Ed.2nd 908; 86 S.Ct. 1826].) "The fact the human body continuously metabolizes alcohol is not enough." (***Ibid.***, citing ***Mitchell***, at p. ___ [139 S.Ct. at p. 2537].)
>
> "In ***Schmerber***, *supra*, 384 U.S. 757, the United States Supreme Court concluded that exigent circumstances could justify a warrantless blood draw during a DUI investigation because BAC diminishes over time and officers may need time to investigate an accident scene or attend to other pressing needs. (***Id***. at pp. 770–771.) But, 'while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in ***Schmerber***, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.'

(***McNeely**, supra,* 569 U.S. at p. 156.)" (***People v. Alvarez*** (2023) 98 Cal.App.5th 531, 543.)

The Unconscious DUI Suspect:

"When a driver is *unconscious*, the general rule is a warrant is not needed." (***Ibid.***, citing ***Mitchell**, supra,* 588 U.S. at p. ___ [139 S.Ct. at p. 2531].) "The **Fourth Amendment** '*almost always*' permits a warrantless blood test when police officers do not have a reasonable opportunity for a breath test before hospitalization." (***Missouri v. McNeely**, supra,* at p. 156; citing ***Mitchell***, at p. ___ [139 S.Ct. at p. 2539].)

However, where the investigating officer had about two hours during which he could have obtained a search warrant, knowing that it only took about 30 to 45 minutes to get one telephonically, no exigency was found excusing the extraction of blood from an unconscious suspect in a fatal traffic collision. (***People v. Alvarez*** (2023) 98 Cal.App.5th 531, 542-543.)

Note: ***Alvarez*** is unique in that and the driver remained conscious and responsive until 90 minutes after the crash, which included interacting with the officer for almost 45 minutes in the emergency room. He then closed his eyes and was either ignoring the officer or was unconscious. The Court later noted that nothing in the record showed that the officer was precluded from obtaining a telephonic search warrant.

Exception; No Governmental Involvement:

The removal and seizure of bullet fragments from defendant's head by medical personnel during emergency surgery, "acting independently of law enforcement directives," does not implicate the **Fourth Amendment**. (***People v. Caro*** (2019) 7 Cal.5th 463, 498.)

Implied Consent to a Warrantless Blood Draw in DUI cases:

Actual Consent vs. Implied Consent: California's "*implied consent law*" (**V.C. § 23612(a)(1)(A)** & **(B)**) has been held to be a factor, among the "totality of the circumstances," in determining whether or not a DUI

arrestee has given "*actual consent*" to a warrantless blood draw. (***People v. Harris*** (2015) 234 Cal.App.4th 671, 681-692.)

> "(A)ctual consent to a blood draw is not 'implied consent,' but rather a possible result of requiring the driver to choose whether to consent under the implied consent law. (Citation.) '[T]he implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether the driver will give or decline to give actual consent to a blood draw when put to the choice between consent or automatic sanctions. Framed in the terms of "implied consent," choosing the "yes" option affirms the driver's implied consent and constitutes actual consent for the blood draw. Choosing the "no" option acts to withdraw the driver's implied consent and establishes that the driver does not give actual consent.' (Citation)" (***Id***., at p. 686.)
>
> > *Note*: To put this rule into a formula: *Implied consent per* ***V.C. § 23612*** *+ circumstances consistent with consent = actual consent*.
> >
> > But see ***People v. Alvarez*** (2023) 98 Cal.App.5th 531, 548-549, indicating that implied consent is insufficient to allow for a warrantless blood draw under any circumstances: "[(F)or warrantless blood draw under implied consent statute, **Fourth Amendment** requires "actual consent" that is "freely and voluntarily given"]; (Citing ***People v. Harris*** (2015) 234 Cal.App.4th 671), . . . at p. 686 ["rather than determine whether 'implied consent' to a chemical test satisfies the **Fourth Amendment**, we must determine whether submission to a chemical test, after advisement under the implied consent law, is freely and voluntarily given and constitutes *actual* consent"]; *id.* at p. 689 ["(W)e must determine whether defendant's submission in this case was freely and voluntarily given under the normal totality of the circumstances analysis"]; ***People v. Mason*** (2016) 8 Cal.App.5th Supp. 11, 19–33, . . .] 'To recap, we have concluded that advance "deemed" consent under the implied consent law cannot be considered actual **Fourth Amendment** consent']; ***People v. Ling*** (2017) 15 Cal.App.5th Supp. 1, 3–5, 10–11 . . .] [lawfulness of consent to blood draw post-***McNeely*** 'will be based on a consideration of the totality of all the circumstances'].) No California court after ***McNeely*** has held that the implied consent statute is sufficient by itself to justify a warrantless blood draw under the **Fourth Amendment**."

At p. 549, the ***Alvarez*** Court cites numerous cases from other jurisdictions, with similar implied consent statutes, that have reached the same conclusion.

"(T)he *failure* to disclose accurate information regarding the potential legal consequences of certain behavior would seem to be a more logical basis for a defendant to assert that his or her decision to engage in that behavior was coerced and involuntary." (***People v. Harris***, *supra*, at p. 689; see also ***People v. Ling*** (2017) 15 Cal.App.5th Supp. 1, 9.)

Exigent circumstances also excuse the lack of a search warrant. When defendant caused a traffic collision, resulting in the need to care for injured victims and delaying the DUI investigation, and where defendant was uncooperative making it impossible to determine when he'd had his last drink, forcing a blood draw without a search warrant was justified by exigent circumstances. (***People v. Toure*** (2015) 232 Cal.App.4th 1096, 1103-1105.)

But see ***People v. Meza*** (2018) 23 Cal.App.5th 604, where the People failed to show why the arresting officer could not have obtained a search warrant for defendant's blood in the two hours between defendant's traffic accident and the actual taking of a blood sample.

"The Legislature's goal was thus to balance the rights, concerns, and dignity of the individual against the need to enforce California's DUI laws, and to avoid the unpredictability of forced blood draws. Its solution was to 'devise . . . an additional or alternative method of compelling a person arrested for drunk driving to submit to a test for intoxication, by providing that such person will lose his automobile driver's license for a period . . . if he refuses to submit to a test for intoxication.'" (***People v. Valencia*** (2015) 240 Cal.App.4th Supp. 11, 18.); citing ***Hernandez v. Department of Motor Vehicles*** (1981) 30 Cal.3rd 70, 77.)

See **Veh. Code § 23577** for other "*enhanced*" administrative punishments, that may be imposed upon a DUI conviction, for a person who refuses a chemical test of his blood or breath when arrested for DUI.

"Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." (***Birchfield v. North Dakota*** (2016) 579 U.S. 438, 476-477 [136 S.Ct. 2160; 195 L.Ed.2nd 560]; citing ***McNeely***, *supra*. [569 U.S.

141]; and ***South Dakota v. Neville*** (1983) 459 U.S. 553, 560 [103 S.Ct. 916; 74 L.Ed.2nd 748].)

> The Court, in ***Birchfield***, however, held that statutes that make it *a crime* to refuse a blood test in a DUI case, or otherwise imposed penal sanctions for refusing to submit to a blood test, were unconstitutional.

An arresting officer's failure to advise defendant under **V.C. § 23612(a)(2)(B)**, of his statutory right to choose either a blood or breath test did not violate the **Fourth Amendment** of the **U.S. Constitution**, and thus **Cal. Const.**, **art. I**, **§ 28**, **subd. (f)(2)** required the admission of blood test results into evidence. (***People v. Vannesse*** (2018) 23 Cal.App.5th 440.)

Where defendant was charged with misdemeanor DUI, the appellate court concluded that defendant freely consented to the search of his blood. Although a statement by the arresting officer was incomplete under **Veh. Code § 23612(a)(1)(D)**, there was no evidence the officer intended to deceive defendant about his right to refuse a blood altogether. Nor was the officer's statement about the implied consent law demonstrably false. At no point before or after defendant consented to the test did he indicate any objection. Looking at the totality of the circumstances, including the officer's conduct, the existence of the implied consent law, and defendant's actions before and after he consented to the blood test, the appellate court could not say the trial court's finding that defendant voluntarily consented to the test was error. (***People v. Balov*** (2018) 23 Cal.App.5th 696.)

> "[T]he implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether the driver will give or decline to give actual consent to a blood draw when put to the choice between consent or automatic sanctions. Framed in the terms of 'implied consent,' choosing the 'yes' option affirms the driver's implied consent and constitutes actual consent for the blood draw. Choosing the 'no' option acts to withdraw the driver's implied consent and establishes that the driver does not give actual consent." [Citation.]" (***Id.***, at p. 702; ***People v. Lopez*** (2020) 46 Cal.App.5th 317, 326.)

The **Fourth Amendment** was held not to have prohibited a finding of implied consent to a blood draw under California's former law, even though defendant was advised that the law required a chemical test, because he was given a choice of tests. Just because

the state cannot compel a warrantless blood test does not mean that it cannot offer one as an alternative to the breath test that it clearly *can* compel. The trial court properly found that defendant's consent to a blood draw was voluntary, even though he had been advised that a breath or blood test was required by the law. Both arresting officers testified to the circumstances under which defendant gave his consent to the blood test and there was no testimony that he only gave actual consent because of the threat of criminal prosecution. (***People v. Nzolameso*** (2019) 39 Cal.App.5th 1181.)

The **Fourth Amendment** did not require suppression of evidence from a warrantless blood draw because substantial evidence supported a finding that defendant consented. After the officer instructed her that the implied consent law required her to undergo a blood draw (she having been arrested for driving while under the influence of a drug), defendant did not object or refuse to undergo the test, did not resist any of the officers' directions, and voluntarily placed her arm on the table to allow the phlebotomist to draw her blood. The result was not changed by the officer's failure to relate the admonitions regarding the consequences of refusal. (***People v. Lopez*** (2020) 46 Cal.App.5th 317.)

See "***Veh. Code § 23612***," *under* "*California's Implied Consent Law In Driving Under the Influence* (*DUI*) *Cases*," under "*Warrantless Searches and Seizures*" (Chapter 9), above.

The admonition that defendant's refusal to submit to chemical testing would result in a license suspension was not invalidated by the omission of an admonition that refusal would result in a fine or imprisonment. The department was not seeking a fine or imprisonment. (***Elmore v. Gordon*** (2021) 73 Cal.App.5th 520, 522-523.)

V.C. § 23612(a)(1)(A) provides that: "A person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or breath for the purpose of determining the alcoholic content of his or her blood…." In **subd. (d)(2)**, the code add: "If a blood or breath test is not available…, the person shall submit to the remaining test in order to determine the percent, by weight, of alcohol in the person's blood." In a case where the petitioner chose a breath test, and declined to submit to a blood test when told that the breathalyzer was broken and unavailable, the Court held that a breathalyzer device cannot be viewed as "unavailable" without first contacting

other stations in the vicinity. The trial court, therefore, was in error for denying the petitioner's writ of mandate seeking to require the Department of Motor Vehicles not to suspend his driver's license. (***Tarzia v. Gordon*** (2023) 2023 Cal.App.Unpub. LEXIS 3432.)

Petitioner. arrested for DUI, was taken to a lab facility, where Yasmin Ramos, a phlebotomist, took a needle from a sealed package supplied by the County Forensic Lab, cleaned Petitioner's arm, and drew two vials of blood. The county lab measured Petitioner's BAC at 0.110 percent, +/- 0.004 percent. The lab report certified that the "sample appears to be compliant with **Title 17**" of the **California Code of Regulations**. At a hearing, Petitioner attempted to rebut the presumption, **Evidence Code section 664**, that the blood was properly collected. Petitioner called one witness, Salustiano Ribeiro, the president of Bay Area Phlebotomy and Laboratory Services, who testified that Ramos was a CPT, not a "qualified person" (licensed physician, RN, LVN, licensed clinical laboratory scientist, licensed clinical laboratory bioanalyst, certified paramedic, or licensed physician assistant). Petitioner also established that a licensed physician had not approved the policies and procedures that Ramos followed; a qualified person had not verified Ramos' competency to draw blood for alcohol testing before she was first allowed to do so without direct supervision; a qualified person had not reviewed Ramos' work at least once a month; and no qualified individual was accessible for consultation within 30 minutes. The hearing officer rejected Petitioner's arguments and ordered the suspension of his driving privilege. The court of appeal affirmed, citing ***Gerwig v. Gordon*** (2021) 61 Cal.App.5th 59, as it's authority. While Petitioner had rebutted the presumption that the blood test was properly performed, the evidence established the reliability of the manner of collection of Petitioner's blood. (***Phillips v. Gordon*** (2023) 97 Cal.App.5th 702.)

Implied Consent and the Unconscious or Deceased DUI Suspect:

The old California rule of requiring a valid arrest, even of an unconscious suspect, prior to the extraction of a blood sample (See ***People v. Superior Court* [*Hawkins*]** (1972) 6 Cal.3rd 757, 762.), was abrogated by passage of **Proposition 8**, in June, 1982. Now, so long as probable cause exists to believe that the defendant was driving while intoxicated, a formal arrest is not a prerequisite to a

warrantless seizure of a blood sample. (***People v. Trotman*** (1989) 214 Cal.App.3rd 430, 435-437; ***People v. Deltoro*** (1989) 214 Cal.App.3rd 1417, 1422, 1425.)

Note: But see below.

The implied consent provisions under **Veh. Code § 23612(a)(5)**, where, by statute, blood may be drawn from an unconscious or dead DUI suspect, does not overcome the need for a search warrant without a showing of exigent circumstances. (***People v. Arredondo*** (2016) 245 Cal.App.4th 186 (petition for review granted), 193-205; no exigency found, pp. 205-206.)

Also note **Veh. Code § 13384** (effective since 1999) requiring for all new and renewed driver's licenses to include the applicant's written consent to submit to a chemical test or tests of that person's blood, breath, or urine, or to submit to a preliminary alcohol screening test pursuant to **Veh. Code § 23136** (persons under 21 years of age with a blood alcohol level of .01% or higher), when requested to do so by a peace officer, and for the applicant to sign a written declaration consenting to the above. The legal effect of this mandated written consent has yet to be tested, but may offer a solution to the inability of **section 23612's** "implied consent" provisions to avoid the need for a search warrant. (See ***People v. Arredondo***, at p. 198, & fn. 7.)

Note: Petition for Review was dismissed and the case remanded in light of the decision in ***Mitchell v. Wisconsin*** (June 27, 2019) 588 U.S.__, __ [139 S.Ct. 2525; 204 L.Ed.2nd 1040], where the U.S. Supreme Court held that when a DUI arrestee is unconscious, this fact alone will "*almost always*" constitute an exigency, allowing for a warrantless blood draw (see below).

In those cases where a suspected DUI driver is unconscious and therefore unable to give a breath test, the exigent-circumstances rule will almost always permit a blood draw without a warrant given the fact that the circumstances commonly involve other tasks that may be incompatible with the procedures that would be required to obtain a warrant, such as investigating a traffic accident, attending to other injured drivers or passengers, and preventing further accidents. (***Mitchell v. Wisconsin*** (June 27, 2019) 588 U.S.__ [139 S.Ct. 2525; 204 L.Ed.2nd 1040]; "In this respect, the case for allowing a blood draw is stronger here than in ***Schmerber* v. *California***, . . ." (139 S.Ct. at p. 2538, fn. 8.)

> Immediate medical treatment administered by the hospital staff could delay (or otherwise distort the results of) a blood draw conducted later, upon receipt of a warrant, thus reducing its evidentiary value. (***Id***, at p. __.)
>
> The availability of telephonic search warrant procedures is irrelevant. "(W)ith better technology, the time required (to obtain a search warrant) has shrunk, but it has not disappeared." (***Id***, at p. __.)
>
> But, see dissenting opinion at pp. __-__.

Where an on-going investigation into a fatal crash was in the process, with three fatalities and an injured suspect, the Court noted that "pressing investigative responsibilities existed," which "reduced the number of police resources available to investigate the crash," plus the on-duty Assistant U.S. Attorney could not be reached (it being in the early morning hours) and that obtaining a telephonic search warrant would take 3 to 5 hours, the Court determined that exigent circumstances allowed for the warrantless extraction of blood from the DUI suspect. (***United States v. Manubolu*** (1st Cir. ME 2021) 13 F.4th 57.)

"When a driver is *unconscious*, the general rule is a warrant is not needed." (Italics in original, citing ***Mitchell v. Wisconsin***, *supra*, 588 U.S. at p. ___ [139 S.Ct. at p. 2531; 204 L.Ed.2nd 1040].) "The **Fourth Amendment** 'almost always' permits a warrantless blood test when police officers do not have a reasonable opportunity for a breath test before hospitalization." (***People v. Nault*** (2021) 72 Cal.App.5th 1144, 1148; citing ***Mitchell***, at p. ___ [139 S.Ct. at p. 2539].)

However, where an officer had over two hours to obtain a search warrant which, telephonically, could have been accomplished in 30 to 45 minutes, and where the defendant was unconscious in the hospital, his failure to do so did not qualify for a "good faith" exception. The resulting blood test results should have been suppressed. (***People v. Alvarez*** (2023) 98 Cal.App.5th 531, 542-543.)

> The Court in ***Alvarez*** held at p. 547 that: "It was not objectively reasonable for (the officer) to believe that the implied consent law even applied here. (**§ 23612**.) The only two subdivisions of the statute deeming drivers to have given their consent to a blood draw are **subdivisions (a)(1)(A)** and **(B)**, both of which apply *only if the driver is*

"lawfully arrested for an offense allegedly committed in violation of ***Section 23140****,* ***23152****, or* ***213153****."* (Italics added.) **Section 23612**, **subdivision (a)(1)(C)** further states that "[t]he testing shall be *incidental to a lawful arrest* (Italics added) . . . ." By its plain language, therefore, the implied consent law applies only if the person has been lawfully arrested for one of the listed offenses. (See ***People v. Superior Court* (*Hawkins*)** (1972) 6 Cal.3rd 757, 765 . . .] ["the Legislature took pains to condition its use upon a lawful arrest for driving under the influence … ."].)

In ***Alvarez***, the Court held that because the officer did not yet know who was at fault, probable cause did not yet exist supporting the defendant's arrest, citing ***People v. Trotman*** (1989) 214 Cal.App.3rd 430, 435, ***People v. Deltoro*** (1989) 214 Cal.App.3rd 1417, 1425, and ***United States v. Chapel*** (9th Cir. 1995) 55 F.3rd 1416, 1419, for the argument that an officer must have at least *probable cause* to arrest for the implied consent rules of **V.C. § 23612** to apply. "Thus, 'a formal arrest is not a precondition to the warrantless extraction of blood so long as probable cause exists to believe that the defendant was driving under the influence and that an analysis of the sample will yield evidence of that crime.'" (***Alvarez***, at p. 548, quoting ***People v. Trotman***, *supra*, at p. 437.)

McNeely *is Not Retroactive*:

A forced blood draw performed in 2011, before ***McNeely*** was decided, does not require the suppression of the blood result in that police officers are entitled to act on the law as it is understood at the time to apply. The **Fourth Amendment** exclusionary rule does not require suppression of evidence from a warrantless blood draw because the draw was conducted in an objectively reasonable reliance on then-binding precedent. (***People v. Youn*** (2014) 229 Cal.App.4th 571, 576-579; ***People v. Jimenez*** (2015) 242 Cal.App.4th 1337, 1360-1365; see also ***People v. Rossetti*** (2014) 230 Cal.App.4th 1070, 1074-1077; four officers held defendant down as a warrantless forced draw was made in a medically approved manner.)

Where defendant's blood was taken over his objection and without a warrant, ***Missouri v. McNeely***, *supra*, did not mandate suppression of the blood result in that ***McNeely*** was decided after the arrest in this case. Also, defendant was subject to search and

seizure conditions under his "post-release community supervision" (**PRCS**) terms, eliminating the need for a search warrant. With probable cause to believe that he was driving while under the influence of alcohol when he had a traffic accident, his mandatory **PRCS** search and seizure conditions, authorizing the blood draw without the necessity of a search warrant, was not in violation of the **Fourth Amendment**. (***People v. Jones*** (2014) 231 Cal.App.4th 1257, 1262-1269.)

Pen. Code § 1524(a) Amended: Since ***McNeely***, the California Legislature has amended **Pen. Code § 1524(a)**, adding new **subd. (13)**, providing statutory authority for a search warrant to retrieve a DUI suspect's blood when necessary due to the suspect's refusal to submit to a blood test.

Per **Subd. (a)(13)**: "To obtain a blood sample in **V.C. §§ 23140** (person under age 21 driving with BA of 0.05 or higher), **23152** (DUI), and **23153** (DUI with injury) cases when the person has refused to submit to or has failed to complete a blood test, and the sample will be drawn in a "*reasonable, medically approved manner*." This new paragraph is not intended to abrogate a court's mandate to determine the propriety of the issuance of a search warrant on a case-by-case basis."

Additional Case Law:

The blood test in a drunk driving case should have been suppressed when the defendant had already given a urine sample that was the functional equivalent of the blood test for evidentiary purposes. (***People v. Fiscalini*** (1991) 228 Cal.App.3rd 1639.)

But, forcing an arrested DUI suspect to give blood after the suspect intentionally frustrated the officer's attempts at obtaining a breath sample was held to be lawful. (***People v. Sugarman*** (2002) 96 Cal.App.4th 210; a pre-***McNeely*** case.)

When otherwise lawful, ***Schmerber*** requires no more than that blood be drawn in a constitutionally reasonable manner, which is not necessarily limited to being by a physician and in a hospital. Drawing blood by someone qualified to do so, and even in a jail, will normally meet the requirement that it be done in a "medically approved manner." Also, it is reasonable for the officer himself, observing the blood-draw procedure, as opposed to an expert, to provide the necessary testimony to meet this standard. (***People v. Cuevas*** (2013) 218 Cal.App.4th 1278, 1283-1286; ***People v. Harris*** (2015) 234 Cal.App.4th 671, 692-697.)

Also, where actual consent is found (e.g., by signing a consent form), the rule of ***McNeely*** is irrelevant. An officer's testimony, which the trial court, in its discretion, found as credible, is sufficieint to allow for a warrantless blood draw. (***People v. Elder*** (2017) 11 Cal.App.5th 123, 130-131.)

Use of Force in Making a Blood Draw:

Where otherwise lawful (e.g., an exigency existed or a search warrant was obtained), using physical force to effect a blood draw, so long as the officers "act reasonably and use only that degree of force which is necessary to overcome a defendant's resistance in taking a blood sample," is lawful. (***People v. Rossetti*** (2014) 230 Cal.App.4th 1070, 1077-1079; quoting ***Carlton v. Superior Court*** (1985)170 Cal.App.3rd 1182, 1187-1191.)

In ***Rossetti***, four officers held a handcuffed defendant on the floor when defendant was "kicking around and not doing what [he was] told to do" while a licensed phlebotomist drew blood. The use of force was upheld as reasonable. (***People v. Rossett***, *supra*.)

Also, in ***Carlton***, a struggling defendant was held by six officers to the floor in a "temporary carotid restraint" position, with his face to the floor, as blood was withdrawn by a registered nurse. The force used was upheld as reasonable. (***Carlton v. Superior Court***, *supra*.)

See also ***People v. Ryan*** (1981) 116 Cal.App.3rd 168, where the force used was upheld as reasonable when a resisting defendant was restrained by five police officers as a technician removed the blood sample from his left arm, without any showing that the officers "introduced any wantonness, violence or beatings."

But see ***People v Kraft*** (1970) 3 Cal.App.3rd 890, where defendant refused to submit to a blood test. Taken to a hospital, defendant resisted being taken inside, resulting in an officer striking him in the cheek with a closed fist. While being carried to a bed in an examination room, defendant fell or was pushed to the floor. While on the floor, police immobilized him while a physician withdrew blood. One officer held defendant's arm while also holding a scissor lock on his legs. It was acknowledged in testimony that defendant's behavior had not been aggressive but was "defensive." The court concluded that the officers' "strong

arm" tactics were "aggressive beyond all need" and exceeded the limits of permissible force. (***Id***., at pp. 895-899.)

See also ***Freitas v. Shiomoto*** (2016) 3 Cal.App.5th 294: The trial court erred in finding that rebuttal of the presumption of regulatory compliance in a driver's license suspension proceeding required the driver to prove the gas chromatograph used in taking an arrested driver's breath sample was improperly calibrated or maintained because the driver could rebut presumption by showing that a testing apparatus was improperly employed when his sample was tested.

Other Examples of Bodily Intrusions:

Held to be Reasonable; Examples:

Scraping underneath a suspect's fingernails to find evidence of a crime has been upheld by the United States Supreme Court, calling such a procedure a "very limited intrusion." (***Cupp v. Murphy*** (1973) 412 U. S. 291, [93 S.Ct. 2000; 36 L. Ed. 2nd 900].)

Forcing a suspect to submit to the removal of a rubber finger stall of powdered drugs from his rectum, the procedure being conducted by a physician and involving little if any pain, was approved. (***People v. Woods*** (1956) 139 Cal.App.2nd 515.)

Inserting the capped end of a ballpoint pen and prying a 2-inch wad of masking tape out of defendant's mouth, suspected of being evidence, is not unreasonable. (***People v. Fulkman*** (1991) 235 Cal.App.3rd 555, 563.)

The U.S. Supreme Court has described the process of the warrantless collecting of a DNA sample, as part of a routine booking process, by rubbing a swab on the inside of a person's cheek as a "negligible" intrusion, and lawful. (***Maryland v. King*** (2013) 569 U. S. 435, 446, [133 S.Ct. 1958; 186 L.Ed.2nd 1].)

However, see the earlier case of ***Friedman v. Boucher*** (9th Cir. 2009) 580 F.3rd 847, 852-853, where it was held that the taking of a DNA sample via a "buccal swab" of the mouth of a pre-trial detainee, without statutory authorization, is a search under the **Fourth Amendment**, and illegal absent a search warrant or an exigent circumstance allowing for such a search.

There is no privacy right in the mouthpiece of the PAS device, which was provided by the police and where defendant abandoned any expectation of privacy in the saliva he deposited on the device when he failed to wipe it off. Whether defendant subjectively expected that the genetic material contained in his saliva would become known to the police was irrelevant because he deposited it on a police device and thus made it accessible to the police. The officer who administered the PAS (Preliminary Alcohol Screening) test testified that used mouthpieces were normally discarded in the trash. Thus, any subjective expectation defendant may have had that his right to privacy would be preserved was unreasonable. (***People v. Thomas*** (2011) 200 Cal.App.4th 338.)

Requiring a parolee, subject to search and seizure conditions, and where officers had at least a reasonable suspicion to believe that he was dealing drugs, to remove his pants and bend over, and then "flicking" at a visible baggie that was held between his buttocks (but not inside his anal cavity), causing the baggie to fall out, was held *not* to be unreasonable. (***United States v. Doxey*** (6th Cir. Mich. 2016) 833 F.3rd 692.)

"'In the prison context, where inmates are routinely subject to medical procedures, including blood draws, and where their expectation of bodily privacy, while intact, is diminished [citation], the intrusiveness of a blood draw is even further minimized.'" (***People v. Robinson*** (2010) 47 Cal.4th 1104, 1120; quoting ***Nicholas v. Goord*** (2nd Cir. 2005) 430 F.3rd 652, 669 [fn. omitted)].)

Held to be Unreasonable; Examples:

Where a suspect underwent a digital rectal exam and two enemas before being forced to drink a liquid laxative, the search was held to be unreasonable. (***United States v. Cameron*** (9th Cir. 1976) 538 F.2nd 254, 258-260.)

In balancing the interests, the California Supreme Court determined that a magistrate could *not* lawfully authorize a search warrant in a child molest/incest case for a medical examination consisting of the manual massage of the prostate gland causing a discharge of semen. (***People v. Scott*** (1978) 21 Cal.3rd 284, 291-295; "(T)he more intense, unusual, prolonged, uncomfortable, unsafe or undignified the procedure contemplated, or the more it intrudes upon essential standards of privacy, the greater must be the showing for the procedure's necessity.")

Surgery to remove a bullet from the accused was found, under the circumstances, to be *unreasonable*. (***Winston v. Lee*** (1985) 470 U.S. 753, 760-763 [105 S.Ct. 1611; 84 L.Ed.2nd 662, 668-671].)

> Such a procedure will not even be allowed with a court order. (***Ibid***.)
>
> This is not to say, however, that surgery would *never* be lawful. As the Supreme Court pointed out in ***Winston v. Lee***, *supra*, at p. 760 [84 L.Ed.2nd at p. 669]: "The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure. In a given case, the question whether the community's need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers." In ***Winston***, the defendant would have had to been subjected to general anesthesia, and the prosecution's need for the bullet was questionable, given other evidence of the defendant's guilt.

It was held to be a clear **Fourth Amendment** violation where the plaintiff claimed that doctors sedated him, took blood samples, and inserted a catheter into his penis. (***Ellis v. City of San Diego*** (9th Cir. 1999) 176 F.3rd 1183, 1186, 1191-1192.)

The forced paralysis, intubation, and digital rectal examination of a suspect where it is suspected that he was concealing contraband in his rectum amounted to an unreasonable search in violation of the **Fourth Amendment**. (***United States v. Booker*** (6th Cir. 2013) 728 F.3rd 535.)

Sedating the plaintiff, opening his anus with an endoscope and inserting long forceps into his rectum, and then inserting a tube into his nose and running the tube into his stomach to pump a gallon of liquid laxative through his digestive system thus triggering a complete evacuation of his bowels, when done without consent or a warrant, held to be a violation of the **Fourth Amendment**. (***George v. Edholm*** (9th Cir. 2014) 752 F.3rd 1206, 1217-1220.)

Qualified immunity for an Internal Revenue Service Agent was properly denied in an action alleging that the agent violated plaintiff's **Fourth Amendment** right to bodily privacy when, during the lawful execution of a search warrant at plaintiff's home,

the agent (a female) escorted plaintiff (also a female) to the bathroom and monitored her while she relieved herself. Given the scope, manner, justification, and place of the search, a reasonable jury could conclude that the agent's actions were unreasonable and violated plaintiff's **Fourth Amendment** rights. The agent's general interests in preventing destruction of evidence and promoting officer safety did not justify the scope or manner of the intrusion into plaintiff's most basic subject of privacy, her naked body. A reasonable officer in the agent's position would have known that such a significant intrusion into bodily privacy, in the absence of legitimate government justification, was unlawful. (***Ioane v. Hodges*** (9th Cir. 2019) 939 F.3rd 945, 956-957.)

Privacy in the Hospital Room and During Medical Emergencies:

The California Supreme Court has expressed "concerns about incursions on the privacy we maintain in our bodies (which) are heightened during medical procedures. (See, e.g., ***Sanders v. American Broadcasting Companie***s (1999) 20 Cal.4th 907, 917 . . . [citing cases where pictures of a patient in a hospital constituted an actionable intrusion upon seclusion under tort law]; but see ***Hernandez v. Hillsides, Inc***. (2009) 47 Cal.4th 272, 294, fn. 9 . . . [indicating that state tort law privacy rights are not necessarily coextensive with the **4th Amend.**].)" (***People v. Caro*** (2019) 7 Cal.5th 463, 495-498; finding it unnecessary to resolve the issue of an officer entering the defendant's hospital room during emergency procedures in that any error in admitting evidence of photographs taken there was harmless.)

However: "Intrusive body searches are permissible when they are reasonably necessary to respond to an immediate medical emergency." (***George v. Edholm*** (9th Cir. 2014) 752 F.3rd 1206, 1219, citing ***People v. Bracamonte*** (1975) 15 Cal.3rd 394; ***United States v. Husband*** (7th Cir. 2000) 226 F.3rd 626, 635.)

In ***Edholm***, it was held that the "*speculative, generalized risk*" that a baggie of drugs secreted in the plaintiff's rectum might rupture is insufficient by itself to justify the warrantless extraction (see above) of that baggie. "Every person who hides a baggie of drugs in his rectum faces a risk that the baggie will rupture. But the mere fact 'that the suspect is concealing contraband does not authorize government officials to resort to any and all means at their disposal to retrieve it.'" (***George v. Edholm***, *supra*, quoting ***United States v. Cameron*** (9th Cir 1976) 538 F.2nd 254, 258.)

While the potential for death without treatment qualifies as a "medical emergency," where the suspect himself is responsible for the risk, only a showing of the "*greatest imminent harm*" will justify intrusive action for the purpose of removal of a drug from his body. (***United States v. Cameron*** (9th Cir. 1976) 538 F.2nd 254, 259, fn. 8.)

Photographs taken of a defendant during surgery and afterwards in the recovery room may or may not be admissible. See ***People v. Caro*** (2019) 7 Cal.5th 463, 497, noting that at least one state has held that a defendant has no reasonable expectation of privacy in an operating room because of "a patient's traditional surrender to his or her physician of the right to determine who may and may not be present during medical procedures." (***State v. Thompson*** (1998) 222 Wis.2nd 179, 192 [585 N.W.2nd 905].) On the other hand, however, it has also been held that the privacy rights we maintain in our bodies are heightened during medical procedures. (See, e.g., ***Sanders v. American Broadcasting Companie****s* (1999) 20 Cal.4th 907, 917; citing cases where pictures of a patient in a hospital constituted an actionable intrusion under tort law.) The Supreme Court in ***Caro*** declined to decide the issue in that admission of the questioned photos was held not to be prejudicial given the amount of other evidence proving defendant's guilt.

DNA Swabs taken for the Purpose of Eliminating Others as a Suspect:

A state court order pursuant to **Arizona Revised Statutes § 13-3905** authorizing the collection of DNA samples from officers of the Phoenix Police Department satisfied the Warrant Clause of the **Fourth Amendment** in that the orders were issued by a state court judge and described a saliva sample to be seized by mouth swab from the person of plaintiff police officers. The state court expressly found probable cause to believe that the crime of homicide had been committed and that excluding public safety personnel as the source of the of DNA left at the scene would have plainly aided in the conviction of an eventual criminal defendant by negating any contention at trial that police had contaminated the relevant evidence. No undue intrusion occurred because it was hardly unreasonable to ask sworn officers to provide saliva samples for the sole purpose of demonstrating that DNA left at a crime scene was not the result of inadvertent contamination by on-duty public safety personnel. (***Bill v. Brewer*** (9th Cir. 2015) 799 F.3rd 1295.)

Choking: Searches of the person may also include the need to forcefully keep a suspect from swallowing evidence.

Rule: So long as the suspect can be prevented from swallowing *without* "*choking*" him, reasonable force may normally be used. (***People v. Jones***

(1989) 209 Cal.App.3rd 725; ***People v. Johnson*** (1991) 231 Cal.App.3rd 1, 15-17.)

> "*Choking*" is legally defined as preventing a person from breathing. (See ***People v. Johnson***, *supra*, at p. 16, citing ***Jones***, at p. 730, in noting that "choking someone to recover evidence violates due process, without any need to inquire into the precise degree of choking involved."

Examples:

> Holding a subject's Adam's apple to prevent swallowing is okay. (***People v. Cappellia*** (1989) 208 Cal.App.3rd 1331, 1337.)
>
> Using pepper spray to cause the subject to spit out the contents of his mouth is *probably* not unreasonable. (***United States v. Holloway*** (Kan. 1995) 906 F.Supp. 1437.)
>
> > But see ***Headwaters Forest Defense v. County of Humboldt*** (9th Cir. 2002) 276 F.3rd 1125, holding that the use of pepper spray on non-violent demonstrators to gain their compliance is unreasonable, and grounds for civil liability.
>
> Inserting the capped end of a ballpoint pen and prying a 2-inch wad of masking tape out of defendant's mouth, suspected of being evidence, is not unreasonable. (***People v. Fulkman*** (1991) 235 Cal.App.3rd 555, 563.)
>
> The use of reasonable force in extracting blood, when done in a medically approved manner, is lawful. (***Ritschel v. City of Fountain Valley*** (2005) 137 Cal.App.4th 107; a misdemeanor case.)
>
> See "*Chokehold*," under "*Specific Weapons or Techniques in the Use of Force*," under "*Use of Force*" (Chapter 7), above.

***Searches with Less Than Probable Cause*:** In certain instances, where the governmental interests are stronger than in cases of "*ordinary criminal wrongdoing*," or the individual's privacy interests are diminished, the probable cause standards have been relaxed. For instance:

> *Persons in Pervasively Regulated Industries or Sensitive Positions*: In some situations, where there exists a strong governmental interest, neither a warrant nor a showing of individualized suspicion is required to support the validity of statute requiring employees to submit to a blood or urine test. For instance:

Government Employees: A random search, without cause, of an employee's personal effects by a government employer, at least where the employee has prior notice that his possessions may be subject to search, has been held to be lawful. (***United States v. Gonzalez*** (9th Cir. 2002) 300 F.3rd 1048)

Railway Workers: The testing of blood or urine of *railway workers* involved in certain train accidents. (***Skinner v. Railway Labor Executives' Assn.*** (1989) 489 U.S. 602 [103 L.Ed.2nd 639].)

Drug Testing for Customs Officers: Drug testing as a condition of placement or employment for *Customs officers* in a position involving the interdiction of drugs or carrying of firearms. (***National Treasury Employees Union v. Von Raab*** (1989) 489 U.S. 656 [109 S.Ct. 1384; 103 L.Ed.2nd 685].)

Exception: Similar requirements for persons who were only required to handle classified material was rejected as being too broad. (***Ibid***.)

Exceptions:

Candidates for Public Office: A urinalysis drug test requirement for candidates for public office, however, was held to violate the **Fourth Amendment**. (***Chandler v. Miller*** (1997) 520 U.S. 305 [117 S.Ct. 1295; 137 L.Ed.2nd 513].)

A State Hospital's Drug Testing Policy for Unwed Mothers: See ***Ferguson v. City of Charleston*** (2001) 532 U.S. 67 [121 S.Ct. 1281; 149 L.Ed.2nd 205], finding *a state hospital's drug testing policy*, developed in conjunction with the police, for testing *unwed mothers* for drug abuse, to be unconstitutional, at least without informing the mothers of the purposes for the test.

See also "*Special Needs Searches and Seizures*," under "*Warrantless Searches and Seizures*" (Chapter 9), above.

For Students:

See "*School Searches*," under "*Exceptions to the Search Warrant Requirements*," under "*Warrantless Searches and Seizures*" (Chapter 9), above.

Frisks (or "*Patdowns*" or "*Patsearches*") *for offensive weapons* are considered searches, albeit limited in intrusiveness and scope.

Defined: Frisks generally consist of a police officer doing no more than feeling (i.e., "*patting down*") the outside of a suspect's clothing, checking for the feel of any potential offensive weapons. (See ***Terry v. Ohio*** (1968) 392 U.S. 1 [88 S.Ct. 1868; 20 L.Ed.2nd 889].)

> Often referred to as a "***Terry*** *frisk*." (See ***Thomas v. Dillard*** (9th Cir. 2016) 818 F.3rd 864, 875.)

Rule:

> "A ***Terry*** stop must be 'confined in scope' to a 'carefully limited search of the outer clothing . . . in an attempt to discover weapons.' (Citation) If weapons are discovered, they 'may properly be introduced in evidence against the person from whom they were taken.'" (***United States v. Baker*** (9th Cir. Jan. 30, 2023) 58 F.4th 1109, __; quoting ***Terry v. Ohio*** (1968) 392 U.S. 1, at pp. 29, 30, & 31 [88 S.Ct. 1868; 20 L.Ed.2nd 889].)
>
> "If an officer has a reasonable suspicion, supported by specific and articulable facts, that criminal activity is afoot, the officer may conduct a brief, investigative stop. ((***Terry v. Ohio***, *supra*.), at pp. 21–22.) Additionally, if the officer conducting the so-called ***Terry*** stop believes the suspect is armed and dangerous, the officer may perform a limited search of a person's outer clothing for weapons, i.e., a "patsearch," whether or not the officer has probable cause to arrest. (***Id***., at pp. 27, 30.)" (***In re Jeremiah S.*** (2019) 41 Cal.App.5th 299, 304.)
>
> > "Because a patsearch 'is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment,' it is subject to **Fourth Amendment** restrictions and "not to be undertaken lightly." (***Ibid***., quoting ***Terry***, at p. 17.)
>
> "In the event that, during the ***Terry*** stop, the officer justifiably believes that 'the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,' the officer 'may conduct a patdown search' or frisk 'to determine whether the person is in fact carrying a weapon.'" (***United States v. Brown*** (9th Cir. 2021) 996 F.3rd 998, 1004, quoting ***Minnesota v. Dickerson*** (1993) 508 U.S. 366, at p. 373 [113 S.Ct. 2130; 124 L.Ed.2nd 334], which in turn quotes ***Terry v. Ohio*** (1968) 392 U.S. 1, at p. 24 [88 S.Ct. 1868; 20 L.Ed.2nd 889]).

> Further noting that: "'Each element, the stop and the frisk, must be analyzed separately; the reasonableness of each must be independently determined.'" (***Ibid.***, quoting ***United States v. Thomas*** (9th Cir 1988) 863 F.2nd 622, 628.)

"In connection with an otherwise lawful investigative detention under ***Terry***, 'an officer may conduct a brief pat-down (or frisk) of an individual when the officer reasonably believes that 'the persons with whom he [or she] is dealing may be armed and presently dangerous.'" (***United States v. Brown*** (9th Cir. 2021) 996 F.3rd 998, 1007, quoting ***United States v. I.E.V.*** (9th Cir. 2013) 705 F.3rd 430, 434.)

> In ***Brown***, it was held that while the officer had sufficient reasonable suspicion to conduct a ***Terry*** stop, and to pat the defendant down for weapons, he *did not* have sufficieint probable cause to simply reach into his pockets and extract incriminating evidence. (***Id.***, at pp. 1007-1013.)

The police officer needs to be able to articulate facts establishing a "*reasonable*" or "*rational*" suspicion that the person may be armed. (***Terry v. Ohio***, *supra*.)

> Some courts refer to the test as being a "*reason to believe*" that the subject may be armed. (***People v. Lopez*** (2004) 119 Cal.App.4th 132; see also ***In re H.H.*** (2009) 174 Cal.App.4th 653, 657.)

When an officer has sufficient reasonable suspicion to believe a suspect is armed, he also has, as a matter of law, reasonable suspicion to believe the suspect is dangerous. (***United States v. Robinson*** (4th Cir. 2017) 846 F.3rd 694.)

The test is an objective one. An officer need not later demonstrate that he was in actual fear. (***People v. Osborne*** (2009) 175 Cal.App.4th 1052, 1061-1062.)

Constitutionality:

"(T)here exists 'a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether

a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.' (Citation)) '[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.' (Citation) '[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' (Citation) 'And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?' (Citation) An officer's good faith is not enough." (***King v. State of California*** (2015) 242 Cal.App.4th 265, 283; citing ***Terry v. Ohio***, *supra*.)

> See also ***People v. Pantoja*** (2022) 77 Cal.App.5th 483, at p. 488, quoting ***King*** above, and noting that: "'The sole justification of the search . . . is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.' ([***Terry***, *supra*, 392 U.S.] at p. 29.) The officer must be able to point to specific and articulable facts together with rational inferences therefrom which reasonably support a suspicion that the suspect is armed and dangerous." (Citing ***People v. Dickey*** (1994) 21 Cal.App.4th 952, 956.)

A "*stop and frisk*" is *constitutionally permissible* if two conditions are met:

- The investigatory stop (i.e., "*detention*") must be lawful; i.e., when a police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense.

- The police officer must reasonably suspect that the person stopped is armed and dangerous.

  (***Arizona v. Johnson*** (2009) 555 U.S. 323 [129 S.Ct. 781; 172 L.Ed.2nd 694]; see also ***People v. Fews*** (2018) 27 Cal.App.5th 553, 559-560.)

A court's analysis regarding whether a frisk is constitutional "is a dual one" asking:

- Whether the officers' action was justified at its inception, and

- Whether the officers' action was "confined in scope" by engaging in a carefully limited search of the outer clothing in an attempt to discover weapons which might be used to assault an officer.

(***United States v. I.E.V.*** (9th Cir. 2013) 705 F.3rd 430, 435; citing ***Terry v. Ohio*** (1968) 392 U.S. 1, 20, 29-30 [88 S.Ct. 1868; 20 L.Ed.2nd 889].)

Differentiating a "*search*" from a "*seizure*," the Second Circuit Court of Appeal discussed the difference between conducting a patdown (a search) and positioning him in preparation for doing a patdown (a seizure), noting the traditional conditions that must be present for it to be a search, i.e., whether police: (1) "physically intrud[es] on a constitutionally protected area" under ***United States v. Jones*** (2012) 565 U.S. 400, or (2) violate a person's "reasonable expectation of privacy" under ***Katz v. United States*** (1967) 389 U.S. 347. In this case, merely ordering defendant to stand at the rear quarter panel, even when the officers had the subjective intent to position defendant for a frisk, simply was not a search under either ***Jones*** or ***Katz***. Consequently, the Court concluded that no **Fourth Amendment** search occurred until the frisking officer's "hands physically came into contact with Weaver['s]" person. (***United States v. Weaver*** (2nd Cir. NY, 2021) 9 F.4th 129.)

Articulable Facts:

"[A]n 'inchoate and unparticularized suspicion or "*hunch*"' is insufficient." (Italics added; ***People v. Pantoja*** (2022) 77 Cal.App.5th 483, at p. 489, quoting ***In re Jeremiah S.*** (2019) 41 Cal.App.5th 299, 305.)

"To establish reasonable suspicion a suspect is armed and dangerous, thereby justifying a frisk, 'the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' (Citation) A 'mere "inchoate and unparticularized suspicion or hunch"' that a person is armed and dangerous does not establish reasonable suspicion (Citations), and circumstances suggesting only that a suspect *would* be dangerous if armed are

insufficient (Italics added; Citation). There must be adequate reason to believe the suspect is armed." (***Thomas v. Dillard*** (9th Cir. 2016) 818 F.3rd 864, 876.)

> "Considerations relevant to this inquiry typically include visible bulges or baggy clothing that suggest a hidden weapon; sudden movements or attempts to reach for an object that is not immediately visible; evasive and deceptive responses to an officer's questions about what the individual was doing; and unnatural hand postures that suggest an effort to conceal a weapon." (***In re Jeremiah S.*** (2019) 41 Cal.App.5th 299, 305, citing ***Thomas v. Dillard***, at p. 877; and noting that the type of crime involved is also relevant.

A pat-down search was held *not* to be justified based on circumstances that the defendant "(1) had no identification, (2) exercised his **Fourth Amendment** right and refused to allow the deputy to search the vehicle, (3) was nervous and sweating, (4) or because baking powder was found in a film canister" because "[n]one of these considerations, considered singly or in combination, would lead an officer to '". . . reasonably believe in the possibility that a weapon may be used against him."'" (***People v. Dickey*** (1994) 21 Cal.App.4th 952.)

A claim of "harassing" customers of a business, with no reports of violence, battery, assault, threats or weapons, does not reasonably suggest the presence of weapons. Nor did the fact that defendant was wearing a jacket and sweatshirt on a "pretty warm" day provide reasonable grounds to believe (at least by itself) he was armed and/or dangerous and might gain immediate control of a weapon. (***People v. Thomas*** (2018) 29 Cal.App.5th 1107, 1117.)

In determining whether a suspicion sufficieint to justify a patdown search of a person is reasonable, a court must evaluate the "*totality of the circumstances*" surrounding the stop, including the "*collective knowledge*" of all officers involved in the stop. A reasonable suspicion may exist "even if each fact alone is susceptible of innocent explanation." In this case, considering the collective knowledge of the three deputies at the scene, it was known that (1) defendant had been an inmate at the local county jail; (2) a woman who was arrested with heroin on her person earlier that day told one of the deputies that she was heading to defendant's house; (3) defendant was argumentative and noncompliant, adamantly refusing to comply with lawful orders to exit the truck; and (4) defendant was agitated, fidgeting, moving

around in his seat, and very defensive. Based on the totality of the circumstances, the Eleventh Circuit Court of Appeal held that it was reasonable for the searching deputy to believe that his safety or the safety of the other deputies was in danger; therefore, he was justified in conducting a patdown search of the defendant. (***United States v. Bishop*** (11th Cir. 2019) 940 F.3rd 1242.)

Under the **Fourth Amendment**, reasonable suspicion that a minor was involved in the strong-arm robbery of a purse (i.e., a "purse snatch") and a cellphone *did not* support a pat search because there was no other aspect of the stop that, together with the minor's status as a robbery suspect, gave rise to a reasonable belief that he might be armed and dangerous. The court declined to recognize a rule that would be tantamount to automatically validating pat searches in all lawful detentions related to a fresh strong-armed robbery report. (***In re Jeremiah S.*** (2019) 41 Cal.App.5th 299.)

> "This requires that the officer provide 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.' (***Id***., at p. 305; quoting ***Terry v. Ohio*** (1968) 392 U.S. 1, at p. 21 [88 S.Ct. 1868; 20 L.Ed.2nd 889].)

However, it has been held that a school resource officer patting a non-student down for possible weapons on a high school campus, where the defendant/minor was to be moved to the security office, need not be justified by an articulable suspicion that he might be armed. (***In re Jose Y.*** (2006) 141 Cal.App.4th 748.)

Although lawfully detained at a warehouse where someone had been seen climbing under a fence, patting defendant down for weapons was held to be illegal under circumstances where the officers were unable to articulate any reasonable suspicion to believe he might be armed. Specifically, defendant only vaguely matched the description of the person described by an anonymous tipster. The tip itself did not allege any "ongoing crime or emergency." The contact occurred mid-day, in broad daylight, and not in a high-crime area. And although the defendant exhibited a suspicious response to being contacted (nervous, putting his hands in his pockets), none of this indicated that he might be armed. What concerned the court the most was how the officers reacted. Instead of asking defendant additional questions, such as where he lived or if he knew anything about a burglary at the warehouse where he was contacted, defendant was frisked immediately upon being contacted. The court concluded with the reminder that "frisks need to account for the totality of circumstances—they

cannot be rote or reflexive." (***United States v. Howell*** (7th Cir. 2020) 958 F.3rd 589.)

The Ninth Circuit affirmed a criminal judgment in a case in which the district court denied the defendant's motion to suppress evidence, and the defendant entered a conditional guilty plea to being a convicted felon in possession of a firearm. In this case, Police Detectives detained the defendant after observing a bulge under his sweatshirt that likely indicated a concealed firearm, which is presumptively unlawful to carry in California. Defendant was verbally uncooperative, yelling at the detectives. After defendant's companion was found to be in possession of a firearm, defendant was tased and searched, resulting in the recovery of a firearm in a shoulder holster. The Court held that the district court did not clearly err in crediting the detective's testimony that he observed on the defendant a "very large and obvious bulge" that suggested (in the officer's training and experience) a concealed firearm. The Court further held that reasonable suspicion supported the stop, and that the district court therefore properly denied the defendant's motion to suppress evidence found during the search. A dissenting justice argued that, without other corroborating evidence, a sweatshirt bulge alone did not give an objectively reasonable and particularized suspicion to stop and detain the defendant. (***United States v. Bontemps*** (9th Cir. 2020) 977 F.3rd 909.)

In a traffic stop for infractions (defective tail and license plate lights), where defendant was cooperative, did not appear to be intoxicated, his driver's license was valid, he answered the officer's questions, made no furtive or sudden movements, or exhibited any other suspicious behavior, patting defendant down for weapons was held to be illegal despite defendant wearing baggy clothing (i.e. a sweat shirt, which was naturally baggy, and on a cold night), the lateness of the hour (1:30 a.m.), in a high crime area, and he having a criminal record (over two years old) for weapons offenses (but no violence). (***People v. Pantoja*** (2022) 77 Cal.App.5th 483, at p. 488-492.)

In a case where an officer during a traffic stop conducted three successive patdowns of defendant before finally finding a gun hidden in defendant's underwear, defendant conceded the legality of the first patdown (based upon defendant's observed nervousness and—upon being asked to exit his vehicle—his act of immediately resting the front of his pelvis against the car even though he had not been asked to do so). Nothing unusual was found during the first patdown during which the officer did not check defendant's

groin area. The Court held that the second pat-down was also reasonable and not contrary to the **Fourth Amendment** given the way defendant walked twice between his car and the police car, again repeatedly resting his pelvis against the cars as if to prop something up, and continuing to appear unusually nervous. Based upon this, the Court held that the officer could reasonably infer that defendant was hiding a weapon in his pants. Again, however, nothing was found. As for the third patdown, after defendant claimed his exaggerated limp was due to a traffic accident, and during which a loaded firearm was discovered in his groin area, the Court upheld its legality. The court concluded that defendant's exaggerated limp elevated the officer's suspicions. Also, the officer did not have to accept defendant's story that he had injured his leg in a car accident. (***United States v. Smith*** (7th Cir. 2022) 32 F.4th 638.)

Denial of defendant's motion to suppress under **Fourth Amendment** was proper because his answers to officer's questions about why he was at salvage lot at 3:00 a.m. were odd; he claiming to be there waiting until the lot opened so that he could inquire about a stolen car when no such theft had been reported. Under a totality of circumstances analysis, these facts were sufficient to provide officer with reasonable suspicion to conduct a ***Terry*** stop. The Court further ruled that despite defendant's argument that the bulge in his pockets was insufficient to justify the frisk, under the totality of the circumstances, it was reasonable for the officer to fear for his safety. Therefore, the court concluded that the officer had reasonable suspicion to justify the attempted frisk. (***United States v. Stokes*** (8th Cir. 2023) 62 F.4th 1104.)

Relevance of a Detainee's Prior Criminal History:

Standing alone, a detainee's prior criminal history (i.e., arrests and/or convictions) is insufficient to justify a patdown for weapons. (See ***United States v. Foster*** (4th Cir. 2011) 634 F.3rd 243, 246; ***United States v. Mathurin*** (3rd Cir. 2009) 561 F.3rd 170, 177; ***United States v. Davis*** (10th Cir. 1996) 94 F.3rd 1465, 1469; ***United States v. Sandoval*** (10th Cir. 1994) 29 F.3rd 537, 542; ***People v. Pantoja*** (2022) 77 Cal.App.5th 483, at p. 488, 490-491.)

But see ***People v. Bush*** (2001) 88 Cal.App.4th 1048, where the officer was informed by his dispatch that defendant had a history of violence, possession of weapons and was reported to be a kick-boxer. The Court (at pg. 1053) made the following observations: "In our job as appellate court judges, we have been called upon to review hundreds upon hundreds of criminal convictions. Our

> experience has led us to the conclusion that, unfortunately, felons convicted of illegal weapons offenses often later carry concealed weapons, and they do so more than six years after an initial conviction. Moreover, while some persons who are 'very violent' reform such tendencies, many, many others do not. The information possessed by the dispatcher was not unreasonably stale (i.e., six years old). That information provided 'specific and articulable facts' which reasonably warranted the officer in believing that defendant was dangerous and could gain immediate control of weapons."

For Weapons Only: A frisk is a limited search for *weapons only*. (***Santos v. Superior Court*** (1984) 154 Cal.App.3rd 1178; ***United States v. I.E.V.*** (9th Cir. 2013) 705 F.3rd 430, 435.)

> "The 'sole justification' of the patsearch 'is the protection of the police officer and others nearby.' (Citation.) Its purpose "'is not to discover evidence of crime, but to allow the officer to pursue his [or her] investigation without fear of violence.'" (***In re Jeremiah S.*** (2019) 41 Cal.App.5th 299, 304; quoting ***Minnesota v. Dickerson*** (1993) 508 U.S. 366, 373 [113 S.Ct. 2130; 124 L.Ed.2nd 334].)
>
> > E.g.: Wrong answer: "*I patted him down for weapons and/or contraband*."
>
> Patting a person down for identification is not lawful even though the person has been lawfully stopped and claims to have no identification. (***People v. Garcia*** (2006) 145 Cal.App.4th 782.)
>
> > *But see* "*Searching for Identification*," below.

Examples of Lawful Patdowns:

> Stopping, detaining, and patting down a known gang member, observed running through traffic in a gang area, while looking back nervously as if fleeing from a crime (as either a victim or a perpetrator), was held to be lawful (***In re H.M.*** (2008) 167 Cal.App.4th 136.)
>
> Patting down a passenger in a vehicle for weapons held to be justified based upon the defendant's observed furtive movements of the passenger during the stop of the vehicle, along with his apparently false denial and then unreasonable explanation for the furtive movements. (***United States v. Burkett*** (9th Cir. 2010) 612 F.3rd 1103.)

A probation officer confronted with an uncooperative, irate individual who was present in the house of a juvenile probationer during a **Fourth** waiver search, when the detained visitor appeared to be a gang member and who was overly dressed for the weather, and who attempted to turn away and cover his stomach when ordered not to do so, lawfully patted the visitor down for weapons. (***People v. Rios*** (2011) 193 Cal.App.4th 584, 598-600.)

> The Court further determined that a probation officer has the legal authority to detain and patdown a non-probationer pursuant to **P.C. § 830.5(a)(4)** (i.e.; enforcing "violations of any penal provisions of law which are discovered while performing the usual or authorized duties of his or her employment.") (***Id***, at p. 600.)

A contact in the middle of the night, where the officer was alone with no one in the immediate vicinity who might offer assistance, while outnumbered by three people including one confrontational, much taller male, and a second wearing a knife on a sheath, when both males were wearing clothing loose enough to conceal other weapons, justified a patdown for weapons. (***People v. Mendoza*** (2011) 52 Cal.4th 1056, 1082.)

A patdown for firearms was justified by a nervous suspect's continual touching of a bulge in his sweatshirt and his physical resistance to being detained. (***People v. Parrott*** (2017) 10 Cal.App.5th 485, 495-496; "A police officer has a strong need to practice caution and self-protection when on patrol."

Repeatedly placing his hand in his coat pockets in disregard of an officer's requests to keep his hands out of his pockets, in a manner consistent with someone who was in possession of a weapon, justified a patdown for weapons. (***United States v. Reddick*** (8th Cir. AR 2018) 910 F.3rd 358.)

An officer's observation of a budge in defendant's pants pocket after contacting defendant in response to a citizen's 911 call that a person similar to defendant's description had a gun, was held to have justified a patdown for weapons. (***United States v. Adair*** (7th Cir. IL 2019) 925 F.3rd 931.)

Upon a deputy sheriff responding to a call regarding a disturbance of the peace, defendant was stopped and questioned. During questioning and inquiries regarding his fanny pack he wore around his waist, the deputy became uneasy by defendant's responses and

the contents of the fanny pack. The deputy could see what appeared to be the outline of a small gun. Defendant's refusal to take the fanny pack off and put it on the patrol car heightened the deputy's concern. The deputy therefore placed defendant in the patrol car for his safety, and inspected the fanny pack. A gun was found and defendant was prosecuted and convicted of being a felon in the possession of a firearm despite his argument that the search was illegal. On appeal, defendant argued that he was not under arrest, none of the exceptions to the warrant requirement applied, and a warrantless search incident to arrest was inapplicable as it was limited to a patdown of a suspect's outer clothing in searching for weapons. The court affirmed defendant's conviction, holding that the search was legal in that a protective seizure and search for weapons was not limited to a person's body. Rather, a seizure required a balancing of the intrusion against the governmental interest in neutralizing the threat of physical harm to police, and the search was an objectively reasonable preventive measure. (***People v. Ritter*** (1997) 54 Cal.App. 274.)

Where defendant, recognized as a member of a violent street gang, was found to be driving a car with at least two other gang members in the car, in an area contested by two rival gangs, where a passenger—also a gang member—had already been patted down for weapons and a firearm recovered, it was held that it was lawful to pat the defendant down as well based upon the reasonable suspicion that he too, under these circumstances, may be armed. (***People v. Esparza*** (2023) 95 Cal.App.5th 1084, 1090-1093; resulting in the recovery of a firearm.)

Examples of Unlawful Patdowns:

A traffic stop for an equipment violation in a "*high crime*" (i.e., gang) area at night is *not* reasonable suspicion, by itself, sufficient to justify a detention or patdown for weapons. (***People v. Medina*** (2003) 110 Cal.App.4th 171.)

Patting down a suspect in a mail theft, merely because the interview is to take place in a small, crowded interview room, that the interview might turn confrontational, and it was felt that patting the suspect down would be the "prudent" thing to do, is *not* sufficient reasonable suspicion to believe the person might be armed. (***United States v. Flatter*** (9th Cir. 2006) 456 F.3rd 1154.)

A person's assertion of his **Fourth Amendment** right not to be searched cannot be used to establish a reasonable suspicion to believe that he might be armed. (***In re H.H.*** (2009) 174

Cal.App.4th 653, citing ***People v. Dickey*** (1994) 21 Cal.App.4th 952.)

The alerting by a drug-sniffing dog on defendant's vehicle, but where no drugs were found in the vehicle, and where defendant's companion becomes noticeably nervous, does not justify by itself a patdown for weapons. Also, believing the object felt during a patdown to be contraband as opposed to a weapon does not justify the lifting of defendant's shirt (i.e., a search) to recover the object (found to be a "brick" of marijuana). (***United States v. I.E.V.*** (9th Cir. 2013) 705 F.3rd 430, 434-442.)

The officer's belief that two subjects are engaged in an act of domestic violence by itself is insufficient to justify a detention and a frisk for weapons absent some other facts indicating that at least one of the subjects is armed. (***Thomas v. Dillard*** (9th Cir. 2016) 818 F.3rd 864, 875-886; but see dissent at pp. 892-901, arguing that the fact alone that domestic violence is involved, given the dangerousness of domestic violence incidents, is sufficient to justify a patdown for weapons.)

> The fact that a suspect is wearing clothing capable of hiding a weapon is not a factor, by itself, tending to indicate that he may be armed. (***Id.***, at p. 884.)
>
> Neither is the fact that the suspect declined to submit to an officer's request that he consent to being searched. The suspect is under no legal obligation to consent. "An individual's steadfast refusal to consent to a search cannot become the basis for reasonable suspicion, absent any other specific facts, to justify a forced search of that individual." (***Ibid.*** See also ***United States v. Santos*** (10th Cir. 2005) 403 F.3rd 1120, 1125-1126.)

Merely being present at the scene of some unexplained police activity, being observed opening a garage door, appearing to be surprised, and wearing baggie clothing with the pockets apparently being "full of items," held *not* to justify a "***Terry*** stop" nor a patdown of the defendant's clothing. (***United States v. Job*** (9th Cir. 2017) 871 F.3rd 852, 860-862.)

Denial of the defendant's motion to suppress by the trial court could not stand where police officers did not have reasonable suspicion of criminal activity when they stopped and frisked the defendant, a black man. The totality of the circumstances did not add up to enough reasonable suspicion: I.e., there was no reliable

tip, no reasonable inference of criminal behavior, no police initiative to investigate a particular crime in a high crime area, and flight occurred without any previous attempt to talk to the suspect. An anonymous tip that defendant had a gun created at most a very weak inference that he was unlawfully carrying the gun without a license, and not enough to alone support a ***Terry*** stop, because in Washington State it was presumptively lawful to carry a gun. The record did not support a finding that the manner in which defendant was carrying his gun was unlawful under **Wash. Rev. Code § 9.41.270**. (***United States v. Brown*** (9th Cir. 2019) 925 F.3rd 1150.)

Under the **Fourth Amendment**, reasonable suspicion that a minor was involved in the strong arm robbery of a purse (i.e., a "purse snatch") and a cellphone *did not* support a pat search because there was no other aspect of the stop that, together with the minor's status as a robbery suspect, gave rise to a reasonable belief that he might be armed and dangerous. The court declined to recognize a rule that would be tantamount to automatically validating pat searches in all lawful detentions related to a fresh strong-armed robbery report. (***In re Jeremiah S.*** (2019) 41 Cal.App.5th 299.)

Factors to Consider: A reasonable suspicion to believe that a person may be armed and dangerous is to be determined based upon an evaluation of the "*totality of the circumstances*" known to the officer at the time. (***Thomas v. Dillard***, *supra*.) Such factors may include (recognizing that more than one factor may be required):

- Observing a *visible bulge* in a person's clothing that could indicate the presence of a weapon. (***United States v. Flatter*** (9th Cir. 2006) 456 F.3rd 1154, 1157; ***United States v. Bontemps*** (9th Cir. 2020) 977 F.3rd 909.)

- *Seeing a weapon* in an area the suspect controls, such as the passenger area of a car. (***Michigan v. Long*** (1983) 463 U.S. 1032, 1050 [103 S.Ct. 3469; 77 L.Ed.2nd 1201.)

- "*Sudden movements*" suggesting a potential assault or "attempts to reach for an object that was not immediately visible." (***United States v. Flatter***, *supra*, citing ***United States v. Flippin*** (9th Cir. 1991) 924 F.3nd 163, 164-166; cf. ***Ybarra v. Illinois*** (1979) 444 U.S. 85, 93 [100 S.Ct. 338; 62 L.Ed.2nd 238], holding that reasonable suspicion was lacking where an individual's hands were empty and he made "no gestures or other actions indicative of an intent to commit an assault.")

See also ***United States v. Brown*** (9th Cir. 2021) 996 F.3rd 998, 1007-1008: "We have recognized that 'abrupt movements or . . . suspicious, furtive behavior' may 'justifiably prompt[]' an officer 'to fear for his [or her] safety.'" (Quoting ***United States v. Thomas*** (9th Cir. 1988) 863 F.2nd 622, 629.)

- "*Evasive and deceptive responses*" to an officer's questions about what an individual was up to. (***United States v. Burkett*** (9th Cir. 2010) 612 F.3rd 1103, 1107.)

- *Unnatural hand postures* that suggest an effort to conceal a firearm. (***United States v. Burkett***, *supra*: Suspect opened the passenger car door with his left hand and kept his right hand next to his body and appeared to reach for his coat pocket.)

- Whether the officer observes anything during an encounter with the suspect that would *dispel the officer's suspicions* regarding the suspect's potential involvement in a crime or likelihood of being armed. (***Terry v. Ohio*** (1968) 392 U.S. 1, at p. 21, 28 [88 S.Ct. 1868; 20 L.Ed.2nd 889]; ***United States v. $109,179 in U.S. Currency*** (9th Cir. 2000) 228 F.3rd 1080, 1086.)

The "*nature of the suspected crime*" *suspected* is a factor in determining whether a frisk for weapons is lawful. "(C)ertain crimes carry with them the propensity for violence, and individuals being investigated for those crimes may be pat searched without further justification." (***People v. Osborne*** (2009) 175 Cal.App.4th 1052, 1059; see also ***Sibron v. New York*** (1968) 392 U.S. 40, 74 [20 L.Ed.2nd 917].) For instance:

Mail theft: *No*. (***United States v. Flatter*** (9th Cir. 2006) 456 F.3rd 1154.)

Robbery: *Yes*. (***Terry v. Ohio*** (1968) 392 U.S. 1 [88 S.Ct. 1868; 20 L.Ed.2nd 889]; ***United States v. Hill*** (9th Cir. 1976) 545 F.2nd 1191; ***Green v. Newport*** (7th Cir. Wis. 2017) 868 F.3rd 629.)

Second degree strong arm robbery (i.e., purse snatch): *No*. (***In re Jeremiah S.*** (2019) 41 Cal.App.5th 299.)

Bank robbery: *Yes*. (***United States v. Johnson*** (9th Cir. 2009) 581 F.3rd 994.)

Nighttime burglary: *Yes*. (***United States v. Mattarolo*** (9th Cir. 2000) 209 F.3rd 1153, 1158.)

Counterfeiting: *No*. (***United States v. Thomas*** (9th Cir. 1988) 863 F.2nd 622, 629.)

Large-scale narcotics dealing: *Yes*. (***United States v. $109,179 in U.S. Currency*** (9th Cir. 2000) 228 F.3rd 1080, 1086-1087; ***United States v. Post*** (9th Cir. 1979) 607 F.2nd 847.)

> "(W)e have recognized that where 'officers reasonably suspected that [a person] was involved in narcotics activity, it was also reasonable for them to suspect that he [or she] might be armed.'" (***United States v. Brown*** (9th Cir. 2021) 996 F.3rd 998, 1008, citing ***United States v. Davis*** (9th Cir. 2008) 530 F.3rd 1069, 1082-1083; *and referencing* ***United States v. Flatter*** (9th Cir. 2006) 456 F.3rd 1154, 1158.
>
> > *Note*: In ***Brown***, the drug activity appeared only to be a hand-to-hand sale, and not necessarily "large scale." The Court, nonetheless, found sufficient cause to justify a patdown for weapons although that was not the issue in this case, but rather whether the officer had sufficient cause to do a full search of defendant's pockets (*he did not*).

Drug trafficking: *Yes*. (***People v. Limon*** (1993) 17 Cal.App.4th 524, 535; ***People v. Lee*** (1987) 194 Cal.App.3rd 975, 983; ***United States v. Thompson*** (7th Cir. 2016) 842 F.3rd 1002; ***People v. Fews*** (2018) 27 Cal.App.5th 553; ***United States v. Green*** (8th Cir. IA 2019) 946 F.3rd 433)

Large-scale marijuana growing operation: *Yes*. (***United States v. Davis*** (9th Cir. 2008) 530 F.3rd 1069, 1082-1083; "Because officers reasonably suspected that Richard Davis was involved in narcotics activity, it was also reasonable for them to suspect that he might be armed.")

> See also ***People v. Collier*** (2008) 166 Cal.App.4th 1374; traffic stop where the odor of marijuana was detected and defendant was wearing baggy clothing through which any possible bulges could not be seen; patdown lawful.
>
> But see ***United States v. I.E.V.*** (9th Cir. 2012) 705 F.3rd 430, where it was held that a drug-sniffing dog alerting on defendant's vehicle, without any other indications that defendant was armed, was insufficient cause to justify a patdown for weapons.

Drug-related offense; i.e., under the influence only: *No*. (***Ramirez v. City of Buena Park*** (9th Cir. 2009) 560 F.3rd 1012, 1021-1023: The fact that the defendant was reasonably believed to be under the influence of a controlled substance, by itself, was not cause to pat him down for weapons.)

Vehicle burglary: *No*, but when combined with tools lying nearby, including screwdrivers that could be used as a weapon, the fact that the suspect might be on parole, and he was acting "real nervous," patting him down for weapons was justified. (***People v. Osborne*** (2009) 175 Cal.App.4th 1052, 1059-1062.)

Auto theft: *Yes*. (***United States v. Davidson*** (8th Cir. 2015) 808 F.3rd 325.)

Domestic violence: *No*, at least as a general rule. (***Thomas v. Dillard*** (9th Cir. 2016) 818 F.3rd 864, 878-886, and fn. 9; but see dissent arguing to the contrary; pp. 892-901.)

The "*Totality of the Circumstances*:"

Whether or not a reasonable suspicion exists is based on an evaluation of the "*totality of the circumstances*," precluding the practice of "picking each factor apart separately." (See ***United States v. Arvizu*** *(2002) 534 U.S. 266, 274 [151 L.Ed.2nd 740, 122 S. Ct. 744]*; ***Terry*** precludes a "*divide-and-conquer*" analysis. See also ***People v. Fews*** (2018) 27 Cal.App.5th 553, 560; and ***United States v. Valdes-Vega*** (9th Cir. 2013) 738 F.3rd 1074, 1078-1079.)

But see concurring opinion in ***United States v. Raygoza-Garcia*** (9th Cir. 2018) 902 F.3rd 994, at pp. 1002-1004, criticizing what the justices consider to be putting too much emphasis on otherwise innocent behavior in establishing a reasonable suspicion of criminal activity.

Reasonable Suspicion that is Dispelled:

A frisk is not justified when additional or subsequent facts become known to the officer during the contact that dispel or negate the suspicion. (***Terry v. Ohio***, *supra*, at p. 28; ***United States v. $109,179 in U.S. Currency*** (9th Cir. 2000) 228 F.3rd 1080, 1086; ***Thomas v. Dillard*** (9th Cir. 2016) 818 F.3rd 864, at p. 877, and fn. 8.)

See ***United States v. Thomas*** (9th Cir. 1988) 863 F.2nd 622, 626-630: Although there was reasonable suspicion to stop a driver who

roughly resembled a counterfeiting suspect and was near the scene of the crime, once the driver exited his vehicle and it was clear he did not match the suspect's description, there was no reasonable suspicion under the circumstances to justify further detention or a frisk.

Vehicle Drivers and Passengers:

The driver of a motor vehicle stopped for a traffic offense, ordered by a police officer to exit his vehicle, is subject to be patted down for offensive weapons whenever it is determined that there is a reasonable suspicion to believe that he or she "might be armed and presently dangerous." (***Pennsylvania v. Mimms*** (1977) 434 U.S. 106, 112 [98 S.Ct. 330; 54 L.Ed.2nd 331].)

The same rule applies to passengers in the motor vehicle. They are subject to being ordered out of the vehicle (***Maryland v. Wilson*** (1997) 519 U.S. 408, 415 [117 S.Ct. 882; 137 L.Ed.2nd 41].), may be detained for the duration of the traffic stop (***Brendlin v. California*** (2007) 551 U.S. 249 [127 S.Ct. 2400; 168 L.Ed.2nd 132].), and then patted down so long as there is an articulable reasonable suspicion to believe that they may be armed. (***Arizona v. Johnson*** (2009) 555 U.S. 323 [129 S.Ct. 781; 172 L.Ed.2nd 694].)

See also ***Knowles v. Iowa*** (1998) 525 U.S. 113, 117-118 [119 S.Ct. 484; 142 L.Ed.2nd 492]; Officers who conduct "routine traffic stop[s]" may "perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous." (See also ***Arizona v. Johnson***, *supra*., at p. 324.)

In a **42 U.S.C. § 1983** civil rights action, where a CHP officer was found to be civilly liable after a jury trial, the Court held that the evidence supported a finding that a frisk was unreasonable under the **Fourth Amendment** because the jury found that the traffic stop was constitutionally unreasonable in that the purported reason for the stop; i.e., loud music, was based upon inconsistent, conflicting evidence. The jury could have reasonably discounted testimony that the patdown was justified by horn honking, purported loose clothing, or the presence of gangs in the area. (***King v. State of California*** (2015) 242 Cal.App.4th 265, 278-291.)

Consensual Patdowns: A patdown, like any other search, may be performed when the suspect provides a free and voluntary consent.

After defendant, who had prior drug and firearm-related convictions, paid cash for a last-minute, one-way ticket without checking any luggage, an officer asked defendant for permission to search his bag and his person. Defendant consented twice and spread his arms and legs to facilitate the search. The officer felt something hard and unnatural in defendant's groin area and arrested him. The appellate court determined that defendant voluntarily consented to a patdown search because he was not in custody, officers told him he was free to leave, and officers did not tell him that they could obtain a search warrant if he refused to consent. The scope of the search was reasonable because it was reasonable for the officer to assume the consent included the groin area since the officer specifically advised defendant that the officer was looking for narcotics, defendant lifted his arms and spread his legs, defendant never objected or revoked consent, the search did not extend inside the clothing, and the officer methodically worked his way up defendant's legs before searching the groin. (***United States v. Russell*** (9th Cir. 2012) 664 F.3rd 1279, 1281-1284.)

In the Absence of a Reasonable Suspicion, as a "Special Needs" Search:

Where it is shown there to be a strong governmental interest (i.e., a "special need") in *responding to the sounds of gunfire and preventing violence* in a high crime area where recent shootings and homicides (six shooting and two homicides in that past three months) had occurred, thus constituting an "exigent circumstance." (***United States v. Curry*** (4th Cir. 2019) 937 F.3rd 363.)

The Appellate Court found that the officers acted reasonably in stopping defendant and the other men without individualized suspicion that any of them were involved in the sounds of gunfire in that area, and patting defendant down for firearms when he declined to raise his short and expose his belt line. The Court recognized that the officers were rushing to respond to shots fired seconds earlier in a densely populated residential neighborhood. The court noted the officers were faced with the prospect that an active shooter might continue to threaten the safety of the public. Even though one purpose of the officers' actions that night may have included ordinary law enforcement, the immediate purpose of stopping defendant and the other men and illuminating them with their flashlights was to protect the public and themselves from the threat posed by an active shooter. (***Ibid***.)

Permissible Procedures:

Limited to Outer Clothing; Exceptions: A frisk is *limited to the outer clothing*, except when the clothing (or purse, etc.) is so resistant as to prevent feeling a possible weapon below the clothing. (***People v. Brisendine*** (1975) 13 Cal.3rd 528, 542.)

E.g.: Where the officer responded to a 9-1-1 call of a disturbance, and was directed to the defendant who was wearing a fanny pack in which the officer could see the apparent outline of a pistol, taking the fanny pack from the defendant and unzipping the outer compartment to remove what was in fact determined to be a pistol was not unreasonable. (***People v. Ritter*** (1997) 54 Cal.App.4th 274.)

Removal of Weapons: When an object is felt which might be a weapon of any sort, that object may then be removed and inspected. (***People v. Snyder*** (1992) 11 Cal.App.4th 389; bottle; ***People v. Atmore*** (1970) 13 Cal.App.3rd 244, 247; shotgun shell.)

When Suspect Reaches for a Weapon: When an officer reasonably believes the *suspect is reaching for a weapon*, the officer *need not* first undertake a patdown search to feel for the object for which the suspect is reaching. (***People v. Wigginton*** (1973) 35 Cal.App.3rd 732, 737-740; ***People v. Superior Court* [*Holmes*]** (1971) 15 Cal.App.3rd 806, 813; ***People v. Atmore*** (1970) 13 Cal.App.3rd 244, 247-248; ***People v. Woods*** (1970) 6 Cal.App.3rd 832, 838; ***People v. Sanchez*** (1967) 256 Cal.App.2nd 700, 703-704; ***People v. Rosales*** (1989) 211 Cal.App.3rd 325, 329.)

Pen. Code § 833.5; Statutory Authority to Patdown: California statutes provide legal authority for peace officers to detain and "*conduct a limited search*" of a person the officer has "*reasonable cause*" to believe has a firearm or other deadly weapon and to seize any weapon found. If the person is convicted of a charge related to the firearm or weapon, it shall be deemed a nuisance and disposed of pursuant to **Pen. Code §§ 18000** & **18005** (formerly, **Pen. Code § 12028**).

Note: In that most of the rules on "*patdown searches*" are from constitutionally-based case decisions, anywhere they might differ from the language of this statute, the case law is likely to take precedence.

Problems:

During a "*Consensual Encounter*:" A patdown is probably *not* lawful, although it may never become an issue in that if an officer observes something giving him or her an articulable *reasonable suspicion* that the consensually encountered person may be armed, that same reasonable suspicion would likely elevate the situation into one justifying a lawful detention as well as a patdown. (See ***People v. Lee*** (1987) 194 Cal.App.3rd 975, 982-983; ***People v. Rosales*** (1989) 211 Cal.App.3rd 325, 330.)

During Execution of a Search Warrant or a "***Fourth** Waiver*" *search*, at least for narcotics: Courts tend to recognize the likelihood that narcotics suspects are often armed and may allow a patdown with no more than the *conclusory* opinion that the "*need for officer safety*" dictated the need for a patdown. (***People v. Samples*** 1996) 48 Cal.App.4th 1197.)

Note ***Ybarra v. Illinois*** (1979) 444 U.S. 85 [100 S.Ct. 338; 62 L.Ed.2nd 238], where the United States Supreme Court determined to be illegal the detention and patdown of anyone and everyone at the scene of the execution of a narcotics search warrant (i.e., a bar), absent evidence connecting each person to be detained and patted down with the illegal activity being investigated.

During a "***Fourth** Waiver*" search of a narcotics suspect's home: A patdown of a "known associate" of a probationer whose home is being searched according to that person's terms of probation, with evidence of drug abuse occurring at the house, but without an articulable suspicion that the defendant (the "associate") might be armed, but just because it is "the safe thing to do," is illegal. (***People v. Sandoval*** (2008) 163 Cal.App.4th 205.)

Feeling a Controlled Substance: *The* "*Plain Feel*" *Doctrine*: When an officer feels a controlled substance (or other items subject to seizure) during the patdown for weapons, and he or she has the training and expertise to recognize that the object is *probably* an illegal substance or object, he may do a full search based upon that newly developed *probable cause*. (***People v. Lee*** (1987) 194 Cal.App.3rd 975; ***People v. Thurman*** (1989) 209 Cal.App.3rd 817, 825-826; see also ***United States v. Pacheco*** (6th Cir. 2016) 841 F.3rd 384; ***United States v. Greene*** (3rd Cir. PA 2019) 927 F.3rd 723.)

Under what is sometimes referred to as the "*plain feel*" *doctrine*, having probable cause to believe that an item felt during a lawful patdown for weapons is illegal contraband (i.e., it being "*immediately apparent*"), a search of the person for the contraband is justified. (***United States v. Graves*** (3rd Cir. PA 2017) 877 F.3rd 494.)

E.g.: Feeling a lump which could not have been a weapon, plus other factors (prior lawful observation of pagers, gram scale upon which there was an odor of methamphetamine, and a plastic baggie), justified a finding of probable cause to search for contraband. (***People v. Dibb*** (1995) 37 Cal.App.4th 832.)

"Police officers may also seize 'nonthreatening contraband detected during a protective patdown search . . . so long as the officers' search stays within the bounds marked by ***Terry***.'" (***United States v. Baker*** (9th Cir. 2023) 58 F.4th 1109, 1117; quoting ***Minnesota v. Dickerson*** (1993) 508 U.S. 366, 378, at p. 373 [113 S.Ct. 2130; 124 L.Ed.2nd 334].)

However, if the officer feels what *might* be a controlled substance in the pocket, and "*manipulates*" it (***Minnesota v. Dickerson*** (1993) 508 U.S. 366, 378 [113 S.Ct. 2130; 124 L.Ed.2nd 334]; ***People v. Dickey*** (1994) 21 Cal.App.4th 952, 957.) or "*shakes*" it (***United States v. Miles*** (9th Cir. 2001) 224 F.3rd 1009.) in an attempt to confirm or verify his suspicions, the manipulation or shaking of the object is a search for contraband, done without *probable cause*, and illegal. (***Ibid***.)

Unless the incriminating character of the contraband becomes "*immediately apparent*" to the officer, he may not retrieve it and may not manipulate it in an attempt to determine what the item may be. (***United States v. Davis*** (9th Cir. 2008) 530 F.3rd 1069, 1082-1084.)

> See also ***United States v. Craddock*** (8th Cir. 2016) 841 F.3rd 756; where the Court held that feeling during a patdown what was apparently a keyfob to a vehicle did not supply the necessary probable cause to believe that it might belong to a stolen vehicle parked nearby. Recovering the keyfob was held to be an illegal search.

But, feeling a bulge that is believed to be a weapon, and manipulating it in an attempt to verify that it is a weapon, which requires no more than a *reasonable suspicion*, is lawful. (***United States v. Mattarolo*** (9th Cir. 1999) 209 F.3rd 1153.)

Feeling a bulge and being unable to determine whether or not it is a weapon, it is okay to ask the suspect. If the suspect admits that it is contraband, this will give the officer *probable cause* to arrest and search. (***People v. Avila*** (1997) 58 Cal.App.4th 1069, 1075-1977.)

But feeling a bulge and recognizing that it is *not* a weapon (a film canister, in this case), and then asking the subject what it is, has been argued by some to be illegal as a "*preliminary step to an illegal search*" (see ***People v. Valdez*** (1987) 196 Cal.App.3rd 799, 807); a questionable decision at best.

Feeling a bulge which the officer immediately recognized as car keys, after the subject had denied having any car keys on him, and with other evidence tending to connect him to a recent carjacking during which the car keys were taken, was sufficient probable cause to believe that the car keys were evidence of a crime and to justify the retrieval of the keys from his pocket. (***In re Lennies H.*** (2005) 126 Cal.App.4th 1232.)

Frisk for a Firearm based upon an Uncorroborated Anonymous Tip:

A detention and patdown for weapons, based upon an uncorroborated anonymous tip alone, is not lawful in that anonymous information has repeatedly been held to be legally insufficient to establish a *reasonable suspicion*. There is no such thing as a "*firearms exception*" to this rule. (***Florida v. J.L.*** (2000) 529 U.S. 266 [120 S.Ct. 1375; 146 L.Ed.2nd 254].)

But note: The U.S. Supreme Court, in dicta, hinted strongly that had the anonymous tipster warned of something more dangerous, such as a bomb, a patdown based upon this tip alone might be upheld. The Court also indicated that certain areas where there is a lessened expectation of privacy, such as in

an airport or on school grounds, may also be an exception to this rule. (***Id***., at pp. 273-274.)

> See ***In re K.J.*** (2018) 18 Cal.App.5th 1123, 1134-1135, using the "school grounds" dicta from ***J.L.*** as an excuse to lessen the corroboration requirement in a case where a tipster told a school principal that defendant had a gun with him on campus.
>
> Also, the Second Circuit Court of Appeal held in ***United States v. Albarado*** (2nd Cir. 1974) 495 F.2nd 799, 803, that "Even the unintrusive magnetometer walk-through is a search in that it searches for and discloses metal items within areas most intimate to the person where there is a normal expectation of privacy."

The ***J.L***. Court, in a concurring opinion, also briefly discusses "*predictive information*" which may supply the necessary corroboration, such as being able to correctly describe future actions of the suspect. Also, unconnected anonymous informants, or anything which would add the element of credibility to the information, might sufficiently corroborate the anonymous informant. (***Florida v. J.L.***, at p. 275 [146 L.Ed.2nd at p. 263].)

> See "*Detentions*" (Chapter 4), above.

Taking the hint, the appellate court in ***People v. Coulombe*** (2001) 86 Cal.App.4th 52, found sufficient corroboration justifying a patdown for a firearm when the information came from two separate informants, where the tips were close in time, the informants contacted the officer personally (thus putting their anonymity at risk), and the setting was in a crowded throng of celebrants at a New Year's Eve street party, thus increasing the danger.

The fact that the physical description of a suspect who is reported by an anonymous tipster to have a gun in his pocket is very specific still does not corroborate the tipster's information. Absent at

least some suspicious circumstances observed by the responding police officers, finding the person described by the tipster does not create a reasonable suspicion justifying a detention or a patdown for weapons. (***People v. Jordan*** (2004) 121 Cal.App.4th 544, 553-652; the quick confirmation of the physical description of the defendant and his location, by itself, is legally insufficient.)

A late night radio call concerning two specifically described males causing a disturbance, with one possibly armed, in a known gang area at an address where a call concerning a daytime shooting days earlier resulted in the recovery of two firearms, and where the described males are found within minutes of the call, is sufficient to justify a detention and a patdown. (***In re Richard G.*** (2009) 173 Cal.App.4th 1252, 1257-1258, fn. 1.)

Other Situations:

Frisk of a person for weapons was lawful when it had been reported to police by a witness that one of several people present had been seen with a firearm, defendant was uncooperative and belligerent, and he kept reaching for an area in his baggy pants where there appeared to be a large, heavy object. (***People v. Lopez*** (2004) 119 Cal.App.4th 132.)

Stopping someone suspected of having just committed an armed carjacking, with the observation of a knife and bullets, and then a gun, all in plain sight, was more than enough to justify a cursory check of the suspects for possible weapons. Then, feeling objects which, as the deputy testified, could be, or could contain, weapons, the deputy was justified in removing and inspecting those items. (***United States v. Hartz*** (9th Cir. 2006) 458 F.3rd 1011, 1018-1019.)

Patting a non-student down for possible weapons on a high school campus, where the defendant/minor was to be moved to the security office, need not be justified by an articulable suspicion that he might be armed. (***In re Jose Y.*** (2006) 141 Cal.App.4th 748.)

A traffic stop where the odor of marijuana was detected and defendant was wearing baggy clothing through which any possible bulges could not be seen, held to be lawful. (***People v. Collier*** (2008) 166 Cal.App.4th 1374.)

Abandoned Property:

General Rule: There is no expectation of privacy in abandoned, or discarded, property. Such property, therefore, may be searched or seized without a warrant or even probable cause.

Property abandoned by a suspect, without *both* a subjective and an objectively reasonable expectation of privacy, may be seized and searched without probable cause and without a warrant. (***In re Baraka H.*** (1992) 6 Cal.App.4th 1039.)

Leaving all his belongings in a motel room, disappearing in the middle of the night and without making arrangements to extend his stay, it was held that defendant abandoned the motel room, his personal belongings in the room, and his vehicle in the parking lot. There being no reasonable expectation of privacy in these items due to this abandonment, defendant lost his standing to challenge the warrantless entry. (***People v. Parson*** (2008) 44 Cal.4th 332, 342-348.)

Leaving a cellphone at the scene of a crime negates the suspect's expectation of privacy in the contents of that phone, and is therefore abandoned property despite the suspect's subjective wish to retrieve it, which he fails to act on. "Abandonment . . . is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search." (***People v. Daggs*** (2005) 133 Cal.App.4th 361.)

Abandoning a cigarette butt onto a public street constitutes a loss of one's right to privacy in that butt, making it available to law enforcement to recover and test for DNA without a search warrant. (***People v. Gallego*** (2010) 190 Cal.App.4th 388, 394-398.)

Tricking a suspect out of an item of personal property and then testing it for DNA is another issue. But, as noted in ***Gallego***, at p. 396, several courts from other jurisdictions have found such a tactic to be lawful. (See ***Commonwealth v. Perkins*** (Mass. 2008) 883 N.E.2nd 230; and ***Commonwealth v. Bly*** (Mass. 2007) 862 N.E.2nd 341; testing cigarette butts and a soda can left behind after an interview with police. ***Commonwealth v. Ewing*** (Mass 2006) 67 Mass.App.Ct. 531 [854 N.E.2nd 993, 1001; offering defendant cigarettes and a straw during an interrogation. ***People v. LaGuerre*** (2006) 29 A.D.3rd 822

[815 N.Y.S.2nd 211]; obtaining a DNA sample from a piece of chewing gum defendant voluntarily discarded during a contrived soda tasting test. ***State v. Athan*** (Wash. 2007) 158 P.3rd 27; DNA obtained from defendant's saliva from licking an envelope he mailed to detectives in a police ruse.)

There is no privacy right in the mouthpiece of the PAS device, which was provided by the police and where defendant abandoned any expectation of privacy in the saliva he deposited on the device when he failed to wipe it off. Whether defendant subjectively expected that the genetic material contained in his saliva would become known to the police was irrelevant because he deposited it on a police device and thus made it accessible to the police. The officer who administered the PAS (Preliminary Alcohol Screening) test testified that used mouthpieces were normally discarded in the trash. Thus, any subjective expectation defendant may have had that his right to privacy would be preserved was unreasonable. (***People v. Thomas*** (2011) 200 Cal.App.4th 338.)

The ***Thomas*** court further held that using defendant's DNA taken from the PAS device mouthpiece to legitimately test defendant's blood/alcohol level, with his consent, was not a coercive ruse, and therefore lawful. (***Id***., at p. 344.)

By throwing his backpack onto the roof of a house upon the approach of police officers, defendant abandoned any expectation of privacy in that backpack that he might have previously had. (***United States v. Juszczyk*** (10th Cir. Kan. 2017) 844 F.3rd 1213.)

The defendant's subjective reasoning for abandoning a cellphone held to be irrelevant. Leaving his cellphone in a crashed motor vehicle for the stated purpose of getting away from other who were shooting at him did not prevent the responding officers from seizing the cellphone and searching it in an attempt to locate the person who had been driving it. (***United States v. Crumble*** (8th Cir. MN 2018) 878 F.3rd 656.)

Trashcans: There is no reasonable expectation of privacy in the trash one places in trashcans out at the curb for pick up. (***California v. Greenwood*** (1988) 486 U.S. 35 [108 S.Ct. 1625; 100 L.Ed.2nd 30].)

Fresh marijuana stem and leaf cuttings found in a trashcan in front of a residence establishes probable cause justifying the issuance of a search warrant for the residence. (***People v. Thuss*** (2003) 107 Cal.App.4th 221.)

Having the trash collection company collect defendant's trash on his regular pickup day (i.e., a "trash pull"), segregating it from other trash, was constitutional and did not violate defendant's reasonable expectation of privacy. (***United States v. Thompson*** (8th Cir. S.D., 2018) 881 F.3rd 629.)

The "*Threatened Illegal Detention*:" What happens when the property is abandoned as a direct result of a police officer's attempt to illegally stop and detain a suspect?

The United States Supreme Court resolved a previous three-way split of authority: There is no constitutional violation in a "*threatened unlawful detention*." The **Fourth Amendment** does not apply to such a situation until the person is actually illegal detained; i.e., when the officer actually catches the defendant or the defendant otherwise submits to the officer's authority (i.e.; he gives up). (***California v. Hodari D.*** (1991) 499 U.S. 621 [111 S.Ct. 1547; 113 L.Ed.2nd 690].)

Result: Any evidence abandoned (e.g., tossed or dropped) *during* a foot pursuit of a fleeing suspect, even without any reasonable suspicion justifying a detention (i.e., a "*threatened unlawful detention*"), is admissible as abandoned property (as well as supplying the necessary "*reasonable suspicion*" to justify the suspect's detention upon being caught).

But, if the suspect does not abandon the contraband until *after* he has been caught, and thus illegally detained, then it *is* subject to suppression as "*fruit of the poisonous tree*;" i.e., the unlawful detention.

Defendant discarding a firearm as officers were attempting to (arguably) illegally arrest him, did not require the suppression of the firearm in that when the gun was discarded, defendant had not yet been "touched" nor had he "submitted" to the officers. Thus, the **Fourth Amendment** was not yet implicated. (***United States v. McClendon*** (9th Cir. 2013) 713 F.3rd 1211, 1214-1217.)

The Court noted that a temporary hesitation, nor the officer's use of firearm while telling him he was under arrest, does not alter the rule of ***Hodari D.*** (***Id***., at pp. 1216-1217.)

The definition of a "seizure" was expanded a bit by the United States Supreme Court in the case of ***Torres v. Madrid*** (Mar. 25,

2021) __ U.S. __, __ [141 S.Ct. 989; 209 L.Ed.2nd 190], where the Court ruled that a "seizure" occurs when "(t)he application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person."

The ***Madrid*** Court overruled a lower court's holding that a suspect's continued flight after being shot by police negates a **Fourth Amendment** excessive-force claim.

Searching for Identification:

General Rule: A patdown of an individual for identification is *illegal*: Patdowns on less than probable cause are allowed only for the purpose of discovering offensive weapons, and then only when the officer is able to articulate a "*reasonable suspicion*" for believing why the person might be armed. (***People v. Garcia*** (2006) 145 Cal.App.4th 782.)

Exceptions:

A circumstance allowing for a check for identification has been found, however, where the defendant claimed to have none, but the officer could see that he had a wallet in his pocket. (***People v. Long*** (1987) 189 Cal.App.3rd 77; telling the suspect to check his wallet and then insisting on watching him do so justified by the need to insure that he didn't conceal evidence or retrieve a weapon.)

Retrieving a wallet from a suspect where the wallet was visible in his pocket, after the suspect, who was lawfully detained, said he didn't have any identification, done for the purpose of checking the wallet for identification, was lawful "under the unique facts of this case." (***People v. Loudermilk*** (1987) 195 Cal.App.3rd 996.)

Searching for a Driver's Identification and/or Vehicle Documentation:

The California Supreme Court had previously ruled that during a lawful traffic stop, at least after a demand for the driver's license and other vehicle documentation is made and a negative response is obtained (see ***United States v. Lopez*** (C.D.Cal. 1979) 474 F.Supp. 943, 948-949.), a warrantless, suspicionless intrusion into the vehicle for the limited purpose of locating such identification and documentation is lawful, even if the driver denies that any such documentation exists. In so doing, the officer may look in any location where it is reasonable to believe he or she might find such documentation. (***In re Arturo D.*** (2002) 27 Cal.4th 60;

Arturo D. was joined with the companion case, ***People v. Hinger*** (using the same cite) out of the Fourth District Court of Appeal.

This was held to include *under the front seat* (whether looking from the front or rear of the seat), in a *glove compartment*, and over the *visor*. It would probably *not* include within *containers* found in the vehicle or the *trunk*, absent some articulable reason to believe why such documentation might actually be there. (***Id***., at p. 86, and fn. 25.)

Arturo D. was overruled by the California Court in ***People v. Lopez*** (2019) 8 Cal.5th 353, however, at least so far as it had ruled that the warrantless search of the vehicle for the driver's identification is concerned. The rule is now that although a driver's denial of having his driver's license or other identification with him *does not* justify an officer's search of the automobile for such identification, it might if the officer is able to develop the necessary "*probable cause*" that the driver lied about his identity. (***People v. Lopez***, *supra*, at pp. 372-373.)

The California Supreme Court's decision of ***People v. Lopez*** (2019) 8 Cal.5th 353, overruled the ***Arturo D.*** decision, but only so far as it pertained to the limited search of a vehicle for the driver's identification. In so holding, the Court noted that its decision in ***Lopez*** is limited to searches for identification, and does *not* purport to overrule prior cases that have upheld searches of vehicles under similar circumstances where the officer is looking for vehicle documentation. (***Id***., at p. 385, fn. 3; see below.)

See "*Searching a Vehicle* for a *Driver's License* and/or *Vehicle Registration, VIN Number, Proof of Insurance*, etc.," under "*Searches of Vehicles*" (Chapter 12), below.

Fingerprint Evidence:

No Right to Refuse, Upon Arrest:

Upon being arrested, an arrestee has no legal right to refuse a fingerprint examination. (***Virgle v. Superior Court*** (2002) 100 Cal.App.4th 572.)

The legal authority for fingerprinting an arrestee can be inferred from various state statutes:

Pen. Code § 7(21): Describing the obtaining of fingerprints as part of the booking procedure.

Pen. Code § 853.6(g): The requirement that persons arrested and released on a misdemeanor citation provide fingerprints prior to the person's scheduled court appearance.

Pen. Code §§ 13125, **13127:** Providing for the retention of certain basic information, including fingerprint identification numbers, on arrested individuals.

"Fingerprints taken pursuant to an arrest are part of so-called 'booking' procedures, designed to ensure that the person who is arrested is in fact the person law enforcement officials believe they have in custody. (Fn. omitted)" (***United States v. Kinkade*** (9th Cir. 2003) 345 F.3rd 1095, 100-1101 (Reversed on other grounds); citing ***Smith v. United States*** (D.C. Cir. 1963) 324 F.2nd 879, 883; and ***Napolitano v. United States*** (1st Cir. 1965) 340 F.2nd 313, 314.)

Fingerprints taken upon arrest for identification purposes are lawful, even if the product of an illegal arrest. (***Immigration and Naturalization Service v. Lopez-Mendoza*** (1984) 468 U.S. 1032, 1039-1040 [104 S.Ct. 3479; 82 L.Ed.2nd 778].)

If, however, the fingerprints are found to have been obtained for "*investigative purposes*," such prints are subject to suppression absent probable cause justifying the arrest. (***Davis v. Mississippi*** (1969) 394 U.S. 721 [89 S.Ct. 1394; 22 L.Ed.2nd 676]; ***Hayes v. Florida*** (1985) 470 U.S. 811 [105 S.Ct. 1643; 84 L.Ed.2nd 705]; ***United States v. Beltran*** (9th Cir. 389 F.3rd 864.)

However, even after fingerprints are taken for investigative purposes, and therefore suppressed as the product of an illegal arrest, the court, upon request, can require defendant to submit a new set of fingerprints for purposes of trial on the new criminal offense. (***United States v. Garcia-Beltran*** (9th Cir. 2006) 443 F.3rd 1126; ***United States v. Parga-Rosas*** (9th Cir. 2001) 238 F.3rd 1209; ***United States v. Ortiz-Hernandez*** (9th Cir. 2005) 427 F.3rd 567.)

It can also be argued that refusal to cooperate in providing fingerprints during the booking procedure is a violation of **P.C. § 148(a)(1)**, for interfering with the officer in the performance of his or her duties. (See ***People v. Quiroga*** (1993) 16 Cal.App.4th 961, 971-972; where defendant's conviction for **P.C. § 148(a)(1)** upheld

for refusing to identify himself during the booking procedure, at least for a felony offense.)

> However, in noting that **Pen. Code § 148(a)(1)** provides that "*when no other punishment is prescribed*," the Court held that; "(a) refusal to disclose personal identification following arrest for a misdemeanor or infraction cannot constitute a violation of **Pen. Code, § 148** (resisting a peace officer). By enacting **Pen. Code, § 853.5** (refusal by person arrested for infraction to provide identification), **Pen. Code, § 853.6, subd. (i)(5)** (failure of person arrested for misdemeanor to provide satisfactory evidence of personal identification), **Veh. Code, § 40302** (mandatory appearance before magistrate), and **Veh. Code, § 40305** (failure of nonresident to furnish satisfactory evidence of identity), the Legislature established other ways of dealing with such nondisclosure." (***Id***., at p. 970.)

In that fingerprint evidence does not involve any **Fifth Amendment**, self-incrimination issues (see ***Schmerber v. California*** (1966) 384 U.S. 757, 764 [86 S.Ct. 1826; 16 L.Ed.2nd 908, 916].), an arrestee has no right to refuse to provide them at his or her booking. (***United States v. Kelly*** (2nd Cir. 1932) 55 F.2nd 67; ***People v. Jones*** (1931) 112 Cal.App. 68.)

Use of Force:

While excessive force is not permissible (***People v. Matteson*** (1964) 61 Cal.2d 466.), reasonable force which does not "*shock the conscience*" may be used if necessary in order to secure fingerprints from the arrested subject. (***People v. Williams*** (1969) 71 Cal.2nd 614, 625.)

Five deputies holding down a resisting criminal defendant for the purpose of obtaining his fingerprints, in a courtroom (but out of the jury's presence), where there were found to be less violent alternatives to obtaining the same evidence, is force that "*shocks the conscience*" and a violation of the defendant's **Fourteenth Amendment** due process rights. (***People v. Herndon*** (2007) 149 Cal.App.4th 274; held to be "*harmless error*" in light of other evidence and because defendant created the situation causing the force to be used.)

Refusal Upon Less than an Arrest:

> Absent an arrest, the refusal to provide law enforcement with fingerprints is not a crime. However, it is apparently lawful to stop and fingerprint a particular suspect on less than probable cause, at least if the coerciveness is minimized by doing the fingerprinting at the scene and without transportation to a police station. (***Davis v. Mississippi*** (1969) 394 U.S. 721 [89 S.Ct. 1394; 22 L.Ed.2nd 676]; ***Hayes v. Florida*** (1985) 470 U.S. 811 [105 S.Ct. 1643; 84 L.Ed.2nd 705]; ***Virgle v. Superior Court*** (2002) 100 Cal.App.4th 572; ***Kaupp v. Texas*** (2003) 538 U.S. 626, 630, fn. 2 [123 S.Ct. 1843; 155 L.Ed.2nd 814, 820].)

Right to Assistance of Counsel:

> The taking of a defendant's fingerprints is *not* a critical stage of criminal proceedings at which a defendant needs the presence of counsel. Therefore, there is no **Sixth Amendment** right to the presence of counsel at the taking of fingerprints (i.e, "booking"). (***People v. Williams*** (1969) 71 Cal.2nd 614, 625; citing ***United States v. Wade*** (1967) 388 U.S. 218, 227-228 [18 L.Ed.2d 1149, 1157-1158].)

Handwriting (and other types of) *Exemplars*:

> Similarly, a criminal arrestee *does not* have a **Fifth Amendment** self-incrimination right not to provide a handwriting exemplar. (***Schmerber v. California*** (1966) 384 U.S. 757, 768 [86 S.Ct. 1826; 16 L.Ed.2nd 908, 918]; ***Gilbert v. California*** (1967) 388 U.S 263 [87 S.Ct. 1951; 18 L.Ed.2nd 1178]; ***People v. Graves*** (1966) 64 Cal.2nd 208.)
>
> The same legal theory applies to a "*voice exemplar*" (***United States v. Dionisio*** (1973) 410 U.S. 1 [93 S.Ct. 764; 35 L.Ed.2nd 67].), as well as submitting to being photographed. (***Schmerber v. California***, *supra*.)
>
> *Note*: While it may be physically impossible to force an arrestee to provide any of the above, because there is no constitutional right not to cooperate, his that he refused may be used in evidence against him.

Jail, Prison, and Prisoner Searches:

> *Booking Inventory Searches*: A person who is to be booked, and who has objects in his possession, may be subjected to an *inventory search* despite the lack of probable cause to believe he has anything illegal on him. (***Illinois v. Lafayette*** (1983) 462 U.S. 640 [103 S.Ct. 2605; 77 L.Ed.2nd 65].)

Scope: "This exception (to the search warrant requirement) permits 'police to search the personal effects of a person under lawful arrest as part of the routine administrative procedure at a police station house incident to booking and jailing the suspect.'" (***People v. Turner*** (2017) 13 Cal.App.5th 397, 403; quoting ***People v. Macabeo*** (2016) 1 Cal.5th 1206, 1212, 1213.)

> "*Booking*" entails the recordation of an arrest in official police records, and the taking by the police of fingerprints and photographs of the person arrested. (See ***People v. Superior Court* [*Simon*]** (1971) 7 Cal.3rd 186, 208; see also **P.C. § 7, subd. 21.**)

Purposes:

> *Warrantless searches* may be made by jail and prison officials to accommodate legitimate "*institutional needs and objectives*;" primarily internal security. (***Hudson v. Palmer*** (1984) 468 U.S. 517, 524 [104 S.Ct. 3194; 82 L.Ed.2nd 393, 401].)
>
> *Other Purposes* include:
>
> - To prevent the introduction of drugs and other contraband (including weapons) into the premises;
>
> - The detection of escape plots; *and*
>
> - The maintenance of sanitary conditions.
>
> (See ***Hudson v. Palmer***, *supra*, at p. 527 [82 L.Ed.2nd at pp. 403-404]; ***United States v. Cohen*** (2nd Cir. 1986) 796 F.2nd 20, 22-23.)
>
> - Post-booking searches also serve the purpose of collecting evidence against inmates, including pretrial detainees.
>
> (***People v. Davis*** (2005) 36 Cal.4th 510, 523-529.)

Justifications: Booking searches are justified under a number of legal theories:

- To safeguard the person's property and for security purposes. (***Illinois v. Lafayette*** (1983) 462 U.S. 640, 643-647 [103 S.Ct. 2605; 77 L.Ed.2nd 65]; ***People v. Laiwa*** (1983) 34 Cal.3rd 711, 724-727; ***People v. Hamilton*** (1988) 46 Cal.3rd 123, 137.)

See **Gov't. Code § 26640**; duty of the sheriff to take charge of, and safely keep, the property of a prisoner.

- To prevent introduction of weapons and contraband into the jail facility. (***People v. Gilliam*** (1974) 41 Cal.App.3rd 181, 189.)

- To discover evidence pertaining to the crime for which the person was arrested. (***People v. Maher*** (1976) 17 Cal.3rd 196, 200-201.)

Belated Search Incident to Arrest: Older authority has held that a booking search is really a "*search incident to arrest with an inconsequential time lag*." (***People v. Superior Court* [*Murry*]** (1973) 30 Cal.App.3rd 257, 263; and ***United States v. Edwards*** (1974) 415 U.S. 800, 803 [94 S.Ct. 1234; 39 L.Ed.2nd 771].)

A defendant detained at a jail for failure to present satisfactory evidence of identification, pursuant to **Veh. Code § 40307**, may properly be subjected to a booking search even though not formally booked into the jail. (***People v. Benz*** (1984) 156 Cal.App.3rd 483, 489.)

Note: This theory is questionable given more recent authority holding that a "search incident to arrest" must be contemporaneous with the arrest. (See "*Contemporaneous in Time and Place*," above.)

Containers: The right to conduct a warrantless booking search includes the right to search containers (e.g., purse, wallet, etc.) in the possession of the person to be booked. (***Illinois v. Lafayette*** (1983) 462 U.S. 640, 643-647 [103 S.Ct. 2605; 77 L.Ed.2nd 65]; ***People v. Hamilton*** (1988) 46 Cal.3rd 123, 137.)

Exception; Cellphones: This rule, however, does not include cellphones despite the argument that cellphones are nothing more than a "*container of information*" (e.g., see ***People v. Michael E.*** (2014) 230 Cal.App.4th 261, 276-279.):

A warrantless search incident to arrest also does *not* include cellphones found on the person at the time of his arrest. (***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430].)

Note: Either consent or a warrant is required.

Cellphones are *not* containers for purposes of the vehicle exception to the search warrant requirement. (***United States v. Camou*** (9th Cir. 2014) 773 F.3rd 932, 941-943.)

See also ***United States v. Lara*** (9th Cir. 2016) 815 F.3rd 605, 610-611; declining to include defendant's cellphone under the category of a "container," in defendant's **Fourth** waiver search conditions.

See "*Seizures and Searches of High Tech Devices*" (Chapter 17), below.

Post-Booking Searches of Impounded Property: A warrantless search of a prisoner's impounded property, such as a wallet or a purse, which was not searched until after completion of the booking process, and when there is no exigency, violates the inmate's privacy rights. A search warrant will be required to lawfully search the impounded wallet, purse, or other item. (***People v. Smith*** (1980) 103 Cal.App.3rd 840; evidence recovered from a wallet, not previously searched, in the defendant's booked property.)

Exceptions: Although ***Smith*** has never been expressly overruled, its continuing validity is seriously in question. At the very least, the exceptions to ***Smith*** have just about eaten up the rule. For instance:

No warrant is necessary for a post-booking search when the personal property searched has previously been viewed by officials. (E.g.; during the booking process or during a lawful search incident to arrest.) (***People v. Davis*** (2000) 84 Cal.App.4th 390; ***United States v. Holzman*** (9th Cir. 1989) 871 F.2nd 1496, 1505; ***United States v. Thompson*** (5th Cir. 1988) 837 F.2nd 673, 675; ***United States v. Johnson*** (9th Cir. 1987) 820 F.2nd 1065, 1071-1072.)

Property which is evidence of a crime may be taken from the person of the defendant without a warrant, even hours after booking, for the purpose of examination and testing. (***United States v. Edwards*** (1974) 415 U.S. 800, 806 [94 S.Ct. 1234; 39 L.Ed.2nd 771, 777]; defendant's clothing, worn at the time of the booking, taken from him ten hours later, after replacement clothing was purchased for him.)

Note, however, the Supreme Court refused to "conclude that the **Warrant Clause** of the **Fourth Amendment** is never applicable to post-arrest seizures of the effects of an arrestee. [fn. Omitted]" (***Id.***, at p. 808 [39 L.Ed.2nd at p. 778].)

Recovery of a ring from defendant's booked property, contained in, and readily visible through, a transparent property bag, without the need to search any containers, was lawfully seized from

defendant's property without the need for a warrant. (***People v. Superior Court* [*Gunn*]** (1980) 112 Cal.App.3rd 970.)

> *Note*, however, the Court's discussion indicating that the right to search property without a warrant may even be broader: "Once articles have lawfully fallen into the hands of the police they may examine them to see if they have been stolen, test them to see if they have been used in the commission of a crime, return them to the prisoner on his release, or preserve them for use as evidence at the time of trial. [Citation] During their period of police custody an arrested person's personal effects, like his person itself, are subject to reasonable inspection, examination, and test. [Citation] Whatever segregation the police make as a matter of internal police administration of articles taken from a prisoner at the time of his arrest and booking does not derogate the fact of their continued custody and possession of such articles. [Citation]" (***Id.***, at pp. 974-975.)

Ring worn by defendant in a robbery, visible to and identifiable by the victim, and properly in the custody of the sheriff after booking, does not hold the "*vestige of privacy*" as did the wallet in ***Smith***, and was therefore properly retrieved from his impounded property in the jail and used as evidence in trial. (***People v. Bradley*** (1981) 115 Cal.App.3rd 744, 751; see also ***People v. Davis*** (2000) 84 Cal.App.4th 390.)

The warrantless search of defendant's personal effects, as an extension of the booking process, is okay. (***People v. Panfili*** (1983) 145 Cal.App.3rd 387, 392-394; where the arresting officer was instructed to isolate the property for a more detailed search later.)

An exception, however, does not to apply to cellphones in that cellphones do not pose a danger to officers and once seized, it is unlikely any evidence contained in the phone is going to be destroyed. When balanced with the large amount of personal information likely to be found in cellphones, a warrantless intrusion into the phone is not justified under the **Fourth Amendment** absent exigent circumstances. (***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430].)

Strip Searches of Prisoners:

Fifth *and* ***Fourteenth*** *Due Process, and* ***Fourth Amendment*** *Search and Seizure Issues*:

Rule: Whether a prison or county jail inmate may be lawfully subjected to a "*strip search*" has been the subject of some controversy, and been held to depend upon the circumstances, with **Fifth** and **Fourteenth Amendment** "*due process*," as well as **Fourth Amendment** "*search and seizure*" implications.

The ***Fourth Amendment***: *The* ***Fourth Amendment*** right of the people to be secure against unreasonable searches and seizures "extends to incarcerated prisoners; however, the reasonableness of a particular search is determined by reference to the prison context." (***Michenfelder v. Sumner*** (9th Cir. 1988) 860 F.2nd 328, 332; ***Bell v. Wolfish*** (1979) 441 U.S. 520, 545; [99 S.Ct. 1861; 60 L. Ed.2nd 447]; ***Bull v. City and County of San Francisco*** (9th Cir. 2010) 595 F.3rd 964, 972.)

"*Reasonableness*," under the **Fourth Amendment**, requires the court to balance the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the intrusion, the justification for initiating it, and the place in which it is conducted. (***Bell v. Wolfish***, *supra*, at p. 559.)

"A prison 'is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence.' . . . In determining whether a prison search is reasonable under the **Fourth Amendment**, the prison's 'significant and legitimate security interests' must be balanced against the privacy interests of those who enter, or seek to enter, the prison.'" (***Cates v. Stroud*** (9th Cir. 2020) 976 F.3rd 972, 979, quoting ***Bell v. Wolfish*** (1979) 441 U.S. 520, 558, 559-560 [99 S.Ct. 1861; 60 L.Ed.2nd 447].)

However, "(i)t is well-established that prisoners do not shed all constitutional rights at the prison gate, though these rights may be limited or restricted." (***Cates v. Stroud***, *supra*, citing ***Bell v. Wofish***, *supra*, at pp. 545-546.)

"Prisoners retain only those rights 'not inconsistent with their status as . . . prisoners or with the legitimate penological objectives of the corrections system.'" (***Cates***

v. Stroud, *supra*, quoting ***Gerber v. Hickman*** (9th Cir. 2002) 291 F.3rd 617, 620.)

Note also authority (albeit the minority rule) from another circuit holding that prisoners have *no* privacy interests protected by the **Fourth Amendment**. (***Johnson v. Phelan*** (7th Cir. 1995) 69 F.2rd 144, 150.)

However, even if a prisoner retains some degree of his or her **Fourth Amendment** rights, strip searches are reasonably related to legitimate penological interests, and therefore, if conducted properly, and limited to when necessary under the circumstances, are legal. (***Michenfelder v. Sumner***, *supra*, at p. 333.)

Due Process: Even if the **Fourth Amendment** is inapplicable, the (***Fifth*** and) ***Fourteenth Amendment*** "*due process*" clause(s) prohibit(s) prison officials from "treating prisoners in a fashion so 'brutal' and 'offensive to human dignity' as to 'shock the conscience.'" (***Vaughn v. Ricketts*** (9th Cir. 1988) 859 F.2nd 736, 742; digital cavity searches conducted in a brutal fashion.)

Visual Body Inspections:

Rule: The constitutionality of a visual inspection of a prison inmate's unclothed body, including body cavities, depends upon a balancing of (1) the scope of the particular intrusion, (2) the manner in which it is conducted, (3) the justification for initiating the search, and (4) the place in which it is conducted. (***People v. Collins*** (2004) 115 Cal.App.4th 137, 152-153.)

The ***Collins*** Court also noted that the more intrusive, "*physical body cavity search*" requires judicial authorization (i.e., a search warrant) and the use of properly trained medical personnel. (***Id***., at p. 143; see also ***Bouse v. Bussey*** (9th Cir. 1977) 573 F.2nd 548, 550; and ***United States v. Fowlkes*** (9th Cir. 2015) 804 F.3rd 954, 960-968.)

California Code of Regulations, Title 15, § 3287(b), allows for a visual search of an inmate, clothed or unclothed, whenever there is a "*substantial reason* to believe the inmate may have unauthorized or dangerous items concealed on his or her person." (Italics added) Judicial authorization (i.e., a search warrant), and the use of "medical personnel in a medical setting," is only required in the case of a "*physical* (as opposed to a non-contact *visual*) *body cavity search*." In ***Collins***, *supra*, a visual inspection of the

defendant's rectal area was intended, for which it is generally accepted that the rigorous requirements of the more intrusive "*physical body cavity search*" is not required.

Case Law:

> Such visual body cavity searches have been upheld under circumstances constituting less than even a reasonable suspicion, such as after a visit to the law library, infirmary or exercise room, or an encounter with an outsider. (***People v. Collins***, *supra*, at pp. 152-155; ***Goff v. Nix*** (8th Cir. 1986) 803 F.2nd 358, 368-371; ***Campbell v. Miller*** (7th Cir. 1986) 787 F.2nd 217, 228; and ***Arruda v. Fair*** (1st Cir. 1983) 710 F.2nd 886, 886-888.)
>
> > *Note*: Violation of the administrative provisions for the searching of prisoners in a prison, absent a constitutional violation, does not require the suppression of any resulting evidence. (***People v. Collins***, *supra*, at p. 156.)
>
> See ***Byrd v. Maricopa County Board of Supervisors*** (9th Cir. 2017) 845 F.3rd 919, where it was held that a federal district court had erred when it sua sponte dismissed a pretrial detainee's **42 U.S.C. § 1983** civil suit which challenged a county sheriff's policy of allowing female guards to observe male pretrial detainees' use of the shower and bathroom, as plaintiff had stated claims under the **Fourth** and **Fourteenth Amendments** because the scope and manner of the intrusions were far broader than those that have been previously approved, such that the claim was not foreclosed by precedent, and whether it was a violation of his right to bodily privacy or cruel and unusual punishment required further litigation.

Blood Draws:

> "'In the prison context, where inmates are routinely subject to medical procedures, including blood draws, and where their expectation of bodily privacy, while intact, is diminished [citation], the intrusiveness of a blood draw is even further minimized.'" (***People v. Robinson*** (2010) 47 Cal.4th 1104, 1120; quoting ***Nicholas v. Goord*** (2nd Cir. 2005) 430 F.3rd 652, 669 [fn. omitted)].)

Strip Searches Restricted: With these principles in mind, the Courts have been reluctant to grant jail and prison officials carte blanch authority to conduct unrestricted strip searches:

> A "*search incident to arrest*" does *not* include a "*strip search*" which, as a "serious intrusion upon personal rights" and "an invasion of personal rights of the first magnitude" (***Chapman v. Nichols*** (10th Cir. 1993) 989 F.2nd 393, 395-396.), is generally not allowed prior to booking. (***Foote v. Spiegel*** (10th Cir Dist. Utah 1995) 903 F.Supp. 1463.)
>
> The fact that the offense for which the defendant was arrested is classified as a felony does not mean that a strip search is constitutional. The seriousness of the offense must be balanced with all the other factors. (***Kennedy v. Los Angeles*** (9th Cir. 1989) 901 F.2nd 702, 710-716; arrest for grand theft did not warrant a visual strip search, under the circumstances.)
>
> But, a visual strip search was upheld for a person arrested for grand theft auto, in that this offense is sufficiently associated with violence to justify the intrusion into defendant's privacy. (***Thompson v. Los Angeles*** (9th Cir. 1989) 885 F.2nd 1439, 1445-1448.)
>
> > ***Thompson v. Los Angeles***, *supra*, however, was overruled in ***Bull v. City and County of San Francisco*** (9th Cir. 2010) 595 F.3rd 964 (see below; "*Strip Searches Upheld*"), in so far as it noted that strip searches must be based upon a reasonable suspicion that the arrestee is carrying contraband and not on whether he is going to be place in a jail's general population.
>
> Also, searches which are excessive, vindictive, harassing, or unrelated to any legitimate penological interest will *not* be upheld. (***Michenfelder v. Sumner***, *supra*, at p. 332; routine and repeated visual body cavity searches upheld for inmates in a maximum security prison holding Nevada's 40 most dangerous prisoners.)
>
> Contact body cavity searches of female inmates conducted by police officers, without medical personnel, in a non-hygienic manner and in the presence of male officers, rejected as unreasonable. (***Bonitz v. Fair*** (1st Cir. 1986) 804 F.2nd 164, 172-173.)
>
> However, female prison guards subjecting male inmates to periodic body cavity searches was held *not* to be a **Fourteenth**

Amendment due process violation, nor an **Eighth Amendment** "*cruel and unusual punishment*," and therefore will not subject the guards to any civil liability. (***Somers v. Thurman*** (9th Cir. 1997) 109 F.3rd 614.)

A "*partial strip search*" (i.e., with the prisoner clothed in his boxer shorts only) of a male prisoner by a female detentions cadet (or any such "cross-gender" strip search), held to be a **Fourth Amendment** violation absent an emergency situation. (***Byrd v. Maricopa County Sheriff's Department*** (9th Cir. 2011) 629 F.3rd 1135, 1140-1147; but see the dissent, pgs. 1147-1154.)

Being arrested for possession of marijuana does not justify a physical body cavity search at the side of the road. (See ***Hamilton v. Kindred*** (5th Cir. 2017) 845 F.3rd 659; holding that it was clearly established in the Fifth Circuit that an officer could be liable as a bystander in a civil case involving excessive force (referring to the physical body cavity search) if he knew a constitutional violation was taking place and he had a reasonable opportunity to prevent the harm.)

In a concurring opinion to the Supreme Court's denial of certiorari in a case where the female plaintiff was subjected to a warrantless inspection of her vagina and anus by a male doctor, based upon what was alleged to be a "reasonable suspicion that she was hiding contraband, Justice Sonia Sotomayer noted that '(t)he necessity of a (body cavity) search and its extent cannot be determined in a vacuum. It must instead "be judged in light of the availability of . . . less invasive alternative[s].'" (Citing ***Birchfield* v. *North Dakota*** (2016) 579 U. S. 438 (136 S.Ct. 2160, at pp. 2165 & 2184.).) "When such an option exists, the State must offer a 'satisfactory justification for demanding the more intrusive alternative.'" ***Ibid***. Also citing ***Florida* v. *Royer*** (1983) 460 U.S. 491, 500 [103 S.Ct. 1319; 75 L.Ed.2nd 229]: "[T]he investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion"). (***Brown v. Polk County*** (Apr. 19, 2021) __ U.S. __, __ [141 S.Ct. 1304; 209 L.Ed.2nd 573]; noting that the court below "did not address the option of a solely visual search . . . or multiple visual searches over time, . . . (or) X ray or transabdominal ultrasound, . . . (or) isolat(ing) the detainee and investigate further to obtain probable cause, . . . (or) await a monitored bowel movement." (at p. __.)

Strip Searches Upheld:

A full body cavity search of a group of 40 to 44 inmates returning to an honor farm from a day's work furlough was upheld when based upon information that marijuana was being brought into the honor farm. The body cavity searches were conducted by a doctor using an acceptable medical procedure. (***People v. West*** (1985) 170 Cal.App.3rd 326.)

X-raying all incoming prisoners being moved from one high-risk prison to a second high-risk prison is lawful. (***People v. Pifer*** (1989) 216 Cal.App.3rd 956.)

An en banc panel of the Ninth Circuit reversed its prior decisions and in ***Thompson v. City of Los Angeles*** (9th Cir. 1989) 885 F.2nd 1439, and ***Giles v. Ackerman*** (9th Cir. 1984) 746 F.2nd 614, and held that a sheriff's blanket policy of doing non-contact strip searches of all persons being placed into the general jail population was reasonable and lawful. (***Bull v. City and County of San Francisco*** (9th Cir. 2010) 595 F.3rd 964.)

Resolution of the Conflict:

Finally, the United States Supreme Court ended the debate on this issue. Defendant, arrested on an outstanding warrant and briefly incarcerated in two different jails in the general jail population, was subject to strip searches on two occasions. The charges against him were later dismissed in that defendant had earlier satisfied the requirements of the warrant. Defendant claimed that individuals arrested for minor offenses should not be required to remove their clothing and expose the most private areas of their bodies to close visual inspection as a routine part of the jail intake process. He argued that jail officials could conduct this kind of search only if they had reason to suspect a particular inmate of concealing a weapon, drugs or other contraband. The Supreme Court disagreed and, in a 5-to-4 decision, affirmed the Third Circuit Court of Appeals, holding that the search procedures at the two jails struck a reasonable balance between inmate privacy and the needs of the institutions. (***Florence v. Board of Chosen Freeholders of the County of Burlington*** (2012) 566 U.S. 318 [132 S.Ct. 1510; 182 L.Ed.2nd 566].)

In so holding, the Court accepted the prison officials' assertions, supported by evidence presented, that strip searches were needed to:

- Detect injury or disease upon intake; Identify gang-related markings and tattoos so as to avoid housing problems and violence, *and*

- Detect contraband that might be harmful to prisoners and prison officials alike.

Note: This rule probably does *not* apply to persons arrested on a minor traffic offense and/or who are *not* held in the jail's general population. (See ***Id***., 132 S.Ct. at pp. 1522-1523; "This case does not require the Court to rule on the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees.")

See also "*Misdemeanor (and Infraction) Booking Searches*," below, and ***Brown v. Polk County*** (Apr. 19, 2021) __ U.S. __ [141 S.Ct. 1304; 209 L.Ed.2nd 573].)

Continued Limitations:

However, the forcible removal of a baggie containing drugs from defendant's rectum by officers without medical training or a warrant during a visual body cavity search, while defendant was in the city jail, was held to have violated defendant's **Fourth Amendment** rights. (***United States v. Fowlkes*** (9th Cir. 2015) 804 F.3rd 954, 960-968.)

See **Cal. Code of Reg., Title 15, § 3287(b)**, for statutory rules on strip searches of prison inmates.

Misdemeanor (and Infraction) Booking Searches:

Statutory Rules re Body Cavity Searches and Housing in the General Jail Populations: In the case of most misdemeanor and infraction arrestees, the California Legislature has restricted by statute the right to conduct "*strip*" and "*visual*" or "*physical*" *body cavity searches*, as well as rule concerning housing in the general jail population (**Pen. Code §§ 4030** & **4031**; see below.)

Pen. Code § 4030(a): Legislative purpose to establish "a statewide policy strictly limiting strip and body cavity searches" for pre-arraignment misdemeanor and infraction detainees in county jails.

Pen. Code § 4030(b): The following restrictions apply only to *pre-arraignment detainees* arrested for infraction and misdemeanor offenses, and minors detained prior to a detention hearing for infraction and misdemeanor violations. They *do not* apply to prisoners of the Department of Corrections & Rehabilitation or the Division of Juvenile Justice in the Department of Corrections and Rehabilitation, or to post-arraignment inmates in local custody.

Pen. Code § 4030(c): *Definitions*:

> **Subd. (c)(1)**: "*Body Cavity*" means the stomach or rectal cavity of a person, and vagina of a female person.
>
> **Subd. (c)(2)**: "*Physical Body Cavity Search*" means physical intrusion into a body cavity for the purpose of discovering any object concealed in the body cavity. (Often referred to as a "*manual body cavity search*" in federal cases.)
>
> **Subd. (c)(3)**: "*Strip Search*" means any search which requires the officer to remove or arrange some or all of that person's clothing so as to permit a visual inspection of the underclothing, breasts, buttocks, or genitalia of the person.
>
> **Subd. (c)(4)**: "*Visual Body Cavity Search*" means visual inspection of a body cavity.

Pen. Code § 4030(d)(1): Notwithstanding any other law, including **V.C. § 40304.5**, when a person is arrested and taken into custody, that person may be subjected to *patdown searches*, *metal detector searches*, *body scanners*, and thorough clothing searches in order to discover and retrieve concealed weapons and contraband substances prior to being placed in a booking cell.

> **Subd. (d)(2)** An agency that utilizes a body scanner pursuant to this subdivision shall endeavor to avoid knowingly using a body scanner to scan a woman who is pregnant.

Pen. Code § 4030(e): A person arrested and held in custody on a misdemeanor or infraction offense, except those involving weapons, controlled substances, or violence, or a minor detained prior to a detention hearing on the grounds that he or she is a person described in **W&I Code §§ 300**, **601** or **602**, except for those minors alleged to have committed felonies or offenses

involving weapons, controlled substances, or violence, shall not be subjected to a strip search or visual body cavity search prior to placement in the general jail population, unless a peace officer has determined there is reasonable suspicion, based on specific and articulable facts, to believe that person is concealing a weapon or contraband, and a strip search will result in the discovery of the weapon or contraband. A strip search or visual body cavity search, or both, shall not be conducted without the prior written authorization of the supervising officer on duty. The authorization shall include the specific and articulable facts and circumstances upon which the reasonable suspicion determination was made by the supervisor.

Pen. Code § 4030(f)(1) & **(2)**: Restrictions on being Confined in the General Jail Population:

> **Subd. (f)(1)** Except pursuant to the provisions of **para. (2)**, a person arrested and held in custody on a misdemeanor or infraction offense not involving weapons, controlled substances, or violence, shall not be confined in the general jail population unless all of the following are true:
>
> > **(A)** The person is not cited and released.
> >
> > **(B)** The person is not released on his or her own recognizance.
> >
> > **(C)** The person is not able to post bail within a reasonable time, not less than three hours.
>
> **Subd. (f)(2)** A person shall not be housed in the general jail population prior to release pursuant to the provisions of **para. (1)** unless a documented emergency exists and there is no reasonable alternative to that placement. The person shall be placed in the general population only upon prior written authorization documenting the specific facts and circumstances of the emergency. The written authorization shall be signed by the uniformed supervisor of the facility or by a uniformed watch commander. A person confined in the general jail population pursuant to **para. (1)** shall retain all rights to release on citation, his or her own recognizance, or bail that were preempted as a consequence of the emergency.
>
> An arrest for the misdemeanor offense of being under the influence of a controlled substance, per **H&S § 11550**, does

not justify a later visual body cavity search at the jail prior to being taken into the general jail population, despite this statute to the contrary, absent any specific articulable facts amounting to a reasonable suspicion that the arrestee does in fact possess a controlled substance. (***Way v. County of Ventura*** (2006) 445 F.3rd 1157.)

Pen. Code § 4030(g): No person (nor a minor, prior to a disposition hearing) arrested for an infraction or a misdemeanor offense shall be subjected to a "*physical body cavity search*" except under the authority of a *search warrant* issued by a magistrate specifically authorizing the physical body cavity search.

Pen. Code § 4030(h): A copy of the prior written authorization required by **subds. (e)** and **(f)** and the search warrant required by **subd. (g)** shall be placed in the agency's records and made available, on request, to the person searched or his or her authorized representative. With regard to a strip search or visual or physical body cavity search, the time, date, and place of the search, the name and sex of the person conducting the search, and a statement of the results of the search, including a list of items removed from the person searched, shall be recorded in the agency's records and made available, upon request, to the person searched or his or her authorized representative.

Pen. Code § 4030(i): Persons conducting a "*strip search*" or a "*visual body cavity search*" *shall not touch* the breasts, buttocks, or genitalia of the person being searched.

Pen. Code § 4030(j): "*Physical body cavity searches*" may be conducted only:

- Under sanitary conditions.

- Only by a physician, nurse practitioner, registered nurse, licensed vocational nurse or emergency medical technician Level II, licensed to practice in this state.

Pen. Code § 4030(k)(1): All persons conducting or otherwise present for a "*strip search*," or a "*visual*" or "*physical body cavity search*," except for physicians or licensed medical personnel, shall be of the *same sex* as the person being searched.

Subd. (k)(2) A person within sight of the visual display of a body scanner depicting the body during a scan shall be of

the same sex as the person being scanned, except for physicians or licensed medical personnel.

Pen. Code § 4030(*l*): All "*strip searches*," or "*visual*" or "*physical body cavity searches*" shall be conducted in an area of privacy so that the search cannot be observed by persons not participating in the search. Persons are considered to be participating in the search if their official duties relative to search procedure require them to be present at the time the search is conducted.

Pen. Code § 4030(m): Violation of any of the above is a misdemeanor; 6 months and $1,000 fine. (**P.C. § 19**)

Pen. Code § 4030(n) & **(o)**: Civil remedies for violations.

Pen. Code § 4031: Searches of Minors in Juvenile Detention Centers:

Subd. (a): This section applies to all minors detained in a juvenile detention center on the grounds that he or she is a person described in **W&I §§ 300**, **601**, or **602**, and all minors adjudged a ward of the court and held in a juvenile detention center on the grounds he or she is a person described in **W&I §§ 300**, **601**, or **602**.

Subd. (b): Persons conducting a strip search or a visual body cavity search shall not touch the breasts, buttocks, or genitalia of the person being searched.

Subd. (c): A physical body cavity search shall be conducted under sanitary conditions, and only by a physician, nurse practitioner, registered nurse, licensed vocational nurse, or emergency medical technician Level II licensed to practice in this state. A physician engaged in providing health care to detainees, wards, and inmates of the facility may conduct physical body cavity searches.

Subd. (d): A person conducting or otherwise present or within sight of the inmate during a strip search or visual or physical body cavity search shall be of the same sex as the person being searched, except for physicians or licensed medical personnel.

Subd. (e): All strip searches and visual and physical body cavity searches shall be conducted in an area of privacy so

that the search cannot be observed by persons not participating in the search. Persons are considered to be participating in the search if their official duties relative to search procedure require them to be present at the time the search is conducted.

Subd. (f): A person who knowingly and willfully authorizes or conducts a strip searches and visual or physical body cavity search in violation of this section is guilty of a misdemeanor.

Subd. (g): Nothing in this section shall be construed as limiting the common law or statutory rights of a person regarding an action for damages or injunctive relief, or as precluding the prosecution under another law of a peace officer or other person who has violated this section.

Subd. (h): Any person who suffers damage or harm as a result of a violation of this section may bring a civil action to recover actual damages, or one thousand dollars ($1,000), whichever is greater. In addition, the court may, in its discretion, award punitive damages, equitable relief as it deems necessary and proper, and costs, including reasonable attorney's fees.

Subd. (i): This section does not limit the protections granted by **P.C. § 4030** to individuals described in **subd. (b)** of that section.

Case law:

People v. Wade (1989) 208 Cal.App.3rd 304: Probable cause existed for a visual body cavity search of a defendant arrested for a narcotics violation, although other **Pen. Code § 4030** requirements were not met. However, **Pen. Code § 4030** does not provide for suppression of evidence as a remedy for violating the terms of this section, and the search was valid under federal constitutional law. Therefore, the resulting evidence was admissible despite the **Pen. Code § 4030** violation.

An en banc panel of the Ninth Circuit Court of Appeal, in ***Bull v. City and County of San Francisco*** (9th Cir. 2010) 595 F.3rd 964, overruled itself in its prior decision of ***Giles v. Ackerman*** (9th Cir 1984) 746 F.2nd 614, ***Giles*** having held that a person arrested on minor misdemeanor arrest warrants, with no prior criminal history or any relationship to drugs or weapons, could not be subjected to

a strip search even though she was to be put into the general jail population. ***Florence v. Board of Chosen Freeholders of the County of Burlington*** (2012) 566 U.S. 318 [132 S.Ct. 1510; 182 L.Ed.2nd 566] also has the effect of overruling these prior Ninth Circuit decisions.

Balancing the interests involved, it has been held to be a **Fourteenth** (and **Fifth**) **Amendment** *due process* violation to strip-search a *misdemeanor arrestee* where the arrestee is not to be intermingled with the general jail population, the offense for which she was arrested is not one commonly associated with the possession of weapons or contraband (i.e., DUI in this case), and there is no cause to believe she may possess either. (***Logan v. Shealy*** (4th Cir. 1981) 660 F.2nd 1007.)

See ***Byrd v. Maricopa County Board of Supervisors*** (9th Cir. 2017) 845 F.3rd 919, where it was held that a federal district court had erred when it sua sponte dismissed a pretrial detainee's **42 U.S.C. § 1983** civil suit which challenged a county sheriff's policy of allowing female guards to observe male pretrial detainees' use of the shower and bathroom, as plaintiff had stated claims under the **Fourth** and **Fourteenth Amendments** because the scope and manner of the intrusions were far broader than those that have been previously approved, such that the claim was not foreclosed by precedent, and whether it was a violation of his right to bodily privacy or cruel and unusual punishment required further litigation.

Searches of Jail Cells:

The United States Supreme Court has upheld the random, warrantless searches of an inmate's prison cell, concluding that the **Fourth Amendment's** proscription against unreasonable searches and seizures is not applicable because an inmate has no reasonable expectation of privacy in his or her cell. (***Hudson v. Palmer*** (1984) 468 U.S. 517, 526 [104 S.Ct. 3194; 82 L.Ed.2nd 393, 402-403].)

The courts have found the rules for prisons to be no different than those for a county jail. (See ***DeLancie v. Superior Court*** (1982) 31 Cal.3rd 865, overruled on other grounds.)

The California Supreme Court is in accord, applying the rule of ***Hudson v. Palmer*** to a defendant's jail cell. (***People v. Bittaker*** (1989) 48 Cal.3rd 1046, 1096.)

In discussing the warrantless seizure of materials from the defendant's jail cell that were relevant to a pending murder

prosecution, the California Supreme Court, at pages 1095-1096, noted that: "(D)efendant had no reasonable expectation of privacy in property within his jail cell either under federal law (see ***Hudson* v. *Palmer*** (1984) 468 U.S. 517, 526 [104 S.Ct. 3194; 82 L.Ed.2d 393, 402-403 . . .].) or under California decisions which govern searches antedating ***DeLancie* v. *Superior Court*** (1982) 31 Cal.3d 865 . . . (see ***People* v. *Valenzuela*** (1984) 151 Cal.App. 3d 180, 189 . . . and cases there cited). Since Budds could have seized the manuscript without asking for or receiving consent, the issues defendant raises are immaterial to the validity of the seizure."

The California Supreme Court has also interprets ***Hudson*** to mean that eavesdropping on jail inmates' (including pretrial detainees) conversations is lawful due to the lack of an expectation of privacy, and even if done for the purpose of collecting evidence. (***People v. Davis*** (2005) 36 Cal.4th 510, 523-529; recognizing that some courts disagree on whether pretrial detainees have a higher expectation of privacy than do convicted inmates.)

Similarly, the warrantless search of defendant's dormitory room in a state hospital where he had been committed as a sexually violent predator (SVP) was lawful, defendant not having a reasonable expectation of privacy in the dormitory. The dormitory shared none of the attributes of privacy of a home. The dormitory itself accommodated multiple patients. Officers conducted random searches on a daily basis. Also, various signs throughout the facility warned residents that they were subject to such searches. (***People v. Golden*** (2017) 19 Cal.App.5th 905.)

See also **Cal. Code of Reg., Title 15, §§ 3287(a)** and **4711** for statutory rules on the searches of prison cells and other inmate property.

Male Correctional Officers and Female Inmates; ***Pen. Code § 2644***:

Subd. (a): A male correctional officer *shall not* conduct a pat down search of a female inmate unless the prisoner presents a risk of immediate harm to herself or others or risk of escape and there is not a female correctional officer available to conduct the search.

Subd. (b): A male correctional officer *shall not* enter into an area of the institution where female inmates may be in a state of undress, or be in an area where they can view female inmates in a state of undress, including, but not limited to, restrooms, shower areas, or medical treatment areas, unless an inmate in the area presents a risk of immediate harm to herself or others or if there is a medical emergency in the area. A male correctional officer shall not enter into an area prohibited under this subdivision if there is a female correctional officer who can resolve the situation in a

safe and timely manner without his assistance. To prevent incidental viewing, staff of the opposite sex shall announce their presence when entering a housing unit.

Subd. (c): If a male correctional officer conducts a pat down search under an exception provided in **subd. (a)** or enters a prohibited area under an exception provided in **subd. (b)**, the circumstances for and details of the exception shall be documented within three days of the incident. The documentation shall be reviewed by the warden and retained by the institution for reporting purposes.

Subd. (d): The department may promulgate regulations to implement this section.

Monitoring of Jail Visitations and Telephone Calls:

Rule: Given an inmate's lack of any reasonable expectation of privacy, the California Supreme Court in ***People v. Loyd*** (2002) 27 Cal.4th 997 (overruling its previous decision in ***Delancie v. Superior Court*** (1982) 31 Cal.3rd 865), upheld the *constitutionality* of the following, even when done for the sole purpose of seeking incriminating evidence, and despite the lack of a warrant or other judicial authorization.

- Monitoring and recording of *jail visitations*.
- Monitoring and recording of jail conversations over *internal phone lines*.
- Monitoring and recording of jail conversations over *external phone lines*.

Note: **Pen. Code §§ 2600** & **2601(d)**, purporting to provide state prison (and by inference, county jail) inmates with a right to have visitors, were both amended by the Legislature in 1997 (via **SB 1260**), eliminating that right.

Case Law:

The Court in ***People v. Loyd*** (2002) 27 Cal.4th 997, specifically declined to decide the applicability of **Title III** of the **Omnibus Crime Control and Safe Streets Act of 1968** (**18 U.S.C. §§ 2510-2520**) to the monitoring and recording of jail conversations over *external* telephone lines.

However, under **Title III**; "(I)t shall not be unlawful . . . for a person acting under color of law to intercept a wire, oral, or electronic communication where . . . one of the parties to

> the communication has given prior consent to such interception." (**18 U.S.C. § 2511(2)(c)**, **(d)**)
>
> See ***People v. Zepeda*** (2001) 87 Cal.App.4th 1183, where the need to obtain judicial authorization was assumed, without discussion, to be the law.

Based upon this, it has been held that where a sign has been posted indicating that "*telephone calls may be monitored and recorded*," inmates are on notice, and his or her "decision to engage in conversations over those phones constitute implied consent to that monitoring and takes any wiretap outside the prohibitions of **Title III**." (***People v. Kelly*** (2002) 103 Cal.App.4th 853, 858; warrantless recording of defendant's telephone conversations to parties on the outside approved.)

> Such warning signs also take such telephone calls outside the search warrant provisions of California's wiretap statutes. (**Pen. Code §§ 629.50 et seq**.; ***Id***., at pp. 859-860.)

See **also *People v. Windham*** (2006) 145 Cal.App.4th 881: The warrantless monitoring and recording of a jail inmates' telephone calls, where signs were posted, a message was heard at the beginning of every call, and jail rules provided to inmates, all noted that telephone calls would be monitored, violated neither the federal **Title III** rules nor California's **Privacy Act** provisions (**Pen. Code §§ 630 et seq.**)

Note also, a phone used during a physical visitation by a prisoner and his or her visitor does *not* meet the requirements of a "*wire communication*," not using a line in interstate or foreign commerce. It is therefore not subject to the wiretap restrictions of **Pen. Code § 631**. (***People v. Santos*** (1972) 26 Cal.App.3rd 397, 402.)

The California Supreme Court interprets ***Hudson v. Palmer*** (1984) 468 U.S. 517, 526 [104 S.Ct. 3194; 82 L.Ed.2nd 393, 402-403], to similarly allow eavesdropping on the conversations of inmates (including pretrial detainees) due to the lack of an expectation of privacy, even if done for the purpose of collecting evidence. (***People v. Davis*** (2005) 36 Cal.4th 510, 523-529.)

See also ***People v. Leonard*** (2007) 40 Cal.4th 1370, 1404, where the California Supreme Court found no violation of the **Fourth Amendment**, the **California Constitution's** right to privacy, and **Title III** of the federal **Omnibus Crime Control and Safe Streets**

Act of 1968 (**42 U.S.C. § 3711**) by videotaping the defendant's end of a telephone conversation with his father when the defendant knew he was being videotaped.

The Ninth Circuit Court of Appeal is in accord. (***United States v. Van Poyck*** (9th Cir. 1996) 77 F.3rd 285, 291; "(A)ny expectation of privacy in outbound calls from prison is not objectively reasonable and . . . the **Fourth Amendment** is therefore not triggered by the routine taping of such calls.")

See also ***United States v. Monghur*** (9th Cir. 2009) 588 F.3rd 975, 979; noting that the defendant conceded, "as he must, that he had no expectation of privacy in those calls" from county jail, where warnings were posted that telephone conversations from jail were monitored and recorded; citing ***Van Poyck***, *supra*.)

Exceptions: There are a number of very important exceptions with which law enforcement *must* be aware:

Pen. Code § 636(a): *Eavesdropping on Conversations with an Attorney, Religious Advisor, or Licensed Physician*: Makes it a felony to *eavesdrop on*, or *record*, by means of *an electronic device*, a conversation between a person in the physical custody of a law enforcement officer or other public officer, or who is on the property of a law enforcement agency or other public agency, and that person's *attorney*, *religious advisor*, or *licensed physician*. (See ***In re Jordan*** (1972) 7 Cal.3rd 930, 937-938, fn. 3; ***People v. Lopez*** (1963) 60 Cal.2nd 223, 248.)

Subdivision (b) makes it a felony to *eavesdrop on* such a conversation by "*nonelectronic*" means, but excludes inadvertently overhearing such a conversation, or when the conversation is in a courtroom or other room used for adjudicatory proceedings.

However, a state prison inmate has no reasonable expectation of privacy under either **P.C. § 636** or **Cal. Const., art. I, § 1**, when he is being seen by a physician for treatment. It is not a violation of these provisions for a correctional officer to be allowed to be present during such examinations where the officer's presence is a matter of prison policy to further the safety and security of the institution, consistent with **Pen. Code § 2600**. (***Faunce v. Cate*** (2013) 222 Cal.App. 4th 166, 170-172.)

Lulling an Inmate into Believing a Conversation was Confidential: Where jail officers acted so that the suspect "and his wife were lulled into believing that their conversation would be confidential." (***North v. Superior Court*** (1972) 8 Cal.3rd 301, 311; ***People v. Loyd*** (2002) 27 Cal.4th 997, 1002.)

See also, "*Wiretap Laws*," under "*Searches with a Search Warrant*" (Chapter 10), above.

Monitoring Jail Mail:

Rule: It is constitutionally permissible to monitor inmate mail coming into a jail facility. (***Wolff v. McDonnell*** (1974) 418 U.S. 539, 576-577 [94 S.Ct. 2963; 41 L.Ed.2nd 935]; ***People v. Dinkins*** (1966) 242 Cal.App.2nd 892, 903; ***People v. Jones*** (1971) 19 Cal.App.3rd 437, 449.)

Under the theory of ***People v. Loyd*** (2002) 27 Cal.4th 997, it would seem that monitoring all non-legal mail, coming in and going out of a facility, would be constitutionally permissible even if the purpose is to look for incriminating evidence.

Outgoing mail may be monitored, "to prevent any threats emanating from inmates." (***People v. Jones***, *supra*, see **Cal. Code Regs, Title 15, § 3138(a)**)

Exception: The sole exception is legal correspondence to the defendant's attorney. (**Cal. Code Regs, tit. 15, § 3141(b), (c)**): "An attorney at law listed with a state bar." (**subd. (c)(6)**)

An inmate's "*legal mail*" (i.e., correspondence with the prisoner's attorney) may be opened as well, so long as it is not read. (***People v. Poe*** (1983) 145 Cal.App.3rd 574; ***People v. White*** (1984) 161 Cal.App.3rd 246.)

A prison inmate has a viable lawsuit under **42 U.S.C. § 1983** where he has alleged that prison officials have opened and read, as opposed to merely inspected for contraband, his legal mail address to his attorney, and, in seeking injunctive relief, he sufficiently alleged the threatened repetition of his **Sixth Amendment** rights where he remains incarcerated and a corrections director personally informed him that prison officials were permitted to read his legal mail. (***Nordstrom v. Ryan*** (9th Cir. 2014) 762 F.3rd 903,908-912; citing ***Wolff v. McDonnell*** (1974) 418 U.S. 539, 576-577 [94 S.Ct. 2963; 41 L.Ed.2nd 935], which upheld the right of jail officials to open and inspect, but not read, mail to an inmates attorney.)

A prisoner has a **First Amendment** right to be present when his properly marked legal mail is opened for inspection. (***Hayes v. Idaho Correctional Center*** (9th Cir. 2017) 849 F.3rd 1204.)

A prisoner's **Sixth Amendment** right to counsel and **First Amendment** freedom of speech are violated when jail guards read, or even open while not in the prisoner's presence, his legal mail relating to criminal proceedings. (***Mangiaracina v. Penzone*** (9th Cir, 2017) 849 F.3rd 1191.)

"*Intra-jail mail*" between inmates may also be read "to discover any threats that might be made to an inmate, 'snitch jackets' placed on other inmates, and to detect coordination of possible escape attempts between inmates in custody." (***People v. McCaslin*** (1986) 178 Cal.App.3rd 1, 4.)

Additional Case Law:

The marital communication privilege does not protect defendant's personal letters to his wife. (***United States v. Griffin*** (9th Cir. 2006) 440 F.3rd 1138.)

Interference with outgoing prisoner mail is only justified if the regulation furthers an important or substantial governmental interest unrelated to the suppression of expression. The limitation of **First Amendment** freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. With respect to the first requirement, the U.S. Supreme Court identified three relevant governmental interests: (1) The preservation of internal order and discipline; (2) the maintenance of institutional security against escape or unauthorized entry; and (3) the rehabilitation of the prisoners. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. (***Lane v. Swain*** (9th Cir. 2018) 910 F.3rd 1293, 1296; citing ***Procunier v. Martinez*** (1974) 416 U.S. 396, 412-413 [94 S.Ct. 1800; 40 L.Ed.2nd 224].)

The second prong requires the limitation to be "no greater than is necessary" to protect such interests. The Supreme Court has made clear, however, that ***Procunier*** should not be read "as subjecting the decisions of prison officials to a strict 'least restrictive means' test." (***Id***, quoting

Thornburgh v. Abbott (1989) 490 U.S. 401, 411 [109 S.Ct. 1874; 104 L.Ed.2nd 459].)

In ***Lane***, The district court properly denied the inmate's three **28 U.S.C. § 2241** habeas corpus petitions, stemming from the revocation of his good time credits for violating **Bureau of Prison** ("BOP") **Prohibited Acts Code 203, 28 C.F.R. § 541.3, Table 1**, by sending threatening letters from prison, holding that the term "another" and the phrase "any other offense" were not so broad and vague as to violate his rights under the **First Amendment** when read reasonably in the context of the prison setting, and limiting the phrase "any other offense" to criminal offenses or violations of BOP rules.

Prison authorities may enact and enforce rules restricting the receipt of magazines and other literature so long as such regulations "support the legitimate penological interests of reducing prohibited behaviors such as sexual aggression and gambling and maintaining respect for legitimate authority." (***Bahrampour v. Lampert*** (9th Cir. 2004) 356 F.3rd 969.)

Turner v. Safley (1987) 482 U.S. 79 [107 S.Ct. 2254; 96 L.Ed.2nd 64], laid out a four-factor test for evaluating the reasonableness of jail regulations, requiring courts to consider (1) whether there is a "rational connection" between the regulation and a "legitimate and neutral" government objective; (2) whether "alternative means of exercising the right" remain available to inmates; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources;" and (4) whether "the existence of obvious, easy alternatives" to the regulation indicate that it "is an 'exaggerated response' to prison concerns."

A jail policy of prohibiting unsolicited commercial mail (i.e., magazines) was held to be lawful where the four-factors of ***Turner v. Safley***, *supra*, were satisfied. Given the problems that the paper from such mail cause in a jail (e.g., covering windows and lights, blocking air vents and speakers, clogging toilets, passing notes, obstructing security cameras, and hiding contraband), and in light of the fact that a more appropriate method of allowing the contents of the magazines to be made available to inmates (i.e., the use of electronic kiosks), the jail's policy was upheld as reasonable. (***Crime Justice & Am., Inc. v. Honea*** (9th Cir. 2017) 876 F.3rd 966.)

Note: None of the above cases have required, or indicated the need for, a search warrant to monitor jail mail.

Regulating Jail/Prison Visitations:

Rule: There is no constitutionally guaranteed "*due process*" right to visitation for jail or prison inmates. "The denial of prison access to a particular visitor 'is well within the terms of confinement ordinarily contemplated by a prison sentence,' (***Hewitt v. Helms*** (1983) 459 U.S. 460, 468 [107 S.Ct. 2672; 96 L.Ed.2nd 654].), and therefore is not independently protected by the Due Process Clause." (***Kentucky Department of Corrections v. Thompson*** (1989) 490 U.S. 454, 461 [109 S.Ct. 1904; 104 L.Ed.2nd 506, 515].)

Exceptions:

See **Pen. Code §§ 2600** & **2601(d)**, purporting to provide state prison (and by inference, county jail) inmates with a right to have visitors, were both amended by the Legislature in 1997 (via **SB 1260**), eliminating that right.

A state, however, may create such enforceable liberty interests in the prison, and presumably county jail, settings by statute. (***Ibid***.; ***Hewitt v. Helms*** (1983) 459 U.S. 460, 469 [107 S.Ct. 2672; 96 L.Ed.2nd 654].)

However, it has been held, at least for purposes of persons attempting to visit an inmate of any of the prisons of the California Department of Corrections, while justifying the lowered search standard on the theory that keeping weapons and contraband out of a prison is an important governmental interest and that therefore searching visitors is an "*administrative search*," the visitor must be given the option of forgoing the visit, and leaving, rather than submitting to a strip search. (***Estes v. Rowland*** (1993) 14 Cal.App.4th 508.) See below.

Case Law:

A person who intends to visit a prison or county jail inmate will be subject to a strip search, including a "*visual body cavity search*," whenever there is a "*reasonable suspicion*" to believe the visitor possessions weapons and/or contraband. (***In re Roark*** (1996) 48 Cal.App.4th 1946.)

The Los Angeles County Jail has the authority to ban all contact visits between visitors and inmates because of the threat they posed. (***Block v. Rutherford*** (1984) 468 U.S. 576 [104 S.Ct. 3227; 82 L.Ed.2nd 438].)

A county jail, including lockers located outside the visitor center but maintained by the jail personnel, particularly with signs warning visitors that they were subject to search, is the equivalent to a closely regulated business allowing for a warrantless search of a visitor and the property he deposits in the lockers. (***People v. Boulter*** (2011) 199 Cal.App.4th 761.)

It is not a violation of the constitutional right of association (**First Amendment**), against cruel and unusual punishment (**Eight Amendment**), nor due process (**Fifth** and **Fourteenth Amendments**) to limit the number and relationship of visitors, such regulations being reasonably related to "*legitimate penological interests*." (***Overton v. Bazzetta*** (2003) 539 U.S. 126 [123 S.Ct. 2162; 156 L.Ed.2nd 162].)

Prison Parking Lot Searches:

California: The Rule of ***Estes v. Rowland*** (1993) 14 Cal.App.4th 508:

In ***Estes v. Rowland***, *supra* (the Government, by stipulation, and probably giving away a lot more than the case law requires), the following requirements were imposed upon the Department of Corrections before a strip search of a prison visitor or the search of the person's vehicle will be allowed:

- All persons eligible to visit inmates must be mailed written notice in English and Spanish of a dog search policy, the reasons for the policy, and the consequences of finding contraband in a vehicle or on the person of a prison visitor.

- Immediately prior to a proposed search, the driver of each vehicle must be informed orally and in writing (again, in English and Spanish) of what the search will entail, the reasons for it, and the consequences of finding contraband. The notice must advise the driver that he or she has the option of leaving and returning without the car without losing visiting privileges for that day. Searches may be conducted only after written consent for the search is first obtained from the driver.

- If the driver decides to leave, passengers may stay and cannot be denied their visit.

- Local police officers may not be involved in the search process, and may not be present at the search unless there is some valid reason for their presence. Violations of the **Vehicle Code** may not be reported to any law enforcement agency.

- No vehicle may be delayed more than *ten* (*10*) *minutes* prior to the search. A wait of up to *30 minutes* is allowed "*in unusual situations*" (see p. 529 of the decision) "where the exigency is not created by the Department (of Corrections)."

- A search should take no longer than reasonably necessary.

- Dogs must be kept at least *twenty* (*20*) *feet* from visitors at all times.

- Searchers may not read books, letters or other documents in possession of the visitors absent a reasonable suspicion that they are contraband.

- A visitor may be requested to submit to a strip search if a drug dog alerts on the individual or drugs are found in the vehicle. The person must be given the reasons for the search orally and in writing, and given the option of refusing to be searched and leaving the grounds.

- The Department of Corrections must adopt regulations encompassing the conditions and must distribute them to all institutions.

The Ninth Circuit:

The Court in ***Cates v. Stroud*** (9th Cir. 2020) 976 F.3rd 972, 983-984, differentiated cases from other circuits (e.g., ***United States v. Prevo*** (11th Cir. 2006) 435 F.3rd 1343; ***Neumeyer v. Beard*** (3rd Cir. 2005) 421 F.3rd 210, 211, and ***McDonell v. Hunter*** (8th Cir. 1987) 809 F.2nd 1302, 1309; ***Romo v. Champion*** (10th Cir. 1995) 46 F.3rd 1013) with seemingly contrary opinions, and held that visitors could be subjected to *vehicle searches* while in a prison parking lot without being given the option to leave. It was noted, for instance, that there is a substantial difference between a strip search ("*humiliating and intrusive*") and a vehicle search, the vehicle

search being significantly less intrusive. It was also noted that prisoners had access to the parking lot at that the facilities in issue.

Strip Searches of Jail/Prison Visitors:

Problem: "A prison 'is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence.' . . . In determining whether a prison search is reasonable under the **Fourth Amendment**, the prison's 'significant and legitimate security interests' must be balanced against the privacy interests of those who enter, or seek to enter, the prison.'" (***Cates v. Stroud*** (9th Cir. 2020) 976 F.3rd 972, 979, quoting ***Bell v. Wolfish*** (1979) 441 U.S. 520, 558, 559-560 [99 S.Ct. 1861; 60 L.Ed.2nd 447].)

"Like prisoners, prison visitors retain only those rights that are consistent with the prison's significant and legitimate security interests. But visitors' privacy interests, and their threats to prison security, are distinct from those of inmates and detainees." (***Cates v. Stroud***, *supra*, at p. 979.)

"While 'some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure,' (Citation omitted), the unique context of the prison facility does not always require individualized suspicion. Some searches of visitors to 'sensitive facilities,' like courthouses or prisons, require no individualized suspicion provided that the searches are both limited and necessary. (Citation omitted). Pat-down searches and metal detector screenings of visitors may be conducted as a prerequisite to visitation without any individualized suspicion, given the weighty institutional safety concerns. Such searches are 'relatively inoffensive' and 'less intrusive than alternative methods,' and they may be avoided by the simple expedient of not visiting the prison. (Citation omitted.)" (***Cates v. Stroud***, *supra*, at pp. 979-980.)

The ***Cates*** Court also noted (at p. 980) that; "(i)n circumstances where they threaten prison security, prison *visitors* may be strip searched when based on reasonable and individualized suspicion." (Italics in original; citing ***Burgess v. Lowery*** (7th Cir. 2000) 201 F.3rd 942, 945; "recognizing 'a long and unbroken series of decisions by our sister circuits' finding "strip searches of prison visitors . . . unconstitutional in the absence of reasonable suspicion that the visitor was carrying contraband.")

"However, even where there is reasonable suspicion that a prison visitor is carrying contraband, a strip search is

permissible only if it can be justified by a legitimate security concern." (***Cates v. Stroud***, *supra*.)

In ***Cates v. Stroud***, the Ninth Circuit Court of Appeal affirmed the district court's summary judgment for defendant prison guards and state officials for the Office of the Inspector General in an action brought pursuant to **42 U.S.C. § 1983** alleging that plaintiff's constitutional rights were violated when she was, among other things, subjected to a strip search upon arriving at a prison to visit her boyfriend. Although she signed a "consent to search" form, the form did not specify that it included a strip search of her person. The Court held that plaintiff's unconsented strip search was unreasonable under the **Fourth Amendment**, and that even if there was a reasonable suspicion that plaintiff was seeking to bring drugs into the prison (based upon informant tips, the validity of which the Court did not discuss), the civil defendant female state investigator who performed the search violated plaintiff's rights under the **Fourth Amendment** by subjecting her to the search without first giving plaintiff the option of leaving the prison. However, prior to the decision in this case, there has been no controlling precedent in the Ninth Circuit, or a sufficiently robust consensus of persuasive authority in other circuits, holding that prior to a strip search a prison visitor—even a visitor as to whom there is reasonable suspicion is carrying contraband—must be given an opportunity to leave the prison rather than being subjected to the strip search. Accordingly, because at the time of the violation, plaintiff did not have a clearly established **Fourth Amendment** right to leave without being subjected to the search, defendant prison investigator was entitled to qualified immunity. (***Cates v. Stroud***, *supra*, at pp. 975-985.)

See also case authority from other federal circuits *(supra*, at pp. 981-982) for the argument that in addition to having a "*reasonable suspicion*," a visitor must be given the opportunity to leave the prison grounds before being subjected to a strip search of his or her person is justified. (E.g., see ***Spear v. Sowders*** (6th Cir. 1995) 71 F.3rd 626.)

Case Law: *A* "*manual*" *or* "*physical*" *body cavity search* of a jail visitor, requiring a touching and constituting more than a mere visual inspection, performed without at least a "*reasonable suspicion*" (and maybe full "*probable cause*") that the visitor was bringing contraband into the jail or prison, violates the **Fourth Amendment**.

See ***Laughter v. Kay*** (D. Utah 1997) 986 F.Supp. 1362; where *probable cause* and a *search warrant* were required.

But see ***Long v. Norris*** (6th Cir. 1991) 929 F.2nd 1111; inferring that no more than a *reasonable suspicion* is necessary, and that a *search warrant* was *not* required.

The Ninth Circuit Court of Appeal addressed this issue in ***Cates v. Stroud*** (9th Cir. 2020) 976 F.3rd 972 (above), while affirming the district court's summary judgment for defendant prison guards and state officials for the Office of the Inspector General in an action brought pursuant to **42 U.S.C. § 1983**, where it was alleged that plaintiff's constitutional rights were violated when she was, among other things, subjected to a strip search upon arriving at a prison to visit her boyfriend. Although she signed a "consent to search" form, the form did not specify that it included a strip search of her person. The Court held that plaintiff's unconsented strip search was unreasonable under the **Fourth Amendment**, and that even if there was a reasonable suspicion that plaintiff was seeking to bring drugs into the prison (based upon informant tips, the validity of which the Court did not discuss), the civil defendant female state investigator who performed the search violated plaintiff's rights under the **Fourth Amendment** by subjecting her to the search without first giving plaintiff the option of leaving the prison. However, prior to the decision in this case, there had been no controlling precedent in the Ninth Circuit, or a sufficiently "robust consensus of persuasive authority" in other circuits, holding that prior to a strip search a prison visitor—even a visitor as to whom there is reasonable suspicion that she is carrying contraband—must be given an opportunity to leave the prison rather than being subjected to the strip search. Accordingly, because at the time of the violation plaintiff did not have a clearly established **Fourth Amendment** right to leave without being subjected to the search, defendant prison guard was entitled to qualified immunity.

A Prisoner's Retained Constitutional Rights:

Infringement of Rights: It has been held that prison inmates *do* retain certain basic constitutional rights that may be infringed on, if at all, only when rationally related to "*institutional penological interests*." (***Overton v. Bazzetta*** (2003) 539 U.S. 126 [123 S.Ct. 2162; 156 L.Ed.2nd 162].)

"When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." (***Procunier v. Martinez*** (1974) 416 U.S. 396, 405-406 [94 S.Ct. 1800; 40 L.Ed.2nd 224, 236].)

However, absent a showing that prison regulations or practices "create inhumane prison conditions, deprive inmates of basic necessities or fail to protect their health or safety . . . (or) involve the infliction of pain or injury, or deliberate indifference to the risk that it might occur," there is no constitutional violation. (***Overton v. Bazzetta***, *supra*, at p. 137 [156 L.Ed.2nd at p. 173].)

Rights retained by prison inmates include:

- The right to "*petition the government for a redress of grievances*" (**First Amendment**). (***Johnson v. Avery*** (1969) 393 U.S. 483 [89 S.Ct. 747; 21 L.Ed.2nd 718].)

- The right to be protected from "*invidious racial discrimination*" (**Fourteenth Amendment**, *Equal Protection*). (***Lee v. Washington*** (1968) 390 U.S. 333 [88 S.Ct. 994; 19 L.Ed.2nd 1212].)

- The right to "*due process*" (**Fifth** and **Fourteenth Amendments**). (***Wolff v. McDonnell*** (1974) 418 U.S. 539 [94 S.Ct. 2963; 41 L.Ed.2nd 935]; ***Haines v. Kerner*** (1972) 404 U.S. 519 [92 S.Ct. 594; 30 L.Ed.2nd 652].)

***Dog Sniffs and Fourth Amendment Searches*:**

Used to Search: Whether or not a dog-sniff constitutes a search depends upon what it is being sniffed. (See below)

Luggage: A sniff of one's luggage by a trained drug detection dog in a public place is not a "*search*" within the meaning of the **Fourth Amendment**. (***United States v. Place*** (1983) 462 U.S. 696, 707 [103 S.Ct. 2637; 77 L.Ed.2nd 110, 121]; ***People v. $48,715*** (1997) 58 Cal.App.4th 1507, 1515-1516.)

The Supreme Court first agreed with the lower court that the principles of ***Terry v. Ohio*** (1968) 392 U.S. 1 [88 S.Ct. 1868; 20 L.Ed.2nd 889], apply to the "detention" of the luggage. ***Terry***, of course, allows for a temporary detention for investigation of a person on less than probable cause (i.e., a "reasonable suspicion"), "causing (the officer) to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity." (***People v. Walker*** (2012) 210 Cal.App.4th 1372, 1381; ***Terry v. Ohio***, at p. 27.) Based upon this reasoning, a majority of the *Place* Court, therefore, specifically held; ". . . that that when an officer's observations lead him reasonably to believe that a traveler is

> carrying luggage that contains narcotics, the principles of ***Terry*** and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope." (***United States v. Place***, *supra*, at p. 706.)
>
> From here, the Court turned to the dog-sniff itself, analyzing the standards applicable to such an investigative tool. In so doing, the High Court in exercising its power to make law had no problem determining without the need to cite any authority, and simply by applying a little common sense, that dog-sniffs do not even amount to what is commonly labeled as a "search." (***Id.***, *supra*, at p. 706.)
>
> The ***Place*** Court ultimately rule, however, that because the defendant's luggage had been detained too long (i.e., 90 minute) between its seizure and the dog-sniff, the detention was unlawfully prolonged, requiring the suppression of the resulting contraband. (Id., at pp. 709-710.)
>
> The Ninth Circuit is in accord with the rule in Place that dog-sniffs of one's luggage is not a search. (***United States v. Beal*** (9th Cir. 1982) 674 F.2nd 1327.)
>
> See also ***People v. Mayberry*** (1982) 31 Cal.3rd 335: In concluding "that sniffing the air surrounding an object *is neither an intrusion nor a search*," the California Supreme Court referenced the "substantial authority supporting this conclusion," citing some nine federal circuit court cases and two law reviews to that effect." (***Id.***, at p. 340.)

Vehicles: Running a properly trained narcotics-sniffing dog around a vehicle that is otherwise lawfully stopped for a traffic infraction does not implicate the **Fourth Amendment**, and is therefore not a search. As such, the defendant's expectation of privacy is not violated. Assuming the dog is properly trained and that the traffic stop is not unlawfully prolonged, probable cause is lawfully established, justifying a warrantless search, when the dog alerts on a part of the car. (***Illinois v. Caballes*** (2005) 543 U.S. 405 [125 S.Ct. 834; 160 L.Ed.2nd 842], rejecting the argument that to do so "unjustifiably enlarge(s) the scope of a routine traffic stop into a drug investigation.")

> "It is well-established that an alert by a narcotics dog gives rise to probable cause for a vehicle search." (***People v. Ayon*** (2022) 80 Cal.App.5th 926, 937; citing ***Florida v. Harris*** (2013) 568 U.S. 237, 248 [133 S.Ct. 1050; 185 L.Ed.2nd 61]; see also ***United States v. Diaz*** (6th Cir. 1994) 25 F.3rd 392, 296.)

However, the dog-sniff of one's vehicle must not be allowed to prolong the traffic stop beyond the time it would have taken to compete the "mission of the traffic stop." Absent the development of additional reasonable suspicion, running a drug-sniffing dog around the car beyond the time it takes to write the ticket and perform other functions reasonably related to the stop, the detention will be held to have been unlawfully prolonged. (***Rodriguez v. United States*** (2015) 575 U.S. 348, 355 [135 S.Ct. 1609; 191 L.Ed.2nd 4927].)

> The so-called "mission of a traffic stop" has generally been held to include "ordinary inquiries incident to [the traffic] stop," such as "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." (***Ibid.***) It has also been noted that, "(t)he mission involves activities that serve the purpose of 'enforcement of the traffic code' . . . and the 'safety precautions' that officers may need to take while doing so." (***People v. Vera*** (2018) 28 Cal.App.5th 1081, 1086-1087.)
>
> The time it took to set up and conduct the dog's sniffing of defendant's vehicle was held to have unlawfully prolonged by an additional six minutes defendant's detention on a traffic stop during which time the detaining officer talked about other unrelated topics, adding to an over-all 18-minute unlawfully prolonged detention. (***People v. Ayon***, *supra*, at pp. 937-941.)
>
> A dog sniff performed at a traffic stop, unless supported by independent reasonable suspicion *or* done during the time it would have taken to complete the purposes of the traffic stop, can cause the stop (or detention) to become "unlawfully prolonged," and will be held to be illegal. (***United States v. Evans*** (9th Cir. 2015) 786 F.3rd 779, 787-788.)

Note also that this rule includes the dog-sniff of a semi-trailer parked at the rear of a gas station, as held by the Ninth Circuit Court of Appeal almost three decades earlier in ***United States v. Solis*** (9th Cir. 1976) 536 F.2nd 880.) In so ruling, the Court held that, "generally, evidence acquired by unaided human senses from without a protected area is not considered an illegal invasion of privacy, but is usable under doctrines of plain view or open view or the equivalent. Odors so detected may furnish evidence of

probable cause of 'most persuasive character.'" (***Id***., at pg. 882; quoting ***Johnson v. United States*** (1948) 333 U.S. 10, 13 [92 L.Ed.436; 68 S.Ct. 367]. As such, the Court concluded that, "the use of the dogs was not unreasonable under the circumstances (i.e., sniffing around the outside of the trailer) and therefore was not a prohibited search under the (**F**)**ourth** (**A**)**mendment**." (At p. 883.)

The Ninth Circuit Court of Appeal has held that upon a suspect giving consent to search his car, the fact that officers choose to employ the assistance of a drug-sniffing dog to do so is irrelevant, even if the defendant wasn't aware that a dog would be used. The Court held in the case of ***United States v. Perez*** (9th Cir. 1994) 37 F.3rd 510, 515-516, that use of a drug-sniffing canine to search the defendant's car following his written consent to allow the officers to search, even if not something the defendant may have envisioned and even if the use of a dog may be "more effective," is not illegal."

"(A) canine sniff is not a '*search*' under the **Fourth Amendment** and thus 'neither a warrant, nor probable cause, nor reasonable suspicion' is required for its use. ***United States v. Lingenfelter*** 997 F.2nd 632, 639 (9th Cir. 1993)." (***United States v. Todhunter*** (9th Cir. 2002) 297 F.3rd 886, 891; the warrantless dog-sniff of a boat by law enforcement assisting the Coast Guard, based upon a "reasonable suspicion that "ripened into probable cause.")

And should a dog "instinctively" jump into the car, without assistance, facilitation, or other intentional act by the dog's handler, alerting once inside the car, no search or **Fourth Amendment** violation has occurred. (***United States v. Pierce*** (3rd Cir. 2010) 622 F.3rd 209.)

A properly certified drug-detection dog's alert on a container in a vehicle establishes probable cause (as opposed to merely a reasonable suspicion) to search that container even though it is never verified that the item actually contains something the dog is trained to detect. The fact that the dog sniffed into the open bed of a pickup truck does not make the dog's acts a search. And even if it is, a dog's instinctive acts done without an officer's instigation does not violate the **Fourth Amendment**. (***People v. Stillwell et al.*** (2011) 197 Cal.App.4th 996.)

A properly certified dog's "alert," or any change in his behavior in reaction to the odor of drugs, as opposed to his trained "indication," was sufficient to establish probable cause to search defendant's vehicle. A final indication by the dog was

unnecessary. Thus the subsequent entry by the dog into the car (by jumping through an open window of the car) was not an illegal search. (***United States v. Moore*** (10th Cir. 2015) 795 F.3rd 1224.)

See also ***United States v. Jackson*** (8th Cir. 2016) 811 F.3rd 1049; properly trained narcotics dog alerting on marijuana in a private plane.

A consent to search of one's vehicle, unless specifically limited, does not preclude the use of a drug detection dog, at least where the defendant should have been aware that the dog may be used and failed to object when it was. (***People v. Bell*** (1996) 43 Cal.App.4th 754; ***United States v. Perez*** (9th Cir. 1994) 37 F.3rd 510, 516.)

An "*alert*" by "a certified, reliable narcotics detector dog" on the gas tank of defendant's vehicle, with nothing more, is sufficient to establish probable cause to arrest. (***United States v. Cedano-Arellano*** (9th Cir. 2003) 332 F.3rd 568.)

Private Residences: In 2013, the United States Supreme Court varied from the rules announced in ***Place*** and ***Caballes*** when it considered the circumstance of a dog sniff done in what the Court refers to as "a constitutionally protected area." In ***Florida v. Jardines*** (2013) 569 U.S. 1 [133 S.Ct. 1409; 185 L.Ed.2nd 495], the High Court discussed the legal consequences of a warrantless dog sniff that occurs within the curtilage of a suspect's home; on the front porch in this case. The question considered by the Court was whether such a dog sniff constitutes a "search," despite the rulings in ***Place*** and ***Caballes***.

A bare majority of the Court ruled that it did. In analyzing this issue, the Court compared the differences between a person coming up to the front door for the purpose of making contact with the occupants of the house, which is consistent with an "implied license to enter the porch," and a police officer approaching that same door for the purpose of collecting evidence of criminal wrongdoing. The latter, per the Court, constituted a search and, without the benefit of a warrant, violated the Fourth Amendment.

Note, however, that the dissenting justices make the perfectly valid argument that pursuant to ***Katz v. United States*** (1967) 389 U.S. 347 [88 S.Ct. 507; 19 L.Ed.2nd 576], where the Court ruled that, "(a) reasonable person understands that odors emanating from a house may be detected from locations that are open to the public, and a reasonable person will not count on the strength of those

odors remaining within the range that, while detectible by a dog, cannot be smelled by a human." (***Florida v. Jardines***, *supra*, at p. 17.)

> See "*Two Types of Searches*," under "*Searches of Residences and Other Buildings*" (Chapter 13), below.

"(D)rug-detection dogs are highly trained tools of law enforcement, geared to respond in distinctive ways to specific scents so as to convey clear and reliable information to their human partners." (***Florida v Jardines***, supra, at pp. 13-14; concurring opinion, citing ***Florida v. Harris*** (2013) 568 U.S. 237, 241, 246-247 [133 S.Ct. 1050; 185 L.Ed.2nd 61].)

Note: See "*Curtilage of the Home*," under "*Searches of Residences and Other Buildings*" (Chapter 13), below.

The North Dakota Supreme Court, for instance, recently held in ***State v. Nguyen*** (2013) 841 N.W.2nd 676, that ***Jardines*** does not apply to the common hallway outside an apartment when used by anyone who might be living in or visiting an apartment. As such, use of a narcotics dog-sniff in the hallway outside the defendant's apartment was held not to have occurred in the curtilage of the defendant's apartment, even when the building was secured and tenants kept items in the hallway. In so ruling, the North Dakota Supreme Court cites with approval the 1993 Ninth Circuit case of ***United States v. Nohara*** (9th Cir. 1993) 3 F.3rd 1239, 1241-1242, where it was held that the defendant had no legitimate expectation of privacy in the hallway of his secured apartment building even if the officers may have been trespassing.

Use of a dog to sniff a motel room was lawful where the officers and the dog were voluntarily admitted by the defendant into the room and the dog was held on a six-foot leash. The dog was where it had a lawful right to be. (***United States v. Esquilin*** (1st Cir. 2000) 208 F.3rd 315.)

Whether or not the theory of ***Jardines*** is applicable to a drug-sniffing dog used around the outside, and leaning up against, the open bed and tool box in a suspect's truck (which would over-rule prior case law), was left open by the Ninth Circuit Court of Appeal, holding that pursuant to the "faith-in-case law" rule of ***Davis v. United States*** (2011) 564 U.S. 229, 236-239 [131 S.Ct. 2419; 180 L.Ed.2nd 285], it was unnecessary to decide the issue.

(***United States v. Thomas*** (9th Cir. 2013) 726 F.3rd 1086, 1092-1095.)

The rule of ***Jardines*** has been extended to the locked, but shared hallway, outside defendant's apartment, even though the hallway was open to other residents and their guests. (***United States v. Whitaker*** (7th Cir. 2016) 820 F.3rd 849.)

Consent to enter defendant's apartment when the officers had a drug-sniffing dog with them, and where the dog was visible to defendant, impliedly included defendant's consent to the entry of the dog as well. When the dog alerted on illegal drugs defendant had in his compartment, the dog being in a place it had the legal right to be, the alert did not constitute an illegal search. (***United States v. Iverson*** (2nd Cir. 2018) 897 F.3rd 450.)

Use of a dog to search a *private office* without a search warrant is a violation of the **Fourth Amendment**, exposing the dog's law enforcement handler to potential civil liability. (***Pike v. Hester*** (9th Cir. Nev. 2018) 891 F.3rd 1131; the officer held not to be entitled to qualified immunity.)

Even if evidence was obtained pursuant to execution of an invalid search warrant based on dog sniffs of curtilage of defendant's home, the good faith exception under ***United States v. Leon*** (1984) 468 U.S. 897 [82 L.Ed.2nd 677, 104 S.Ct. 3405], applied because it was reasonable for officers to rely on circuit precedent that dog sniffs at interior apartment door were permissible; defendant's motion to suppress was properly denied. (***United States v. Hines*** (8th Cir. 2023) 62 F.4th 1087.)

Sniffing a Storage Facility:

In officers using a drug-sniffing dog to sniff a storage facility, the sniff was not contested. "A dog alert can provide the probable cause needed for a search warrant." (***People v. Bautista*** (2004) 115 Cal.App.4th 229, 236; citing ***United States v. Spetz*** (9th Cir. 1983) 721 F.2nd 1457, 1464; ***Estes v. Rowland*** (1993) 14 Cal.App.4th 508, 532.)

> The issue in ***Bautista*** was the use of an Army dog and whether to do so was a "*posse comitatus*" violation. The Court ruled that it was not, while it was conceded that a dog sniff can provide the necessary probable cause to obtain a search warrant for the storage facility that was in issue.

Officers using a drug-sniffing dog outside a storage unit rented by defendant, after which a search warrant was obtained for the storage unit itself, was held to be lawful, it being a place that was open to the public and where defendant did not have a reasonable expectation of privacy. (***United States v. McKenzie*** (2nd Cir. NY 2021) 13 F.4th 233.)

Sniffing the Person:

A New York Court of Appeals held in ***People v. Butler*** (Dec. 19, 2023) 2023 NY Slip Op 06468, that for a police drug-detection dog to lawfully sniff a person, there must be cause—either probable cause or at least a reasonable suspicion (see below)—to believe that the person sniffed has illegal drugs on him.

In ***Butler***, officers made a lawful traffic stop of Devon T. Butler after observing what appeared to be Butler and another person engaging in a hand-to-hand street drug transaction. Upon observing some traffic violations as he drove away, officers make a traffic stop. While talking to Butler about why he was stopped, an officer's drug-sniffing canine—"Apache"—alerted on the driver's seat area of Butler's car. Apache's handler then directed the dog towards Butler himself who, by this time, was out of his vehicle. Apache instantly alerted on the Butler's "groin/buttock region." Freaking out, Butler attempted to flee on foot, discarding a plastic bag found to contain 76 glassine envelopes of heroin as he did so. When finally apprehended, Butler admitted the heroin belonged to him.

Extrapolating the theory of ***Jardines*** to the expectation of privacy one has in his or her own body, the ***Butler*** Court held that, "the use of a canine to sniff defendant's body for the presence of narcotics qualified as a search." This is because like the curtilage around one's home, and as opposed to the air around our vehicles and luggage, we all have a reasonable expectation of privacy in our own bodies. As such, "the sniffing of the human body involves an obviously greater intrusion on personal privacy, security, and dignity."

The ***Butler*** Court also held that it is irrelevant that the dog did not make actual contact with the defendant and sniffed only the air closely

> surrounding his person. Such a sniff violates what is sometimes referred to as our "*personal space*," making irrelevant the lack of any direct contact with a suspect's body.
>
> The ***Butler*** Court returned the case to the trial court for a determination of whether "probable cause" or only a "reasonable suspicion" was required to make legal a dog-sniff of one's person. Given the facts in Butler, it is likely that the Court will hold that full "probable cause" is required, but that given the dog-alert on defendant's vehicle, the officers likely had sufficient cause to have the dog sniff defendant himself.

In ***B.C. v. Plumas Unified School District*** (9th Cir. 1999) 192 F.3rd 1260, a high school principal had the students from one of the school's classrooms pass by a drug-sniffing dog, one by one. After alerting on one of the students (someone other than B.C.), the dog was run through the classroom, sniffing the students' backpacks, jackets, and other belongings which the students had left in the room. When the students were allowed to return to their classroom, they were again walked past the deputy and his dog, whereupon the dog alerted again on the same student. In the resulting civil suit filed by B.C., it was held that the students who were subjected to a dog-sniff for drugs were the victims of a warrantless **Fourth Amendment** violation, although the officers were entitled to qualified immunity from civil liability because the issue was not yet well settled in the law. (***Id.***, at p. 1268.)

See also ***Horton v. Goose Creek Independent School District*** (5th Cir. 1982) 690 F.2nd 470, where it was held that although a dog-sniff of students' cars and lockers did *not* constitute a search, a dog-sniff of the students themselves was in fact a **Fourth Amendment** search, and as such, a violation of the students' Fourth Amendment rights.

It is the opinion of the California Attorney General that a policy of unannounced, random, neutral dog sniffing of students' personal belongings, such as backpacks, purses, jackets, and outer garments, after ordering students to leave these items in a classroom and remain in another area, would be unconstitutional absent some suspicion or probable cause to support the search. (83 ***Opn.Cal.Atty.Gen.*** 257 (2000))

However, see ***Doe v. Renfrow*** (7th Cir. 1981) 631 F.2nd 91, where the Seventh Circuit held that a dog-sniff of one's person is not a search.

Note: Given the more recent authority, as discussed above, it's safe to say that ***Butler***, ***B.C.***, and ***Horton***, particularly in light of the reasoning of ***Florida v Jardines***, are the cases with which law enforcement officers and prosecutors need to be familiar, and ready to follow.

Mailed Packages:

"The postal-inspector's 'use of a well-trained narcotics detection dog . . . [did] not implicate legitimate privacy interests.'" (***United States v. Jefferson*** (9th Cir. 2009) 566 F.3rd 928, 933.)

Movement of containers to be sniffed, without taking the containers from the defendant (***United States v. Harvey*** (8th Cir. 1992) 961 F.2nd 1361, 1363-1364.), or otherwise interfering with the defendant's possessory interests (***United States v. Johnson*** (9th Cir. 1993) 990 F.2nd 1129, 1132-1133.), does *not* implicate the **Fourth Amendment**.

See "*Detention of a Container*," under "*Searches of Containers*" (Chapter 16), above.

Additional Case Law:

Only when the police conduct a canine sniff in a private place, or in a manner which otherwise violates a reasonable expectation of privacy, is the resulting intrusion a search. (***Romo v. Champion*** (10th Cir. 1995) 46 F.3rd 1013, 1016-1017.)

Threatening to use a drug-sniffing dog, when such use does not require the suspect's consent and is otherwise lawful, will also not invalidate the resulting consent to search. (***United States v. Todhunter*** (9th Cir. 2002) 297 F.3rd 886, 891.)

The United States Supreme Court reaffirmed the rules as they relate to dog-sniffs in ***Florida v. Harris*** (2013) 568 U.S. 237 [133 S.Ct. 1050; 185 L.Ed.2nd 61], where the Court rejected an attempt by the Florida Supreme Court to impose a more rigorous standard on the prosecution. (See ***Harris v. State*** (Fla. 2011) 71 So.3rd 756.) The Supreme Court criticized Florida's failure to apply the standard probable cause definition when it attempted to create a

strict evidentiary checklist to assess a drug-detection dog's reliability.

> Per the Court: "The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test." (***Id***., at p. 248.)
>
> But where the prosecution fails to disclose to the defense that a police dog had a history of mistaken identifications, such a failure being a violation of the discovery requirements of ***Brady v. Maryland*** (1963) 373 U.S. 83, and where the dog's scent evidence was the only evidence linking the defendant to the getaway car and was the only evidence corroborating "strikingly weak" eyewitness identifications, a resulting conviction is subject to being reversed. (***Aguilar v. Woodford*** (9th Cir. 2013) 725 F.3rd 970, 981-985.)
>
> > *Note*: Per **Pen. Code § 141(c)**; "(a) prosecuting attorney who intentionally and in bad faith alters, modifies, or withholds any physical matter, digital image, video recording, or relevant exculpatory material or information, knowing that it is relevant and material to the outcome of the case, with the specific intent that the physical matter, digital image, video recording, or relevant exculpatory material or information will be concealed or destroyed, or fraudulently represented as the original evidence upon a trial, proceeding, or inquiry, is guilty of a felony . . . ."
>
> But, where the records used to support a dog's training and reliability have been redacted to the point where it is impossible to tell whether there is any negative information contained therein, such records may not be enough to support a determination of probable cause. (***United States v. Thomas*** (9th Cir. 2013) 726 F.3rd 1086, 1095-1095.)

Certification of a Dog:

> Proof of certification or successful completion of a training program supports a rebuttable presumption of a dog's reliability, subject to cross-examination and introduction of conflicting

evidence by the defendant. (***Florida v. Harris*** (2013) 568 U.S. 237, 246-247 [133 S.Ct. 1050; 185 L.Ed.2nd 61].)

> "[E]vidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs."

It has been held that the issue of a drug-detection dog's reliability does not require an exhaustive showing of the dog's error and success rate. Instead, reliability can be shown when the K-9's handler testifies to the dog's training, certification, and testing, as well as to his own training and certification to handle the dog. "Nothing more was required." (***People v. Stilwell*** (2011) 197 Cal.App.4th 996, 1006.)

"The standard enunciated by the district court, however, was proper: GCISD (i.e., "Goose Creek Consolidated Independent School District") need not show that the dogs are infallible or even that they are reliable enough to give the defendant probable cause; instead, the dogs must be reasonably reliable. It will not, however, be enough to show that the dogs are reasonably reliable in indicating the presence *or* recent presence of contraband. If the reaction is to justify a search, it must give rise to reasonable suspicion that the search will produce something — i.e., reasonable suspicion that contraband is *currently* present. If the school does have reasonable cause to suspect the presence of contraband, the ease with which it can be destroyed or moved presents an exigent circumstance that excuses the warrant requirement. (Italics in original: ***Horton v. Goose Creek Independent School District*** (5th Cir. 1982) 690 F.2nd 470, 482; citing ***United States v. Petty*** (5th Cir. 1979) 601 F.2nd 883, 890.)

Fourteenth Amendment *Due Process*:

See ***Horton v. Goose Creek Independent School District*** (5th Cir. 1982) 690 F.2nd 470, at pp. 482-483, declining to decide whether plaintiffs' due process rights were violated by having a drug-sniffing dog sniff students, but also noting that given the docility of the dogs used, and their training, that "as long as the dogs are

carefully selected for their nonaggressive character, and the handlers supervise them during their playtime, we do not think that the minimal 'harassment' arising from their mere presence on campus rises to the level of a constitutional violation."

Used to Track (*or Trail*):

Rule: The use of a properly trained dog to track a suspect is lawful, and the evidence of canine tracking is admissible in court. (***People v. Craig*** (1978) 86 Cal.App.3rd 905; "(W)e choose to require each particular dog's ability and reliability to be shown on a case-by-case basis." (***Id***., at pp. 916-917.)

Certification of a Dog: Proof of certification or successful completion of a training program supports a rebuttable presumption of a dog's reliability, subject to cross-examination and introduction of conflicting evidence by the defendant. (***Florida v. Harris*** (2013) 568 U.S. 237, 246-247 [133 S.Ct. 1050; 185 L.Ed.2nd 61]; ***People v. Peterson*** (2020) 10 Cal.5th 409, 449.)

Prerequisites to Admission of Evidence:

The dog's handler was qualified by training and experience in the use of the dog;

The dog was adequately trained in tracking humans;

The dog has been found to be reliable in tracking humans;

The dog was placed on the track where circumstances indicted the guilty party to have been; *and*

The trail had not become stale or contaminated.

(***People v. Malgren*** (1983) 139 Cal.App.3rd 234; dog tracked suspect for 35 minutes over about seven-tenths of a mile. See also ***People v. Westerfield*** (2019) 6 Cal.5th 632, 705-711; and ***People v. Peterson*** (2020) 10 Cal.5th 409, 445.)

Case Law:

The California Appellate Courts have specifically rejected the argument that the court was obligated to instruct that dog trailing evidence must be viewed with caution. (***People v. Malgren,*** *supra*, at p. 241.)

> See also ***People v. Westerfield***, *supra*, at pp. 708-709: "(W)e conclude an express cautionary admonition regarding dog-scent evidence is not a general principle of law necessary to the jury's understanding of the case."

See ***People v. Jackson*** (2016) 1 Cal.5th 269, 321-322, 325, modifying the ***Malgren*** factors necessary for an evidentiary foundation before dog scene evidence is admissible to a requirement that the proponent of the evidence establish as background qualifications the adequacy of the handler's and dog's training and supply evidence of the dog's reliability in trailing humans. The party must also show the adequacy of the manner in which the dog was given a scent to trail, whether by being allowed it to sniff the beginning of a known trail or by being "presented with a scent article" and then asked to smell for a corresponding trail of the same scent. Lastly, there must be some independent evidence tending to confirm that the person found at the end of the trail the dog followed was indeed the person who left the scent trail and supplied the initial scent.

Use of a dog to track defendant's scent from a stolen vehicle to where defendant was being detained held to supply the necessary "*fair probability*" which, with other evidence, justified the defendant's search and subsequent arrest for the theft of the vehicle. (***In re Lennies H.*** (2005) 126 Cal.App.4th 1232, 1239.)

Use of a "*scent transfer unit*," which extracts scents from an object, transferring the scents to a sterile gauze pad from which a dog may obtain the suspect's scent (see also ***People v. Jackson*** (2016) 1 Cal.5th 269, 291.) requires proof of the unit's reliability and acceptability in the scientific community, per "***Kelly/Frye***," and that it was properly used by the handler, to be admissible in court. (***People v. Mitchell*** (2003) 110 Cal.App.4th 772; ***People v. Willis*** (2004) 115 Cal.App.4th 379, 385-386.)

> The "***Kelly/Frye***" test for evidence admissibility refers to the standards for the admission into evidence of new scientific techniques, per ***People v. Kelly*** (1976) 17 Cal.3rd 24; and ***Frye v. United States*** (D.C. Cir. 1923) 293 F. 1013.)
>
> But see ***People v. Jackson***, *supra*, at pp. 298-326, below, where it was held that a hearing under ***Kelly*** or **Evid. Code § 402** was not necessary before the jury could hear the evidence in that the prosecution laid an adequate foundation for such evidence.

> The California Supreme Court again held in ***People v. Peterson*** (2020) 10 Cal.5th 409, "that the trial court did not err in declining to subject the dog-trailing evidence to the threshold ***Kelly*** test. The nature of the dog-trailing technique at issue here is not meaningfully different from the technique at issue in ***Jackson***, which we concluded was not subject to ***Kelly***." (Id., at p. 446.)
>
> *Note*: As noted in ***Peterson***, pursuant to ***People v. Kelly***, when the admission into evidence of an expert's testimony is the issue, and that testimony relates to the use of novel scientific methods or techniques, the proponent of that evidence must first demonstrate the technique's reliability through testimony from an expert qualified to offer an opinion on the subject. The technique's reliability, in turn, depends upon a showing that it has achieved general acceptance among practitioners in the relevant field. Finally, the proponent of the evidence must show any procedures necessary to ensure the technique's validity were properly followed in the given case. The purpose of these threshold requirements—commonly referred to as the ***Kelly*** test—is to protect against the risk of credulous juries attributing to evidence cloaked in scientific terminology an aura of infallibility. (The Feds follow a similar requirement, pursuant to ***Frye v. United States*** (D.C. Cir. 1923) 293 F. 1013, thus establishing what is more popularly known as the "***Kelly/Frye*** *test*.") However, not every issue requiring expert testimony needs to satisfy the ***Kelly*** test. ***Kelly*** does not apply unless the technique at issue is "novel;" i.e., "which is *new* to science and, even more so, the law." Also, ***Kelly*** only applies when the technique at issue is one whose reliability would be difficult for laypersons (i.e., the jurors) to evaluate. (***Id.***, at p. 444; citing ***People v. Craig*** (1978) 86 Cal.App.3rd 905.)

However, where the prosecution fails to disclose to the defense that a police dog, used in a "scent transfer" identification of the defendant, had a history of mistaken identifications, such a failure being a violation of the discovery requirements of ***Brady v. Maryland*** (1963) 373 U.S. 83, and where the dog's scent evidence was the only evidence linking the defendant to the getaway car and was the only evidence corroborating "strikingly weak" eyewitness identifications, a resulting conviction is subject to being reversed. (***Aguilar v. Woodford*** (9th Cir. 2013) 725 F.3rd 970, 981-985.)

> *Note*: Per **P.C. § 141(c)**: It is a felony for a prosecutor to purposely withhold material evidence favorable to the defense.

Dog trailing evidence was properly admitted at both phases of a capital murder trial because a hearing under ***Kelly*** (***People v. Kelly*** (1976) 17 Cal.3rd 24.) or **E.C. § 402** was not necessary before the jury could hear the evidence in that the prosecution laid an adequate foundation for such evidence. There's no foundational requirement that, prior to admission of dog trailing testimony, the scent presented to the dog must be shown not to be stale or contaminated. (***People v. Jackson*** (2016) 1 Cal.5th 269, 298-326, 362-365.)

> To the extent that ***People v. Malgren***, *supra*, held to the contrary on the requirement that scent presented to the dog must be shown not to be stale or contaminated, that case was "disapproved." (***Id***., at p. 325.)

The California Supreme Court also added another modification to the necessary Malgren factors to consider before admitting such evidence. A proponent must establish as background qualifications the adequacy of the handler's and dog's training and supply evidence of the dog's reliability in trailing humans. The proponent of the evidence "must also show the adequacy of the manner in which the dog was given a scent to trail, whether (as in ***Craig*** and ***Malgren***) by being allowed to sniff the beginning of a known trail or (as in ***Jackson***) by being 'presented with a scent article' and then asked to smell for a corresponding trail of the same scent." (***People v. Jackson*** (2016) 1 Cal.5th 269, 298-326, 321–322; see also ***People v. Peterson*** (2020) 10 Cal.5th 409, 445.)

> *Note*: In ***Jackson***, a trained dog was given a gauze pad infused with scent from a fresh shoe print left outside a victim's house and then taken to a lobby through which a suspect had passed. Later, the dog was given a gauze pad infused with scent from an envelope left on a different victim's bed and believed to have been handled by the perpetrator. The dog was again asked to seek out and follow any matching trail, which it did, ultimately locating and alerting on the suspect. (***Jackson***, at pp. 308-309.)
>
> In ***Peterson***, the dog was presented with the victim's sunglasses and then directed to smell for trails of the same human scent, if any, at the location where it was suspected that the victim's body had been taken. Per the dog's

> handler: "This was not a novel technique; indeed, . . . teaching a dog to scent off an object and then seek a corresponding trail is a routine part of training dogs to trail humans." (***Peterson***, at p. 446.)

The California Supreme Court has approved the use of **CALJIC No. 2.16**, as follows: "Evidence of dog tracking has been received for the purpose of showing, if it does, that the defendant is the perpetrator of the crimes of kidnapping and murder. This evidence is not by itself sufficient to permit an inference that the defendant is guilty of the crimes of kidnapping and murder. Before guilt may be inferred, there must be other evidence that supports the accuracy of the identification of the defendant as the perpetrator of the crimes of kidnapping and murder. [¶] The corroborating evidence need not be evidence which independently links the defendant to the crime. It is sufficient if it supports the accuracy of the dog tracking. [¶] In determining the weight to give to dog-tracking evidence, you should consider the training, proficiency, experience, and proven ability, if any, of the dog, its trainer, and its handler, together with all the circumstances surrounding the tracking in question." (***People v. Westerfield*** (2019) 6 Cal.5th 632, 708-709; rejecting the argument that the jury should also have been instructed with a cautionary instruction similar to **CALJIC No. 376**; i.e., as modified; that "the dog-sniff evidence is not by itself sufficient to permit an inference of the defendant's guilt and that there must be other corroborating evidence of the defendant's guilt before guilt may be inferred."

The same instruction, modified to reflect that the trailing was of the victim as opposed to the suspect, was also approved by the California Supreme Court. (***People v. Peterson*** (2020) 10 Cal.5th 409, 453-456.)

The "*Corroboration Requirement*:"

The California Supreme Court has also held that there is a "need for some independent evidence tending to confirm that a person found at the end of the trail the dog followed was indeed the person who left the scent trail and supplied the initial scent." (***People v. Peterson*** (2020) 10 Cal.5th 409, 445, citing ***People v. Jackson*** (2016) 1 Cal.5th 269, 321.)

But the corroborative evidence need not necessarily independently link the accused to the crime. "The corroborative evidence need only support the accuracy of the tracking itself." (***People v. Gonzales*** (1990) 218 Cal.App.3rd 403, 414.)

Other Evidentiary Foundational Requirements:

Where the dog is not asked to smell for a scent trail, but instead is exposed to a scent and then watched to see if the dog shows interest in various locales frequented by the suspect, then a scent identification should be admissible only upon an evidentiary foundation concerning such matters as "how long scent remains on an object or at a location" and "whether every person has a scent that is so unique that it provides an accurate basis for scent identification." (***People v. Willis*** (2004) 115 Cal.App.4th 379, 386.)

> In ***Willis***, the dog was given an initial scent from a matchbook but the prosecution failed to present any proof that the target had ever touched the matchbook from which a scent was collected. (***Ibid***.)

And where a dog has been given pads with the scent from murder shell casings and the victim's shirt, and a lineup of pads with scents from various people is performed, including the defendant's scent, this type of lineup smell test has also been held to be different than scent trailing. Such a lineup does not have the kind of centuries-long lineage that scent trailing does, and thus ought to be supported by additional foundation establishing the uniqueness of human scents and their persistence and rate of degradation. (***People v. Mitchell*** (2003) 110 Cal.App.4th 772, 790–794.)

Note: Neither of these requirements were held to apply to the situation in ***People v. Peterson*** (2020) 10 Cal.5th 409, where the dog was asked to seek out and follow a trail, if any could be found, based on a given scent. (p. 447.)

> While evidence related to training of the dog handler in "cue avoidance" (specific instruction on how to avoid cueing dogs to go in a desired, predetermined direction when trailing) such evidence is not necessary for a court to find that the dog handler was sufficiently trained. (***People v. Peterson***, *supra*, at p. 449, fn. 16.)
>
> The California Supreme Court also held that the proponent of dog-trailing evidence is not required to demonstrate past performance in conditions that are identical to the case at hand. (***People v. Peterson***, supra, at p. 450.)

See also discussions concerning foundational requirements (or lack thereof) for trailing related to "enclosed targets" (i.e., such as when the person trailed was in a vehicle or wrapped in a tarp) and the so-called "missing person test" (i.e., training a dog to seek out only the missing person—the person still unaccounted for—after eliminating other known persons who may have touched an item sniffed by the dog), noting that trailing dogs are trained to follow the freshest, most recent scent on a particular object. Per the Court, The circumstances relevant to these two factors are "relevant to the weight the jury might accord this evidence, but not its admissibility." (***People v. Peterson***, *supra*, at p. 451.)

Use of Dogs in Making Arrests:

The Ninth Circuit Court of Appeal had previously held that "*deadly force*," when evaluating the use of force by a law enforcement agency through the use of a police dog, should be defined as: "*Force which is reasonably likely to cause* (*or which 'had a reasonable probability of causing'*) *death*." (***Vera Cruz v. City of Escondido*** (9th Cir. 1997) 139 F.3rd 659, 663; use of a police dog is *not* deadly force.)

"(T)he force used to arrest [the plaintiff] was severe" because the dog bit the plaintiff three times, dragged him between four and ten feet, and "nearly severed" his arm. (***Chew v. Gates*** (9th Cir. 1994) 27 F.3rd 1432, 1439.)

However, use of a police dog to bite and hold a potentially dangerous fleeing felon for up to a minute, until the arresting officer could insure that the situation was safe, did not constitute the use of "*deadly force*," and was therefore not a violation of the **Fourth Amendment** (seizure), despite the fact that the suspect's arm was severely injured by the dog. (***Miller v. Clark County*** (9th Cir. 2003) 340 F.3rd 959.)

The above, however, was a minority opinion. As a result, the Ninth Circuit has recently changed its mind, adopting the majority rule, agreeing that even in the use of a police dog, "*deadly force*" should be defined as "*force that creates a substantial risk of death or serious bodily injury*." (***Smith v. City of Hemet*** (9th Cir. 2005) 394 F.3rd 689.)

"*Deadly Force as Defined by the* **Model Penal Code § 3.11(2)** (1962): "Force that the actor uses with the purpose

> of causing or that he knows to create a substantial risk of causing *death or serious bodily injury*." (*Emphasis added*.)
>
> See also ***Seidner v. De Vries*** (9th Cir. June 30, 2022) 39 F.4th 591, at p. 597 (not a dog-use case), where the Ninth Circuit has also noted that: "(W)e have classified deployment of a police dog as both a severe use of force and a moderate use of force depending on the suspect's condition when the dog was ordered to attack, how long the attack lasted, and whether the dog was within its handler's control." (Citing ***Lowry v. City of San Diego*** (9th Cir. 2017) 858 F.3rd 1248, 1256-1257.)

The Ninth Circuit Court of Appeal further held in ***Smith*** that the defendant pleading guilty to resisting arrest, per **P.C. § 148(a)(1)**, does not preclude him from suing the officers for using unreasonable force so long as the officer's legal actions can be separated from his use of unreasonable force. The California Supreme Court later ruled in ***Yount v. City of Sacramento*** (2008) 43 Cal.4th 885, that it is not necessary to find the officers' lawful actions divisible from their use of unreasonable use of force in order for the criminal defendant to be guilty of resisting arrest and still sue. Based upon this theory, the Ninth Circuit found that a criminal defendant, even after pleading guilty to resisting arrest per **P.C. § 148(a)(1)**, may sue the officer for using unreasonable force in a continuous course of action so long as at least part of the officer's actions were lawful. (***Hooper v. County of San Diego*** (9th Cir. 2011) 629 F.3rd 1127.)

Note: Both ***Smith*** and ***Hooper*** are dog bite cases.

However, the use of a police dog does not necessarily constitute the use of deadly force under all circumstances. It depends upon the circumstances of the case in question. In such a case, the issue for a civil jury is to merely determine whether the force used was reasonable under the circumstances. (***Thompson v. County of Los Angeles*** (2006) 142 Cal.App.4th 154.)

Where the dog's handler closely followed his police dog and called her off very quickly after the initial contact with the plaintiff, and due to the officer's close proximity to his dog, the encounter between plaintiff and the dog was so brief that the officer did not even know if contact had occurred, where the risk of harm posed by this particular use of force, and the actual harm caused, was moderate, the district court properly determined that the use of force in this instance was not severe. Summary

judgment for the City of San Diego was upheld. (***Lowry v. City of San Diego*** (9th 2017) 858 F.3rd 1248.)

An officer/dog handler was entitled to qualified immunity when sued for using excessive force, where the officer deployed the dog without warning to find and bite plaintiff, who was armed with a knife, and then allowed the dog to continue biting the plaintiff until he was handcuffed despite the plaintiff's intent to surrender. First, the court found that even if plaintiff had dropped the knife and was lying flat on the ground, it was undisputed that (1) the officer saw the knife, which remained within plaintiff's reach, (2) the officer knew that plaintiff's mother had called 911 and told the police her son would not go without a fight, (3) plaintiff had committed a felony assault and (4) plaintiff had fled before hiding in a neighbor's backyard for approximately twenty minutes. (***Escobar v. Montee*** (5th Cir. TX 2018) 895 F.3rd 387.)

> The lawfulness of deploying the dog without the usual warning was not an issue on appeal, the issue being decided in the officer's favor (i.e., entitled to qualified immunity) at the trial court level.

Use of a police dog to attack and pull what appeared to be an uncooperative driver from his vehicle, after a two-minute, 100-mph high speed chase, and what appeared to be an uncooperative driver (the plaintiff/driver later claiming that he refused to get out of his car because the car was still in drive and the officers had ordered him to stick his hands out the window), the court noted that the reasonableness standard does not take into account facts not known to the officer at the time force was used, nor does it require an officer to use the best technique available at the time. The Court also noted that in police work officers usually face a range of acceptable options, not a single, rigid right answer and that the reasonableness standard contains a "measure of deference to the officer's on-the-spot judgment." Under these circumstances, use of the police dog in subduing what appeared to be an uncooperative suspect was held to be reasonable. (***Ashford v. Raby*** (6th Cir. 2020) 951 F.3rd 798.)

Use of a dog to subdue a fleeing suspect may subject the dog's handler to civil liability if the dog is allowed to bite and hold the suspect after the suspect has submitted and attempts to comply with the officer's orders to submit, causing serious injury to the suspect. (depublished: ***Hartsell v. County of San Diego*** (9th Cir. 2020) 802 F. Appx. 295; affirming the district court's ruling denying the officer qualified immunity.)

In a civil rights action brought by the family of a van driver shot by police and the van occupant against the city and police officers following a police chase that ended when the van crashed into a cruiser and the driver was killed, the trial court properly granted summary judgment to defendant

officers on the **42 U.S.C.S. § 1983** and **Fourth Amendment** claims. The Court held that the use of deadly force was reasonable where the driver was actively resisting arrest and attempting to drive toward the officers, who were on foot. The severity of the crime weighed in favor of the use of force. Also he officers did not use excessive force when they deployed a canine to physically apprehend the detainee after the shooting. Plaintiffs' state claims also failed because they could not show battery where the officers did not use unreasonable force. The negligence claim required the court to assess the reasonableness of the officers' actions. Lastly, the **Bane Act** claim failed where plaintiffs failed to show the officers interfered with any constitutional rights using threats, intimidation, or coercion. (***Monzon v. City of Murrieta*** (9th Cir. 2020) 978 F.3rd 1150.)

Viewing the evidence in the light most favorable to the plaintiff, where a police officer intentionally released his dog to bite a woman (the plaintiff) who posed no threat to the officers and who was not fleeing or resisting arrest, even assuming the officer's conduct violated the plaintiff's **Fourth Amendment** right to be free from unreasonable seizure, that constitutional right was not clearly established as it relates to a second officer who failed to intervene. Because the law did not clearly establish when an officer must intervene, the officer was entitled to summary judgment on qualified immunity grounds for his failure to intervene when the dog was biting the plaintiff. (***Penaloza v. City of Rialto*** (9th Cir. 2020) 836 Fed. Appx. 547; an unpublished opinion.)

Where a police dog was used to help subdue a resisting prisoner, and the prisoner later sues the officer alleging the use of excessive force, the Court held that to "defeat qualified immunity, [the plaintiff] must show that the state of the law as of [the events at issue] gave a reasonable officer 'fair warning' that using a police dog on a noncompliant suspect, who had resisted lesser methods of force to complete his arrest, was unconstitutional." (***Hughes v. Rodriguez*** (9th Cir. 2022) 31 F.4th 1211, 1223-1224; citing ***Koley v. Williams*** (D. Ariz. 2021) 2021 U.S. Dist. LEXIS 40149), where the district court concluded that a dog bite with no lasting complications was a minor injury.

> In ***Hughes***, the plaintiff testified that he suffered dog bites to his left leg, abrasions to his head and face, and bruising on his upper right thigh. He claimed that this resulted in scarring and residual soreness in his left leg. However, he made no allegations that these injuries interfere with his work or daily life. Based upon this record, the Court concluded that plaintiff's injuries were relatively minor. (***Id.***, at p. 1221.)
>
> Ultimately, with evidence that plaintiff, who the officers had reason to believe he might be armed (he was not), and who was

hiding in a third party's home, the Hughes Court held that "the initial use of the police dog was proportional to the 'threats to the safety of [the officers], as reasonably perceived by the responsible officials on the basis of the facts known to them.'" (Id., at p. 1222; quoting ***Whitley v. Albers*** (1986) 475 U.S. 312, at p. 321 [106 S.Ct. 1078; 89 L.Ed.2nd 251].)

Miscellaneous:

Support Dogs:

Allowing a support dog in the courtroom for child sexual abuse victims who were adults at the time they testified was not error because **Pen. Code § 868.4(a)(2)** made support dogs available to prosecuting witnesses, regardless of age, in certain specified cases set forth in **Pen. Code § 868.5(a)**, including child sexual abuse cases, and evidence on the potential trauma of testifying satisfied the requirement that the dog might reduce anxiety or otherwise be helpful to the witnesses while testifying under **section 868.4(b)(3)**, even if the dog might not have been necessary. Although the standard support dog instruction in **CALCRIM No. 377** was not as expansive as instructions in some cases, it adequately instructed the jury not to let the dog affect the assessment of evidence because it told the jury not to be distracted by, or consider, the dog's presence. (***People v. Picazo*** (2022) 84 Cal.App.5th 778.)

Shooting Dogs in Self-Defense:

Officers are expected to use some discretion in the execution of a warrant to avoid the taking of unnecessarily excessive (i.e., "cumulative") property and engaging in unnecessarily destructive behavior. (***San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*** (9th Cir. 2005) 402 F.3rd 962; the shooting of several dogs without having considered alternative methods of controlling the dogs.)

A dog is property. The unreasonable seizure of that property is a violation of the **Fourth Amendment**. It is clearly established that unreasonably killing a person's dog is an unconstitutional seizure of property under the **Fourth Amendment**. But shooting and killing a suspect's dog may be justified when done in the necessary defense of oneself; e.g., when the dogs posed an imminent threat to the officers who were attempting to execute a search warrant. (***Brown v. Battle Creek Police Dep't.*** (6th Cir. 2016) 844 F.3rd 556.)

The **Fourth Amendment** provides for "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Privately-owned dogs are "effects" under the **Fourth Amendment**. "(A) police officer "cannot shoot a dog in the absence of an objectively legitimate and imminent threat to him or others." Therefore, police officers must act reasonably when seizing them. Where it was alleged that an officer shot and seriously injured two of plaintiffs' dogs (although pit bulls, they were used as "emotional service . . . and seizure alert animals"), the officer was held *not* to be entitled to qualified immunity from civil suite absent evidence supporting the argument that they were a danger to the officer. Per the Court, when an officer "shoots and kills an individual's family pet when that pet presented no danger and when non-lethal methods of capture would have been successful," this is an unreasonable seizure of property. (***Lemay v. Mays*** (8th Cir. MN 2021) 18 F.4th 283.)

***Pen. Code §§ 295 et seq.*: *The DNA and Forensic Identification Database and Data Bank Act of 1998*:**

DNA Testing: As noted by the United States Supreme Court: "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices." (***District Attorney's Office for the Third Judicial District v. Osborne*** (2009) 557 U.S. 51, 55 [129 S.Ct. 2308; 174 L.Ed.2nd 38]; see also ***Maryland v. King*** (2013) 569 U. S. 435, 442, [133 S.Ct. 1958; 186 L.Ed.2nd 1].)

California's Statutes:

Pen. Code § 295(a): *Name of the Act*: **The DNA and Forensic Identification Database and Data Bank Act of 1998**.

Pen. Code § 295(b): *Statement of Intent*: "It is the intent of the people of the State of California, in order to further the purposes of this chapter, to require DNA and forensic identification data bank samples from all persons, including juveniles, for the felony and misdemeanor offenses described in **subdivision (a)** of **Section 296**." (**Para. (2)**)

Pen. Code § 295(c): *Purpose*: The stated purpose is to establish a data bank and database to assist federal, state, and local criminal justice and law enforcement agencies in the expeditious detection and prosecution of individuals responsible for sex offenses and other crimes, the exclusion of suspects who are being investigated for these crimes, and the identification of missing and unidentified persons, particularly abducted children.

Pen. Code § 295(d): Describes these provisions as "an administrative requirement to assist in the accurate identification of criminal offenders."

Pen. Code § 295(e): Unless otherwise requested by the Department of Justice, collection of biological samples for DNA analysis from qualifying persons is limited to collection of inner cheek cells of the mouth ("*buccal swab samples*").

Pen. Code 295(f): Authorizes the collection of blood specimens from federal, state or local law enforcement agencies when necessary in a particular case or would aid DOJ in obtaining an accurate forensic DNA profile for identification purposes.

Pen. Code § 295(g) & ***(h)***: Department of Justice is responsible for the management and administration of the DNA and Forensic Identification Database and Data Bank Program, and for liaison with the FBI. Provisions for the enactment of local and state policies and procedures.

> Provisions for providing information to an international DNA database and data bank program does not violate defendant's privacy rights and is therefore constitutional. (***People v. McCray*** (2006) 144 Cal.App.4th 258.)

Pen. Code § 295(i): *Counties' Responsibilities*:

> **(1)** When the specimens, samples and print impressions are collected at a county jail or other county facility, including a private community correctional facility, the county sheriff or chief administrative officer of the county jail or other facility shall be responsible for all the following:
>
> > **(A)** Collect the specimens, etc., immediately following arrest, conviction, or adjudication, or during the booking or intake or reception center process at that facility, or reasonably promptly thereafter.
> >
> > **(B)** Collect the specimens, etc., as soon as administratively practicable after a qualifying person reports to the facility for the purpose of providing them.
> >
> > **(C)** Forward the collected specimens, etc., immediately to the Department of Justice, and in compliance with department policies.
>
> **(2)** The specimens, etc., shall be collected by a person using a collection kit approved by the Department of Justice and in

accordance with the requirements and procedures set forth in **P.C. § 298**.

(3) Counties to be reimbursed for expenses.

Pen. Code § 295(j): Portion of the costs may be paid by defendants at sentencing.

Pen. Code § 295(k): Funds to be deposited in the DNA Testing Fund.

Pen. Code § 295(l): The Department of Justice DNA Laboratory to be known as the "*Jan Bashinski DNA Laboratory*."

Pen. Code § 295.2: Prohibits the DNA and forensic identification database and data bank, and the Department of Justice DNA Laboratory, from being used as a source of genetic material for testing, research, or experiments, by any person, agency, or entity seeking to find a causal link between genetics and behavior or health.

Pen. Code § 296(a): The below listed persons *shall* provide buccal swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples as described in the statutes, for law enforcement identification analysis:

(1) Any person, including any juvenile, who is *convicted* of or pleads guilty or no contest to any felony offense, or is found not guilty by reason of insanity of any felony offense, or any juvenile who is adjudicated under **W&I § 602** for committing any felony offense.

The mandatory requirements of this section have withstood constitutional attack, as far as adult defendants are concerned, a number of times. (See ***People v. King*** (2000) 82 Cal.App.4th 1363; ***Alfaro v. Terhune*** (2002) 98 Cal.App.4th 492; ***People v. Travis*** (2006) 139 Cal.App.4th 1271.)

It has also been held that the requirement that a juvenile comply with this section is constitutional (i.e., no **Fourth Amendment** violation) despite the stronger privacy interest in Juvenile Court proceedings. (***In re Calvin S.*** (2007) 150 Cal.App.4th 443.)

Reduction of defendant's felony conviction to a misdemeanor, after having successfully completed certain terms and conditions of probation for one year, does *not*

entitle defendant to the expungement of the DNA data or return or destruction of the DNA sample. (***Coffey v. Superior Court*** (2005) 129 Cal.App.4th 809.)

In two cases consolidated for purposes of an appeal (***In re C.B.*** (2016) 2 Cal.App.5th 1112, and ***In re C.H.*** (2016) 2 Cal.App.5th 1139.), defendants were juveniles who were declared wards of the court based on conduct that was felonious when committed. Juveniles declared wards based on felony conduct must submit DNA samples, but need not do so for most misdemeanor offenses. In 2014, the passage of **Proposition 47** reclassified various drug and property offenses from felonies to misdemeanors. Defendants, with their offenses reduced to misdemeanors, argued they were entitled to have their DNA samples and profiles removed from the State's databank. The California Supreme Court disagreed: "While **Proposition 47** spares some future offenders a duty to submit samples, it does not alter the past reality that [the juveniles] were adjudicated to have committed felonies and were obligated at the time to provide samples based on those adjudications" and "a showing of changed circumstances eliminating a duty to *submit* a sample is an insufficient basis for *expungement* of a sample already submitted." (***In re C.B.*** (2018) 6 Cal.5th 118, 123-135.)

(2) Any adult who is *arrested for* or charged with any of the following felony offenses:

(A): All felony **Pen. Code § 290** (sex registration) offenses, or attempts to commit such offense.

(B): Murder or voluntary manslaughter, or attempts to commit such offense.

(C): Any felony offense (effective *1/1/2009*; **Proposition 69**).

The United States Supreme Court has upheld the constitutionality of taking a mouth swab for DNA testing of all arrestees for "*serious offenses*," as defined by Maryland statutes, likening the procedure to the taking of fingerprints and photos as part of the booking procedure. (***Maryland v. King*** (2013) 569 U. S. 435 [133 S.Ct. 1958; 186 L.Ed.2nd 1]; see also ***People v. Marquez*** (2019) 31

Cal.App.5th 402, 409-410; noting, without deciding that a "*serious offense*" may be definable by whether the arrested-for offense was "jailable," or "non-jailable," citing ***People v. Thompson*** (2006) 38 Cal.4th 811, 824.)

The constitutionality of California's statutory requirement that all persons arrested for, or charged with, any felony, whether serious or not, submit to a mouth swab DNA test, was upheld in ***Haskell v. Harris*** (9th Cir. 2014) 745 F.3rd 1269.)

The constitutionality of **Pen. Code § 296(a)(2)(C)**, allowing the collection of DNA from all post-arrest, pre-conviction felony suspects, even before a judicial determination of probable cause, was upheld in ***People v. Buza*** (2018) 4 Cal.5th 658; finding it violated neither the U.S. nor the California Constitutions, at least for a serious offense such as the offense in issue here; arson.

> The ***Buza*** Court also approved the immediate testing of the DNA sample, without needing to await a judicial determination of probable cause. (***Id***., at pp. 676-679.)

Note: The U.S. Supreme Court in ***Maryland v. King***, *supra*, says that to be lawful, the warrantless collection of a DNA sample from an arrestee, done even before any judicial hearings, the offense must be a "*serious*" one. The State of Maryland apparently has a statutory list of what they consider to be "serious crimes." (See **Md. Code Ann., Crim. Law § 14-101 (2012)**) King was arrested for rape, which is listed in their statutes as "serious." The California Supreme Court in ***People v. Buza***, *supra*, upheld the constitutionality of **Pen. Code § 296(a)(2)(C)** which allows a warrantless collection of DNA from anyone arrested for *any* felony offense, again upon their arrest and before any court hearings. Buza's crime was arson, which is certainly also serious. In ***People v. Marquez***, *supra*, defendant was arrested for personal possession of a controlled substance, per **H&S § 11350**, which was a felony offense at the time. It was not decided in

Buza, however, whether **P.C. § 296(a)(2)(C)** can constitutionally allow for DNA collection in a felony offense situation where the felony is *not* considered to be serious, leaving this issue "for another day." (4 Cal.5th at pp. 681, 693.) The Court in ***People v. Marquez*** (at p. 537) suggests that the difference between "serious" and "non-serious" is whether or the offense arrested for is "jailable" (citing ***People v. Thompson*** (2006) 38 Cal.4th 811, 824.), a definition that is no doubt broader than Maryland's statutory list, and of questionable validity when you consider that California statutes do not authorize the automatic collection of DNA in misdemeanor situations, jailable or not. In other words, we do not yet know whether **Pen. Code § 296(a)(2)(C)** is constitutional when used to justify the warrantless taking of a DNA sample from an arrestee where the felony offense involved is not considered to be "serious," however this term is to be defined.

Collecting DNA from defendant when he was validly arrested for a felony on probable cause did not violate search and seizure principles under the **Fourth Amendment**, or **Cal. Const.**, **art. I**, **§ 13**, even though defendant was never formally charged. Also, once validly obtained, the DNA evidence could be used in the investigation of an unrelated murder. The situation was noted to be no different than taking fingerprints and photographs of someone arrested on probable cause. There was also no violation of defendant's state constitutional right to privacy (**Cal. Const.**, **art. I**, **§ 13**), but even if there was, the "Truth in Evidence" provisions of **Proposition 8** precludes the suppression of any evidence. (***People v. Roberts*** (2021) 68 Cal.App.5th 64.)

(3) Any person, including any juvenile, who is required to register per **Pen. Code §§ 290** (sex) or **457.1** (arson) because of the commission of, or attempt to commit, a felony or misdemeanor offense, or any person, including any juvenile, who is housed in a mental health facility or sex offender treatment program after referral to such facility or program by a court after being charged with any felony offense.

All registered sex offenders, even when convicted prior to the DNA statutes were passed, are required to provide a DNA sample. The statutes added by **Proposition 69**, adding more offenses to the list of people who must provide a DNA sample, are retroactive. (***Good v. Superior Court* [*People*]** (2008) 158 Cal.App.4th 1494.)

(4) Includes attempts.

(5) These provisions are not intended to preclude the collection of samples as a condition of a plea for a non-qualifying offense.

Pen. Code § 296(b): Provisions apply to all qualifying persons regardless of the sentence imposed.

Pen. Code § 296(c): Provisions apply to all qualifying persons regardless of placement or confinement in any mental hospital or other public or private treatment facility, and shall include, but not be limited to, the following persons including juveniles:

(1) Any person committed to a state hospital or other treatment facility as a mentally disordered sex offender, per **W&I §§ 6300 et seq.**

(2) Any person who has a severe mental disorder, per **Pen. Code §§ 2960 et seq.**

(3) Any person found to be a sexually violent predator, per **P.C. §§ 6600 et seq.**

Pen. Code § 296(d): Provisions are mandatory, and apply even if not so advised by the court.

One's religious beliefs *might* provide a particular defendant, under the "**Religious Freedom Restoration Act**" with a legal excuse for declining to provide a blood sample if the defendant can:

- Articulate the scope of his beliefs;
- Show that his beliefs are religious;
- Prove that his beliefs are sincerely held; *and*
- Establish that the exercise of his sincerely held religious beliefs is substantially burdened.

If defendant can prove the above, the government may still require he provide a blood sample if it can show that:

- Requiring that he provide a blood sample furthers a compelling governmental interest;
- It is the least restrictive means available.

(***United States v. Zimmerman*** (9th Cir. 2007) 514 F.3rd 851.)

The Ninth Circuit has held that a warrantless, suspicionless forced mouth swap of a pre-trial detainee in Nevada, for inclusion in the state's cold case data bank, when there is no qualifying conviction, is a **Fourth Amendment** violation. (***Friedman v. Boucher*** (9th Cir. 2009) 580 F.3rd 847.)

The California Supreme Court, in contrast, has held that mistakenly collecting blood samples for inclusion into California's DNA data base (See **Pen. Code § 296**), when the defendant did not actually have a qualifying prior conviction, is *not* a **Fourth Amendment** violation, but even if it were, it does not require the suppression of the mistakenly collected blood samples, nor is it grounds to suppress the resulting match of the defendant's DNA with that left at a crime scene. (***People v. Robinson*** (2010) 47 Cal.4th 1104, 1116-1129.)

Pen. Code § 296(e): Duty of a prosecutor to notify the court of a defendant's duty to provide the required samples.

Pen. Code § 296(f): Duty of a court to inquire and verify that the required samples have been collected. Abstract of judgment to show that a defendant was ordered to provide such samples, and advisal to a defendant that he or she will be included in the DNA data bank. Failure to so notify a defendant is not grounds to invalidate an arrest, plea conviction or disposition, or affect the defendant's duty to provide such samples.

Pen. Code § 296.1(a): The specimens, samples, and print impressions shall be collected from persons as described in **P.C. § 296(a)** for "*present and past qualifying offenses of record*" as follows:

(1) Collection from any adult following arrest for a felony offense as described in **P.C. § 296(a)(2)(A)**, **(B)** and **(C)**:

(A): Immediately following arrest, or during the booking or intake or reception center process, or as soon as administratively practicable after arrest, but, in any case, prior to release on bail or pending trial or any physical release from confinement or custody; *or*

(B): Upon mandatory order of the court to report within five calendar days to a county jail facility or to a city, state, local, private, or other designated facility.

> The United States Supreme Court has upheld the constitutionality of taking a mouth swab for DNA testing of all arrestees for "*serious offenses*," as defined by Maryland statutes, likening the procedure to the taking of fingerprints and photos as part of the booking procedure. (***Maryland v. King*** (2013) 569 U. S. 435 [133 S.Ct. 1958; 186 L.Ed.2nd 1]; see also ***People v. Marquez*** (2019) 31 Cal.App.5th 402, 409-410; noting, without deciding that a "*serious offense*" may be definable by whether the arrested-for offense was "jailable," or "non-jailable," citing ***People v. Thompson*** (2006) 38 Cal.4th 811, 824.).)
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> The constitutionality of California's statutory requirement that all persons arrested for, or charged with, any felony, whether serious or not, submit to a mouth swab DNA test, was upheld in ***Haskell v. Harris*** (9th Cir. 2014) 745 F.3rd 1269.)
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> The constitutionality of **P.C. § 296(a)(2)(C)**, allowing the collection of DNA from all post-arrest, pre-conviction felony suspects, even before a judicial determination of probable cause, was upheld in ***People v. Buza*** (2018) 4 Cal.5th 658; finding it violated neither the U.S. nor the California Constitutions, at least for a serious offense such as the offense in issue here; arson.
>
> > The ***Buza*** Court also approved the immediate testing of the DNA sample, without needing to await a judicial determination of probable cause. (***Id***., at pp. 676-679.)
>
> The 2006 collection of defendant's DNA sample was unlawful under the **Fourth Amendment** because the prosecution failed to prove that defendant was validly arrested or that his DNA was collected as part of a routine booking procedure. However, the trial court properly admitted the DNA evidence lawfully collected from defendant in 2008

because it was sufficiently attenuated from the unlawful 2006 collection of defendant's DNA sample, given that there was a substantial time break, as well as intervening circumstances and a lack of evidence concerning flagrant official misconduct. (***People v. Marquez*** (2019) 31 Cal.App.5th 402, 408-414.)

(2) Collection from persons (adult or juvenile) already confined or in custody after conviction or adjudication:

(A) Immediately upon intake, or during the prison reception center process, or as soon as administratively practicable at the appropriate custodial or receiving institution or program, *if*:

(i) The person has a record of any past or present conviction or adjudication as a ward of the court in California of a qualifying offense described in **P.C. § 296(a)**, or has a record of any past or present conviction or adjudication in any other court, including any state, federal, or military court, of any offense that, if committed or attempted in this state, would have been punishable as an offense as described in **P.C. § 296(a)**; *and*

(ii) The person's specimens, etc., are not in the possession of the Department of Justice DNA Laboratory, or have not been recorded as part of DOJ's DNA data bank program.

(B) Murder or voluntary manslaughter or any attempt to commit murder or voluntary manslaughter.

(C) Commencing on January 1 of the fifth year following enactment of the act that added this subparagraph, as amended, any adult person arrested or charged with any felony offense.

The constitutionality of **Pen. Code § 296(a)(2)(C)**, allowing the collection of DNA from all post-arrest, pre-conviction felony suspects, even before a judicial determination of probable cause, was upheld in ***People v. Buza*** (2018) 4 Cal.5th 658; finding it violated neither the U.S. nor the California Constitutions, at least for a serious

offense such as the offense in issue here; arson. Defendant's misdemeanor conviction for refusal to provide a DNA swab upon his arrest was also upheld.

The ***Buza*** Court also approved the immediate testing of the DNA sample, without needing to await a judicial determination of probable cause. (***Id***., at pp. 676-679.)

(3) Collection from persons on probation, parole, or other release:

(A) Any person, including a juvenile, who has a record of any past or present conviction or adjudication for any offense listed in **Pen. Code § 296(a)**, who is on probation, parole, postrelease community supervision (**Pen. Code §§ 3450** et seq.), or mandatory supervision pursuant to **P.C. § 1170(h)(5)** for any felony or misdemeanor whether or not listed under **Pen. Code § 296(a)**, shall provide the required samples *if*:

(i) The person has a record of any past or present conviction or adjudication as a ward of the court in California of a qualifying offense described in **Pen. Code § 296(a)**, or has a record of any past or present conviction or adjudication in any other court, including any state, federal, or military court, of any offense that, if committed or attempted in this state, would have been punishable as an offense as described in **Pen. Code § 296(a)**; *and*

(ii) The person's specimens, etc., are not in the possession of the Department of Justice DNA Laboratory, or have not been recorded as part of DOJ's DNA data bank program.

(B) The person shall have the required specimens, etc., collected within five calendar days of being notified by the court, or a law enforcement agency or other agency authorized by the Department of Justice. The specimens, etc., shall be collected in accordance with **Pen. Code § 295(i)** at a county jail facility or a city, state, local, private, or other facility designated for this collection.

(4) Collection from parole violators and others returned to custody:

(A) If a person, including a juvenile, who has been released on parole, furlough, or other release for any offense or crime, whether or not set forth in **Pen. Code § 296(a)**, is returned to a state correctional or other institution for a violation of a condition of his or her parole, furlough, or other release, or for any other reason, that person shall provide the required samples at a state correctional or other receiving institution, *if*:

(i) The person has a record of any past or present conviction or adjudication as a ward of the court in California of a qualifying offense described in **Pen. Code § 296(a)**, or has a record of any past or present conviction or adjudication in any other court, including any state, federal, or military court, of any offense that, if committed or attempted in this state, would have been punishable as an offense as described in **Pen. Code § 296(a)**; *and*

(ii) The person's specimens, etc., are not in the possession of the Department of Justice DNA Laboratory, or have not been recorded as part of DOJ's DNA data bank program.

(5) Collection from persons accepted into California from other jurisdictions:

(A) When an offender from another state is accepted into this state under the various listed agreements and compacts, whether or not the offender is in custody, the acceptance is conditional on the offender providing the required specimens *if* the offender has a record of any past or present conviction or adjudication in California of a qualifying offense as listed in **Pen. Code § 296(a)**, or has a record of any past or present conviction or adjudication in any other court, including any state, federal, or military court, of any offense that, if committed or attempted in this state, would have been punishable as an offense as described in **Pen. Code § 296(a)**.

(B) If the person is not in custody, the required specimens, etc., must be provided within five calendar days after the person reports to the supervising agent or within five

calendar days of notice to the person, whichever occurs first. The person shall report to a county jail facility in the country where he or she resides or temporarily is located to have the specimens collected, in accordance with **Pen. Code § 295(i)**.

(C) If the person is in custody, the required specimens, etc., shall be collected as soon as practicable after receipt in the facility.

(6) Collection from persons in federal custody:

(A) Subject to the approval of the FBI, persons confined or incarcerated in a federal prison or federal institution who have a record of any past or present conviction or juvenile adjudication for an offense listed in **Pen. Code § 296(a)**, or a similar crime under the laws of the United States or any other state that would constitute an offense described in **Pen. Code § 296(a)**, are subject to the requirements of these sections *if* any of the following apply:

(i) The person committed the qualifying offense in California;

(ii) The person was a resident of California at the time of the qualifying offense;

(iii) The person has any record of a California conviction for an offense described in **Pen. Code § 296(a)** regardless of when it was committed; *or*

(iv) The person will be released in California.

(B) The Department of Justice DNA Laboratory shall forward portions of the required specimens, etc., to the U.S. Department of Justice, upon request. Samples will be collected in accordance with **Pen. Code § 295(i)**.

Defendant was convicted of felony marijuana possession (**H&S § 11357(a)**) in 2014 and at the time of his arrest provided his DNA by buccal swab. In 2016, the charge was reduced to a misdemeanor pursuant to the plea agreement and **Pen. Code § 1170.18**, and in 2017 it was reduced to an infraction under **Proposition 64/H&S § 11361.8**. Defendant thereafter moved to have his DNA expunged from the state's database, the motion was denied, and defendant appealed. The District Court of Appeal

affirmed: "Because DNA collection occurs at the time of the felony arrest ([**Pen. Code §**] **296.1**) and is administrative [], the redesignation to an infraction for all purposes under **Proposition 64** does not relate back to the initial charge for purposes of DNA expungement" and "[w]hile [defendant's] felony conviction was redesignated an infraction for all purposes, the retroactive impact is limited to ameliorate the punitive effects of the conviction. . . . DNA collection and retention is not punitive. . . . Thus, the redesignation has no effect on the DNA retention." (***People v. Laird*** (2018) 27 Cal.App.5th 458, 463-473.)

Pen. Code § 296.1(b): The above provisions are retroactive.

Pen. Code § 296.2: Procedures for obtaining replacement samples when the originals are not usable.

Pen. Code § 297: Analysis of crime scene samples.

Pen. Code § 298: Procedures for collection of samples:

(a)

(1) The Director of Corrections, or the Chief Administrative Officer of the detention facility, jail or other facility at which the specimens, etc., were collected shall cause them to be forwarded promptly to the Department of Justice. The specimens, etc., shall be collected by a person using a Department of Justice approved collection kit and in accordance with the requirements and procedures set forth below.

(2) A blood specimen or buccal swab sample taken from a person arrested for the commission of a felony as specified in **Pen. Code § 296(a)(2)** that has not been forwarded to the Department of Justice within six months following the arrest of that person because the agency that took the blood specimen or buccal swab sample has not received notice to forward the DNA specimen or sample to the Department of Justice for inclusion in the state's DNA and Forensic Identification Database and Databank Program pursuant to **para (1)** following a determination of probable cause, shall be destroyed by the agency that collected the blood specimen or buccal swab sample.

(b)

(1) Department of Justice's responsibility for providing kits.

(2) The withdrawal of blood shall be performed in a medically approved manner by health care providers trained and certified to draw blood.

(3) Buccal swab samples may be procured by law enforcement or correctional personnel or other individuals trained to assist in buccal swab collection.

(4) Thumb and palms prints shall be taken on forms prescribed by the Department of Justice, with palm print forms to be forwarded to, and maintained by, the Bureau of Criminal Identification and Information, Department of Justice. Thumbprints to be placed on the sample and specimen containers and forms as directed by the Department of Justice, and forwarded to, and maintained by, the DNA Laboratory.

(5) The collecting agencies responsibility to confirm that the person from whom the specimens, etc., are collected, qualifies.

(6) The DNA Laboratory is responsible for establishing procedures for entering data bank and database information.

(c) Protection from civil or criminal liability for errors in the above. Mistakes also not grounds for invalidating an arrest, plea, conviction, or disposition.

Pen. Code § 298.1(a): It is a misdemeanor for any person to refuse "to give any or all of the following, blood specimens, *saliva samples*, or thumb or palm print impressions as required by this chapter, once he or she has received written notice from the Department of Justice, the Department of Corrections and Rehabilitation, any law enforcement personnel, or officer of the court that he or she is required to provide specimens, samples, and print impressions pursuant to this chapter . . . ." (Italics added)

Sanctions for failure to provide the required samples upon *written* notification: *Misdemeanor*; 1 year and $500 fine. For persons already confined in state prison; "by sanctions for misdemeanors according to a schedule determined by the Department of Corrections."

The constitutionality of **Pen. Code § 296(a)(2)(C)**, allowing the collection of DNA from all post-arrest, pre-conviction felony suspects, even before a judicial determination of probable cause, was upheld in ***People v. Buza*** (2018) 4 Cal.5th 658; finding it violated neither the U.S. nor the California Constitutions, at least for a serious offense such as the offense in issue here; arson. Defendant's misdemeanor conviction for refusal to provide a DNA swab upon his arrest was also upheld.

The ***Buza*** Court also approved the immediate testing of the DNA sample, without needing to await a judicial determination of probable cause. (***Id***., at pp. 676-679.)

Pen. Code § 298.1(b)(1): Authorized law enforcement, custodial, or corrections personnel, including peace officers as defined in **Pen. Code §§ 830**, **830.1**, **830.2(d)**, **830.5**, and **830.55**, may employ *reasonable force* to collect blood specimens, saliva samples, or thumb or palm print impressions from individuals who, after a written or oral request, refuse to provide those specimens, samples, or thumb or palm print impressions.

Pen. Code § 298.1(b)(2): The withdrawal of blood shall be performed in a medically approved manner in accordance with the requirements of **Pen. Code § 298(b)(2)** (above).

Pen. Code § 298.1(c)(1)(A), (2)(A): "*Use of Reasonable Force*" is defined as force that an objective, trained and competent correctional employee, faced with similar facts and circumstances, would consider necessary and reasonable to gain compliance.

Pen. Code § 298.1(c)(1)(B), (2)(B): The use of force must be preceded by written authorization by the supervising officer on duty, which must include the details of the request and the subject's refusal.

Pen. Code § 298.1(c)(1)(C), (2)(C): The use of force must be preceded by efforts to secure voluntary compliance.

Pen. Code 298.1(c)(1)(D), (2)(D): If the use of force includes a jail "*cell extraction*," the extraction shall be videotaped.

Pen. Code § 299: Expungement of Data.

(a) A person whose DNA profile has been included in the data bank shall have his or her DNA specimen and sample destroyed and searchable database profile expunged from the data bank if the person has no past or present offense or pending charge which

qualifies that person for inclusion within the state's DNA and Forensic Identification Database and Data Bank Program and there otherwise is no legal basis for retaining the specimen or sample or searchable profile.

(b) A person who has no past or present qualifying offense, and for whom there otherwise is no legal basis for retaining the specimen or sample or searchable profile, may make a written request to have his or her specimen and sample destroyed and searchable database profile expunged from the data bank program *if*:

> **(1)** Following arrest, no accusatory pleading has been filed within the applicable period allowed by law charging the person with a qualifying offense or if the charges have been dismissed prior to adjudication by a trier of fact;
>
> **(2)** The charges which served as the basis for including the DNA profile in the state's DNA and Forensic Identification Database and Databank Program have been dismissed prior to adjudication by a trier of fact, in which case the court shall forward an order to the Department of Justice upon disposition of the case, indicating that the charges have been dismissed;
>
> **(3)** The underlying conviction or disposition serving as the basis for including the DNA profile has been reversed and the case dismissed;
>
> **(4)** The person has been found factually innocent of the underlying offense pursuant to **Pen. Code § 851.8** or **W&I § 781.5**; *or*
>
> **(5)** The defendant has been found not guilty or the defendant has been acquitted of the underlying offense.

(c) Except as provided in this section, the Department of Justice shall destroy a specimen and sample and expunge the searchable DNA database profile pertaining to the person who has no present or past qualifying offense of record upon receipt of the following:

> **(1)** A certified copy of the court order reversing and dismissing the conviction or case, or a letter from the district attorney certifying that no accusatory pleading has been filed or the charges which served as the basis for collecting a DNA specimen and sample have been dismissed prior to adjudication by a trier of fact, the

defendant has been found factually innocent, the defendant has been found not guilty, the defendant has been acquitted of the underlying offense, or the underlying conviction has been reversed and the case dismissed.

(2) A court order verifying that no retrial or appeal of the case is pending.

(d) Pursuant to this section, the Department of Justice shall destroy any specimen or sample collected from the person and any searchable DNA database profile pertaining to the person, unless the department determines that the person is subject to the provisions of this chapter because of a past qualifying offense of record or is or has otherwise become obligated to submit a blood specimen or buccal swab sample as a result of a separate arrest, conviction, juvenile adjudication, or finding of guilty or not guilty by reason of insanity for an offense described in **Pen. Code § 296(a)**, or as a condition of a plea.

The Department of Justice is not required to destroy analytical data or other items obtained from a blood specimen or saliva, or buccal swab sample, if evidence relating to another person subject to the provisions of this chapter would thereby be destroyed or otherwise compromised.

Any identification, warrant, probable cause to arrest, or arrest based upon a databank or database match is not invalidated due to a failure to expunge or a delay in expunging records.

(e) Notwithstanding any other law, the Department of Justice DNA Laboratory is not required to expunge DNA profile or forensic identification information or destroy or return specimens, samples, or print impressions taken pursuant to this section if the duty to register under **Pen. Code §§ 290** or **457.1**.

(f) Notwithstanding any other law, including **Pen. Code §§ 17**, **1170.18**, **1203.4**, and **1203.4a**, a judge is not authorized to relieve a person of the separate administrative duty to provide specimens, samples, or print impressions required by this chapter if a person has been found guilty or was adjudicated a ward of the court by a trier of fact of a qualifying offense as defined in **Pen. Code § 296(a)**, or was found not guilty by reason of insanity or pleads no contest to a qualifying offense as defined in **Pen. Code § 296(a)**.

(g) This section shall only become operative if the California Supreme Court rules to uphold the California Court of Appeal decision in ***People v. Buza*** (2014) 231 Cal.App.4th 1446 in regard to the provisions of **Pen. Code § 299**, as amended by **Section 9** of the **DNA Fingerprint, Unsolved Crime and Innocence Protection Act**, **Proposition 69**, approved by the voters at the November 2, 2004, statewide general election, in which case this section shall become operative immediately upon that ruling becoming final.

Note: The constitutionality of **Pen. Code § 296(a)(2)(C)**, allowing the collection of DNA from all post-arrest, pre-conviction felony suspects, even before a judicial determination of probable cause, was in fact upheld in ***People v. Buza*** (2018) 4 Cal.5th 658; finding it violated neither the U.S. nor the California Constitutions, at least for a serious offense such as the offense in issue here; arson.

> The ***Buza*** Court also approved the immediate testing of the DNA sample, without needing to await a judicial determination of probable cause. (***Id***., at pp. 676-679.)

In two cases consolidated for purposes of an appeal (***In re C.B.*** (2016) 2 Cal.App.5th 1112, and ***In re C.H.*** (2016) 2 Cal.App.5th 1139.), defendants were juveniles who were declared wards of the court based on conduct that was felonious when committed. Juveniles declared wards based on felony conduct must submit DNA samples, but need not do so for most misdemeanor offenses. In 2014, the passage of **Proposition 47** reclassified various drug and property offenses from felonies to misdemeanors. Defendants, with their offenses reduced to misdemeanors, argued they were entitled to have their DNA samples and profiles removed from the State's databank. The California Supreme Court disagreed: "While **Proposition 47** spares some future offenders a duty to submit samples, it does not alter the past reality that [the juveniles] were adjudicated to have committed felonies and were obligated at the time to provide samples based on those adjudications" and "a showing of changed circumstances eliminating a duty to *submit* a sample is an insufficient basis for *expungement* of a sample already submitted." (***In re C.B.*** (2018) 6 Cal.5th 118, 123-135.)

Reduction of defendant's felony conviction to a misdemeanor, after having successfully completed certain terms and conditions of probation for one year, does *not* entitle defendant to the expungement of the DNA data or return or destruction of the DNA sample. (***Coffey v. Superior Court*** (2005) 129 Cal.App.4th 809.)

Also, reduction of a defendant's felony conviction to a misdemeanor under the provisions of **Pen. Code § 1170.18** (**Proposition 47**) does not allow for the expungement of the defendant's previously obtained DNA sample, as specified in the amended **Pen. Code § 290(f).** (***People v. Harris*** (2017) 15 Cal.App.5th 47, 54-60; also rejecting defendant's arguments that the collection and retention of a DNA buccal swap sample violates his constitutional and equal protection and privacy rights; at pp. 60-66.)

The 2006 collection of defendant's DNA sample was unlawful under the **Fourth Amendment** because the prosecution failed to prove that defendant was validly arrested or that his DNA was collected as part of a routine booking procedure. However, the trial court properly admitted the DNA evidence lawfully collected from defendant in 2008 because it was sufficiently attenuated from the unlawful 2006 collection of defendant's DNA sample, given that there was a substantial time break, as well as intervening circumstances and a lack of evidence concerning flagrant official misconduct. (***People v. Marquez*** (2019) 31 Cal.App.5th 402, 408-414.)

Pen. Code § 299.5: Confidentiality requirements and permitted disclosures:

Information obtained from an arrestee's DNA is confidential and may not be disclosed to the public. DNA samples and the biological material from which they are obtained may not be used "as a source of genetic material for testing, research, or experiments, by any person, agency, or entity seeking to find a causal link between genetics and behavior or health." (***Id***., **§ 295.2**.) Any person who knowingly uses a DNA sample or profile for any purpose other than "criminal identification or exclusion purposes" or "the identification of missing persons," or who "knowingly discloses DNA or other forensic identification information … to an unauthorized individual or agency" for any unauthorized reason is subject to criminal prosecution and may be imprisoned for up to three years and fined up to $10,000. (***Id***., **Pen. Code § 299.5(i)(1)**.) The Department of Justice is also subject to civil damages for knowing misuse of a sample or profile by any of its employees. (***Id***., **Pen. Code § 299.5(i)(2)(A)**.) (***People v. Buza*** (2018) 4 Cal.5th 658, 667.)

Pen. Code 299.6: Dissemination of information to law enforcement agencies:

(a) Sharing or dissemination of population database or data bank information, DNA profile or forensic identification database or data bank information, analytical data and results generated for forensic identification database and data bank purposes, or protocol and forensic DNA analysis methods and quality assurance or quality control procedures, may be made with:

(1) Federal, state or local law enforcement agencies.

(2) Crime laboratories, public or private, that serve federal, state and local law enforcement agencies, that have been approved by the Department of Justice.

(3) The attorney general's office of any state.

(4) Any state or federally authorized auditing agent or board that inspects or reviews the work of the Department of Justice DNA Laboratory for the purpose of ensuring that the laboratory meets described standards.

(5) Any third party DOJ deems necessary to assist the department's crime laboratory with statistical analyses of population databases, or the analyses of forensic protocol, research methods, or quality control procedures, or to assist in the recovery or identification of human remains for humanitarian purposes, including identification of missing persons.

(b) The population databases and data banks of the DNA Laboratory may be made available to and searched by the FBI and any other agency participating in the FBI's CODIS System or any other national or international law enforcement database or data bank system.

(c) The Department of Justice may provide portions of biological samples (as described) to local public law enforcement DNA laboratories for identification purposes provided that the privacy provisions are followed, and if each of the following conditions are met:

(1) The procedures used for handling of specimens and samples and the disclosure of results are as established by DOJ pursuant to **Pen. Code §§ 297**, **298** and **299.5**.

(2) The methodologies and procedures used for DNA or forensic identification analysis are compatible with those established by DOJ pursuant to **Pen. Code § 299.5(i)**, or otherwise are determined by DOJ to be valid and appropriate for identification purposes.

(3) Only tests of value to law enforcement for identification purposes are performed and a copy of the results of the analysis are sent to DOJ.

(4) All provisions concerning privacy and security are followed.

Pen. Code § 299.7: Disposal of samples.

Pen. Code §§ 300 et seq.: Construction and severability.

Additional Case Law:

The provisions of these statutes (formerly, **Pen. Code § 290.2**), requiring the providing of the listed samples, are constitutional. (***People v. King*** (2000) 82 Cal.App.4th 1363.)

The new provisions replacing **Pen. Code § 290.2** (**Pen. Code §§ 295 et seq.**) have similarly been held to be constitutional. (***Alfaro v. Terhune*** (2002) 98 Cal.App.4th 492.)

The taking of blood samples from prison inmates, parolees and probationers for the purpose of completing a federal DNA database, is lawful. (***United States v. Kincade*** (9th Cir. 2004) 379 F.3rd 813.)

See also ***United States v. Lujan*** (9th Cir. 2007) 504 F.3rd 1003; upholding the federal "**DNA Analysis Backlog Elimination Act of 2000**," **42 U.S.C. §§ 14135-14135e**, when challenged on the basis that the **Act** violates the **Fourth Amendment**, the **Ex Post Facto Clause**, that it is a "**Bill of Attainder**, and that it contravenes constitutional "separation of powers" restrictions, when challenged by a federal felon who, when the requirement that she provide a DNA sample was imposed, was on supervised release.

Similarly, further amendment to this legislation by passage of the "**Justice for All Act of 2004**," expanding the DNA collection requirements to all federal felonies, crimes of violence, and all sexual abuse crimes, where the defendant is on probation, parole or supervised release, is constitutional. (***United States v. Kriesel*** (9th Cir. 2007) 508 F.3rd 941.)

Reduction of defendant's felony conviction to a misdemeanor, after having successfully completed certain terms and conditions of probation for one year, does *not* entitle defendant to the expungement of the DNA data or return or destruction of the DNA sample. (***Coffey v. Superior Court*** (2005) 129 Cal.App.4th 809.)

The amendments to **Pen. Code § 296(a)(1)**, providing for the mandatory collection of DNA samples from anyone convicted of a felony offense, do not violate a defendant's **Fourth** (Search and Seizure) or **Fourteenth** (Equal Protection and Due Process) rights, and is not an *Ex Post Facto* violation despite being enacted after the date of defendant's offense. (***People v. Travis*** (2006) 139 Cal.App.4th 1271; a felony DUI case.)

The "***Kelly/Frye***" (***People v. Kelly*** (1976) 17 Cal.3rd 24; ***Frye v. United States*** (D.C. Cir. 1923) 293 F. 1013.) standard does not apply to a DNA data base search used to identify a possible suspect. Requiring inmates to supply a DNA sample, even though not a criminal suspect at the time of the taking of the sample, is a constitutional "search" pursuant to **Pen. Code § 295**. (***People v. Johnson*** (2006) 139 Cal.App.4th 1135.)

All registered sex offenders, even when convicted prior to the DNA statutes were passed, are required to provide a DNA sample. The statutes added by **Proposition 69**, adding more offenses to the list of people who must provide a DNA sample, are retroactive. (***Good v. Superior Court* [*People*]** (2008) 158 Cal.App.4th 1494.)

California's provisions for extracting DNA samples from convicted felons, even over a prisoner's objection and through the use of reasonable force, does not violate either the **Fourth Amendment** search or seizure rules, the **Eighth Amendment** ("reckless and deliberate indifference"), nor **Fourteenth Amendment** due process. (***Hamilton v. Brown*** (9th Cir. 2010) 630 F.3rd 889.)

The United States Supreme Court has upheld the constitutionality of taking a mouth swab for DNA testing of all arrestees for "*serious offenses*," as defined by Maryland statutes, likening the procedure to the taking of fingerprints and photos as part of the booking procedure. (***Maryland v. King*** (2013) 569 U. S. 435, [133 S.Ct. 1958; 186 L.Ed.2nd 1].)

"(B)uccal swabs are 'brief and . . . minimal' physical intrusions '"'involv[ing] virtually no risk, trauma, or pain.'"'" (***Bill v. Brewer*** (9th Cir. 2015) 799 F.3rd 1295, 1302, quoting ***Maryland v. King***, *supra*, at p. 446.)

The constitutionality of California's statutory requirement that all persons arrested for, or charged with, any felony, whether serious or not, submit to a mouth swab DNA test, was upheld in ***Haskell v. Harris*** (9th Cir. 2014) 745 F.3rd 1269.)

Defendant's motion for the return of blood samples after completion of supervised release, collected upon his imprisonment, was properly denied because the Government's continued retention of the blood sample was reasonable under the circumstances in that the Government used blood samples to ensure the accuracy of DNA identification and CODIS (a nationwide database of genetic identifying information). The match confirmation process is a method of long-term quality control. The retention of the blood samples furthered the Government's goals by ensuring the accuracy of the CODIS profile match. (***United States v. Kriesel*** (9th Cir. 2013) 720 F.3rd 1137, 1144-1147.)

> *Note*: "The CODIS database stores DNA profiles of convicted federal felons on supervised release and others who have had brushes with the law. *See* **DNA Analysis Backlog Elimination Act of 2000** (**DNA Act**), **Pub. L. No. 106-546, § 3, 114 Stat. 2746, 2728-30**; *see also* ***28 C.R.R. § 28.2***. These DNA profiles are commonly generated from blood samples." (***Id***., at p. 1140.) CODIS is a "centrally-managed database linking DNA profiles culled from federal, state, and territorial DNA collection programs, as well as profiles drawn from crime-scene evidence, unidentified remains, and genetic samples voluntarily provided by relatives of missing persons." (***Bill v. Brewer*** (9th Cir. 2015) 799 F.3rd 1295, 1 298, fn. 1.)

In two cases consolidated for purposes of an appeal (***In re C.B.*** (2016) 2 Cal.App.5th 1112, and ***In re C.H.*** (2016) 2 Cal.App.5th 1139.), defendants were juveniles who were declared wards of the court based on conduct that was felonious when committed. Juveniles declared wards based on felony conduct must submit DNA samples, but need not do so for most misdemeanor offenses. In 2014, the passage of **Proposition 47** reclassified various drug and property offenses from felonies to misdemeanors. Defendants, with their offenses reduced to misdemeanors, argued they were entitled to have their DNA samples and profiles removed from the State's databank. The California Supreme Court disagreed: "While **Proposition 47** spares some future offenders a duty to submit samples, it does not alter the past reality that [the juveniles] were adjudicated to have committed felonies and were obligated at the time to provide samples based on those adjudications" and "a showing of changed circumstances eliminating a duty to *submit* a sample is an insufficient basis for *expungement* of a sample already submitted." (***In re C.B.*** (2018) 6 Cal.5th 118, 123-135.)

The 2006 collection of defendant's DNA sample was unlawful under the **Fourth Amendment** because the prosecution failed to prove that defendant was validly arrested or that his DNA was collected as part of a routine booking procedure. However, the trial court properly admitted the DNA evidence lawfully collected from defendant in 2008 because it was sufficiently attenuated from the unlawful 2006 collection of defendant's DNA sample, given that there was a substantial time break, as well as intervening circumstances and a lack of evidence concerning flagrant official misconduct. (***People v. Marquez*** (2019) 31 Cal.App.5th 402, 408-414; noting, without deciding that a "*serious offense*" may be definable by whether the arrested-for offense was "jailable," or "non-jailable," citing ***People v. Thompson*** (2006) 38 Cal.4th 811, 824.)

The trial court was held not to have erred in relying on expert testimony presented at a ***Kelly*** (i.e., "***Kelly/Frye***:" ***People v. Kelly*** (1976) 17 Cal.3rd 24; ***Frye v. United States*** (D.C. Cir. 1923) 293 F. 1013.) hearing in determining that a method of DNA analysis, which had been used on blood from a murder scene, had gained general acceptance. One expert was not shown to be biased, while another expert who had a vested professional interest in the method's acceptance did not fail to set forth the scientific community's views fairly and impartially while including any opposing scientific views,. Further, the prosecution supported the latter expert's testimony with literature and legal decisions. The evidence was also held not to be unduly prejudicial under **Evid. Code § 352** because it was highly probative on the issue of identity and would not have caused the jury to decide the case on an improper basis. Lastly, due process was not violated because the jury was instructed with **CALCRIM No. 332**; i.e., that it was not required to accept expert testimony. (***People v. Davis*** (2022) 75 Cal.App.5th 694.)

The trial court sustained, without leave to amend, a demurrer to a complaint alleging that a DNA collection program (**Pen. Code §§ 295, 295.1, 296, 296.1**), as applied by the county district attorney, violated alleged misdemeanants' rights to privacy (**Cal. Const., art. I, § 1**), counsel, and due process. The Court of Appeal reversed and remanded. Because taxpayer standing (**Code Civ. Proc. § 526a(a)**) is appropriate to challenge a government program as unlawfully implemented, taxpaying county residents who had not participated in the DNA collection program could bring suit challenging it. The taxpayers adequately pleaded that waivers of privacy and counsel rights were not knowing or voluntary because they alleged prosecutors improperly obtained waivers from uncounseled participants without disclosing how DNA was maintained and used. A due process claim sufficiently alleged deprivation of a protected interest because the privacy and counsel claims were viable.

(***Thompson v. Spitzer*** (2023) 90 Cal.App.5th 436; as modified at 2023 Cal.App.LEXIS 350 (May 5, 2023).)

***DNA Fingerprint, Unsolved Crime and Innocence Protection Act; Proposition 69*:**

Proposition 69 (approved 2004), known as the **DNA Fingerprint, Unsolved Crime and Innocence Protection Act**, expanded the requirements for the collection of DNA identification information for law enforcement purposes. When the California electorate voted to pass the **DNA Act**, it substantially expanded the scope of DNA sampling to include individuals who are arrested for any felony offense, as well as those who have been convicted of such an offense. **Pen. Code § 296(a)**. Similarly, the **DNA Act** amended California law to mandate DNA collection from any person who commits a misdemeanor offense requiring registry as a sex offender or arsonist. **Pen. Code § 296(a)(3)**. The **DNA Act's** requirement to collect DNA from persons arrested for serious crimes has been generally found constitutional by the California Supreme Court. DNA samples collected under California law are stored in a statewide databank maintained by the California Department of Justice. **Pen. Code §§ 295(g)**, **(h), 295.1(c)**, **(d)**. The Department of Justice is authorized to forward its DNA samples to the nationwide databank operated by the United States Department of Justice under certain conditions. **Pen. Code § 296.1(a)(6)(B)**.

Because taxpayer standing under **Code Civ. Proc § 526a(a)**, was appropriate to challenge a government program as unlawfully implemented, taxpaying county residents who had not participated in a county DNA collection program established under the authority of **Pen. Code §§ 295**, **295.1**, **296**, **296.1**, could bring suit alleging that the program, as applied by the county district attorney, violated alleged misdemeanants' rights to privacy under **Cal. Const., art. I, § 1**, counsel, and due process. The taxpayers adequately pleaded that waivers of privacy and counsel rights were not knowing or voluntary because they alleged prosecutors improperly obtained waivers from uncounseled participants without disclosing how DNA was maintained and used. A due process claim sufficiently alleged deprivation of a protected interest because the privacy and counsel claims were viable. (***Thompson v. Spitzer*** (2023) 90 Cal.App.5th 436.)

***Taking DNA Samples from Minors*:**

***Wel. & Inst. Code § 625.4*:**

(a) A law enforcement officer, employee of a law enforcement agency, or any agent thereof, shall *not* request that a voluntary DNA reference sample be collected directly from the person of a minor unless all of *the following conditions* are met:

(1) The minor consents in writing, after being verbally informed of the purpose and manner of the collection, the right to refuse consent, the right to sample expungement, and the right to consult with an attorney, parent, or legal guardian prior to providing consent.

(2) A specific parent or legal guardian identified by the minor, or an attorney representing the minor, is contacted, is provided the information specified in **para. (1)**, is allowed to privately consult by telephone or in person with the minor, and, after that consultation, concurs with the minor's decision to consent.

(3) Local law enforcement provides the minor with a form for requesting expungement of the voluntary DNA buccal swab sample, if a sample is consented to and collected pursuant to this section.

(b) Nothing in **subd. (a)** is intended to create a right to the *appointment of counsel*.

(c) The *detention* of a minor that occurs for the purpose of requesting a voluntary DNA reference sample directly from the person of that minor pursuant to this section *shall not be unreasonably extended* solely for the purpose of contacting a parent, legal guardian, or attorney pursuant to **subd. (a)(2)**, if a parent, legal guardian, or attorney cannot be reached after reasonable attempts have been made.

(d) The court shall, in adjudicating the *admissibility* of a voluntary DNA reference sample taken directly from a minor pursuant to this section, consider the effect of any failure to comply with this section.

(e) The law enforcement agency obtaining a voluntary DNA reference sample directly from the person of a minor pursuant to this section shall determine within *two years* whether the person *remains a suspect in a criminal investigation*. If, within two years, the voluntary DNA reference sample that is collected pursuant to this section is not found to implicate the minor as a suspect in a criminal offense, the local law enforcement agency shall *promptly expunge* the sample and the DNA profile information from that voluntary DNA reference sample from the databases or data banks into which they have been entered.

(f) If the minor requests *expungement of a voluntary DNA* reference sample collected directly from the person of a minor pursuant to this section, the local law enforcement agency shall make reasonable efforts to promptly expunge the sample and the DNA profile information from that voluntary DNA reference sample from all DNA databases or data banks

unless the voluntary DNA reference sample has implicated the minor as a suspect in a criminal investigation. If expungement occurs, law enforcement shall make reasonable efforts to notify the minor when the minor's DNA sample and DNA profile information have been expunged.

(g) A voluntary DNA reference sample taken directly from the person of a minor pursuant to this section and the DNA profile information from that voluntary DNA reference sample shall not be searched, analyzed, or compared to DNA samples or profiles in the *investigation of crimes other than the investigation or investigations for which it was taken*, unless that additional use is permitted by a court order.

(h) Any local law enforcement agency that is found by *clear and convincing evidence* to maintain a pattern and practice of collecting voluntary DNA reference samples directly from the person of a minor in violation of this section after January 1, 2019, shall be liable to each minor whose sample was inappropriately collected in the amount of five thousand dollars ($5,000) for each violation, plus attorney's fees and costs.

(i) The *scope* of this section is limited to the collection of voluntary DNA reference samples directly from the person of minors, and, as such, **subds. (a)** to **(h)**, inclusive have no application to the collection and use of DNA under other circumstances, including, but not limited to, any of the following:

> **(1)** The sample collection or use is expressly authorized pursuant to the state's DNA Act as set forth in the **DNA and Forensic Identification Database and Data Bank Act of 1998**, as amended, **P.C. §§ 295 et seq.** (**Part 1**, **Title 9**, **Chapter 6**).
>
> **(2)** A DNA reference sample collection and analysis that occurs pursuant to a valid search warrant or court order or exigent circumstances.
>
> **(3)** A DNA reference sample collection that occurs in the investigation or identification of a missing or abducted minor.
>
> **(4)** Any DNA reference sample collected from a juvenile victim or suspected perpetrator of a sexual assault or other crime as authorized by law.
>
> **(5)** Any DNA sample that is collected as evidence in a criminal investigation, such as evidence from a crime scene or an abandoned sample.

***DNA Cases from Other Jurisdictions*:**

Petitioner, convicted by a Texas jury f murder and sentenced to death, had standing to sue for post-conviction DNA testing of other physical pieces of evidence because he sufficiently alleged an injury in fact, which was denial of access to the requested evidence. A federal court's conclusion that Texas's post-conviction DNA testing procedures violated due process would have amounted to a significant increase in the likelihood that petitioner would obtain relief that directly redressed the injury suffered. When a prisoner pursued state post-conviction DNA testing through the state-provided litigation process, and that petition is denied, the statute of limitations for a **42 U.S.C.S. § 1983** procedural due process claim began to run when the state litigation ended. Petitioner's **§ 1983** claim, which raised a procedural due process challenge to Texas's post-conviction DNA testing law, was timely because the statute of limitations began to run when the Texas Court of Criminal Appeals denied petitioner's motion for rehearing. (***Reed v. Goertz*** (Apr. 19, 2023) __U.S.__ [143 S.Ct. 955; 215 L.Ed.2nd 218]

***Chapter 12*:**

***Searches of Vehicles*:**

General Rule: Search warrants *are not* needed to lawfully seize and search a motor vehicle, at least in most instances, the applicable exceptions overwhelming the general **Fourth Amendment** search warrant requirement.

> Although the constitutional protections against unreasonable searches and seizures extend to automobiles, it is recognized that vehicles enjoy a lesser expectation of privacy than do other things or places, "often permit(ing) officers to dispense with obtaining a warrant before conducting a lawful search." (***Byrd v. United States*** (2018) 584 U.S. 395, 403 [138 S.Ct. 1518; 1526; 200 L.Ed.2nd 805]; citing ***California v. Acevedo*** (1991) 500 U.S. 565, 579 [111 S.Ct. 1982; 114 L.Ed. 2nd 619].)
>
> "A warrantless search is unlawful under the **Fourth Amendment** 'unless it falls within one of the "specifically established and well-delineated exceptions."' (***People v. Woods*** (1999) 21 Cal.4th 668, 674 . . .]; see also ***Arizona v. Gant*** (2009) 556 U.S. 332, 338 [173 L.Ed.2nd 485; 129 S.Ct. 1710].) Automobiles are the subject of special exceptions, and warrantless searches of automobiles 'have been upheld in circumstances in which a search of a home or office would not.' (***South Dakota v. Opperman*** (1976) 428 U.S. 364, 367 [49 L.Ed.2nd 1000; 96 S. Ct. 3092] . . .) These broader exceptions from the **Fourth Amendment's** general prohibition against warrantless searches derive from the inherent mobility of automobiles and a diminished expectation of privacy given the public nature of automobile travel. (***Id***. at pp. 367–368.)" (***People v. Lee*** (2019) 40 Cal.App.5th 853. 861.)

Warrantless Searches of Vehicles can be justified under one or more of *Eight* legal theories, each of which is considered separately, below:

- *Incident to Arrest*
- *With Probable Cause* (*The* "*Automobile Exception*")
- *When the Vehicle Itself is Evidence of a Crime*
- *Inventory Searches of Impounded Vehicles*
- *The* "*Protective Search*" (or "*Patdown*") *of a Vehicle for Weapons*
- *Statutory Automobile Inspections*
- *Statutory Automobile Searches*
- *Searching a Vehicle* for a *Driver's License* and/or *Vehicle Registration, VIN Number, Proof of Insurance, etc.*

***Searches Incident to Arrest**:*

> *General Rule*: Any time a person is arrested "*in*," or "*near*" (see below), or (under the old rule) as a "*recent occupant*" (but see "*Searches where Arrestee is a*

'*Recent Occupant*,'" below) of his or her vehicle, a search of the suspect and the area immediately surrounding the suspect, including within the passenger area of his vehicle, is, as a general rule, lawful. (***New York v. Belton*** (1981) 453 U.S. 454 [101 S.Ct. 2860; 69 L.Ed.2nd 768]; ***United States v. Robinson*** (1973) 414 U.S. 218 [94 S.Ct. 467; 38 L.Ed.2nd 427]; ***People v. Molina*** (1994) 25 Cal.App.4th 1038, 1044; ***Thornton v. United States*** (2004) 541 U.S. 615 [124 S.Ct. 2127; 158 L.Ed.2nd 905]; ***People v. Johnson*** (2018) 21 Cal.App.5th 1026, 1032-1033.)

The Rationale: The traditional rationale of warrantless searches incident to arrest is the two-fold need to (1) uncover evidence of the crime, to prevent its destruction, and (2) to preclude the possibility the arrestee might reach for a weapon with which he could injure the arresting officer or effect an escape. (***Preston v. United States*** (1964) 376 U.S. 364, 367 [84 S.Ct. 881; 11 L.Ed.2nd 777]; ***United States v. Rabinowitz*** (1950) 339 U.S. 56, 72-75 [70 S.Ct. 430; 94 L.Ed. 653]; ***Agnello v. United States*** (1925) 269 U.S. 20, 30 [46 S.Ct. 4; 70 L.Ed. 145]; ***United States v. Edwards*** (1974) 415 U.S. 800, 802-803 [94 S.Ct. 1234; 39 L.Ed.2nd 771]; ***People v. Diaz*** (2011) 51 Cal.4th 84; ***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430].)

> But see ***Arizona v. Gant*** (2009) 556 U.S. 332 [129 S.Ct. 1710; 173 L.Ed.2nd 485], which has severely limited searches incident to arrest in a vehicle, at least where the arrested subject has already been secured and can no longer lunge for evidence or weapons. (See "*Limitation of the* ***Chimel*****/*****Belton*** '*Bright Line*' *Test*; *When the Arrestee Has Been Secured*," below.)

Containers in the Vehicle:

> *Rule*: The searchable area includes any *containers* found in that area, even if not the arrestee's property. (***People v. Mitchell*** (1995) 36 Cal.App.4th 672, 674-677; ***People v. Prance*** (1991) 226 Cal.App.3rd 1525, 1531; purses belonging to passengers.)
>
> *Case Law*:
>
> > A warrantless search of those areas of the passenger compartment of a vehicle where an officer reasonably expects that the parolee could have stowed personal belongings or discarded items when aware of police activity, as well as a search of personal property located in those areas if the officer reasonably believes that the parolee owns those items or has the ability to exert control over them, is lawful. (***People v. Schmitz*** (2012) 55 Cal.4th 909, 916-933.)
> >
> > > See ***People v. Maxwell*** (2020) 58 Cal.App.5th 546, extending the same rule to parolees. "We thus conclude an

> officer may search 'those areas of the passenger compartment where the officer reasonably expects that the parolee could have stowed personal belongings or discarded items when aware of police activity.'" (Pg. 556.)

See also ***Wyoming v. Houghton*** (1999) 626 U.S. 295 [119 S.Ct. 1297; 143 L.Ed.2nd 408]; search of another person's purse when the search was based upon *probable cause* (below).

Similarly, a vehicle search based on a passenger's probation status may extend beyond the probationer's person and the seat he or she occupies, but is confined to those areas of the passenger compartment where the officer reasonably expects that the probationer could have stowed personal belongings or discarded items when aware of police activity. (***People v. Cervantes*** (2017) 11 Cal.App.5th 860, 871.)

Where officers searched a backpack in a vehicle after arresting two of the occupants for falsely identifying themselves, the Court upheld the search, ruling that it was reasonable to believe that verification of the arrestee's identification would be found in that backpack. In so ruling , the court held that police officers may search a vehicle incident to a recent occupant's arrest if: 1) the arrestee is within reaching distance of the passenger compartment at the time of the search; or 2) it is reasonable to believe the vehicle contains evidence of the offense for which the occupant was arrested. Here, the court held that it was reasonable to believe that the defendants' vehicle contained evidence of the offense of providing false identification information. (***United States v. Campbell-Martin*** (8th Cir. IA 2021) 17 F.4th 807.)

However, defendant's locked glovebox (defendant being the driver and owner of the car) was held *not* to be searchable merely because a parolee (subject to search and seizure conditions) was in the back seat, absent evidence tending to show that the parolee was capable of accessing the glovebox and in the absence of any observations by the police suggesting that the occupants of the car were maneuvering to get the gun from the back seat passenger into the glove box and lock it. (***Claypool v. Superior Court*** (2022) 85 Cal.App.5th 1092.)

This rule has been held *not* to apply to cellphones in that cellphones do not pose a danger to officers and once seized, it is unlikely any evidence contained in the phone is going to be destroyed. When balanced with the large amount of personal information likely to be found in cellphones, a warrantless

intrusion into the phone is not justified under the **Fourth Amendment** absent exigent circumstances. (***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430].)

Once considered by some to be a container of information (See ***People v. Michael E.*** (2014) 230 Cal.App.4th 261, 276-279, where the Court included a whole segment criticizing the current trend of referring to computers and cellphones as "*containers of information*"), recent authority has decided that cellphones no longer fall into the category of containers. (***United States v. Camou*** (9th Cir. 2014) 773 F.3rd 932, 941-943; see also **United States *v.* Lara** (9th Cir. 2016) 815 F.3rd 605, 610-611

And see "*Limitations*," below.

Probable Cause Not Needed: Except for that which is necessary to justify the arrest, there *need not be any separate probable cause* to believe there is anything there to seize, in order to justify the search of the vehicle. The arrest alone justifies the search. (***United States v. Robinson*** (1973) 414 U.S. 218 [94 S.Ct. 467; 38 L.Ed.2nd 427]; ***People v. Molina*** (1994) 25 Cal.App.4th 1038.)

Limitations:

"*The Lunging area*:" The area to be searched is limited by ***Chimel v. California*** (1969) 395 U.S. 752 [89 S.Ct. 2034; 23 L.Ed.2nd 685], to the "*lunging area*" within the vehicle. (***People v. Summers*** (1999) 73 Cal.App.4th 288.)

See the concurring, minority opinion in ***Summers*** discussing the legal justification for a search *after* the suspect has been immobilized and removed from the "*grabbing area*," delaying the search until it can be done safety.

The "*lunging area*" of ***Chimel*** generally includes *the entire passenger area* of the car. (***New York v. Belton*** (1981) 453 U.S. 454, 460 [101 S.Ct. 2860; 69 L.Ed.2nd 768, 775].)

This includes the rear area of a hatchback vehicle, so long as that area is accessible to the passengers in the vehicle, whether or not that storage area is covered. (***United States v. Mayo*** (9th Cir. 2005) 394 F.3rd 1271; see also ***United States v. Caldwell*** (8th Cir. 1996) 97 F.3rd 1063, 1067; ***United States v. Doward*** (1st Cir. 1994) 41 F.3rd 789, 794.)

See also ***United States v. Olguin-Rivera*** (10th Cir. 1999) 168 F.3rd 1203, 1205-1207; covered cargo area of a sport utility vehicle.

And ***United States v. Pino*** (6th Cir. 1988) 855 F.2nd 357, 364; cargo area of midsize station wagon.

The hatchback or rear hatch area of a vehicle held to be a part of the passenger compartment. (***United States v. Stegall*** (8th Cir. Ark. 2017) 850 F.3rd 981.)

Contemporaneous in Time and Place: Defendant must be arrested *in or near* his car, and, except when impractical to do so under the circumstances, the search must be "*roughly contemporaneous in time and place*" with the arrest. (***People v. Stoffle*** (1992) 1 Cal.App.4th 1671; ***People v. Boissard*** (1992) 5 Cal.App.4th 972; ***United States v. Weaver*** (9th Cir. 2006) 433 F.3rd 1104.)

What is meant by "*near*" the vehicle? If his car is within the "*lunging area*" of ***Chimel***, the passenger area of the car may be searched despite the fact that the defendant was not in it when arrested. (***Thornton v. United States*** (2004) 541 U.S. 615 [124 S.Ct. 2127; 158 L.Ed.2nd 905]; analyzing whether the arrestee was an occupant or a "*recent occupant*" as the definitive test.)

See "*Searches where Arrestee is a* '*Recent Occupant*,'" below.

Federal law is in accord as to the requirement that the search be contemporaneous with the arrest. (***Preston v. United States*** (1964) 376 U.S. 364 [84 S.Ct. 881; 11 L.Ed.2nd 777]; ***United States v. McLaughlin*** (9th Cir. 1999) 170 F.3rd 889.)

A ten to fifteen minute delay between an arrest in a vehicle and the search of that vehicle with no intervening occurrences is still a lawful warrantless search incident to arrest. (***United States v. Weaver***, *supra*.)

Arresting defendant a block and a half away after a foot pursuit, and when the car is then searched "*well after*" the arrest, is neither contemporaneous in time nor place with defendant's arrest. (***United States v. Caseres*** (9th Cir. 2008) 533 F.3rd 1064, 1070-1074.)

See also ***United States v. Vasey*** (9th Cir. 1987) 834 F.2nd 782, 787; finding unauthorized a vehicle search conducted 30 to 45 minutes

after an arrest and after the arrestee had been handcuffed and secured in the back of a police car.

Although defendant was arrested in his car, a search of his cellphone found in the car, but not searched until an hour and twenty minutes after his arrest, with a string of intervening acts occurring between the arrest and the eventual search, is too far removed to be considered a search incident to the defendant's arrest. (***United States v. Camou*** (9th Cir. 2014) 773 F.3rd 932, 937-939.)

Arresting defendant two blocks from his vehicle, his arrest did not meet the requirement of being "when and where" his vehicle was searched. Therefore, the "incident to arrest" theory did not justify the search of his car. (***People v. Johnson*** (2018) 21 Cal.App.5th 1026, 1035-1037; but upholding the search under the "probable cause" justification. Pgs. 1037-1039. See "*Search With Probable Cause*," below.)

Limitation of the ***Chimel***/***Belton*** "*Bright Line*" *Test*; *When the Arrestee Has Been Secured*:

Chimel/***Belton*** *Rule Criticized*:

In addition to the above limitations, a number of courts criticized the application of a "*bright line rule*" allowing for the search of a vehicle incident to arrest in those circumstances where a the arrestee has been removed from the vehicle and secured, and where there is no reasonable possibility he can still lunge for weapons and/or evidence. (E.g., see ***United States v. Weaver***, *supra*, at p. 1107; ***Thornton v. United States*** (2004) 541 U.S. 615, 624 [124 S.Ct. 2127; 158 L.Ed.2nd 905]; concurring opinion.)

Arizona v. Gant:

Finally, the U.S. Supreme Court decided in ***Arizona v. Gant*** (2009) 556 U.S. 332 [129 S.Ct. 1710; 173 L.Ed.2nd 485], that a warrantless search of a vehicle incident to arrest is lawful *only* when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. (Overruling ***New York v. Belton*** (1981) 453 U.S. 454, 460 [101 S.Ct. 2860; 69 L.Ed.2nd 768, 775], in so far as it has been interpreted to allow the warrantless, suspicionless search of a motor vehicle incident to arrest *after* the suspect has been handcuffed and

secured in a patrol car from where he could no longer lunge for weapons or destroy evidence.)

Although the United States Supreme Court has indicated that ***Gant*** is limited to "circumstances unique to the vehicle context" (***Thornton v. United States***, *supra*, at pp. 629-632; see also ***Riley v. California*** (2014) 573 U.S. 373, 398-399 [134 S.Ct. 2473; 189 L.Ed.2nd 430], citing ***Gant*** at p. 343.), at least one California court has applied it to the residential situation. (See ***People v. Leal*** (2009) 178 Cal.App.4th 1051; arrest in a residence, citing as its authority ***United States v. Rabinowitz*** (1950) 339 U.S. 56 [70 S.Ct. 430; 94 L.Ed. 653].

> ***United States v. Rabinowitz***, *supra*, is a case involving the warrantless search of a business office, based upon probable cause, itself being severely criticized later in ***Chimel v. California*** (1969) 395 U.S. 752, 759-768 [89 S.Ct. 2034; 23 L.Ed.2nd 685].

Also, citing ***United States v. Fleming*** (7th Cir. 1982) 667 F.2nd 602, 605-608, the ***Leal*** Court noted that handcuffing alone is probably not enough to fully secure the suspect.

> "Handcuffs are a temporary restraining device; they limit but do not eliminate a person's ability to perform various acts. They obviously do not impair a person's ability to use his legs and feet, whether to walk, run, or kick. Handcuffs do limit a person's ability to use his hands and arms, but the degree of the effectiveness of handcuffs in this role depends on a variety of factors, including the handcuffed person's size, strength, bone and joint structure, flexibility, and tolerance of pain. 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, and in so doing to cause injury to his intended victim, to a bystander, or even to himself." (***People v. Leal***, *supra*, at p. 1062.)
>
> See also ***United States v. Cook*** (9th Cir. 2015) 808 F.3rd 1195, 1198-1200, upholding the search of defendant's backpack immediately upon his arrest even though he was already handcuffed, noting that he was not secured in a patrol car as was the

defendant in ***Gant***. Also, Gant had been arrested for a misdemeanor while Cook was under arrest for a felony.

See also ***United States v. Shakir*** (3rd Cir. 2010) 616 F.3rd 315, 321; where a similar result was reported in a search incident to arrest of the arrestee's duffle bag although he had been handcuffed and officers were holding his arms.

However, apparently putting a suspect into a locked patrol vehicle while unhandcuffed *is* sufficient to trigger the securing rule of ***Gant***. (See ***United States v. Ruckes*** (9th Cir. 2009) 586 F.3rd 713; issue not discussed.)

Note: See ***People v. Lopez*** (2019) 8 Cal.5th 353, at pages 364-366.), for a historical review of the sequence of cases from ***Chimel v. California***, *supra*, through ***New York v. Belton***, *supra*, and ***Thornton v. United States***, *supra*, to ***Arizona v. Gant***, *supra*, as the law on searches incident to arrest developed.

Gant's *Alternative Theory*: The ***Gant*** Court, however, also provides for a second legal theory justifying the warrantless search of a vehicle, incident to arrest, even if the suspect has been removed from the vehicle and secured: I.e., when it is "*reasonable to believe evidence relevant to the crime of arrest might be found in the car*." (***Arizona v. Gant***, *supra*, at pp. 343-344; ***Davis v. United States*** (2011) 564 U.S. 229, 234-235 [131 S.Ct. 2419; 180 L.Ed.2nd 285]; ***People v. Johnson*** (2018) 21 Cal.App.5th 1026, 1033-1034.)

Note: The Supreme Court in ***Gant*** mentions this as an "*alternate*" theory justifying the warrantless search of a vehicle incident to arrest, but fails to explain when and how it is applicable, merely citing ***Thornton v. United States***, *supra*, as authority for its application.

The Court does state, however, that this alternate theory "stems not from ***Chimel*** (i.e., a "search incident to arrest") . . . , but from 'circumstances unique to the vehicle context.' (i.e., the "automobile exception")." (**Arizona v. Gant**, supra, at p. 343.)

"Some courts have concluded or implied that whether it is reasonable to believe offense-related evidence might be

found in a vehicle is determined solely by reference to the nature of the offense of arrest, rather than by reference to the particularized facts of the case. Others have required some level of particularized suspicion, based at least on the facts of the specific case." (***People v. Evans*** (2011) 200 Cal.App.4th 735, 747-751.)

> The ***Evans*** Court (Second District Court of Appeal) concluded that "a reasonable belief to search for evidence of the offense of arrest exists when the nature of the offense, considered in conjunction with the particular facts of the case, gives rise to a degree of suspicion commensurate with that sufficient for limited intrusions such as investigatory stops." (***Id***., at p. 751.)

Also, the phrases "*reasonable to believe*" and "*reasonable basis to believe*" are not defined (e.g., "*probable cause*" or "*reasonable suspicion*?") in the ***Gant*** decision. Neither are the other legal parameters (e.g., is it limited to the passenger area of the car, must it be contemporaneous with the arrest in time and place, etc.?) even discussed.

> See ***People v. Osborne*** (2009) 175 Cal.App.4th 1052, 1065, where "*reasonable basis to believe*" in a ***Gant*** search of a vehicle was defined as "*a standard less than probable cause*." (See also ***People v. Nottoli*** (2011) 199 Cal.App.4th 531, 551, fn. 9, & 553.)
>
> California's Second District Court of Appeal concluded that the standard is a "(r)easonable suspicion, not probable cause, . . ." (***People v. Evans*** (2011) 200 Cal.App.4th 735, 751.)

This alternate theory under ***Gant*** for searching containers and other items found in a vehicle does not apply, however, to cellphones given the higher expectation of privacy in a person's cellphone. (***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473, 2484-2495; 189 L.Ed.2nd 430]; see also ***United States v. Camou*** (9th Cir. 2014) 773 F.3rd 932, 941-943.)

The search of defendant's vehicle was upheld when based upon probable cause to believe defendant was illegally transporting marijuana, the necessary probable cause being

supplied by a trained and experienced officer's recognition of the odor of fresh and burnt marijuana coming from his vehicle. (***United States v. Johnson*** (9th Cir. 2019) 913 F.3rd 793, 801-802.)

However, searching a defendant's vehicle after he fled from his car on foot, and after he was arrested for various traffic violations, was held to be illegal under both the alternate theory of ***Gant*** and absent any probable cause to believe the car might contain evidence related to the cause of the arrest. (***United States v. Davis*** (4th Cir. 2021) 997 F.3rd 191.)

Subsequent Case Law:

Arresting defendant for vehicle burglary, sitting in a vehicle, particularly with tools visible in the vehicle, justified the warrantless search of the vehicle upon "*a reasonable basis to believe*" that evidence related to the suspected vehicle burglary might be found in the car. (***People v. Osborne*** (2009) 175 Cal.App.4th 1052, 1062-1065.)

> ***Osborne*** interprets "*reasonable basis to believe*" to be something less than "*probable cause*." (***Id***., at p. 1065.)

The search of a cellphone at the scene of an arrest in a vehicle is lawful so long as it is "*reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle*." When the driver is arrested for driving under the influence of drugs, and the record contains expert testimony concerning the use of cellphones by drug users, the warrantless search of the driver's cellphone is lawful. (***People v. Nottoli*** (2011) 199 Cal.App.4th 531, 544-559.)

Arresting a person for driving on a suspended license does *not* establish a "*reasonable basis to believe*" that the car will contain any evidence of this offense. (***United States v. Ruckes*** (9th Cir. 2009) 586 F.3rd 713, 718; citing ***Gant*** at 129 S.Ct. p. 1719.)

Stopped and physically arrested for driving on a suspended license (with a prior conviction for the same), defendant was secured in the back seat of a patrol car. The subsequent search of his vehicle, resulting in recovery of

cocaine and an illegal firearm (defendant being a convicted felon), was found to be in violation of the rule of ***Gant***. (***United States v. Ruckes*** (9th Cir. 2009) 586 F.3rd 713, 716-718: Evidence was held to be admissible, however, under the inevitable discovery rule in that the vehicle was to be impounded and subjected to an inventory search; pp. 718-719.)

The federal Seventh Circuit Court of Appeal has found that in a drug conspiracy-related arrest, there is commonly going to be "*a reasonable basis to believe*" that evidence related to the drugs or the conspiracy are going to be found in the defendant's vehicle. (***United States v. Slone*** (7th Cir. 2011) 636 F.3rd 845, 852; defendant arrested while in the process of conducting security or counter-surveillance operations in a drug trafficking conspiracy.)

Two searches of defendant's car were not justified as incident to his arrest for interfering with an investigation (**Pen. Code § 148**). The first search did not fall within the ***Gant*** first prong (arrestee within reaching distance of his vehicle) because defendant had been Tased and detained, and was lying face down on the ground with officers on him. The second search was conducted at the impound yard. But under the second ***Gant*** prong, it was not reasonable to believe evidence of interfering with the officer would remain in the vehicle after defendant was removed. A reasonable belief to search a vehicle for evidence of the offense of arrest exists when the nature of the offense, considered in conjunction with the particular facts of the case, gave rise to a degree of suspicion commensurate with that sufficient for limited intrusions. Reasonable suspicion, not probable cause, is required. Therefore, the automobile exception also did not justify either search. Also, probable cause was not established by defendant's erratic driving, nervousness, or refusal to exit the car, or by the location of the stop in gang territory, or the discovery of baggies and cash in the first search. (***People v. Evans*** (2011) 200 Cal.App.4th 735, 743-755.)

> The Court further rejected both the "inventory search" and "inevitable discovery" theories in that the evidence necessary to establish either theory was not sufficiently developed at the trial court level. (***Id***., at pp. 755-756.)

Arresting a person for driving while under the influence of a controlled substance supplies the necessary "reasonable basis for believing that evidence 'relevant' to that type of offense might be in his vehicle." (***People v. Quick*** (2016) 5 Cal.App.5th 1006, 1011-1012; see also ***People v. Nottoli*** (2011) 199 Cal.App.4th 531, 553-554; "The presence of some amount of the controlled substance or drug paraphernalia in the interior of the vehicle would be circumstantial evidence tending to corroborate that a driver was in fact under the influence of the controlled substance.")

The federal Eight Circuit Court of Appeal upheld the warrantless search of the hatchback area of defendant's SUV as a valid search incident to arrest after defendant was secured in the backseat of a patrol car. The officers had a reasonable basis to believe the vehicle contained evidence relevant to the crime of arrest, making a terroristic threat, where defendant aggravated a road rage incident by pointing a pistol at the victim. The warrantless search was upheld under ***Gant's*** alternative theory; i.e., where it is reasonable to believe the vehicle contains evidence of the crime for which the suspect was arrested. The court held the warrantless search of defendant's SUV was reasonable under the second part of ***Gant*** because defendant had confirmed that he was the driver of the SUV involved in the earlier road rage incident, he told the officers he "probably" had a firearm in his vehicle, the 911 caller positively identified defendant as the driver who brandished a gun at him, and witness had seen defendant concealing something in the rear hatch of his SUV. The court further held that the hatchback or rear hatch area of a vehicle is part of the passenger compartment. (***United States v. Stegall*** (8th Cir. Ark. 2017) 850 F.3rd 981.)

When a heavily intoxicated defendant was contacted by police in the passenger seat of a parked car in a bar parking lot, the officers believed he was in violation of a San Diego municipal code section (i.e., **San Diego Municipal Code section 85.10**, making it illegal to be under the influence in or near a car in public). The car was searched and multiple concealed handguns recovered. With defendant's motion to suppress the firearms being denied by the trial court, the Fourth District Court of Appeal ruled that the search was permissible as incident to defendant's arrest for public intoxication because he was still unsecured and the

passenger area of his car was within reaching distance when officers discovered the first loaded firearm. (***People v. Sims*** (2021) 59 Cal.App.5th 943, 953-955; citing ***Arizona v. Gant***, *supra*.)

> The fact that defendant was paralyzed from the waist down did not render it unreasonable for the arresting officers to believe he might grab something from the vehicle's rear floorboard. "'"'[T]he only question the trial court asks is whether the area searched is generally "reachable without exiting the vehicle, without regard to the likelihood in the particular case that such a reaching was possible."' (***U.S. v. Allen*** (1st Cir. 2006) 469 F.3rd 11, 15, italics omitted; see ***United States v. Stegall*** (8th Cir. 2017) 850 F.3d 981, 985 ['actual reachability under the circumstances' is irrelevant when considering the scope of a passenger compartment search].)" (***Id***., at p. 955.)
>
> The search of defendant's car was *also* subject to a warrantless search under the second prong of ***Gant***; i.e., the officers had a reasonable basis to believe the vehicle contained evidence relevant to establish that defendant was publicly intoxicated in violation of **San Diego Municipal Code section 85.10**. (***Id***., at p. 955.)
>
> The warrantless search of the entire vehicle was also approved under the "*automobile exception*," where the officers had probable cause to believe open containers of alcohol might be found in the vehicle. (***Id***., at pp. 951-952.)
>
> Also note that the Court hinted that **Pen. Code § 647(f)**, drunk in public, would have worked just as well as San Diego's municipal code section. (***Id***., at p. 949, fn. 3.)
>
> In a sex sting operation at South Dakota's annual Sturgis Motorcycle Rally, the Eighth Circuit Court of appeal upheld the trial court's determination that defendant was arrested on probable cause to believe that he was attempting to commit various sex trafficking crimes when he responded to an officer's posted advertisement entitled "Who Wants to Be

Naughty" on a classified advertising website in its dating section under the category "women seeking men." In the resulting communications between the two, the officer posed as a 15-year-old female. Arrangements were made between the two to meet at a particular location. Defendant responded affirmatively to the officer's demand that defendant pay $200 for one hour of sexual intercourse, bring a condom, and not hurt her. Upon defendant showing up at the designated time and location with condoms and $200, the Court found this sufficient to establish the necessary probable cause to arrest defendant and to search his car incident to the arrest. (***United States v. Slim*** (8th Cir. 2022) 34 F.4th 641.)

Exception: Where the person is arrested and transported to the police station, property found "*on his person*" may be searched (and/or his property taken for laboratory analysis) upon arrival at the station, there being little perceived difference between searching in the field and shortly thereafter at the police station. (***United States v. Edwards*** (1974) 415 U.S. 800, 802-803 [94 S.Ct. 1234; 39 L.Ed.2nd 771]; ***In re Charles C.*** (1999) 76 Cal.App.4th 420, 425; see also ***United States v. Finley*** (5th Cir. 2007) 477 F.3rd 250, 260, fn. 7; ***United States v. Rodriguez*** (5th Cir. 2012) 702 F.3rd 206, 209-210; ***People v. Diaz*** (2011) 51 Cal.4th 84.)

This rule, however, has been held *not* to apply to cellphones in that cellphones do not pose a danger to officers and once seized, it is unlikely any evidence contained in the phone is going to be destroyed. When balanced with the large amount of personal information likely to be found in cellphones, a warrantless intrusion into the phone is not justified under the **Fourth Amendment** absent exigent circumstances. (***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430]; overruling by implication any of the above cases that involve cellphones [e.g., ***Finley***, ***Diaz***, and ***Rodriguez***.)

The California Supreme Court concluded in a warrantless cellphone search case (reversing a lower appellate court decision) that the search of defendant's cellphone would not have been proper even under its prior decision in ***People v. Diaz*** (2011) 51 Cal.4th 84 (a search incident to arrest case), and that a reasonably well-trained officer would have known this. Defendant was not under arrest

when officers searched his phone. Under ***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430], which overruled ***Diaz***, even if defendant had been properly arrested, a warrant was required to search his cellphone. The search in this case violated the **Fourth Amendment**; the good faith exception to the exclusionary rule did not apply. Also, the search was not the result of negligence, nor did it result from any pressure to apply a newly enacted statutory scheme that was confusing and complex. The officers' conduct, including the search, was deliberate. Exclusion of the evidence in this case serves to deter future similar behavior. (***People v. Macabeo*** (2016) 1 Cal.5th 1206, 1212-1226.)

Exception to Exception: The search of an arrestee's vehicle incident to his arrest was held to be justified where he was arrested for driving while under the influence of a controlled substance, and where upon stepping out of his vehicle to perform field sobriety tests, he threw his jacket and keys into the car, rolled up the window, and locked and shut the door. A person arrested for DUI may not defeat a search incident to arrest by locking incriminating evidence inside the car. (***People v. Quick*** (2016) 5 Cal.App.5th 1006, 1011-1012.)

Retroactivity:

Following ***Gant***, a gun found during the search of a vehicle in which the defendant was a passenger, searched incident to the arrest of another passenger and after defendant himself had been handcuffed and secured in a patrol car, should have been suppressed. (***United States v. Gonzalez*** (9th Cir. 2009) 578 F.3rd 1130; also noting that the decision in ***Gant*** applies retroactively to any case not yet final (i.e., still on appeal) despite the officer's good faith in following the old rule that was valid at the time of the search.)

However, the United States Supreme Court has since ruled that searches conducted in objectively reasonable reliance on binding appellate precedent in effect at the time of the search, despite a later decision changing the rules, are not subject to the Exclusionary Rule. (***Davis v. United States*** (2011) 564 U.S. 229, 236-239 [131 S.Ct. 2419; 180 L.Ed.2nd 285].)

As a result, a search of a defendant's vehicle following his custodial arrest, done in violation of ***Gant***, did not require

the suppression of two firearms found in the car in that this search occurred prior to the ***Gant*** decision. (***United States v. Tschacher*** (9th Cir. 2012) 687 F.3rd 923, 932-933.)

An officer's good faith belief in the rules for searching vehicle's incident to arrest, as dictated under ***New York v. Belton*** (1981) 453 U.S. 454, 455, 460–461 [69 L. Ed. 2d 768; 101 S. Ct. 2860], as it existed in 1991 when defendant's vehicle was searched, held to apply despite the subsequent tightening of the rules under ***Arizona v. Gant*** (2009) 556 U.S. 332 [173 L.Ed.2nd 485; 129 S.Ct. 1710]. (***People v. Silveria and Travis*** (2020) 10 Cal.5th 195, 236, 239.)

But see ***People v. Leal*** (2009) 178 Cal.App.4th 1051, 1065-1066, a search incident to arrest in a residence where the Court applied the rule of ***Gant***, and found that the law was sufficiently settled prior to ***Gant***, at least under California authority as it applied to searches of residences, that "*good faith*" reliance upon prior authority did *not* allow for the admissibility of the evidence recovered in this case; a questionable decision in light of the decision in ***Davis v. United States***, *supra*.)

Extending the Theory of ***Gant***:

In ***United States v. Davis*** (4th Cir. 2021) 997 F.3rd 191, the Fourth Circuit Court of Appeal applied the theory of ***Gant*** to an arrestee's backpack that he dropped on the ground upon being arrested following a foot pursuit, and which was searched after he was arrested and handcuffed.

Transportation: The arrestee must be subject to a post-arrest transportation to jail or the police station, or perhaps a detoxification facility, before a search incident to arrest is justified. (***People v. Brisendine*** (1975) 13 Cal.3rd 528, 538-552.)

Therefore, if the procedure is to cite and release the subject at the scene of the arrest, no "*search incident to arrest*" is lawful. The theory is that a person is not as prone to attempt to destroy evidence or reach for a weapon if he is only to be cited, as opposed to taken to jail. (***Ibid***.)

Taking a person in to "*protective custody*," where, for instance, he is acting irrationally (e.g., intoxicated, in this case), allows for a

patdown for weapons prior to transporting him. (***United States v. Gilmore*** (10th Cir.) 776 F.3rd 765.)

See "*Search Incident to Arrest*," under "*Searches of Persons*" (Chapter 11), above.

Search Incident to a Citation: There is no such thing as legal justification for a "*search incident to a citation*," because of the lack of the right to physically transport the subject from the scene. (***Knowles v. Iowa*** (1989) 525 U.S. 113 [119 S.Ct. 484; 142 L.Ed.2nd 492]; see also ***People v. Brisendine*** (1975) 13 Cal.3rd 528, 538-552; ***People v. Macabeo*** (2016) 1 Cal.5th 1206, 1216-1219; ***In re D.W.*** (2017) 13 Cal.App.5th1249, 1253.)

An exception to this rule is when there is probable cause to search for marijuana. The fact that the illegal simple possession of marijuana is a citable offense only, does not preclude officers from doing a probable cause vehicle search for illegally possessed marijuana, such as when the suspects are all under the age of 21 and thus could not legally possess marijuana. (See (***People v. Castro*** (2022) 86 Cal.App.5th 314; finding the "automobile exception" to the warrant requirement applicable to a search of a vehicle for marijuana, and noting (at p. 320) that "[w]here such probable cause exists, a law enforcement officer may search the vehicle 'irrespective of whether [the offense] is an infraction and not an arrestable offense.'" Quoting from ***People v. McGee*** (2020) 53 Cal.App.5th 796, 805; and ***People v. Fews*** (2018) 27 Cal.App.5th 553, 564.)

See "*Search Incident to a Citation*" under "*Other Requirements and Limitations*," under "*Searches of Persons*" (Chapter 11), above.

However, it is not unconstitutional to make a custodial arrest (i.e., transporting to jail or court) of a person arrested for a minor misdemeanor (***Atwater v. City of Lago Vista*** (2001) 532 U.S. 318 [121 S.Ct. 1536; 149 L.Ed.2nd 549].), or even for a fine-only, infraction. (***People v. McKay*** (2002) 27 Cal.4th 601, 607; see also ***United States v. McFadden*** (2nd Cir. 2001) 238 F.3rd 198, 204; see also ***Virginia v. Moore*** (2008) 553 U.S. 164 [128 S.Ct. 1598; 170 L.Ed.2nd 559].)

In order to justify a search incident to arrest, however, the subject must have actually been subjected to a custodial arrest. Absent such an actual arrest and transportation, the rule that a search incident to a citation not being lawful, per ***Knowles v. Iowa*** (1998) 525 U.S. 113 [119 S.Ct. 484; 142

L.Ed.2nd 492], applies. (***People v. Macabeo*** (2016) 1 Cal.5th 1206, 1216-1219; ***In re D.W.*** (2017) 13 Cal.App.5th1249, 1253.)

California's statutory provisions require the release of misdemeanor arrestees in most circumstances. (e.g., see **Pen. Code §§ 853.5, 853.6, V.C. §§ 40303, 40500**) However, violation of these statutory requirements is not a constitutional violation and, therefore, *should not* result in suppression of any evidence recovered as a result of such an arrest. (***People v. McKay***, *supra*, at pp. 607-619, a violation of **Veh. Code § 21650.1** (riding a bicycle in the wrong direction); ***People v. Gomez*** (2004) 117 Cal.App.4th 531, 538-539, seat belt violation (**Veh. Code § 27315(d)(1)**), citing: ***Atwater v. City of Lago Vista*** (2001) 532 U.S. 318 [121 S.Ct. 1536; 149 L.Ed.2nd 549]; ***People v. Bennett*** (2011) 197 Cal.App.4th 907, 918.)

See also; "*Search Incident to Arrest*," under "*Searches of Persons*" (Chapter 11), above.

Searches where Arrestee is a "*Recent Occupant*:"

Old Rule: Under the past ***Chimel***/***Belton*** "*Bright Line*" rule (see above):

The arrestee need not have been arrested while physically within his vehicle to make it subject to search so long as he is at least a "*recent occupant*" of the vehicle. (***Thornton v. United States*** (2004) 541 U.S. 615 [124 S.Ct. 2127; 158 L.Ed.2nd 905].)

See ***United States v. Osife*** (9th Cir. 2005) 398 F.3rd 1143, where the Court, without discussing the issue, found the defendant to be a "*recent occupant*" where he had left his vehicle, gone into a store, and returned to it before being arrested.

Being a "*recent occupant*" of a vehicle does *not* add a requirement that in order to search the passenger area of the vehicle there must be some reason to believe the vehicle contains evidence related to the crime for which the defendant was arrested. (***United States v. Osife***, *supra*, reaffirming the rule of ***New York v. Belton*** (1981) 453 U.S. 454, 460 [101 S.Ct. 2860; 69 L.Ed.2nd 768, 775], defendant arguing that a minority, concurring opinion in ***Thornton*** to this effect should be accepted as a new rule.)

New Rule: In ***Arizona v. Gant*** (2009) 556 U.S. 332 [129 S.Ct. 1910; 173 L.Ed.2nd 485], the old rule of ***Thronton*** was rejected.

"To read ***Belton*** as authorizing a vehicle search incident to every recent occupant's arrest," even when the arrestee was out of reach of the passenger compartment, would "untether the rule from the justifications underlying the ***Chimel*** exception." (***Arizona v. Gant***, *supra*, at p. 343.)

"For years, ***Belton*** was widely understood to have set down a simple, bright-line rule. Numerous courts read the decision to authorize automobile searches incident to arrests of recent occupants, regardless of whether the arrestee in any particular case was within reaching distance of the vehicle at the time of the search. [Citation.] Even after the arrestee had stepped out of the vehicle and had been subdued by police, the prevailing understanding was that ***Belton*** still authorized a substantially contemporaneous search of the automobile's passenger compartment." (***Davis v. United States*** (2011) 564 U.S. 229, 233-241 [180 L.Ed.2d 285; 131 S.Ct. 2419]; recognizing the invalidity of the ***Belton*** rule after ***Gant***, but noting that the search in this case took place well before ***Gant*** was decided, and applying the "good faith reliance" rule to uphold the search of a recent occupant in this case: "Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.")

Even before ***Gant***, the Ninth Circuit was having trouble with the ***Thornton*** Rule: Where defendant is arrested a block and a half away after a foot pursuit from his vehicle, so that when arrested he was no longer within reach of the passenger area of his car, the Ninth Circuit is of the belief that he does not qualify as a "*recent occupant*." (***United States v. Caseres*** (9th Cir. 2008) 533 F.3d 1064, 1070-1074.)

California courts are now in accord: The rule of ***Arizona v. Gant*** (2009) 556 U.S. 332 [129 S.Ct. 1910; 173 L.Ed.2nd 485], overruled ***Belton***. Quoting ***Gant***: "'To read ***Belton*** as authorizing a vehicle search incident to every recent occupant's arrest,' even when the arrestee was out of reach of the passenger compartment, would 'untether the rule from the justifications underlying the ***Chimel*** exception.' (***Gant***, *supra*, 556 U.S. at p. 343.)" (***People v. Johnson*** (2018) 21 Cal.App.5th 1026, 1032-1033.)

> Noting that "***Gant*** . . . represented a substantial shift in the prevailing understanding of the ***Belton rule***." (***People v. Lopez*** (2019) 8 Cal.5th 353, 380.)

Similarly, the "*recent occupant*" rule of ***Thornton v. United States***, *supra*, is limited to those instances when the vehicle is to be searched "*when and where*" the defendant is arrested; i.e., in compliance with the "*contemporaneous in time and place*" rule. (***People v. Johnson***, *supra*., at p. 1037; defendant was arrested two blocks away.)

***Searches With Probable Cause* (*The* "*Automobile Exception*"):** Searches *with Probable Cause* to believe there is contraband or other sizable items in a vehicle:

General Rule: If police officers have *probable cause* to search a car, they may, as a general rule, make a warrantless search anywhere a warrant could have authorized. (***Carroll v. United States*** (1925) 267 U.S. 132, 150-153 [45 S.Ct. 280; 69 L.Ed. 543]; ***United States v. Ross*** (1982) 456 US. 798 [102 S.Ct. 2157; 72 L.Ed.2nd 572]; ***Pennsylvania v. Labron*** (1996) 518 U.S. 938 [116 S.Ct. 2485; 135 L.Ed.2nd 89]; ***Maryland v. Dyson*** (1999) 527 U.S. 465 [119 S.Ct. 2013; 144 L.Ed.2nd 442]; ***People v. Superior Court* [*Nasmeh*]** (2007) 151 Cal.App.4th 85, 100-102; ***United States v. Davis*** (9th Cir. 2008) 530 F.3rd 1069, 1084; ***United States v. Noster*** (9th Cir. 2009) 590 F.3rd 624, 633-634; ***People v. Xinos*** (2011) 192 Cal.App.4th 637, 653-659; ***People v. Diaz*** (2013) 213 Cal.App.4th 743, 753-754, search of a vehicle's "*black box*," or "*Sensing Diagnostic Module*," or "*SMD*;" ***Collins v. Virginia*** (2018) 584 U.S. 586, 592 [138 S.Ct. 1663; 201 L.Ed.2nd 9]; ***United States v. Cervantes*** (9th Cir. 2012) 703 F.3rd 1135, 1148-1140; ***People v. Johnson*** (2018) 21 Cal.App.5th 1026, 1034-1035; and see ***Florida v. Harris*** (2013) 568 U.S. 237, 243-250 [133 S.Ct. 1050; 185 L.Ed.2nd 61], a warrantless search of a vehicle based upon a drug-detection dog's sniff; ***People v. Waxler*** (2014) 224 Cal.App.4th 712, 718-719, a warrantless search of a vehicle based upon the odor of marijuana and observation of a pipe with apparent marijuana residue; ***People v. Moore*** (2021) 64 Cal.App.5th 291, search of a backpack found in a car based upon the odor of marijuana.)

"'The automobile exception provides "police who have probable cause to believe a lawfully stopped vehicle contains evidence of criminal activity or contraband may conduct a warrantless search of any area of the vehicle *in which the evidence might be found*."' . . . (Italics added; ***People v. Leal*** (2023) 93 Cal.App.5th 1143, 1147; quoting ***People v. McGee*** (2020) 53 Cal.App.5th 796, 801, which in turn quotes ***People v. Evans*** (2011) 200 Cal.App.4th 735, 753.)

"The scope of a warrantless search is 'defined by the object of the search and the places in which there is probable cause to believe that it may be found.'" (***Ibid***.; quoting ***United States v. Ross*** (1982) 456 U.S. 798, 824 [72 L.Ed.2nd 572, 102 S.Ct. 2157].)

Note that ***Leal*** uses the limiting phrase "*in which the evidence might be found*" instead of the more common; "*anywhere a warrant could have authorized*."

"In determining whether probable cause to search exists, we look at the totality of the circumstances. (***People v. Tousant*** (2021) 64 Cal.App.5th 804, 815. . . .) Our review is limited to the facts and circumstances known *to the searching officer*. (***Henry v. United States*** (1959) 361 U.S. 98, 102 [4 L.Ed.2nd 134; 80 S.Ct. 168].) '[P]robable cause [to] search exists when an officer is aware of facts that would lead a [person] of ordinary caution or prudence to believe, and conscientiously to entertain, a strong suspicion that the object of the search is in the particular place to be searched.' (***Wimberly v. Superior Court*** (1976) 16 Cal.3rd 557, 571. . . .)" (***People v. Leal***, *supra*, at p. 1151.)

Search of a purse found in defendant's vehicle after defendant had been arrested outside the car from which he had just fled, with crack cocaine and a large amount of money in his pockets indicating that he had been engaged in the selling of drugs, constituted sufficient probable cause to believe that more contraband, or other evidence of drug dealing, would be found in his car. The warrantless search of the car, and the purse (in which a gun was found), was upheld as lawful. (***United States v. Williams*** (9th Cir. 2017) 846 F.3rd 303, 312-313.)

That same probable cause allows for the warrantless *seizure* of the vehicle. (***United States v. Magallon-Lopez*** (9th Cir. 2016) 817 F.3rd 671, 675-676.)

The "*Automobile Exception*:"

Sometimes referred to as the "*automobile* (or *vehicle*) *exception*" to the search warrant requirement (See ***Pennsylvania v. Labron*** (1996) 518 U.S. 938 [116 S.Ct. 2485; 135 L.Ed.2nd 89]), it is accepted that an automobile is commonly an exigent circumstance in and of itself. (***People v. Nicholson*** (1984) 207 Cal.App.3rd 707, 711-712; ***People v. Superior Court* [*Nasmeh*]** (2007) 151 Cal.App.4th 85, 100-102; ***People v. Waxler*** (2014) 224 Cal.App.4th 712, 718-719; ***People v. Hall*** (2020) 57 Cal.App.5th 946, 951.)

"A warrantless automobile search 'is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained.'" (***People v. Moore*** (2021) 64 Cal.App.5th 291, 297, quoting ***United States v. Ross*** (1982) 456 U.S. 798, at p. 809 [72 L.Ed.2nd 572; 102 S.Ct. 2157].)

"Decisions upholding warrantless searches of vehicles thus do not distinguish between searches conducted on parked vehicles or

> vehicles that have been stopped by police on a highway." (***People v. Tousant*** (2021) 64 Cal.App.5th 804, 814; citing ***People v. Superior Court* (*Overland*)** (1988) 203 Cal.App.3rd 1114, 1119.)

Pursuant to the "automobile exception," a "warrantless search of a vehicle is permitted 'if there is probable cause to believe that the vehicle contains evidence of a crime.' ***United States v. Brooks***, 610 F.3d 1186, 1193 (9th Cir. 2010). Probable cause exists if there is a 'fair probability that contraband or evidence of a crime will be found in a particular place,' under the totality of the circumstances. ***United States v. Rodriguez***, 869 F.2d 479, 484 (9th Cir. 1989) (quoting **Illinois v. Gates**, 462 U.S. 213, 238, 103 S.Ct. 2317; 76 L.Ed.2nd 527 (1983)). 'A finding of probable cause must be supported by the objective facts known to the officer at the time of the search.' ***United States v. Rogers***, 656 F.3rd 1023, 1029 (9th Cir. 2011)." (***United States v. Faagai*** (9th Cir. 2017) 869 F.3rd 1145, 1150; see also ***People v. Johnson*** (2020) 50 Cal.App.5th 620.)

> See also ***United States v. Rowe*** (8th Cir. MN 2017) 878 F.3rd 623; ***People v. Lee*** (2019) 40 Cal.App.5th 853, 861-867; and ***People v. Tousant*** (2021) 64 Cal.App.5th 804, 814.)

> "'Probable cause to search exists when, based upon the totality of the circumstances . . . "there is a fair probability that contraband or evidence of a crime will be found in a particular place."'" (***People v. Tousant***, *supra*, quoting ***People v. Farley*** (2009) 46 Cal.4th 1053, 1098; and ***Illinois v. Gates*** (1983) 462 U.S. 213, 230–239 [76 L. Ed. 2d 527; 103 S. Ct. 2317].)

"Under the so-called automobile exception officers may search a vehicle without a warrant if it 'is readily mobile and probable cause exists to believe it contains contraband' or evidence of criminal activity." (***People v. Johnson*** (2018) 21 Cal.App.5th 1026, 1034; quoting ***Pennsylvania v. Labron*** (1996) 518 U.S. 938, 940 [116 S.Ct. 2485; 135 L.Ed.2nd 89].)

"The automobile exception provides 'police who have probable cause to believe a lawfully stopped vehicle contains evidence of criminal activity or contraband may conduct a warrantless search of any area of the vehicle in which the evidence might be found.' (***People v. Evans*** (2011) 200 Cal.App.4th 735, 753 . . . ; see also ***Carroll v. United States*** (1925) 267 U.S. 132, 149 [69 L.Ed. 543, 45 S.Ct. 280, 549, . . .].) Once an officer has probable cause to search the vehicle under the automobile exception, they 'may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view.' (***United States v. Ross*** (1982) 456 U.S. 798, 800 [72 L.Ed.2nd 572; 102 S.Ct. 2157].) Probable cause to search exists 'where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that

contraband or evidence of a crime will be found.' (***Ornelas v. United States*** (1996) 517 U.S. 690, 696 [134 L.Ed.2d 911, 918, 116 S. Ct. 1657].)" (***People v. McGee*** (2020) 53 Cal.App.5th 796. 801; upholding the search of a vehicle upon the plain sight observation of an opened container of marijuana; a violation of **Veh. Code § 23222(b)(1)** and **H&S Code § 11362.3(a)(4)**.)

> See also ***People v. Sims*** (2021) 59 Cal.App.5th 943, 950-951; search of defendant's vehicle after he was arrested while sitting in his vehicle, for being drunk in public.

"(T)he automobile exception does *not* permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein." (***Collins v. Virginia*** (2018) 584 U.S. 586, 601 [138 S.Ct. 1663; 201 L.Ed.2nd 9]; reaffirming the "plain-view seizure" principles articulated in ***Horton v. California*** (1990 496 U.S. 128 [110 S.Ct. 2301; 110 L.Ed.2nd 112, 123] and ***Soldal v. Cook County*** (1992) 506 U.S. 56, 65-66 [121 L.Ed. 2nd 450; 113 S.Ct. 538].

However, see ***Coolidge v. New Hampshire*** (1971) 403 U.S. 443 [91 S.Ct. 2022; 29 L.Ed.2nd 564, 581-582], decided the year after ***Chambers v. Maroney*** (1970) 399 U.S. 42 [26 L.Ed.2nd 419; 90 S.Ct. 1975], and holding that "the 'automobile exception' to the **Fourth Amendment's** warrant requirement did *not* apply to seizure and subsequent search at a police station of a car that had been parked in plain view in the defendant's driveway, when defendant already had been arrested inside his home. (***Coolidge***, *supra*, 403 U.S. at pp. 456, 458–464.) This was so despite probable cause to search the car. (***Id.*** at p. 458 ["even granting that the police had probable cause to search the car, the application of the [automobile exception] to these facts would extend it far beyond its original rationale"]; ***id.*** at p. 464 ["Here there was probable cause, but no exigent circumstances justified the police in proceeding without a warrant."].)" (***People v. Rorabaugh*** (2022) 74 Cal.App.5th 296, 308.)

> The search in ***Coolidge*** did not come within the automobile exception to the warrant requirement because the automobile was regularly parked in the driveway and was not fleeing, and the items searched for were not contraband. Finally, the Court found that the car was not an instrumentality of the crime that could be seized in plain view because the police knew in advance of the car's location and had ample opportunity to obtain a valid warrant. (***Coolidge v. New Hampshire***, *supra*, at pp. 455-484.)

A warrantless search of defendant's car, during which a police officer discovered a loaded handgun with no serial number in the trunk, fell within the automobile exception to the **Fourth Amendment's** warrant

requirement. Based on the strong odor of burnt marijuana emanating from defendant's car, defendant's admission he had smoked marijuana two hours earlier, and the fact all occupants of the car were under 21 years of age, officers had probable cause to believe they would find contraband or evidence (e.g., marijuana possessed by someone under 21) of a crime in the car. The belief by one of the officers that there was still marijuana in the car based on the current smell of marijuana coming from inside the car was reasonable under the circumstances of this case. Accordingly, the officers had probable cause to search the car under the automobile exception, and the trial court did not err in denying defendant's motion to suppress. (***People v. Castro*** (2022) 86 Cal.App.5th 314; finding the "automobile exception" to the warrant requirement applicable to this situation, and noting (at p. 320) that "[w]here such probable cause exists, a law enforcement officer may search the vehicle 'irrespective of whether [the offense] is an infraction and not an arrestable offense.'" Quoting ***People v. McGee*** (2020) 53 Cal.App.5th 796, 805; and ***People v. Fews*** (2018) 27 Cal.App.5th 553, 564.)

Upon legally stopping a vehicle, and discovering that the passenger was in possession of methamphetamine, and upon noting a screwdriver in the passenger area of the car, it was held to be lawful to search all parts of the vehicle where there is a fair probability contraband could be concealed, including in the air filter under the hood of the vehicle. Citing ***Carroll v. United States*** (1925) 267 U.S. 132 [45 S.Ct. 280; 69 L.Ed.2nd 543], the court found that given the totality of the circumstances, including the passenger's possession of methamphetamine, defendant's previous drug-related arrest, and the presence of a screwdriver in the car—a tool known to be used for hiding drugs in vehicles—the officers had a fair probability to believe that methamphetamine could be concealed in the car, including under its hood. In so ruling, the Seventh Circuit Court of Appeal held that the officers had probable cause to search the entire vehicle, including in the air filter under the hood. (***United States v. Hays*** (7th Cir. 2024) 90 F.4th 904.)

Limitation:

The automobile exception, however, is limited to those areas of a vehicle for which there is actual probable cause to believe seizeable property might be found. (***People v. Leal*** (2023) 93 Cal.App.5th 1143.)

In ***Leal***, an officer received information via a radio broadcast from another officer that a juvenile on probation with a firearm restriction likely placed a firearm under the front passenger seat in defendant Leal's (a felon) car before defendant got into his car and drove away. Defendant's car was allegedly under constant surveillance from the time of the alleged firearm placement until

the searching officer stopped defendant's car and conducted the search. No firearm was found under the seat. So the officer expanded his search to the trunk of the car where a loaded firearm was found. Pleading no contest to illegally possessing a firearm, the Court of Appeal reversed the trial court's denial of defendant's motion to suppress the firearm. (Pgs. 1147, 1149-1150) In so ruling, the Court held as follows:

> "We hold that when an officer has probable cause to believe contraband or evidence of a crime will be found specifically in the passenger compartment of a vehicle (as compared to having probable cause to believe it will be found *somewhere* in the vehicle), and no other subsequent discovery or information provides further probable cause to believe the evidence will be found in the trunk, an officer's search of the trunk exceeds the permissible scope of a warrantless search under the automobile exception." (Italics added, pg. 1148.)

The Court in ***Leal*** (at pgs. 1151-1152) noted that the automobile exception generally requires that a search fall into one or more of three categories of circumstances:

> "(1) officers have probable cause to believe contraband or evidence of a crime will be found specifically in the trunk or other enclosed compartment;
>
> (2) a search of the passenger compartment reveals contraband or other evidence generating further probable cause to search the trunk or other enclosed compartment; or
>
> (3) probable cause exists as to the entire car (i.e., that the contraband or evidence of a crime will be found somewhere in the car)."

In ***Leal***, it was held that none of the above categories applied. Further, the defendant's mere nervousness was insufficient to establish probable cause. (pg. 1153.)

After Impoundment of the Vehicle:

"(W)here police have probable cause to stop and search a car without a warrant, a subsequent search of the car after it has been driven to a police station is also permissible without a warrant. [Citation] ***Chambers*** (***v. Maroney*** (1970) 399 U.S. 42 [26 L.Ed.2nd 419; 90 S.Ct. 1975]) *observed* that the high court had long adhered to the rule that a warrantless search of

an automobile is permissible so long as the police have probable cause to believe the car contains evidence or contraband. [Citation.] This exception to the warrant requirement, ***Chambers*** said, is *justified by the ease with which an automobile might be moved out of the jurisdiction before a warrant can be obtained*. [Citation.] Although ***Chambers*** recognized that the problem of mobility might be solved by first seizing the car and then seeking a search warrant, the high court declined to adopt such a rule: 'For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.'" (Italics in case decision; ***People v. Rorabaugh*** (2022) 74 Cal.App.5th 296, 308; quoting ***Robey v. Superior Court*** (2013) 56 Cal.4th 1218, 1225–1226.)

> However, see ***Coolidge v. New Hampshire*** (1971) 403 U.S. 443 [91 S.Ct. 2022; 29 L.Ed.2nd 564, 581-582], decided the year after ***Chambers***, and holding that "the 'automobile exception' to the **Fourth Amendment's** warrant requirement did *not* apply to seizure and subsequent search at a police station of a car that had been parked in plain view in the defendant's driveway, when defendant already had been arrested inside his home. (***Coolidge***, *supra*, 403 U.S. at pp. 456, 458–464.) This was so despite probable cause to search the car. (***Id.*** at p. 458 ["even granting that the police had probable cause to search the car, the application of the [automobile exception] to these facts would extend it far beyond its original rationale"]; ***id.*** at p. 464 ["Here there was probable cause, but no exigent circumstances justified the police in proceeding without a warrant."].)" (***People v. Rorabaugh***, *supra*.)

The "search with probable cause" rule applies so long as probable cause exists to believe the vehicle contains evidence of a crime. (***United States v. Caldwell*** (4th Cir. 2021) 7 F.4th 191; search of the trunk of an impounded vehicle two weeks after being impounded was lawful in that a dead battery prevented the earlier opening of the trunk, the Court holding that there was still probable cause to believe the trunk contained evidence of a bank robbery.)

Justifications for the Rule:

The ready (or inherent) mobility of the automobile. (***Carroll v. United States*** (1925) 267 U.S. 132 [45 S.Ct. 280; 69 L.Ed.2nd 543]; ***United States v. Ross*** (1982) 456 US. 798 [102 S.Ct. 2157; 72 L.Ed.2nd 572]; ***People v. Superior Court*** **[*Nasmeh*]** (2007) 151 Cal.App.4th 85, 100-102; ***People v. Waxler*** (2014) 224 Cal.App.4th 712, 719; ***United States v. Camou*** (9th Cir. 2014) 773 F.3rd 932, 941-943; ***Collins v. Virginia*** (2018) 584 U.S. 586,

613 [138 S.Ct. 1663; 201 L.Ed.2nd 9]; ***People v. Lee*** (2019) 40 Cal.App.5th 853. 861; ***People v. Tousant*** (2021) 64 Cal.App.5th 804, 814.)

> It has been held that an easily repairable flat tire on the vehicle does not make it any less inherently mobile. The probable cause rule still applies. (***United States v. Short*** (8th Cir. 2021) 2 F.4th 1076.)

The lessened expectation of privacy in a vehicle, resulting from the "*pervasive governmental regulation*" of vehicles capable of traveling on public highways. (See ***Cady v. Dombrowski*** (1973) 413 U.S. 433 [93 S.Ct. 2523; 37 L.Ed.2nd 706]; ***South Dakota v. Opperman*** (1976) 428 U.S. 354 [96 S.Ct. 3092; 49 L.Ed.2nd 1000]; ***Carroll v. United States*** (1925) 267 U.S. 132, 153, 156 [45 S.Ct. 280; 60 L.Ed. 543]; ***People v. Diaz*** (2013) 213 Cal.App.4th 743, 753-754; ***People v. Waxler***, *supra*; ***United States v Camou***, *supra*; ***Collins v. Virginia***, *supra*; ***People v. Lee*** (2019) 40 Cal.App.5th 853. 861; (***United States v. Talley*** (Dist. Ct. N.D. 2020) 467 F. Supp.3rd 832, 834, referring to a "*diminished expectation of privacy*.")

> See also ***People v. Valencia*** (2011) 201 Cal.App.4th 922, 938-939, comparing the diminished expectation of privacy in one's vehicle when compared to the "heightened expectation of privacy" in one's residence.
>
> Some of that "*pervasive regulation*," as cited by the Supreme Court in ***In re Arturo D.*** (2002) 27 Cal.4th 60 (overruled to the extent it is inconsistent with the Court's holding in ***People v. Lopez*** (2019) 8 Cal.5th 353.) includes:
>
> > **Veh. Code § 4462(a):** Requirement that the *vehicle's registration* be produced on demand of a peace officer.
> >
> > **Veh. Code § 12951(b):** Requirement that the *driver's license* be produced on demand of a peace officer.
> >
> > **Veh. Code § 2805(a):** Right of the California Highway Patrol and other listed peace officers whose primary duties are to conduct vehicle theft investigations to inspect a motor vehicle for its title in order to determine ownership.
> >
> > *Note*: Although not mentioned by the Supreme Court, it would seem that **Veh. Code § 16028(a)**, requiring production of proof of insurance upon demand when being cited for another offense, could be added to this list.

The expense, delay, and risk of loss in securing a vehicle while a search warrant is obtained. (***People v. Superior Court* [*Valdez*]** (1983) 35 Cal.3rd 11, 16.)

The need for clear guidelines for police. (***People v. Superior Court* [*Valdez*]**, *supra*; see also ***People v. Chavers*** (1983) 33 Cal.3rd 462, 469; and ***Arkansas v. Sanders*** (1979) 442 U.S. 753, 760-761, 765, fn. 14 [99 S.Ct. 2586; 61 L.Ed.2d 235].)

Case Law:

A suspect's general consent to search his car does not allow the officers to drill through the floor of the trunk. "Cutting" or "destroying" an object during a search requires either explicit consent for the destructive search or probable cause. (***United States v. Zamora-Garcia*** (8th Cir. Ark. 2016) 831 F.3rd 979.)

See "*The Scope of the Consent*," under "*Consent Searches*" (Chapter 20), below.

"A probable cause inquiry relies on an objective standard; we do not consider an officer's subjective beliefs." (***People v. Lee*** (2019) 40 Cal.App.5th 853. 862: citing ***People v. Evans*** (2011) 200 Cal.App.4th 735, at p. 753.)

> Probable cause "exists 'where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found. . . .'" (***People v. Lee***, *supra*, quoting ***Qrnelas v. United States*** (1996) 517 U.S. 690, 696 [134 L.Ed.2nd 911; 116 S.Ct. 1657]; ***People v. Johnson*** (2020) 50 Cal.App.5th 620.)
>
> The "*totality of the circumstances*" must be considered. (***People v. Lee***, *supra*, citing ***Illinois v. Gates*** (1983) 462 U.S. 213, 238 [76 L.Ed.2nd 527; 103 S. Ct. 2317].)

Although a driver's denial of having his driver's license or other identification with him *does not* justify an officer's search of the automobile for such identification, it might if the officer is able to develop the necessary "*probable cause*" that the driver lied about his identity. (***People v. Lopez*** (2019) 8 Cal.5th 353, 372-373.), overruling ***In re Arturo D.*** (2002) 27 Cal.4th 60, which previously held that the simple denial of having identification justified a limited search of the driver's vehicle in those places were identification is most likely to be found.

The rule is that if such probable cause exists to believe that a lawfully stopped vehicle contains evidence of crime or other contraband, then anywhere in the vehicle that a warrant could have authorized is subject to search. Warrantless searches in such cases are justified by "the reduced expectation of privacy in a vehicle, the fact a vehicle is inherently mobile, and the historical distinction between searches of automobiles and dwellings." (***People v. Evans*** (2011) 200 Cal.App.4th 735, 753; ***People v. Waxler***, *supra*; "justif(ying) the search of every part of the vehicle and its contents that may conceal the object of the search.")

> Erratic driving, nervousness, and a failure to cooperate, even when combined with knowledge that defendant had hidden a weapon in the air vents in his car on a prior occasion, were held to be insufficient to establish probable cause to search his car. (***Id.***, at pp. 753-755.)

For a court to determine the existence of probable cause, it must consider whether, under the totality of the circumstances, there is a "*fair probability*" that contraband or evidence of a crime will be found in a particular place. (***People v. Little*** (2012) 206 Cal.App.4th 1364, 1371; quoting ***Illinois v. Gates*** (1983) 462 U.S. 213, 238 [103 S.Ct. 2317; 76 L.Ed.2nd 527].)

Warrantless search of defendant's vehicle justified by exigent circumstances (looking for a missing eight-year-old girl) and probable cause (blood seen in the vehicle and a cord hanging out of the trunk). (***People v. Panah*** (2005) 35 Cal.4th 395, 468-469.)

This includes any compartments and containers in the vehicle; assuming the item for which there is probable cause for which to search would reasonably be expected to be in the container searched. (***United States v. Ross*** (1982) 456 U.S. 798 [102 S.Ct. 2157; 72 L.Ed.2nd 572]; ***People v. Chavers*** (1983) 33 Cal.3rd 462, 466-467.)

"The scope of a warrantless search of an automobile 'is defined by the object of the search and the places in which there is probable cause to believe that it may be found.'" ***People v. Diaz*** (2013) 213 Cal.App.4th 743, 754, citing ***United States v. Ross***, *supra*, at p. 824.)

Even if the container searched does not belong to the defendant, it is subject to search. (***Wyoming v. Houghton*** (1999) 526 US. 295 [119 S.Ct. 1297; 143 L.Ed.2nd 408]: Where defendant was a passenger in the vehicle, the search of defendant's purse which was left in the car when the passengers were ordered out is okay.)

Note ***People v. Mitchell*** (1995) 36 Cal.App.4th 672, and ***People v. Prance*** (1991) 226 Cal.App.3rd 1525, upholding the search of purses belonging to passengers under the "*incident to arrest*" theory (above).

However, a search of the female defendant's purse left in the car when an officer is conducting a parole search of a male parolee, is illegal absent a reasonable suspicion to believe that the parolee had joint access, possession or control over the purse. (***People v. Baker*** (2008) 164 Cal.App.4th 1152.)

It is not relevant that the car must be damaged to get to the hidden compartments. (***Wimberly v. Superior Court*** (1976) 16 Cal.3rd 557, 571.)

It is also lawful to make a warrantless seizure of a vehicle, found in any public area, when an officer has probable cause to believe that the vehicle itself is "*forfeitable contraband*" (***Florida v. White*** (1999) 526 U.S. 559 [119 S.Ct. 1555; 143 L.Ed.2nd 748]; see also ***Carroll v. United States*** (1925) 267 U.S. 132, 150-151 [45 S.Ct. 280; 69 L.Ed. 543].), or is transporting contraband. (***United States v. Alverez-Tejeda*** (9th Cir. 2007) 491 F.3rd 1013.)

"(C)ircumstances unique to the vehicle context justify a search incident to a lawful arrest when it is "*reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle*." (***Arizona v. Gant*** (2009) 556 U.S. 332 [129 S.Ct. 1710; 173 L.Ed.2nd 485], citing ***Thornton v. United States*** (2004) 541 U.S. 615, 629-632 [124 S.Ct. 2127; 158 L.Ed.2nd 905].)

Note: This theory for justifying a warrantless search, which is likely to be limited to the searches of vehicles (***Thornton v. United States***, *infra*, at p. 632.), generates more questions than it answers: For instance, "*reasonable to believe*" is not defined (e.g., "probable cause" or "reasonable suspicion?") Neither are the other legal parameters (e.g.: Is it limited to the passenger area of the car, must it be contemporaneous with the arrest in time and place, etc.?) even discussed. The theory itself comes from the concurring (two justices) opinion in ***Thornton v. United States*** (2004) 541 U.S. 615, at pp. 629-632 [124 S.Ct. 2127; 158 L.Ed.2d 905]. ***Thornton*** itself cites as its authority ***United States v. Rabinowitz*** (1950) 339 U.S. 56 [70 S.Ct. 430; 94 L.Ed. 653], which was itself all but overruled in ***Chimel v. California*** (1969) 395 U.S. 752, 759-768 [89 S.Ct. 2034; 23 L.Ed.2nd 685].

The warrantless search of a vehicle pursuant to the "automobile exception" to the warrant requirement is no less justified merely because

the vehicle is parked at the defendant's apartment in a nearby carport. The "twin justifications" for not requiring search warrants to search vehicles; i.e., "the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility," applies just as much as when the car is out on the street. (***People v. Hockstraser*** (2009) 178 Cal.App.4th 883, 902-905.)

Having probable cause to arrest a passenger in a vehicle for providing false information to a peace officer concerning her age *does not* constitute probable cause to believe that she is hiding identification in a car when she tells the officer that she does not have any identification with her. (***United States v. Rodger*** (9th Cir. 2011) 656 F.3rd 1023.)

During a traffic stop, defendant gave counterfeit bills to another passenger who stuffed them, folded, into the weather stripping between the right front passenger door and window. An officer noticed the partially-visible bills, removed them, unfolded them, and observed that they were counterfeit. The appellate court determined that suppression was not warranted because (1) the circumstances presented a fair probability that the money was involved in drug trafficking and that a search of the car would have revealed evidence of a crime since the passenger was nervous, a parolee, and appeared under the influence of a drug, and the money was located in a place that suggested an effort to conceal its presence and called to the officer's mind the door compartments and other hiding places used by drug couriers to transport contraband and cash, and (2) a separate "secondary" search did not occur when the officer unfolded the bills since the money was within the scope of the search. (***United States v. Ewing*** (9th Cir. 2011) 638 F.3rd 1226, 1230-1234.)

> The fact that the defendant and his cohorts were involved in counterfeiting instead of drug trafficking did not detract from the fact that probable cause to believe that the crime being committed was related to drugs. (***Id***., at p. 1233.)

Two searches of defendant's car were *not* justified under the probable cause theory in that probable cause was not established by defendant's erratic driving, nervousness, or refusal to exit the car, or by the location of the stop in gang territory, or the discovery of baggies and cash in the first search. (***People v. Evans*** (2011) 200 Cal.App.4th 735, 753-755.)

> "Although nervousness and furtive gestures are not sufficient by themselves to support a patsearch, "[n]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion." (***People v. Fews*** (2018) 27 Cal.App.5th 553, 560; quoting ***In re H.M.*** (2008) 167 Cal.App.4th 136, 144.)

> Mere nervousness, by itself, does not establish probable cause. (***People v. Leal*** (2009) 178 Cal.App.4th 1051, 1153.)

A vehicle stop and search based upon the following was held to be based upon sufficient probable cause: (1) The vehicle was stopped only 33 minutes after the initial dispatch was sent out; (2) it was stopped in the city in which the crime of residential burglary had occurred, and only about three miles away from the scene of the crime; (3) the vehicle was "somewhat unique" in that it was a red Ford F-150 with chrome rims; and (4) two Black people were in the truck—one male in his 50's and one female in her 30's, all matching the descriptions put out by police dispatch. Also, upon contacting the vehicle's occupants, (5) one of the vehicle's occupants admitted being at the scene of the burglary, and (6) the clothing descriptions for both subjects matched the victim's descriptions. (***People v. Little*** (2012) 206 Cal.App.4th 1364, 1370-1373.)

A police officer's conclusory statement that a box in defendant's car came from a "suspected narcotics stash house," without defining why the residence was considered to be a "stash house," and his observation that defendant "did not take a direct route to his location," were not sufficient to establish probable cause to conduct a warrantless search of defendant's car under the automobile exception to the **Fourth Amendment's** warrant requirement. (***United States v. Cervantes*** (9th Cir. 2012) 703 F.3rd 1135, 1138-1140.)

> The Court further held that a detective's conclusion that defendant had engaged in "countersurveillance driving techniques" was not substantiated by the record, at least when compared with prior cases (e.g., see ***United States v. Del Vizo*** (9th Cir. 1990) 918 F.2nd 821, 822.), when the only evidence was that defendant had not taken the most direct route. (***United States v. Cervantes***, *supra*, at p. 1140.)

"A police officer has probable cause to conduct a search when 'the facts available to [him] would "warrant a [person] of reasonable caution in the belief"' that contraband or evidence of a crime is present. [Citations] The test for probable cause is not reducible to 'precise definition or quantification.' [Citation]. 'Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place in the [probable-cause] decision.' [Citation]. All we have required is the kind of 'fair probability' on which "reasonable and prudent [people,] not legal technicians, act.' [Citation]" (***Florida v. Harris*** (2013) 568 U.S. 237. 243-244 [133 S.Ct. 1050; 185 L.Ed.2nd 61]; a warrantless search of a vehicle based upon a drug-detection dog's sniff.)

Finding a cellphone in an arrestee's vehicle, and then not attempting a search of the phone for another hour and twenty minutes, negates any argument that an exigency existed, making such a search unlawful. (***United States v. Camou*** (9th Cir. 2014) 773 F.3rd 932, 937-945.)

Information obtained from the suspects themselves (e.g., through a lawful wiretap), absent some reason to believe the subjects were not telling the truth, is entitled to the same level of belief as that from a citizen informant, and will supply the probable cause necessary to justify a traffic stop of the vehicle and then, particularly with corroboration received at the scene of the stop that "eliminat(ing) virtually any doubt on that score, the warrantless seizure of that car pending the obtaining of a search warrant. (***United States v. Magallon-Lopez*** (9th Cir. 2016) 817 F.3rd 671, 675-676.)

An extensive narcotics investigation involving wiretaps and surveillances of defendant and a known drug dealer led to defendant being stopped in his vehicle. The Court upheld the trial court's conclusion that a warrantless search of defendant's truck, upon him being stopped and detained after an apparent buy of methamphetamine, was held to be justified by the automobile exception, there being probable cause to believe that defendant had just make a purchase and that the contraband would be found in his truck. (***United States v. Faagai*** (9th Cir. 2017) 869 F.3rd 1145, 1149-1151.)

Removal of the dashboard console to an automobile, although beyond the scope of an inventory search, was held to be lawful based upon the separate legal theory of probable cause, under the "automobile exception," where a white powder, recognized by the officer as a cutting agent for a controlled substance, had been found under the seat and there were indications that the console had been tampered with. (***People v. Zabala*** (2018) 19 Cal.App.5th 335, 343-344.)

Observing defendant make a hand-to-hand sale of a controlled "rock-like substance," where the officer had a "substantial basis to believe" that the rock-like substance observed in his hand, but not given to the buyer, and the money received from the buyer, when not found on defendant's person upon his later arrest, would likely be in his car that he entered immediately after the sale, a subsequent warrantless search of that car was held to be lawful. (***People v. Johnson*** (2018) 21 Cal.App.5th 1026, 1038-1039.)

Probable cause justifying the warrantless search of defendant's vehicle was supported by any (or all) of the following factors: (1) Defendant, at the scene of a traffic collision, had claimed to be hurrying to pick up his daughter to take her to the hospital, only to be seen driving again in the same area 30 minutes later, the Court noting that apparently false statements and inconsistent stories can support a finding of probable cause

that a person is involved in criminal activity. (2) Upon contacting defendant asleep in his vehicle and taking him out of the car, his sudden act of reaching toward the floor mat supported a finding of probable cause that contraband or evidence of a crime would be located in the vehicle. (3) A conspicuously raised floor mat where defendant had attempted to reach added to the officer's belief that defendant was involved in criminal activity. A warrantless search of that area under the floor mat (finding a firearm) was upheld under the "automobile exception," based upon probable cause to believe that there was evidence of illegal activity under the floor mat. (***United States v. McGhee*** (8th Cir. 2019) 944 F.3rd 740.)

When a heavily intoxicated defendant was contacted by police in the passenger seat of a parked car in a bar parking lot, the officers believed he was in violation of a San Diego municipal code section (i.e., **San Diego Municipal Code section 85.10**, making it illegal to be under the influence in or near a car in public), the car was searched, and multiple concealed handguns recovered. With defendant's motion to suppress the firearms being denied by the trial court, the Appellate Court ruled that the search was permissible under the "*automobile exception*," where the officers had probable cause to believe open containers of alcohol might be found in the vehicle. (***People v. Sims*** (2021) 59 Cal.App.5th 943, 950-952.)

> The Court further held that the initial search of the passenger area of the vehicle was lawful as *incident to defendant's arrest* for public intoxication because he was still unsecured and the passenger area of his car was within reaching distance when officers discovered the first loaded firearm. The fact that defendant was paralyzed from the waist down did not render it unreasonable for the arresting officers to believe he might grab something from the vehicle's rear floorboard. (***Id.***, at pp. 953-955.)
>
> Also note that the Court hinted that **Pen. Code § 647(f)**, drunk in public, would have worked just as well as San Diego's municipal code section. (***Id.***, at p. 949, fn. 3.)

Upon arresting defendant for a violation of a municipal code section (**section 85.10** of the **San Diego Municipal**, for being "under the influence" of alcohol, while "in or about" a motor vehicle while "in a public place," although the Court opined that **Pen. Code § 647(f)** would have worked just as well; see pg. 948, fn. 2, pg. 949, fn. 3, and pg. 951, fn. 4.), it was held that searching defendant's vehicle for evidence related to that violation (i.e., "evidence of alcohol consumption, such as unsealed alcohol containers") was lawful. (***People v. Sims*** (2021) 59 Cal.App.5th 943, 950-952; rejecting defendant's arguments that his inebriation was just as likely to be because he was parked in the parking lot of a bar (which evidence of his state of intoxication without looking for more evidence.)

The Court upheld the warrantless probable cause search of defendant's car because it was a rental, it was parked haphazardly, it was unfamiliar to neighbors, and it was close to shell casings and an abandoned gun magazine at the scene of a shooting. The trial court properly denied defendant's motion to suppress evidence downloaded from his cellphone, seized after the warrantless search of his car left at the scene of the shooting, where there was probable cause to search his car under the automobile exception to the warrant requirement, where there was probable cause to seize his cellphone, which was found in plain view in the car, and where the search warrant for the cellphone was valid under the independent source doctrine. (***People v. Tousant*** (2021) 64 Cal.App.5th 804, 814-820.)

> "Here, law enforcement could reasonably conclude the Camaro was connected to the shooting and could contain evidence relevant to the crime." (***Id.***, at p. 814, citing ***People v. Superior Court (Hampton)*** (1968) 264 Cal.App.2nd 794, 798.)

The warrantless seizure of defendant's electronic devices and related items by the FBI from his vehicle with probable cause to believe that the devices contained child pornography was lawful. Probable cause was established where the agents (1) knew that someone associated with the defendant's IP address had downloaded child pornography; (2) they were told by defendant's future son-in-law and daughter that he was the likely suspect; (3) it was confirmed that none of the future son-in-law and daughter's electronic devices contained child pornography, which further supported the belief that defendant, being the only suspect left, was the primary suspect as well as a belief that he had the devices with him on the road (he being a truck driver); and (4) the FBI knew that defendant had previously committed a child pornography-related crime in another jurisdiction. (***United States v. Keck*** (8th Cir. AR 2021) 2 F.4th 1085: A search warrant was later obtained for a forensic inspection of defendant's electronic devices.)

Having watched known criminal street gang members (belonging to a gang that was known to traffic in guns and drugs) visit a known gang hangout for three minutes, with two occupants of the vehicle going into the residence and them coming out, followed by the resident (also a known gang member) coming out immediately thereafter, leaning into the vehicle, and then going back into the house, the officers had probable cause to stop the vehicle as it left the scene and search it for guns and/or drugs. (***People v. Delgado*** (2022) 78 Cal.App.5th 425, 429.)

These same observations and the results of the vehicle search also provided sufficient probable cause to obtain a search warrant for a search of the residence. (***Id***., at pp. 429-431.)

Note: Assuming that there is such a thing as an all-inclusive "*automobile exception*" to the search warrant requirement is perhaps a dangerous assumption. There are still situations where there are viable arguments that a search warrant is necessary in order to lawfully search a vehicle. (See below)

Problem: *Odor of Alcohol*:

Defendant was stopped for speeding. The officer smelled the fresh odor of beer emitting from the vehicle interior. There was no evidence the driver was impaired. A search of the passenger compartment for open alcohol containers was conducted. An open beer can, two straight blades knives, and a billy club were found. In pockets sewn into a seat cover a gun magazine was found. A loaded .380 auto/ammo clips was found in a duffel bag and cocaine and methamphetamine packaged for sale in a toiletry bag. Because of the fresh odor of alcohol, a probable cause search for open containers was justified. Once the knives were located, a protective frisk for more weapons was justified. Once the officer found the billy club, the entire passenger area could be searched for more weapons as incident to arrest which resulted in the legal discovery of the additional evidence. (***People v. Molina*** (1991) 25 Cal. App. 4th 1038).

Problem: *Marijuana in a Vehicle*: Does the simple *presence of a legal amount of marijuana*, with or *without the odor of marijuana* emanating from the vehicle, provide an officer with probable cause justifying a warrantless search of the entire vehicle?

Other Jurisdictions:

The courts in some jurisdictions feel that the odor alone, without other suspicious circumstances, *may not* be sufficient to establish probable cause. (See ***People v. Taylor*** (Mich. 1997) 564 N.W.2nd 24; odor of marijuana did not justify the warrantless search of a vehicle.)

It has also been held elsewhere that there must be probable cause to believe that there is a *criminal amount* of marijuana in a vehicle in order to justify a warrantless search. (See ***Commonwealth v. Cruz*** (2011) 459 Mass. 459 [945 N.E.2d 899].)

However, it was *not* error for the federal district court to deny defendant's motion to suppress evidence retrieved from his car

because the prolonged stop following a routine traffic stop was justified by the smell of marijuana along with the credible testimony by the police officer. The odor alone was sufficient to establish probable cause to search the automobile and its contents. (***United States v. Smith***) (8th Cir. 2015) 789 F.3rd 923.)

"(T)he smell of burnt marijuana alone establishes probable cause to search a vehicle for the illegal substance." (***United States v. Snyder*** (10th Cir. 2015) 793 F.3rd 1241; see also ***United States v. Walker*** (8th Cir. 2016) 840 F.3rd 477; odor of unburned marijuana alone supplied sufficieint probable cause to search defendant's vehicle.)

Pre-Legalization of Marijuana:

Odor of marijuana smoke during a traffic stop justified the search of a vehicle. (***People v. Lovejoy*** (1970) 12 Cal.App.3rd 883, 887.)

The odor of marijuana emanating from two trucks at a private airstrip, under circumstances consistent with smuggling operations, was found to constitute probable cause to believe the trucks contained marijuana. (***United States v. Johns*** (1985) 469 U.S. 478 [83 L.Ed.2nd 890].)

The odor of beer noted during a traffic stop supplied probable cause to search the car for alcohol. (***People v. Molina*** (1994) 25 Cal.App.4th 1038.)

The odor of burnt marijuana *plus* the plain sight observation of a pipe containing what appeared to be marijuana residue in defendant's vehicle was sufficient to justify the warrantless search of the vehicle. (***People v. Waxler*** (2014) 224 Cal. App. 4th 712.)

The combined odor of burnt and fresh marijuana coming from defendant's motor vehicle supplied the necessary probable cause to search defendant's vehicle without a search warrant, under the "automobile exception" to the search warrant requirement. (***United States v. Johnson*** (9th Cir. 2019) 913 F.3rd 793, 801; citing ***United States v. Barron*** (9th Cir. 1972) 472 F.2nd 1215, 1217.)

Post-Legalization of Marijuana (i.e., after January 1, 2018):

Issue: Since California legalized the possession of recreational use of marijuana (now referred to as "*cannabis*"), whether or not the odor of marijuana (or burning or bulk marijuana) in a vehicle alone, typically observed during a traffic stop, establishes probable

cause to believe a crime is being committed in the officer's presence, thus justifying an immediate warrantless search for contraband, is an issue.

Case Law:

In ***People v. Fews*** (2018) 27 Cal.App.5th 553, at pp. 561-562, the search of defendant's vehicle was upheld, noting the following:

> "[A] warrantless search of an automobile is permissible so long as the police have probable cause to believe the car contains evidence or contraband." (***Robey v. Superior Court*** (2013) 56 Cal.4th 1218, 1225.) The issue is whether the officers' knowledge that a suspect possesses what, on its face, appears to be a lawful amount of recreational marijuana (i.e., now referred to as "cannabis") justifies a search of the vehicle for possible violations of the statutes regulating such possession. **Proposition 64**, effective as of November 8, 2016, made lawful the possession of limited amounts of cannabis. It is argued that since passage of **Proposition 64**, with its enactment of **H&S § 113621**, marijuana is no longer "*contraband*." **Subdivision (c)** of **Section 113621** does in fact provide that "[c]annabis and cannabis products involved in any way with conduct *deemed lawful by this section* are not contraband nor subject to seizure, and no conduct *deemed lawful by this section* shall constitute the basis for detention, search, or arrest." (Italics added) However, it remains *unlawful* to possess, transport, or give away cannabis in excess of the statutorily permitted limits, to cultivate cannabis plants in excess of statutory limits and in violation of local ordinances, to engage in unlicensed "commercial cannabis activity," and to possess, smoke or ingest cannabis in various designated places, including in a motor vehicle while driving. (See **B&P Code §§ 26001(k)**, **26037**, and **26038(c)**; and **H&S Code §§ 11362.1(a)**, **11362.2(a)**, **11362.3(a)**, and **11362.45(a)**.) Driving a motor vehicle on public highways under the influence of any drug (**V.C. § 23152(f)**) or while in possession of an open container of marijuana (**V.C. § 23222(b)(1)**), are

> not acts "deemed lawful" by **H&S § 11362.1**. To the contrary, **Section 11362.1** does not permit any person to possess an open container or open package of cannabis or cannabis products while driving, operating, or riding in the passenger seat or compartment of a motor vehicle or to smoke or ingest cannabis or cannabis products while driving a motor vehicle. (**H&S § 11362.3(a)(4)**) "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." (***Illinois v. Gates*** (1983) 462 U.S. 213, 243, fn. 13. [103 S.Ct. 2317; 76 L.Ed.2nd 527].) The fact that there may also be an innocent explanation does not detract from the finding of probable cause. It has previously been held that a police officer has probable cause to search a vehicle based on the odor of marijuana despite the defendant's presentation of a medical marijuana prescription. (***People v. Strasburg*** (2007) 148 Cal.App.4th 105.) It has also been held that a police officer is entitled to investigate to determine whether a person possesses marijuana for personal medical needs and to determine whether he adhered to the **Compassionate Use Act of 1996's** limits on possession. "It is well settled that even if a defendant makes only personal use of marijuana found in the passenger compartment of a car, a police officer may reasonably suspect additional quantities of marijuana might be found in the car." (***People v. Waxler*** (2014) 224 Cal.App.4th 712, 723-724.) Other states where marijuana use has been legalized are in accord, finding that "the odor of marijuana is still suggestive of criminal activity."

The Court in ***Fews***, therefore, held that "(d)ue to the odor of marijuana emanating from the (Saturn) SUV and Mims, as well as Mims's admission that there was marijuana in his half-burnt cigar, there was a fair probability that a search of the SUV might yield additional contraband or evidence." The search of defendant's vehicle, therefore, was held to be lawful. (***Id***., at p. 563.)

> See ***People v. Johnson*** (2020) 50 Cal.App.5th 620, at p. 630, agreeing with the rule of ***Fews***.

Also cited in ***Fews*** (at pp. 563-564) as support for the Court's conclusions was ***People v. Zuniga*** (Colo. 2016) 372 P.3rd 1052, 1059 [2016 CO 52], holding that despite Colorado's legalization of marijuana, "a substantial number of other marijuana-related activities remain unlawful under Colorado law. Given that state of affairs, the odor of marijuana is still suggestive of criminal activity." Also cited in support of this theory was ***Robinson v. State*** (Md.Ct.App. 2017) 451 Md. 94 [152 A.3rd 661, 664–665].)

However, see ***People v. Lee*** (2019) 40 Cal.App.5th 853, 861-867, where it was held that a driver of a motor vehicle having on his person a small, legal (in a sealed bag) amount of marijuana (i.e., with no odor emanating from the vehicle) is of "fairly minimal significance" in determining whether there is probable cause to believe the vehicle contains an illegal amount. "(T)here must be . . . additional evidence beyond the mere possession of a legal amount" for there to be probable cause to believe there is more marijuana in a suspect's vehicle. (p. 862.)

Also, in ***People v. Johnson*** (2020) 50 Cal.App.5th 620, it was held that since passage of **Proposition 64** (with its enactment of **H&S Code § 11362.1(c)**), legalizing the possession by adults (21 years of age, or older) of less than an ounce of marijuana, the simple observation of a small (legal) amount of marijuana, *even with the odor of marijuana*, no longer establishes probable cause to search the entire vehicle for more marijuana (differentiating the facts here from those of both ***Strasburg*** and ***Waxler***.

> *Note*: There was no testimony in ***Johnson*** of the odor of "*burning*," or "*bulk*," marijuana, either of which would have indicated a violation of **H&S Code § 11362.1**. (See ***People v. Johnson***, *supra*, at p. 630, differentiating the facts in this case from ***People v. Fews*** (2018) 27 Cal.App.5th 553, at p. 563, where observing defendant smoking marijuana (as a violation of H&S Code §**11362.3(a)(4)** and **V.C. § 23222(b)(1)**; open container of marijuana) was held to be sufficient to establish probable cause to search the vehicle.)

Possession of a legal amount of marijuana, but contained in an opened baggie in violation of both **H&S Code § 11362.1(a)(4)** and **Veh. Code § 23222(b)(1)**, was held to

take it from under the protections of **H&S Code § 11362.1(c)**, where it was declared by statute that marijuana lawfully possessed (i.e, an ounce or less) is not contraband, and cannot be used as justification for a search, detention, or arrest. (***People v. McGee*** (2020) 53 Cal.App.5th 796; search of a passenger's purse, based upon an officer's plain sight observation of an opened baggie of marijuana of under an ounce, was held to be lawful.)

The lawful possession of marijuana (i.e., an ounce or less) in a vehicle does not provide probable cause to search the vehicle. (***People v. Hall*** (2020) 57 Cal.App.5th 946, 952.)

> In ***Hall***, Division Two of the First District Court of Appeal reiterated the rule as established in ***People v. Johnson*** (2020) 50 Cal.App.5th 620, that "the mere presence of a lawful amount of marijuana" is not sufficient to establish probable cause to search under the "automobile exception." (***Id.***, at pgs. 948-949, 954.)
>
> Also consistent with ***People v. Johnson***, the Court noted that "*open*" container does not mean that the container must be sealed. A baggie of marijuana is not "open" merely because it is in a baggie that is easily opened or may have been opened at one time. (***Id.***, at pg. 957.)

Possession of a legal amount of marijuana (i.e., cannabis), stored in a vehicle as allowed under the law, does not, by itself, justify a search for more marijuana. The Court further rejected the argument that the odor of fresh marijuana in a vehicle, by itself, not knowing how long that odor might linger, justifies a search of the vehicle for the source of the odor. (***People v. Shumake*** (2019) 45 Cal.App.5th Supp. 1.)

Even though not sealed, a closed container (i.e., a pill bottle) is in compliance with **V.C. § 23222(b)(1)**. Quoting ***People v. Shumake***, *supra*, the Court ruled that an officer's "belief that any cannabis being transported in a vehicle must be in a heat-sealed container is not supported by the plain language of **Section 23222(b)(1)**." Therefore, an officer cannot rely on the presence of a closed (even though not sealed) container of less than an ounce of marijuana—it

being lawful—as justification to search a vehicle for more marijuana. (***United States v. Talley*** (Dist. Ct. N.D. 2020) 467 F. Supp.3rd 832, 835-836.)

> The District Court further ruled that the fact that the possession of any marijuana at all is still a violation of federal law (marijuana still being classified federally as a Schedule I controlled substance) does not provide an excuse to skirt the **H&S § 11362.1(c)** protections from being arrested or searched. The Ninth Circuit has already held that local police officers do not have probable cause to arrest when the alleged violation is of federal law in those circumstances where the officers are, at the time, investigating a violation of *state* law. *See* ***United States v. $186,416.00 in U.S. Currency*** (9th Cir. 2010) 590 F.3rd 942, 948. (***Id.***, at pp. 836-837.)

Probable cause justifying a warrantless search of a vehicle was found where a trained and experienced officer was able to testify to the following factors: (1) the park where the searched vehicle was located was a high-crime area; (2) defendant was observed leaning into the open passenger's side door of a parked Jeep, indicating possible narcotics deal was going down; (3) upon seeing the officer, defendant walked away from the Jeep; (4) when the officer approached the vehicle, the occupant of the vehicle opened the driver's side door and there was a *strong smell* of fresh marijuana; (5) the vehicle's occupant appeared to be nervous; (6) when asked about the smell of fresh marijuana, vehicle's occupant claimed the smell came from him because he had recently smoked marijuana; (7) the vehicle's occupant also indicated that the odor might be from an empty mason jar with what appeared to be marijuana residue inside; and (8) when asked if there were illegal items in the Jeep, the occupant responded "[n]ot that I know of," arousing further suspicion. (***People v. Moore*** (2021) 64 Cal.App.5th 291, 298.)

> In ***Moore***, the Court rejected defendant's "piecemeal approach to the probable cause analysis," noting that the officer's extensive training and experience, together with multiple factors indicating that the odor of marijuana coming from a vehicle was not explained by the empty jar shown

> to the officer which the occupant said had at one time contained marijuana, and established the necessary probable cause to search the vehicle and it's containers (finding a loaded firearm in defendant's backpack). The Court also differentiated ***People v. Lee*** (2019) 40 Cal.App.5th 853 (above), on its facts. The officer was also able to testify that he could tell the difference between the odors of "burnt" and "raw" marijuana.

See also ***Commonwealth v. Craan*** (Mass. 2014) 469 Mass. 24: "Federal law does not supply an alternative basis for investigating possession of one ounce or less of marijuana."

It has also been noted (see ***United States v. Jones*** (U.S. Dist. Ct 2020) 438 F.Supp.3rd 1039, at pp. 1053-1054) that the issue of whether the odor of marijuana alone, since passage of **Proposition 64**, is sufficient to establish probable cause to search a vehicle is currently before the Ninth Circuit Court of Appeal in several cases. (Referencing ***United States v. Martinez***, Case No. 17-CR-00257-LHK, 2018 U.S. Dist. LEXIS 138329 (N.D. Cal. 2018) and ***United States v. Maffei***, Case No. 18-CR-00174 YGR, 417 F. Supp.3rd 1212, 2019 U.S. Dist. LEXIS 177755 (N.D. Cal. 2019.)

During a lawful traffic stop, officers smelled marijuana. The Court held that without any evidence to the effect that defendant was driving while under the influence of marijuana, that he was smoking it while driving, or that he was in violation of any other marijuana-related restrictions, the search of the car could not be justified under a probable cause theory. The simple odor of marijuana alone being insufficient (See ***People v. Fews*** (2018) 27 Cal.App.5th 553, and ***People v. Johnson*** (2020) 50 Cal.App.5th 620.), there was no evidence of any such violations in this case. (***Blakes v. Superior Court*** (2021) 72 Cal.App.5th 904, 910-913.)

A warrantless search of defendant's car, during which a police officer discovered a loaded handgun with no serial number, fell within the automobile exception to the **Fourth Amendment's** warrant requirement. Based upon the strong odor of burnt marijuana emanating from defendant's car, defendant's admission he had smoked marijuana two hours earlier, and the fact all occupants of the car were under 21

years of age, officers had probable cause to believe they would find contraband or evidence (e.g., marijuana possessed by someone under 21) of a crime in the car. The belief by one of the officers that there was still marijuana in the car based on the current smell of burnt marijuana coming from inside the car was reasonable under the circumstances of this case. Accordingly, the officers had probable cause to search the car under the automobile exception, and the trial court did not err in denying defendant's motion to suppress. (***People v. Castro*** (2022) 86 Cal.App.5th 314; finding the "automobile exception" to the warrant requirement applicable to this situation.)

Problem: More than one occupant in a vehicle: Where evidence is found in a vehicle within reach of *more than one of the occupants*, but no one admits ownership (or everyone specifically denies ownership), who, if anyone, is subject to arrest?

Where a large amount of money is found rolled up in a vehicle's glove compartment, and five plastic glassine baggies of cocaine are found behind the center armrest of the backseat, with the armrest pushed up into the closed position to hide the contraband, such contraband being accessible to all the occupants of the vehicle, the arrest of all three subjects in the vehicle (driver, right front and rear seat passengers) was supported by probable cause. (***Maryland v. Pringle*** (2003) 540 U.S. 366 [124 S.Ct. 795; 157 L.Ed.2nd 769].)

Officers had probable cause to arrest both the passenger and the driver for possession of a billy club seen resting against the driver's door. (***People v. Vermouth*** (1971) 20 Cal. App. 3rd 746, 756.)

Informing two suspects in a vehicle that they would both be arrested for possession of a concealed firearm, prompting a response from defendant that he'd "*take the charge*," was *not* the functional equivalent of an interrogation that required a ***Miranda*** admonishment. (***United States v. Collins*** (6th Cir. 2012) 683 F.3rd 697, 701-703.)

Note: However, absent sufficient evidence to connect contraband found in the vehicle to one person or the other "*beyond a reasonable doubt*," the case is unlikely to be filed by a prosecutor.

Problem: *Search of already impounded vehicle*: Search of a vehicle that is *already impounded* and in police custody, where the search is no longer "*contemporaneous in time and place*?"

The "*contemporaneous in time and place*" requirement only applies to "*searches incident to arrest*." If probable cause to believe a vehicle contains contraband or other sizable items existed at the time the vehicle is seized and impounded, a delayed, warrantless search is no less valid than if searched at the time of seizure. The courts have held that such a delayed search imposes no greater intrusion upon a defendant's privacy rights than if it had been immediately searched upon initial seizure. (***People v. Nicholson*** (1989) 207 Cal.App.3rd 707; ***United States v. Johns*** (1985) 469 U.S. 478 [83 L.Ed.2nd 890]; ***United States v. Garcia*** (9th Cir. 2000) 205 F.3rd 1182.)

> "(T)he passage of time between the seizure and the search of [a] car is legally irrelevant." (***People v. Superior Court* [*Nasmeh*]** (2007) 151 Cal.App.4th 85, 100-102; citing ***United States v. Gastiaburo*** (4th Cir. 1994) 16 F.3rd 582, 587.)

"Delays, however, must be 'reasonable in light of all the circumstances.'" (***United States v. Camou*** (9th Cir. 2014) 773 F.3rd 932, 941; citing ***United States v. Albers*** (9th Cir. 1998) 136 F.3rd 670, where a seven-to-ten-day delay in viewing videotapes and file seized from a houseboat was upheld.)

But note; *A Search Warrant Required*? Based upon the reasoning of the above cases, it is arguable that when a vehicle is impounded at a time *when there is no probable cause* to believe it contains contraband or other seizeable items, developing probable cause to search the vehicle at a later time, *probably does not* allow a warrantless search after impoundment. There no longer being any legal theory allowing for a warrantless search of a vehicle when the probable cause is developed after the fact, nor any exigent circumstances, a search warrant should be obtained.

Problem: *Searches of* "*closed containers*" *in a vehicle*:

Old Rule: If a police officer had probable cause to believe a particular closed container in a vehicle contained contraband, as opposed to probable cause to believe that there was contraband in some unknown location in the vehicle in general, then the container itself would have to be seized and a search warrant obtained before opening it. (***United States v. Chadwick*** (1977) 433 U.S. 1 [97 S.Ct. 2476; 53 L.Ed.2nd 538].)

New Rule: Recognizing the absurdity of trying to distinguish the rule of ***United States v. Ross*** (1982) 456 U.S. 789 [102 S.Ct. 2157; 72 L.Ed.2nd 572], allowing a warrantless search of containers in a vehicle if there was probable cause to search the car in general (above), and the rule of ***Chadwick***, requiring a warrant for a particular container when there was probable cause to believe a known container in a vehicle itself contained contraband or other sizable items, the United States Supreme Court finally

overruled ***Chadwick*** in ***California v. Acevedo*** (1991) 500 U.S. 565, 580 [111 S.Ct. 1982; 114 L.Ed.2nd 619].

> Now, pursuant to ***Acevedo***, any time a closed container is found in a car, whether searched (1) incident to arrest, (2) with probable cause to believe there is contraband or other seizeable evidence somewhere in the car, *or* (3) with probable cause to believe a specific container within the vehicle contains contraband or sizable items, the container may be searched without a search warrant. (See also ***People v. Molina*** (1994) 25 Cal.App.4th 1038; and ***People v. Thompson*** (2010) 49 Cal.4th 79, 112.)
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> This includes a closed container belonging to a passenger even though the passenger is not arrested (***People v. Mitchell*** (1995) 35 Cal.App.4th 672; ***People v. Prance*** (1991) 226 Cal.App.3rd 1525.) and even though the passenger has already been ordered out of the vehicle. (***Wyoming v. Houghton*** (1999) 526 U.S. 295 [119 S.Ct. 1297; 143 L.Ed.2nd 408].)
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> Search of a purse found in defendant's vehicle after defendant had been arrested outside the car from which he had just fled, with crack cocaine and a large amount of money in his pockets indicating that he had been engaged in the selling of drugs, constituted sufficient probable cause to believe that more contraband, or other evidence of drug dealing, would be found in his car. The warrantless search of the car, and the purse (in which a gun was found), was upheld as lawful. (***United States v. Williams*** (9th Cir. 2017) 846 F.3rd 303, 312-313.)
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> If, however, the passenger takes the container (such as a briefcase) with him or her upon being ordered out of a vehicle, is that container subject to search? *Maybe not.* (See ***United States v. Vaughan*** (9th Cir. 1983) 718 F.2nd 332, suppressing the contents of defendant's briefcase which he took from a car as he exited the car during a traffic stop.)
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> > *Note*: However, with probable cause to believe that a vehicle contains something such as illegal drugs, it is arguable that the occupant may have more of the same on his or her person, subjecting that person, and any containers they are carrying, to a probable cause search without a search warrant. (*See* "*Searches with Probable Cause*," under "*Searches of Persons*" (Chapter 11), above.
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> While the odor of marijuana coming from a mailed package will justify the seizure of such package, it does not excuse the lack of a

search warrant when law enforcement opens the package without exigent circumstances. (***Robey v. Superior Court*** (2013) 56 Cal.4th 1218, 1223-1243; overruling ***People v. McKinnon*** (1972) 7 Cal.3rd 899, 909; which had held to the contrary.)

When the search of a cellphone is at issue, it has been held that the limitations imposed by ***Chadwick*** continue to apply. (***Riley v. California*** (2014) 573 U.S. 373, 393-395 [134 S.Ct. 2473; 189 L.Ed.2nd 430]; ***People v. Macabeo*** (2016) 1 Cal.5th 1206, 1215.)

> See "Exception; Cellphones," above, and "*Problem*: *When the item searched is a cellphone*," below.

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Problem: *When the vehicle is parked in the curtilage of a residence*:

An exception to the general rule that vehicles are subject to warrantless searches when there exists probable cause to believe that the vehicle contains evidence of a crime exists when the vehicle is parked within the curtilage of a home. (***Collins v. Virginia*** (2018) 584 U.S. 586, 594 [138 S.Ct. 1663; 201 L.Ed.2nd 9]; the illegal search in this case consisting of raising a tarp to expose a motorcycle parked in a home's driveway, and making visible the motorcycles license plate and VIN number.

> "The question before the Court is whether the automobile exception justifies the invasion of the curtilage. (fn. omitted) The answer is *no*." (Italics added; ***Id***., at p. 594.)
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> *Note*: The Court in *Collins* notes an exception to this rule when officers, observing a searchable vehicle on the street, follow the driver of that vehicle into the curtilage of a home. Under these unique circumstances, the "automobile exception" would allow for the warrantless search of the vehicle despite it being within the curtilage at the time of the search. (See ***Scher* v. *United States*** (1938) 305 U.S. 251 [59 S.Ct. 174, 83 L.Ed. 151].)

Problem: *When the item searched is a cellphone*:

The Ninth Circuit has held that cellphones are *not* containers for purposes of the vehicle exception to the search warrant requirement, and thus may not be searched under this theory. (***United States v. Camou*** (9th Cir. 2014) 773 F.3rd 932, 941-943.)

> The ***Camou*** Court cites the Supreme Court decision of ***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430], an "incident to arrest" case, for the argument that cellphones are entitled to an enhanced level of privacy given the quantity of personal information contained therein, "differ(ing) in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." (134 S.Ct. at p. 2489.) ***Camou*** thus extends the theory of ***Riley v. California*** to searches of a vehicle based upon probable cause.

See also ***United States v. Lara*** (9th Cir. 2016) 815 F.3rd 605, 610-611; declining to include defendant's cellphone under the category of a "container," in defendant's **Fourth** waiver search conditions.

See "*Seizures and Searches of High Tech Devices*" (Chapter 17), below.

Problem: A *Motorhome, Travel Trailer, Fifth Wheel* and other similar "*Vehicles*":

> A motorhome, although having many of the attributes of a private residence, is mobile and subject to registration like any other motor vehicle, and is therefore included within the vehicle exception to the search warrant requirement. (***California v. Carney*** (1985) 471 U.S. 386 [105 S.Ct. 2066; 85 L.Ed.2nd 406].)
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> > "When a vehicle (such as a motorhome) is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes—temporary or otherwise—the two justifications for the vehicle exception (i.e., '*mobility*' and '*lessened expectation of privacy*') come into play." (***California v. Carney***, *supra*, at pp. 392-393 [85 L.Ed.2nd at p. 414].)
> >
> > *Thus*, when a motorhome is *not* "*readily capable of . . . use*" on the highway, and *is* found stationary in a place which *is* "*regularly used for residential purposes*," (i.e., such as when hooked up in the residential area of a park), then the rules for searching homes would apply.
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> Defendant's pickup/camper, which the parties stipulated was actually defendant's residence, but which was found parked on the street within 1000 feet of an elementary school, was held *not* to come within the "*residence*" exception to **P.C. § 626.9** (firearm in a vehicle within a "*gun-free school zone*") when a firearm was found in it. (***People v. Anson*** (2002) 105 Cal.App.4th 22, 26-27.)
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> The same rule applies to a *houseboat* (***United States v. Hill*** (10th Cir. 1988) 855 F.2nd 664, 668; ***United States v. Albers*** (9th Cir. 1998) 136 F.3rd 670.), and for a *trailer* used for residential purposes but hooked up to a vehicle and moved to a non-residential area. (***Garber v. Superior Court*** (2010) 184 Cal.App.4th 724; discussing whether the exceptions to the concealed and loaded firearms statutes applied to defendant's trailer that he lived in; holding that, under the circumstances, they did not.)
>
> In writing a search warrant for a residence, the affiant failed to separately list a fifth-wheel-type trailer parked in the driveway, assuming that the warrant's authorization to search all vehicles on the property covered the trailer. The issue on appeal was whether the fifth-wheel was actually a separate residence. Although there was some evidence that the fifth-wheel was being used as a temporary residence, the officers observed the following facts supporting their belief that it was a vehicle: (1) The RV had fully inflated tires, could have been mobile within 30 minutes, and

was parked on a driveway with ready access to a roadway; (2) the truck used to tow the RV was parked next to it; (3) the RV, which was parked at a Pennsylvania residence, had Missouri license plates, had a vehicle identification number, and was registered in Missouri; and (4) the RV, although hooked up to water and electricity, was not attached to the ground or permanently affixed to any structure. Finally, given that a "vehicle" is commonly defined as "an instrument of transportation or conveyance," it was reasonable for the officers to treat it as such. As a result, the court held that it was reasonable for the officers to believe the RV was a vehicle within the scope of the search warrant and that the district court improperly suppressed the evidence found inside it. (***United States v. Houck*** (8th Cir. MO 2018) 888 F.3rd 957.)

> *Note*: It would have eliminated the issue altogether had the officers listed the fifth-wheel trailer separately in the warrant affidavit and in the description of the places to be searched.

Bicycles ridden on public streets are like cars and can be searched without a warrant when there is probable cause to believe it contains contraband. (***People v. Allen*** (2000) 78 Cal.App.4th 445.)

The vehicle exception has been used with other types of vehicles, such as an *airplane.* (See ***United States v. Rollins*** (11th Cir. 1983) 699 F.2nd 530.)

Problem: *Expanding the scope of the search beyond the purposes of the original cause for a traffic stop*:

Having a drug-sniffing dog check the outside of a vehicle stopped for a traffic violation does not require any independent reasons for believing contraband is in the car in order to be lawful. The drug sniff is not a search, and thus does not implicate the **Fourth Amendment**. (***Illinois v. Caballes*** (2005) 543 U.S. 405 [125 S.Ct. 834; 160 L.Ed.2nd 842], rejecting the argument that to do so "unjustifiably enlarge(s) the scope of a routine traffic stop into a drug investigation."

> See "*Dog Sniff Searches*," under "Searches of Persons" (Chapter 11), above.

But, if the dog-sniff is conducted after the purposes of the traffic stop are completed, and thus during an unlawfully prolonged detention, then it is illegal and the resulting evidence will be suppressed. (***Rodriguez v. United States*** (2015) 575 U.S, 348 [135 S.Ct. 1609; 191 L.Ed.2nd 492]; the dog's alert to the presence of drugs being seven to eight minutes after the purposes of the traffic stop had been completed.)

The U.S. Supreme Court has had no difficulty expanding the scope of a detention into topics that were *not* part of the original reasonable suspicion justifying a detention in the first place, so long as the circumstances do not involve an unlawfully prolonged detention. (See ***Muehler v. Mena*** (2005) 544 U.S. 93, 100-101 [125 S.Ct. 1465; 161 L.Ed.2nd 299], rejecting Ninth Circuit Court of Appeal cases to the contrary.)

In other cases, the Supreme Court has held: "Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means." (***United States v. Drayton*** (2002) 536 U.S. 194 [122 S.Ct. 2105; 153 L.Ed.2nd 242].); citing ***Florida v. Bostic*** (1991) 501 U.S. 429, 434-435 [111 S.Ct. 2382; 115 L.Ed.2nd 389, 398-399].)

California courts are in accord with these latest Supreme Court pronouncements on the issue: "Questioning during the routine traffic stop on a subject unrelated to the purpose of the stop is not itself a **Fourth Amendment** violation. Mere questioning is neither a search nor a seizure. [Citation.] While the traffic detainee is under no obligation to answer unrelated questions, the Constitution does not prohibit law enforcement officers from asking. [Citation.]" (***People v. Brown*** (1998) 62 Cal.App.4th 493, 499-500; see also ***People v. Bell*** (1996) 43 Cal.App.4th 754, 767; ***People v. Gallardo*** (2005) 130 Cal.App.4th 234, 238; ***People v. Tully*** (2012) 54 Cal.4th 952, 981-982; and ***People v. Gallardo*** (2005) 130 Cal.App.4th 234, 239; asking for consent to search during the time it would have taken to write the citation that was the original cause of the stop is legal, despite the lack of any evidence to believe there was something there to search for.)

Even the Ninth Circuit Court of Appeal, previously resistant to this theory, has fallen into line. (See ***United States v. Mendez*** (9th Cir. 2007) 476 F.3rd 1077, 1079-1081; overruling prior decisions to the contrary.)

> Questioning defendant/truck driver and asking for consent to search the vehicle, when the truck was initially stopped for no more than an administrative check of its paperwork, is not unconstitutional. (***United States v. Delgado*** (9th Cir. 2008) 545 F.3rd 1195, 1205.)

Note: Oregon Supreme Court authority to the contrary (i.e., ***State v. Arreola-Botello*** (2019) 365 Or. 695), that says that for the purposes of **Article I, section 9** of the **Oregon Constitution**, there are both "*subject-matter and durational limitations*" to the questioning that may occur during a traffic stop, thus making it illegal for Oregon law enforcement officers to question a subject stopped for a traffic violation about anything

other than topics related to the purpose of the traffic stop, is not applicable to federal or California courts, and may (or "*should*") be ignored by California law enforcement officers.

See "*Enlarging the Scope of the Original Detention*," under "*Detentions*" (Chapter 4), above.

Evidence of Probable Cause: Probable cause to search a motor vehicle is established just as in any other case. (***People v. Carrillo*** (1995) 37 Cal.App.4th 1662; defendant claiming no ownership interest in a vehicle when a registration check showed the vehicle to be registered to him, adds to the evidence needed to prove probable cause.)

An officer's probable cause to believe that a person is in illegal possession of marijuana is not diminished just because the person produces a medical marijuana identification card or a physician's authorization. (***People v. Strasburg*** (2007) 148 Cal.App.4th 1052; defendant lawfully detained and his car lawfully searched despite producing a doctor's authorization to use marijuana for medical purposes.)

See also ***People v. Waxler*** (2014) 224 Cal.App.4th 712; holding that the odor of marijuana in a vehicle, with the plain sight observation of a marijuana pipe with what appeared to be a small amount of marijuana in the bowl, supplied probable cause to conduct a warrantless search of the vehicle. The fact that possession of less than an ounce of marijuana is an infraction, or that the defendant has a marijuana card, is irrelevant.

However, when the probable cause evidence is something that was illegally seized itself, the "*fruit of the poisonous tree*" doctrine dictates that that evidence may not be used as a part of the probable cause to search a vehicle. (***United States v. Job*** (9th Cir. 2017) 871 F.3rd 852, 862-863; evidence discovered as a result of an illegal patdown used as probable cause to search the suspect's vehicle.)

"'(P)robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.;" (***People v. Moore*** (2021) 64 Cal.App.5th 291, 297, quoting ***Illinois v. Gates*** (1983) 462 U.S. 213, 232 [76 L.Ed.2nd 527, 544; 103 S.Ct. 2317].)

In ***Moore***, the Court rejected defendant's "piecemeal approach to the probable cause analysis," noting that the officer's extensive training and experience, together with multiple factors indicating that the odor of marijuana coming from a vehicle was not explained by the empty jar shown to the officer which the occupant said had at one time contained marijuana, and established the

necessary probable cause to search the vehicle and it's containers (finding a loaded firearm in defendant's backpack). The Court differentiated ***People v. Lee*** (2019) 40 Cal.App.5th 853 (above), on its facts. The officer was also able to testify that he could tell the difference between the odors of "burnt" and "raw" marijuana.

When the Vehicle Itself is Evidence of a Crime:

Rule: Although there is not a lot of authority on the issue, and what authority there is tends to be a bit vague and inconsistent, it has been held that when the vehicle itself "*constitutes evidence of a crime*," or is the "*instrumentality of a crime*," rather than the "*mere container of evidence*," seizure and a warrantless search of that vehicle is lawful.

Case Law:

It is lawful to make a warrantless seizure of a vehicle, found in any public area, when an officer has probable cause to believe that the vehicle itself is "*forfeitable contraband*." (***Florida v. White*** (1999) 526 U.S. 559 [119 S.Ct. 1555; 143 L.Ed.2nd 748]; see also ***Carroll v. United States*** (1925) 267 U.S. 132, 150-151 [45 S.Ct. 280; 69 L.Ed. 543].)

When the vehicle was used to kidnap the victim, it was found to be the "*instrumentality*" of the crime of kidnapping. (***North v. Superior Court*** (1972) 8 Cal.3rd 301.)

The vehicle in which the victim was shot was evidence of the crime. (***People v. Teale*** (1969) 70 Cal.2nd 497.)

> "[W]hen the police lawfully seize a car which is itself *evidence* of a crime rather than merely a container of incriminating articles, they may postpone searching it until arrival at a time and place in which the examination can be performed in accordance with sound scientific procedures." (***Id***., at p. 508.)

When the defendant was arrested for committing lewd acts on children where it was suspected that he took pictures of his victims in his van, the van became evidence of the crime. (***People v. Rogers*** (1978) 21 Cal.3rd 542.)

Where the defendant's bloody shoeprint was observed on the floorboard of his vehicle, the vehicle itself was found to be evidence of the crime. (***People v. Griffin*** (1988) 46 Cal.3rd 1011.)

> The California Supreme Court noted that this theory for justifying the warrantless seizure and search of a vehicle where the vehicle is

itself evidence of, or the instrumentality of, a crime is *implicit* in a number of United States Supreme Court decisions as well. (***People v. Griffin***, *supra*, at p. 1025, citing ***Cardwell v. Lewis*** (1974) 417 U.S. 583, 592-593 [94 S.Ct. 2464; 41 L.Ed.2d 325, 336]; ***Coolidge v. New Hampshire*** (1971) 403 U.S. 443, 464 [91 S.Ct. 2022; 29 L.Ed.2nd 564, 581-582]; ***Cooper v. California*** (1967) 386 U.S. 58 [87 S.Ct. 788; 17 L.Ed.2d 730]; ***Carroll v. United States*** (1925) 267 U.S. 132, 153, 156 [45 S.Ct. 280; 69 L.Ed. 543, 551, 552-553]; ***United States v. Di Re*** (1948) 332 U.S. 581, 586 [68 S.Ct. 222; 92 L.Ed. 210, 216].)

Where defendant, driving while intoxicated, crashed head-on into another vehicle, killing the other driver, defendant's vehicle was held to be the instrumentality of the charged offenses of involuntary manslaughter (**Pen. Code § 192(b)**), as a lesser included offense to an alleged second degree murder charge, and vehicular manslaughter with gross negligence while intoxicated **(Pen. Code § 191.5(a)**). (***People v. Diaz*** (2013) 213 Cal.App.4th 743, 755-757.)

The Court in ***Diaz*** rejected defendant's arguments that the "*Evidence of a Crime*" theory had been repudiated by subsequent case law, such as ***United States v. Jones*** (2012) 565 U.S. 400 [132 S.Ct. 945; 181 L.Ed.2nd 911]; the GPS case. (***Ibid***.)

Question; False Compartments: When a vehicle has within it a "*false compartment*" (i.e., a "box, container, space or enclosure that is intended for use or designed for use to conceal, hide, or otherwise prevent discovery of any controlled substance within or attached to a vehicle, . . ." See ***People v. Arias*** (2008) 45 Cal.4th 169.), per **H&S § 11366.8**, is the vehicle itself "*evidence of a crime*?" No known case has yet to address this issue.

Question; Chalking or Tapping a Person's Vehicle's Tires: Is not the law enforcement practice of "*chalking*" a vehicle's tires (to enforce parking time limitations) or "*tapping*" the tires (as a safety check) a situation where it could be argued that the vehicle itself is evidence of a crime? No court has yet considered this argument. However, both actions by law enforcement have been held to constitute a "search," for which a warrant might be necessary.

Chalking:

The Sixth Circuit has held that when the chalking of a person's tires is done for the purpose of determining how long the vehicle is parked at a specific location, to do so constitutes a "*search*," and illegal absent a search warrant. Neither the automobile nor the community caretaking exceptions to the search warrant

requirement applies. (***Taylor v. City Saginaw*** (6th Cir. 2021) 11 F.4th 483.)

> The Court also held that the "administrative-search exception" to the search warrant requirement does *not* justify the city's suspicionless chalking of car tires to enforce its parking regulations. The city's parking officer, however, was entitled to qualified immunity because every reasonable parking officer would not understand from prior case that suspicionless chalking of car tires violated **Fourth Amendment.** (***Ibid***.)

However, the Ninth Circuit, in a split, 2-to-1 decision, ruled to the contrary, finding that a city's practice of chalking tires as part of enforcing time limits on city parking spots fell within the administrative search exception to the **Fourth Amendment's** warrant requirement because complementing a broader program of traffic control, tire chalking was reasonable in its scope and manner of execution, it was not used for general crime control purposes, and its intrusion on personal liberty was de minimis at most. (***Verdun v. City of San Diego*** (2022) 51 Cal.App.5th 1033.)

Tapping: The Fifth Circuit Court of Appeal has held that an officer tapping a stopped motorist's tires out of concern that, having viewed them wobbling, they were a hazard to the motorist and others, is a "*search*," under of ***United States v. Jones*** (2012) 565 U.S. 400 [132 S.Ct. 945; 181 L.Ed.2nd 911], albeit a reasonable (thus lawful) one under the circumstances. (***United States v. Richmond*** (5th Cir. Tex. 2019) 915 F.3rd 352.)

Inventory Searches of Impounded Vehicles:

General Rule: A lawfully impounded vehicle may be searched for the purpose of determining its condition and contents at the time of impounding, to avoid later disputes or false claims. Anything observed in the vehicle during the inventory search will be admissible in court. (***Florida v. Wells*** (1990) 495 U.S. 1 [110 S.Ct. 1632; 109 L.Ed.2nd 1].)

> Vehicle inventory searches are a well-defined exception to the **Fourth Amendment** warrant requirement. (**People *v.* Quick** (2016) 5 Cal.App.5th 1006, 1010; citing ***Colorado v. Bertine*** (1987) 479 U.S. 367, 371 [93 L.Ed.2nd 739; 107 S.Ct. 738]; **People *v.* Zabala** (2018) 19 Cal.App.5th 335, 340; ***People v. Smith*** (2020) 46 Cal.App.5th 375, 393-394.)

> "An inventory search may extend to the car's trunk, glove compartment, and closed containers located within the car." (***People v. Smith***, *supra*.)
>
> "An inventory search of a vehicle is reasonable under the **Fourth Amendment** because the government's legitimate interests in conducting such a search 'outweigh[] the individual's privacy interests in the contents of his car.'" (***United States v. Anderson*** (9th Cir. 2022) 56 F.4th 748, 757, quoting ***Illinois v. Lafayette*** (1983) 462 U.S. 640, at p. 647 [103 S.Ct. 2605; 77 L.Ed.2nd 65].)

"'When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents. These procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody [citation]; the protection of the police against claims or disputes over lost or stolen property [citation]; and the protection of the police from potential danger [citation]. The practice has been viewed as essential to respond to incidents of theft or vandalism.'" (***People v. Duong*** (2020) 10 Cal.5th 36, 52; quoting ***South Dakota v. Opperman*** (1976) 428 U.S. 364, 369 [49 L. Ed.2nd 1000; 96 S.Ct. 3092]; but declining to decide the lawfulness of the inventory search in this case as non-prejudicial even if illegal.)

Evidence found during a lawful inventory search of a vehicle that is being impounded is admissible in court. (See ***Harris v. United States*** (1968) 390 U.S. 234 [88 S.Ct. 992; 19 L.Ed.2nd 1067].)

The impoundment of an automobile is a seizure within the meaning of the **Fourth Amendment**. (***United States v. Torres*** (9th Cir. 2016) 828 F.3rd 1113, 1118.)

However, there must be some evidence in the record that the vehicle was actually impounded. An arresting officer's testimony that he searched the vehicle as a pre-impound inventory search, without any evidence to support the theory that the officers in fact intended to impound the vehicle, or that it was it was actually impounded, is insufficient to sustain the trial court's conclusion that a warrantless search of the vehicle was a valid impound search. (***People v. Wallace*** (2017) 15 Cal.App.5th 82, 89-93.)

Impoundment of a Vehicle; Statutory Authority:

> ***Veh. Code § 14602.5*****:** *Impoundment of a Vehicle on Conviction for Driving with a Suspended or Revoked License; Release to Legal Owner*:
>
> > (a) Whenever a person is convicted for driving any class M1 or M2 motor vehicle, while his or her driving privilege has been

suspended or revoked, of which vehicle he or she is the owner, or of which the owner permitted the operation, knowing the person's driving privilege was suspended or revoked, the court may, at the time sentence is imposed on the person, order the motor vehicle impounded in any manner as the court may determine, for a period not to exceed *six months* for a first conviction, and not to exceed *12 months* for a second or subsequent conviction. For the purposes of this section, a "second or subsequent conviction" includes a conviction for any offense described in this section. The cost of keeping the vehicle shall be a lien on the vehicle, pursuant to **Chapter 6.5** (commencing with **Section 3067)** of **Title 14** of **Part 4** of **Division 3** of the **Civil Code**.

(b) Notwithstanding **subdivision (a)**, any motor vehicle impounded pursuant to this section which is subject to a chattel mortgage, conditional sale contract, or lease contract shall, upon the filing of an affidavit by the legal owner that the chattel mortgage, conditional sale contract, or lease contract is in default, be released by the court to the legal owner, and shall be delivered to him or her upon payment of the accrued cost of keeping the motor vehicle.

Veh. Code § 14602.6*: *Upon Determination That a Person was Driving Without Valid License; Arrest; Removal and Seizure of Vehicle; Payment; Storage Hearing; Release of Impounded Vehicle:

(a)

(1) Whenever a peace officer determines that a person was driving a vehicle while his or her driving privilege was suspended or revoked, driving a vehicle while his or her driving privilege is restricted pursuant to **Section 13352** or **23575** and the vehicle is not equipped with a functioning, certified interlock device, or driving a vehicle without ever having been issued a driver's license, the peace officer may either immediately arrest that person and cause the removal and seizure of that vehicle or, if the vehicle is involved in a traffic collision, cause the removal and seizure of the vehicle without the necessity of arresting the person in accordance with **Chapter 10** (commencing with **Section 22650)** of **Division 11**. A vehicle so impounded shall be impounded for 30 days.

(2) The impounding agency, within *two working days* of impoundment, shall send a notice by certified mail, return receipt requested, to the legal owner of the vehicle, at the

address obtained from the department, informing the owner that the vehicle has been impounded. Failure to notify the legal owner within two working days shall prohibit the impounding agency from charging for more than *15 days*' impoundment when the legal owner redeems the impounded vehicle. The impounding agency shall maintain a published telephone number that provides information *24 hours* a day regarding the impoundment of vehicles and the rights of a registered owner to request a hearing. The law enforcement agency shall be open to issue a release to the registered owner or legal owner, or the agent of either, whenever the agency is open to serve the public for nonemergency business.

(b) The registered and legal owner of a vehicle that is removed and seized under **subdivision (a)** or their agents shall be provided the opportunity for a storage hearing to determine the validity of, or consider any mitigating circumstances attendant to, the storage, in accordance with **Section 22852**.

Note: **V.C. § 22852** describes the post-impound hearing requirements.

(c) Any period in which a vehicle is subjected to storage under this section shall be included as part of the period of impoundment ordered by the court under **subdivision (a)** of **Section 14602.5**.

(d)

(1) An impounding agency shall release a vehicle to the registered owner or his or her agent prior to the end of *30 days*' impoundment under any of the following circumstances:

(A) When the vehicle is a stolen vehicle.

(B) When the vehicle is subject to bailment and is driven by an unlicensed employee of a business establishment, including a parking service or repair garage.

(C) When the license of the driver was suspended or revoked for an offense other than those included in **Article 2** (commencing with **Section 13200**) of **Chapter 2** of **Division 6** or **Article 3** (commencing with **Section 13350**) of **Chapter 2** of **Division 6**.

(D) When the vehicle was seized under this section for an offense that does not authorize the seizure of the vehicle.

(E) When the driver reinstates his or her driver's license or acquires a driver's license and proper insurance.

(2) No vehicle shall be released pursuant to this subdivision without presentation of the registered owner's or agent's currently valid driver's license to operate the vehicle and proof of current vehicle registration, or upon order of a court.

(e) The registered owner or his or her agent is responsible for all towing and storage charges related to the impoundment, and any administrative charges authorized under **Section 22850.5**.

(f) A vehicle removed and seized under **subdivision (a)** shall be released to the legal owner of the vehicle or the legal owner's agent prior to the end of 30 days' impoundment if all of the following conditions are met:

(1) The legal owner is a motor vehicle dealer, bank, credit union, acceptance corporation, or other licensed financial institution legally operating in this state or is another person, not the registered owner, holding a security interest in the vehicle.

(2)

(A) The legal owner or the legal owner's agent pays all towing and storage fees related to the seizure of the vehicle. No lien sale processing fees shall be charged to the legal owner who redeems the vehicle prior to the 15th day of impoundment. Neither the impounding authority nor any person having possession of the vehicle shall collect from the legal owner of the type specified in **paragraph (1)**, or the legal owner's agent any administrative charges imposed pursuant to **Section 22850.5** unless the legal owner voluntarily requested a post-storage hearing.

(B) A person operating or in charge of a storage facility where vehicles are stored pursuant to this section shall accept a valid bank credit card or cash for payment of towing, storage, and related fees by a legal or registered owner or the owner's agent claiming the vehicle. A credit card shall be in the name of the person presenting the card. "Credit card" means "credit card" as defined in subdivision (a) **of Section 1747.02 of the Civil Code**, except, for the purposes of this section, credit card does not include a credit card issued by a retail seller.

(C) A person operating or in charge of a storage facility described in **subparagraph (B)** who violates **subparagraph (B)** shall be civilly liable to the owner of the vehicle or to the person who tendered the fees for four times the amount of the towing, storage, and related fees, but not to exceed five hundred dollars ($500).

(D) A person operating or in charge of a storage facility described in **subparagraph (B)** shall have sufficient funds on the premises of the primary storage facility during normal business hours to accommodate, and make change in, a reasonable monetary transaction.

(E) Credit charges for towing and storage services shall comply with **Section 1748.1** of the **Civil Code.** Law enforcement agencies may include the costs of providing for payment by credit when making agreements with towing companies on rates.

(3) The legal owner or the legal owner's agent presents a copy of the assignment, as defined in **subdivision (b)** of **Section 7500.1** of the **Business and Professions Code**; a release from the one responsible governmental agency, only if required by the agency; a government-issued photographic identification card; and any one of the following, as determined by the legal owner or the legal owner's agent: a certificate of repossession for the vehicle, a security agreement for the vehicle, or title, whether paper or electronic, showing proof of legal ownership for the vehicle. Any documents presented may be originals, photocopies, or facsimile copies, or may be transmitted

electronically. The law enforcement agency, impounding agency, or any other governmental agency, or any person acting on behalf of those agencies, shall not require any documents to be notarized. The law enforcement agency, impounding agency, or any person acting on behalf of those agencies may require the agent of the legal owner to produce a photocopy or facsimile copy of its repossession agency license or registration issued pursuant to **Chapter 11** (commencing with **Section 7500**) of **Division 3** of the **Business and Professions Code**, or to demonstrate, to the satisfaction of the law enforcement agency, impounding agency, or any person acting on behalf of those agencies, that the agent is exempt from licensure pursuant to **Section 7500.2** or **7500.3** of the **Business and Professions Code**. No administrative costs authorized under **subdivision (a)** of **Section 22850.5** shall be charged to the legal owner of the type specified in **paragraph (1**), who redeems the vehicle unless the legal owner voluntarily requests a post-storage hearing. No city, county, city and county, or state agency shall require a legal owner or a legal owner's agent to request a post-storage hearing as a requirement for release of the vehicle to the legal owner or the legal owner's agent. The law enforcement agency, impounding agency, or other governmental agency, or any person acting on behalf of those agencies, shall not require any documents other than those specified in this paragraph. The law enforcement agency, impounding agency, or other governmental agency, or any person acting on behalf of those agencies, shall not require any documents to be notarized. The legal owner or the legal owner's agent shall be given a copy of any documents he or she is required to sign, except for a vehicle evidentiary hold logbook. The law enforcement agency, impounding agency, or any person acting on behalf of those agencies, or any person in possession of the vehicle, may photocopy and retain the copies of any documents presented by the legal owner or legal owner's agent.

(4) A failure by a storage facility to comply with any applicable conditions set forth in this subdivision shall not affect the right of the legal owner or the legal owner's agent to retrieve the vehicle, provided all conditions required of the legal owner or legal owner's agent under this subdivision are satisfied.

(g)

(1) A legal owner or the legal owner's agent that obtains release of the vehicle pursuant to **subdivision (f)** shall not release the vehicle to the registered owner of the vehicle, or the person who was listed as the registered owner when the vehicle was impounded, or any agents of the registered owner, unless the registered owner is a rental car agency, until after the termination of the 30-day impoundment period.

(2) The legal owner or the legal owner's agent shall not relinquish the vehicle to the registered owner or the person who was listed as the registered owner when the vehicle was impounded until the registered owner or that owner's agent presents his or her valid driver's license or valid temporary driver's license to the legal owner or the legal owner's agent. The legal owner or the legal owner's agent or the person in possession of the vehicle shall make every reasonable effort to ensure that the license presented is valid and possession of the vehicle will not be given to the driver who was involved in the original impoundment proceeding until the expiration of the impoundment period.

(3) Prior to relinquishing the vehicle, the legal owner may require the registered owner to pay all towing and storage charges related to the impoundment and any administrative charges authorized under **Section 22850.5** that were incurred by the legal owner in connection with obtaining custody of the vehicle.

(4) Any legal owner who knowingly releases or causes the release of a vehicle to a registered owner or the person in possession of the vehicle at the time of the impoundment or any agent of the registered owner in violation of this subdivision shall be guilty of a misdemeanor and subject to a fine in the amount of two thousand dollars ($2,000) in addition to any other penalties established by law.

(5) The legal owner, registered owner, or person in possession of the vehicle shall not change or attempt to change the name of the legal owner or the registered owner on the records of the department until the vehicle is released from the impoundment.

(h)

(1) A vehicle removed and seized under **subdivision (a)** shall be released to a rental car agency prior to the end of 30 days' impoundment if the agency is either the legal owner or registered owner of the vehicle and the agency pays all towing and storage fees related to the seizure of the vehicle.

(2) The owner of a rental vehicle that was seized under this section may continue to rent the vehicle upon recovery of the vehicle. However, the rental car agency may not rent another vehicle to the driver of the vehicle that was seized *until 30* days after the date that the vehicle was seized.

(3) The rental car agency may require the person to whom the vehicle was rented to pay all towing and storage charges related to the impoundment and any administrative charges authorized under **Section 22850.5** that were incurred by the rental car agency in connection with obtaining custody of the vehicle.

(i) Notwithstanding any other provision of this section, the registered owner and not the legal owner shall remain responsible for any towing and storage charges related to the impoundment, any administrative charges authorized under **Section 22850.5**, and any parking fines, penalties, and administrative fees incurred by the registered owner.

(j)

(1) The law enforcement agency and the impounding agency, including any storage facility acting on behalf of the law enforcement agency or impounding agency, shall comply with this section and shall not be liable to the registered owner for the improper release of the vehicle to the legal owner or the legal owner's agent provided the release complies with the provisions of this section. A law enforcement agency shall not refuse to issue a release to a legal owner or the agent of a legal owner on the grounds that it previously issued a release.

(2)

(A) The legal owner of collateral shall, by operation of law and without requiring further action, indemnify and hold harmless a law enforcement agency, city, county, city and county, the state, a

tow yard, storage facility, or an impounding yard from a claim arising out of the release of the collateral to a licensed repossessor or licensed repossession agency, and from any damage to the collateral after its release, including reasonable attorney's fees and costs associated with defending a claim, if the collateral was released in compliance with this section.

(B) This subdivision shall apply only when collateral is released to a licensed repossessor, licensed repossession agency, or its officers or employees pursuant to **Chapter 11** (commencing with **Section 7500**) of **Division 3** of the **Business and Professions Code**.

Case Law:

The authority to impound a vehicle and hold it for 30 days, per **V.C. § 14602.6(a)(1)**, when a person is arrested for driving on a suspended license or never had a license, including when the vehicle has been in an accident, is a discretionary act by law enforcement and does not generate civil liability when the vehicle is not held for 30 days. (***California Highway Patrol v. Superior Court* [*Walker*]** (2008) 162 Cal.App.4th 1144.)

The California Highway Patrol and two of its officers could *not* be held liable in a consolidated wrongful death action brought against them under **Gov't. Code § 815.6** for failing to perform a mandatory duty because **Veh. Code § 14602.6(a)(1)** confers only discretionary authority on law enforcement to impound an individual's vehicle if an individual is arrested for driving with a suspended license under **V.C. § 14601.1**. The legislature's use of the word "*shall*," instead of "*may*," in **V.C. § 14607.6(c)(1)** indicates that it understands the distinction between the two words and acts deliberately in choosing its vocabulary, and this clear distinction in the language employed in **V.C. § 14602.6** and **V.C. § 14607.6**, as well as that employed in **V.C. § 14602.5** and **V.C. § 14602.7**, supports the conclusion that **V.C. § 14602.6(a)(1)** confers discretionary authority on law enforcement. (***Ibid***.)

Use of **V.C. §§ 14602.6** and **22852** to impound vehicles and hold them for 30 days, with the provisions for a post-seizure administrative hearing within two days of a request from the vehicle's owner to determine whether the impound was proper and the existence of any mitigating factors, was held to be lawful and not a violation of equal protection, due process, or the **Fourth Amendment's** search and seizure requirements. (***Alviso v. Sonoma County Sheriff's Department et al.*** (2010) 186 Cal.App.4th 198.)

> *Note*: The initial impound of the vehicle was not contested, eliminating any need to discuss the possible applicability of the rules on law enforcement's "*community caretaking*" function. (***Id***., at p. 214.)
>
> *Note*: **V.C. § 22852** describes the post-impound hearing requirements.

A police department has discretion to establish guidelines that would allow an impounded vehicle to be released in less than 30 days, under **V.C. § 22651(p)**, in situations where a fixed 30-day statutory impoundment period, under **V.C. § 14602.6(a)(1)**, may also potentially apply. (95 ***Ops.Cal.Atty.Gen*** 1 (2012).)

A police department's policy regarding impounding vehicles, which sought to implement **V.C. §§ 14602.6** and **14607.6**, is within the wide discretion of the police chief because it neither creates new law nor conflicts with existing law but, rather, simply implemented existing law. The "Police Protective League" is without standing to challenge such a policy where the policy does not conflict with the **Vehicle Code**. (***Los Angeles Police Protective League v. City of Los Angeles*** (2014) 232 Cal.App.4th 907.)

> *Note*: **V.C. § 14607.6** deals with forfeiture as a nuisance of a motor vehicle if it is driven on a highway by a driver with a suspended or revoked license, or by an unlicensed driver, who is a registered owner of the vehicle at the time of impoundment and has a previous misdemeanor conviction for a violation of **V.C. §§ 12500(a)**,

14601, **14601.1**, **14601.2**, **14601.3**, **14601.4**, or **14601.5**.

Holding onto an impounded vehicle for 30 days, under authority of V.C. § 14602.6(a), is an unlawful seizure under the Fourth Amendment absent the establishment of some legal justification for the vehicle's continued seizure. (***Brewster v. Beck*** (9th Cir. 2017) 859 F.3rd 1194, 1196-1197.)

> Specifically left undecided, the issues having been conceded by the parties, was the legality of the initial impound under the Fifth and Fourteenth Amendment due process clauses, and the applicability of the "Community Caretaking" theory to the driver being unlicensed.

Plaintiffs Sandoval and Ruiz each got pulled over in a separate incidents in Sonoma County. Both men had previously been issued a Mexican driver's license (though Ruiz's was expired) and had California-licensed friends willing to take possession of their vehicles. However, in both cases, the law enforcement officers making the stop caused the vehicles to be impounded for 30 days pursuant to **Veh. Code § 14602.6(a)(1)**. Sued in federal court, the Ninth Circuit affirmed the trial court's granting of the plaintiff's summary judgment motion, holding that a driver who has been issued a driver's license in a foreign jurisdiction for the type of vehicle seized has not driven that vehicle "without ever having been issued a driver's license." (See **V.C. § 310** which defines a "driver's license" as "a valid license to drive the type of motor vehicle or combination of vehicles for which a person is licensed under this code or by a foreign jurisdiction.") **V.C. § 14602.6**, therefore, did not authorize impounding their vehicles. (***Mateos-Sandoval v. County of Sonoma*** (9th Cir. 2018) 912 F.3rd 509, 514-517.)

But see ***United States v. Cervantes*** (9th Cir. 2012) 703 F.3rd 1135, where it was held that impounding a vehicle when the defendant did not have a valid license, pursuant to **V.C. §§ 12500(a)**, **14602.6(a)(1**), and **22651(h)(1)**, violated the "Community Caretaking" rules in that defendant had pulled

over to the curb and legally parked his car when stopped. The fact that defendant's car was not located close to his home was held to be of minor importance. (pp. 1140-1143.)

Despite the existence of authorizing statutes (e.g., **V.C. § 14602.6(a)(1)**), it is a **Fourth Amendment** violation to impound a vehicle (and conduct a subsequent warrantless inventory search) unless such an impoundment is also allowable under the so-called "Community Caretaking Doctrine." To be lawful, the impoundment of a vehicle must be *both* authorized by statute (such as **V.C. § 14602.6(a)(1)**) *and* in compliance with the Community Caretaking Doctrine. (***People v. Lee*** (2019) 40 Cal.App.5th 853, 867-869.)

> *Note*: This section is used by some as authority to cite the unlicensed driver of a motor vehicle even though the driving occurred in other than in the officer's presence. No case yet discusses the legality of this practice.

On appeal from the denial of defendant's motion to suppress evidence found during a search of his cellphone, seized from his rental car after a high-speed chase, the court did not need to address whether defendant had standing to challenge the search because **Fourth Amendment** standing is not jurisdictional and hence need not be addressed before addressing other aspects of the merits of a **Fourth Amendment** claim. Defendant's cellphone was lawfully *seized* as part of a valid inventory search because there was no showing that the search was used to rummage for evidence. The failure to list the phone on an inventory sheet did not invalidate the search. (***United States v. Garay*** (9th Cir. 2019) 938 F.3rd 1108, 111-1113; the vehicle impounded because it was totaled and lying in a ditch.)

In a case from the Fifth Circuit Court of Appeal, it was held that under the **Fourth Amendment's** automobile exception, the government can seize a vehicle from a public area without a warrant when it has probable cause to believe that the vehicle itself was an instrument or constituted evidence of a crime. In this case, plaintiff's vehicle was seized from a private apartment parking lot. However, the Court held that although a private apartment

parking lot is not "public," neither is it "private" in the sense relevant for **Fourth Amendment** protection. There is no reasonable expectation of privacy in a shared apartment parking lot. In this case, the officer had probable cause to believe that plaintiff's car had been involved in a hit and run. The officer, therefore, was entitled to seize plaintiff's car from an the parking lot. And because there was probable cause to believe the car was an instrument or evidence of a crime, a warrant was not required to seize it. Therefore, the seizure did not violate the **Fourth Amendment** and the officer was entitled to qualified immunity. (***Rountree v. Lopinto*** (5th Cir. 2020) 976 F.3rd 606.)

In a federal First Circuit Court of Appeal case, the Appellate Court overruled the district court, holding that the Community Caretaking theory did in fact allow for the impoundment of defendant's vehicle (stopped for a traffic infraction), and the subsequent inventory search during which heroin and an illegal firearm were found, where the defendant was unlicensed and there was no licensed driver in the vehicle. Per the Court, the pre-impoundment inventory search was justified because even if defendant himself did not pose a danger to the trooper because items in the vehicle might have. In addition, even though defendant rode to the impound yard with the tow truck driver, given the late hour and the fact that defendant could not legally operate the vehicle, there was a risk that the vehicle would not be recovered promptly, necessitating the inventory search for the purpose of protecting against any loss from the vehicle while impounded. For these reasons, the court found that the trooper's search of defendant's vehicle served the purposes of a valid inventory search under the **Fourth Amendment**, and was lawful. (***United States v. Rivera*** (1st Cir. 2021) 988 F.3rd 579.)

Veh. Code § 14602.7**:** *Rights and Procedures for Impoundment; Release to Legal Owner*:

(a) A magistrate presented with the affidavit of a peace officer establishing reasonable cause to believe that a vehicle, described by vehicle type and license number, was an instrumentality used in the peace officer's presence in violation of **Section 2800.1**, **2800.2**, **2800.3**, or **23103**, shall issue a warrant or order authorizing any peace officer to immediately seize and cause the removal of the vehicle. The warrant or court order may be entered into a

computerized database. A vehicle so impounded may be impounded for a period not to exceed *30 days*. The impounding agency, within *two working days* of impoundment, shall send a notice by certified mail, return receipt requested, to the legal owner of the vehicle, at the address obtained from the department, informing the owner that the vehicle has been impounded and providing the owner with a copy of the warrant or court order. Failure to notify the legal owner within *two working days* shall prohibit the impounding agency from charging for more than *15 days* impoundment when a legal owner redeems the impounded vehicle. The law enforcement agency shall be open to issue a release to the registered owner or legal owner, or the agent of either, whenever the agency is open to serve the public for regular, nonemergency business.

(b)

(1) An impounding agency shall release a vehicle to the registered owner or his or her agent prior to the end of the impoundment period and without the permission of the magistrate authorizing the vehicle's seizure under any of the following circumstances:

(A) When the vehicle is a stolen vehicle.

(B) When the vehicle is subject to bailment and is driven by an unlicensed employee of the business establishment, including a parking service or repair garage.

(C) When the registered owner of the vehicle causes a peace officer to reasonably believe, based on the totality of the circumstances, that the registered owner was *not* the driver who violated **Section 2800.1**, **2800.2**, or **2800.3**, the agency shall immediately release the vehicle to the registered owner or his or her agent.

(2) No vehicle shall be released pursuant to this subdivision, except upon presentation of the registered owner's or agent's currently valid driver's license to operate the vehicle and proof of current vehicle registration, or upon order of the court.

(c)

(1) Whenever a vehicle is impounded under this section, the magistrate ordering the storage shall provide the vehicle's registered and legal owners of record, or their agents, with the opportunity for a post-storage hearing to determine the validity of the storage.

(2) A notice of the storage shall be mailed or personally delivered to the registered and legal owners within *48 hours* after issuance of the warrant or court order, excluding weekends and holidays, by the person or agency executing the warrant or court order, and shall include all of the following information:

> **(A)** The name, address, and telephone number of the agency providing the notice.
>
> **(B)** The location of the place of storage and a description of the vehicle, which shall include, if available, the name or make, the manufacturer, the license plate number, and the mileage of the vehicle.
>
> **(C)** A copy of the warrant or court order and the peace officer's affidavit, as described in **subdivision (a)**.
>
> **(D)** A statement that, in order to receive their post-storage hearing, the owners, or their agents, are required to request the hearing from the magistrate issuing the warrant or court order in person, in writing, or by telephone, within 10 days of the date of the notice.

(3) The post-storage hearing shall be conducted within *two court days* after receipt of the request for the hearing.

(4) At the hearing, the magistrate may order the vehicle released if he or she finds any of the circumstances described in **subdivision (b)** or **(e)** that allow release of a vehicle by the impounding agency. The magistrate may also consider releasing the vehicle when the continued impoundment will cause undue hardship to persons dependent upon the vehicle for employment or to a person with a community property interest in the vehicle.

(5) Failure of either the registered or legal owner, or his or her agent, to request, or to attend, a scheduled hearing satisfies the post-storage hearing requirement.

(6) The agency employing the peace officer who caused the magistrate to issue the warrant or court order shall be responsible for the costs incurred for towing and storage if it is determined in the post-storage hearing that reasonable grounds for the storage are not established.

(d) The registered owner or his or her agent is responsible for all towing and storage charges related to the impoundment, and any administrative charges authorized under **Section 22850.5**.

(e) A vehicle removed and seized under **subdivision (a)** shall be released to the legal owner of the vehicle or the legal owner's agent prior to the end of the impoundment period and without the permission of the magistrate authorizing the seizure of the vehicle if all of the following conditions are met:

(1) The legal owner is a motor vehicle dealer, bank, credit union, acceptance corporation, or other licensed financial institution legally operating in this state or is another person, not the registered owner, holding a financial interest in the vehicle.

(2)

(A) The legal owner or the legal owner's agent pays all towing and storage fees related to the seizure of the vehicle. No lien sale processing fees shall be charged to the legal owner who redeems the vehicle prior to the *15th day* of impoundment. Neither the impounding authority nor any person having possession of the vehicle shall collect from the legal owner of the type specified in **paragraph (1)**, or the legal owner's agent any administrative charges imposed pursuant to **Section 22850.5** unless the legal owner voluntarily requested a post-storage hearing.

(B) A person operating or in charge of a storage facility where vehicles are stored pursuant to this section shall accept a valid bank credit card or cash for payment of towing, storage, and related fees by a legal or registered owner or the owner's agent

claiming the vehicle. A credit card shall be in the name of the person presenting the card. “Credit card” means “credit card” as defined in **subdivision (a)** of **Section 1747.02** of the **Civil Code**, except, for the purposes of this section, credit card does not include a credit card issued by a retail seller.

(C) A person operating or in charge of a storage facility described in **subparagraph (B)** who violates **subparagraph (B)** shall be civilly liable to the owner of the vehicle or to the person who tendered the fees for four times the amount of the towing, storage and related fees, but not to exceed five hundred dollars ($500).

(D) A person operating or in charge of a storage facility described in **subparagraph (B)** shall have sufficient funds on the premises of the primary storage facility during normal business hours to accommodate, and make change in, a reasonable monetary transaction.

(E) Credit charges for towing and storage services shall comply with **Section 1748.1** of the **Civil Code**. Law enforcement agencies may include the costs of providing for payment by credit when making agreements with towing companies on rates.

(3) The legal owner or the legal owner’s agent presents, to the law enforcement agency, impounding agency, person in possession of the vehicle, or any person acting on behalf of those agencies, a copy of the assignment, as defined in **subdivision (b)** of **Section 7500.1** of the **Business and Professions Code**; a release from the one responsible governmental agency, only if required by the agency; a government-issued photographic identification card; and any one of the following, as determined by the legal owner or the legal owner’s agent: a certificate of repossession for the vehicle, a security agreement for the vehicle, or title, whether paper or electronic, showing proof of legal ownership for the vehicle. Any documents presented may be originals, photocopies, or facsimile copies, or may be transmitted electronically. The law enforcement agency, impounding agency, or any other governmental agency, or any person acting on behalf of those agencies, shall not

require any documents to be notarized. The law enforcement agency, impounding agency, or any person acting on behalf of those agencies, may require the agent of the legal owner to produce a photocopy or facsimile copy of its repossession agency license or registration issued pursuant to **Chapter 11** (commencing with **Section 7500**) of **Division 3** of the **Business and Professions Code**, or to demonstrate, to the satisfaction of the law enforcement agency, impounding agency, or any person acting on behalf of those agencies that the agent is exempt from licensure pursuant to **Section 7500.2** or **7500.3** of the **Business and Professions Code**. No administrative costs authorized under **subdivision (a)** of **Section 22850.5** shall be charged to the legal owner of the type specified in **paragraph (1)**, who redeems the vehicle unless the legal owner voluntarily requests a post-storage hearing. No city, county, city and county, or state agency shall require a legal owner or a legal owner's agent to request a post-storage hearing as a requirement for release of the vehicle to the legal owner or the legal owner's agent. The law enforcement agency, impounding agency, or other governmental agency, or any person acting on behalf of those agencies, shall not require any documents other than those specified in this paragraph. The law enforcement agency, impounding agency, or other governmental agency, or any person acting on behalf of those agencies, shall not require any documents to be notarized. The legal owner or the legal owner's agent shall be given a copy of any documents he or she is required to sign, except for a vehicle evidentiary hold logbook. The law enforcement agency, impounding agency, or any person acting on behalf of those agencies, or any person in possession of the vehicle, may photocopy and retain the copies of any documents presented by the legal owner or legal owner's agent.

(4) A failure by a storage facility to comply with any applicable conditions set forth in this subdivision shall not affect the right of the legal owner or the legal owner's agent to retrieve the vehicle, provided all conditions required of the legal owner or legal owner's agent under this subdivision are satisfied.

(f)

(1) A legal owner or the legal owner's agent that obtains release of the vehicle pursuant to **subdivision (e)** shall not

release the vehicle to the registered owner or the person who was listed as the registered owner when the vehicle was impounded of the vehicle or any agents of the registered owner, unless a registered owner is a rental car agency, until the termination of the impoundment period.

(2) The legal owner or the legal owner's agent shall not relinquish the vehicle to the registered owner or the person who was listed as the registered owner when the vehicle was impounded until the registered owner or that owner's agent presents his or her valid driver's license or valid temporary driver's license to the legal owner or the legal owner's agent. The legal owner or the legal owner's agent shall make every reasonable effort to ensure that the license presented is valid and possession of the vehicle will not be given to the driver who was involved in the original impoundment proceeding until the expiration of the impoundment period.

(3) Prior to relinquishing the vehicle, the legal owner may require the registered owner to pay all towing and storage charges related to the impoundment and the administrative charges authorized under **Section 22850.5** that were incurred by the legal owner in connection with obtaining the custody of the vehicle.

(4) Any legal owner who knowingly releases or causes the release of a vehicle to a registered owner or the person in possession of the vehicle at the time of the impoundment or any agent of the registered owner in violation of this subdivision shall be guilty of a misdemeanor and subject to a fine in the amount of two thousand dollars ($2,000) in addition to any other penalties established by law.

(5) The legal owner, registered owner, or person in possession of the vehicle shall not change or attempt to change the name of the legal owner or the registered owner on the records of the department until the vehicle is released from the impoundment.

(g)

(1) A vehicle impounded and seized under **subdivision (a)** shall be released to a rental car agency prior to the end of the impoundment period if the agency is either the legal owner or registered owner of the vehicle and the agency

pays all towing and storage fees related to the seizure of the vehicle.

(2) The owner of a rental vehicle that was seized under this section may continue to rent the vehicle upon recovery of the vehicle. However, the rental car agency shall not rent another vehicle to the driver who used the vehicle that was seized to evade a police officer until 30 days after the date that the vehicle was seized.

(3) The rental car agency may require the person to whom the vehicle was rented and who evaded the peace officer to pay all towing and storage charges related to the impoundment and any administrative charges authorized under **Section 22850.5** that were incurred by the rental car agency in connection with obtaining custody of the vehicle.

(h) Notwithstanding any other provision of this section, the registered owner and not the legal owner shall remain responsible for any towing and storage charges related to the impoundment and the administrative charges authorized under **Section 22850.5** and any parking fines, penalties, and administrative fees incurred by the registered owner.

(i)

(1) This section does not apply to vehicles abated under the Abandoned Vehicle Abatement Program pursuant to **Sections 22660** to **22668**, inclusive, and **Section 22710**, or to vehicles impounded for investigation pursuant to **Section 22655**, or to vehicles removed from private property pursuant to **Section 22658**.

(2) This section does not apply to abandoned vehicles removed pursuant to **Section 22669** that are determined by the public agency to have an estimated value of three hundred dollars ($300) or less.

(j) The law enforcement agency and the impounding agency, including any storage facility acting on behalf of the law enforcement agency or impounding agency, shall comply with this section and shall not be liable to the registered owner for the improper release of the vehicle to the legal owner or the legal owner’s agent provided the release complies with the provisions of this section. The legal owner shall indemnify and hold harmless a storage facility from any claims arising out of the release of the

vehicle to the legal owner or the legal owner's agent and from any damage to the vehicle after its release, including the reasonable costs associated with defending any such claims. A law enforcement agency shall not refuse to issue a release to a legal owner or the agent of a legal owner on the grounds that it previously issued a release.

Case Law:

The California Highway Patrol and two of its officers could *not* be held liable in a consolidated wrongful death action brought against them under **Gov't. Code § 815.6** for failing to perform a mandatory duty because **Veh. Code § 14602.6(a)(1)** confers only "*discretionary authority*" on law enforcement to impound an individual's vehicle if an individual is arrested for driving with a suspended license under **Veh. Code § 14601.1**. The Legislature's use of "*shall*" instead of "*may*" in **Veh. Code § 14607.6(c)(1)** indicates that it understands the distinction between the two words and acts deliberately in choosing its vocabulary, and this clear distinction in the language employed in **Veh. Code § 14602.6** and **Veh. Code § 14607.6**, as well as that employed in **Veh. Code § 14602.5** and **Veh. Code § 14602.7**, supports the conclusion that **Veh. Code § 14602.6(a)(1)** confers discretionary authority on law enforcement. (***California Highway Patrol v. Superior Court* [*Walker*]** (2008) 162 Cal.App.4th 1144.)

Veh. Code § 14602.8*: *Impoundment of Vehicle; Release:

(a)

(1) If a peace officer determines that a person has been convicted of a violation of **Section 23140**, **23152**, or **23153**, that the violation occurred within the preceding *10 years*, and that one or more of the following circumstances applies to that person, the officer may immediately cause the removal and seizure of the vehicle that the person was driving, under either of the following circumstances:

(A) The person was driving a vehicle when the person had 0.10 percent or more, by weight, of alcohol in his or her blood.

(B) The person driving the vehicle refused to submit to or complete a chemical test requested by the peace officer.

(2) A vehicle impounded pursuant to **paragraph (1)** shall be impounded for the following period of time:

(A) *Five days*, if the person has been convicted once of violating **Section 23140**, **23152**, or **23153**, and the violation occurred within the preceding 10 years.

(B) *Fifteen days*, if the person has been convicted two or more times of violating **Section 23140**, **23152**, or **23153**, or any combination thereof, and the violations occurred within the preceding 10 years.

(3) Within two working days after impoundment, the impounding agency shall send a notice by certified mail, return receipt requested, to the legal owner of the vehicle, at the address obtained from the department, informing the owner that the vehicle has been impounded. Failure to notify the legal owner within two working days shall prohibit the impounding agency from charging for more than five days' impoundment when the legal owner redeems the impounded vehicle. The impounding agency shall maintain a published telephone number that provides information *24 hours* a day regarding the impoundment of vehicles and the rights of a registered owner to request a hearing. The law enforcement agency shall be open to issue a release to the registered owner or legal owner, or the agent of either, whenever the agency is open to serve the public for regular, nonemergency business.

(b) The registered and legal owner of a vehicle that is removed and seized under **subdivision (a)** or his or her agent shall be provided the opportunity for a storage hearing to determine the validity of, or consider any mitigating circumstances attendant to, the storage, in accordance with **Section 22852**.

Note: **V.C. § 22852** describes the post-impound hearing requirements.

(c) Any period during which a vehicle is subjected to storage under this section shall be included as part of the period of impoundment ordered by the court under **Section 23594**.

(d)

(1) The impounding agency shall release the vehicle to the registered owner or his or her agent prior to the end of the impoundment period under any of the following circumstances:

(A) When the vehicle is a stolen vehicle.

(B) When the vehicle is subject to bailment and is driven by an unlicensed employee of a business establishment, including a parking service or repair garage.

(C) When the driver of the vehicle is not the sole registered owner of the vehicle and the vehicle is being released to another registered owner of the vehicle who agrees not to allow the driver to use the vehicle until after the end of the impoundment period.

(2) A vehicle shall not be released pursuant to this subdivision without presentation of the registered owner's or agent's currently valid driver's license to operate the vehicle and proof of current vehicle registration, or upon order of a court.

(e) The registered owner or his or her agent is responsible for all towing and storage charges related to the impoundment, and any administrative charges authorized under **Section 22850.5**.

(f) A vehicle removed and seized under subdivision (a) shall be released to the legal owner of the vehicle or the legal owner's agent prior to the end of the impoundment period if all of the following conditions are met:

(1) The legal owner is a motor vehicle dealer, bank, credit union, acceptance corporation, or other licensed financial institution legally operating in this state, or is another person who is not the registered owner and holds a security interest in the vehicle.

(2)

(A) The legal owner or the legal owner's agent pays all towing and storage fees related to the seizure of the vehicle. A lien sale processing fee shall not be charged to the legal owner who redeems the vehicle prior to the *10th day* of impoundment. The impounding authority or any person having possession of the vehicle shall not collect from the legal owner of the type specified in paragraph (1) or the legal owner's agent any administrative charges imposed pursuant to **Section 22850.5** unless the legal owner voluntarily requested a post-storage hearing.

(B) A person operating or in charge of a storage facility where vehicles are stored pursuant to this section shall accept a valid bank credit card or cash for payment of towing, storage, and related fees by a legal or registered owner or the owner's agent claiming the vehicle. A credit card shall be in the name of the person presenting the card. "*Credit card*" means "credit card" as defined in **subdivision (a)** of **Section 1747.02** of the **Civil Code**, except, for the purposes of this section, credit card does not include a credit card issued by a retail seller.

(C) A person operating or in charge of a storage facility described in **subparagraph (B)** who violates **subparagraph (B)** shall be civilly liable to the owner of the vehicle or to the person who tendered the fees for four times the amount of the towing, storage, and other related fees, but not to exceed five hundred dollars ($500).

(D) A person operating or in charge of a storage facility described in **subparagraph (B)** shall have sufficient funds on the premises of the primary storage facility during normal business hours to accommodate, and make change in, a reasonable monetary transaction.

(E) Credit charges for towing and storage services shall comply with **Section 1748.1** of the **Civil Code**. Law enforcement agencies may include the costs of providing for payment by credit when

making agreements with towing companies on rates.

(3)

(A) The legal owner or the legal owner's agent presents to the law enforcement agency or impounding agency, or any person acting on behalf of those agencies, a copy of the assignment, as defined in **subdivision (b)** of **Section 7500.1** of the **Business and Professions Code**; a release from the one responsible governmental agency, only if required by the agency; a government-issued photographic identification card; and any one of the following as determined by the legal owner or the legal owner's agent: a certificate of repossession for the vehicle, a security agreement for the vehicle, or title, whether paper or electronic, showing proof of legal ownership for the vehicle. The law enforcement agency, impounding agency, or any other governmental agency, or any person acting on behalf of those agencies, shall not require the presentation of any other documents.

(B) The legal owner or the legal owner's agent presents to the person in possession of the vehicle, or any person acting on behalf of the person in possession, a copy of the assignment, as defined in **subdivision (b)** of **Section 7500.1** of the **Business and Professions Code**; a release from the one responsible governmental agency, only if required by the agency; a government-issued photographic identification card; and any one of the following as determined by the legal owner or the legal owner's agent: a certificate of repossession for the vehicle, a security agreement for the vehicle, or title, whether paper or electronic, showing proof of legal ownership for the vehicle. The person in possession of the vehicle, or any person acting on behalf of the person in possession, shall not require the presentation of any other documents.

(C) All presented documents may be originals, photocopies, or facsimile copies, or may be transmitted electronically. The law enforcement agency, impounding agency, or any person acting

on behalf of them, shall not require a document to be notarized. The law enforcement agency, impounding agency, or any person in possession of the vehicle, or anyone acting on behalf of those agencies may require the agent of the legal owner to produce a photocopy or facsimile copy of its repossession agency license or registration issued pursuant to **Chapter 11** (commencing with **Section 7500**) of **Division 3** of the **Business and Professions Code**, or to demonstrate, to the satisfaction of the law enforcement agency, the impounding agency, any other governmental agency, or any person in possession of the vehicle, or anyone acting on behalf of them, that the agent is exempt from licensure pursuant to **Section 7500.2** or **7500.3** of the **Business and Professions Code**.

(D) Administrative costs authorized under **subdivision (a)** of **Section 22850.5** shall not be charged to the legal owner of the type specified in **paragraph (1)** who redeems the vehicle unless the legal owner voluntarily requests a post-storage hearing. A city, county, city and county, or state agency shall not require a legal owner or a legal owner's agent to request a post-storage hearing as a requirement for release of the vehicle to the legal owner or the legal owner's agent. The law enforcement agency, the impounding agency, any governmental agency, or any person acting on behalf of those agencies shall not require any documents other than those specified in this paragraph. The law enforcement agency, impounding agency, or other governmental agency, or any person acting on behalf of those agencies, shall not require any documents to be notarized. The legal owner or the legal owner's agent shall be given a copy of any documents he or she is required to sign, except for a vehicle evidentiary hold logbook. The law enforcement agency, impounding agency, or any person acting on behalf of those agencies, or any person in possession of the vehicle, may photocopy and retain the copies of any documents presented by the legal owner or legal owner's agent.

(4) A failure by a storage facility to comply with any applicable conditions set forth in this subdivision shall not affect the right of the legal owner or the legal owner's agent to retrieve the vehicle, provided all conditions required of the legal owner or legal owner's agent under this subdivision are satisfied.

(g)

(1) A legal owner or the legal owner's agent who obtains release of the vehicle pursuant to **subdivision (f)** shall not release the vehicle to the registered owner of the vehicle or the person who was listed as the registered owner when the vehicle was impounded or any agents of the registered owner unless the registered owner is a rental car agency, until after the termination of the impoundment period.

(2) The legal owner or the legal owner's agent shall not relinquish the vehicle to the registered owner or the person who was listed as the registered owner when the vehicle was impounded until the registered owner or that owner's agent presents his or her valid driver's license or valid temporary driver's license to the legal owner or the legal owner's agent. The legal owner or the legal owner's agent or the person in possession of the vehicle shall make every reasonable effort to ensure that the license presented is valid and possession of the vehicle will not be given to the driver who was involved in the original impoundment proceeding until the expiration of the impoundment period.

(3) Prior to relinquishing the vehicle, the legal owner may require the registered owner to pay all towing and storage charges related to the impoundment and any administrative charges authorized under **Section 22850.5** that were incurred by the legal owner in connection with obtaining custody of the vehicle.

(4) A legal owner who knowingly releases or causes the release of a vehicle to a registered owner or the person in possession of the vehicle at the time of the impoundment or an agent of the registered owner in violation of this subdivision is guilty of a misdemeanor and subject to a fine in the amount of two thousand dollars ($2,000) in addition to any other penalties established by law.

(5) The legal owner, registered owner, or person in possession of the vehicle shall not change or attempt to change the name of the legal owner or the registered owner on the records of the department until the vehicle is released from the impoundment.

(h)

(1) A vehicle removed and seized under subdivision (a) shall be released to a rental car agency prior to the end of the impoundment period if the agency is either the legal owner or registered owner of the vehicle and the agency pays all towing and storage fees related to the seizure of the vehicle.

(2) The owner of a rental vehicle that was seized under this section may continue to rent the vehicle upon recovery of the vehicle. However, the rental car agency shall not rent another vehicle to the driver of the vehicle that was seized until the impoundment period has expired.

(3) The rental car agency may require the person to whom the vehicle was rented to pay all towing and storage charges related to the impoundment and any administrative charges authorized under **Section 22850.5** that were incurred by the rental car agency in connection with obtaining custody of the vehicle.

(i) Notwithstanding any other provision of this section, the registered owner, and not the legal owner, shall remain responsible for any towing and storage charges related to the impoundment, any administrative charges authorized under **Section 22850.5**, and any parking fines, penalties, and administrative fees incurred by the registered owner.

(j) The law enforcement agency and the impounding agency, including any storage facility acting on behalf of the law enforcement agency or impounding agency, shall comply with this section and shall not be liable to the registered owner for the improper release of the vehicle to the legal owner or the legal owner's agent provided the release complies with the provisions of this section. The legal owner shall indemnify and hold harmless a storage facility from any claims arising out of the release of the vehicle to the legal owner or the legal owner's agent and from any damage to the vehicle after its release, including the reasonable costs associated with defending any such claims. A law

enforcement agency shall not refuse to issue a release to a legal owner or the agent of a legal owner on the grounds that it previously issued a release.

Veh. Code § 14602.9*: *Impoundment of Bus or Limousine of Charter-Party Carrier; Notice; Hearing; Release:

(a) For purposes of this section, "*peace officer*" means a person designated as a peace officer pursuant to **Chapter 4.5** (commencing with **Section 830**) of **Title 3** of **Part 2** of the **Penal Code**.

(b) A peace officer may impound a bus or limousine of a charter-party carrier for 30 days if the officer determines that any of the following violations occurred while the driver was operating the bus or limousine of the charter-party carrier:

(1) The driver was operating the bus or limousine of a charter-party carrier when the charter-party carrier did not have a permit or certificate issued by the Public Utilities Commission, pursuant to **Section 5375** of the **Public Utilities Code**.

(2) The driver was operating the bus or limousine of a charter-party carrier when the charter-party carrier was operating with a suspended permit or certificate from the Public Utilities Commission.

(3) The driver was operating the bus or limousine of a charter-party carrier without having a current and valid driver's license of the proper class, a passenger vehicle endorsement, or the required certificate.

(c) A peace officer may impound a bus or limousine belonging to a passenger stage corporation for *30 days* if the officer determines any of the following violations occurred while the driver was operating the bus or limousine:

(1) The driver was operating the bus or limousine when the passenger stage corporation did not have a certificate of public convenience and necessity issued by the Public Utilities Commission as required pursuant to **Article 2** (commencing with **Section 1031**) of **Chapter 5** of **Part 1** of **Division 1** of the **Public Utilities Code**.

(2) The driver was operating the bus or limousine when the operating rights or certificate of public convenience and necessity of a passenger stage corporation was suspended, canceled, or revoked pursuant to **Section 1033.5**, **1033.7**, or **1045** of the **Public Utilities Code**.

(3) The driver was operating the bus or limousine without having a current and valid driver's license of the proper class.

(d) Within *two working days* after impoundment, the impounding agency shall send a notice by certified mail, return receipt requested, to the legal owner of the vehicle, at the address obtained from the department, informing the owner that the vehicle has been impounded. Failure to notify the legal owner within two working days shall prohibit the impounding agency from charging for more than *15 day's* impoundment when the legal owner redeems the impounded vehicle. The impounding agency shall maintain a published telephone number that provides information *24 hours* a day regarding the impoundment of vehicles and the rights of a registered owner to request a hearing.

(e) The registered and legal owner of a vehicle that is removed and seized under **subdivision (b)** or **(c)** or his or her agent shall be provided the opportunity for a storage hearing to determine the validity of, or consider any mitigating circumstances attendant to, the storage, in accordance with **Section 22852**.

Note: **V.C. § 22852** describes the post-impound hearing requirements.

(f)

(1) The impounding agency shall release the vehicle to the registered owner or his or her agent prior to the end of the impoundment period under any of the following circumstances:

(A) When the vehicle is a stolen vehicle.

(B) When the vehicle is subject to bailment and is driven by an unlicensed employee of a business establishment, including a parking service or repair garage.

(C) When, for a charter-party carrier of passengers, the driver of the vehicle is not the sole registered owner of the vehicle and the vehicle is being released to another registered owner of the vehicle who agrees not to allow the driver to use the vehicle until after the end of the impoundment period and the charter-party carrier has been issued a valid permit from the Public Utilities Commission, pursuant to **Section 5375** of the **Public Utilities Code**.

(D) When, for a passenger stage corporation, the driver of the vehicle is not the sole registered owner of the vehicle and the vehicle is being released to another registered owner of the vehicle who agrees not to allow the driver to use the vehicle until after the end of the impoundment period and the passenger stage corporation has been issued a valid certificate of public convenience and necessity by the Public Utilities Commission, pursuant to **Article 2** (commencing with **Section 1031**) of **Chapter 5 of Part 1** of **Division 1** of the **Public Utilities Code**.

(2) A vehicle shall not be released pursuant to this subdivision without presentation of the registered owner's or agent's currently valid driver's license to operate the vehicle and proof of current vehicle registration, or upon order of a court.

(g) The registered owner or his or her agent is responsible for all towing and storage charges related to the impoundment, and any administrative charges authorized under **Section 22850.5**.

(h) A vehicle removed and seized under **subdivision (b)** or **(c)** shall be released to the legal owner of the vehicle or the legal owner's agent prior to the end of the impoundment period if all of the following conditions are met:

(1) The legal owner is a motor vehicle dealer, bank, credit union, acceptance corporation, or other licensed financial institution legally operating in this state, or is another person who is not the registered owner and holds a security interest in the vehicle.

(2) The legal owner or the legal owner's agent pays all towing and storage fees related to the seizure of the vehicle.

A lien sale processing fee shall not be charged to the legal owner who redeems the vehicle prior to the 10th day of impoundment. The impounding authority or any person having possession of the vehicle shall not collect from the legal owner of the type specified in **paragraph (1)**, or the legal owner's agent, any administrative charges imposed pursuant to **Section 22850.5** unless the legal owner voluntarily requested a post-storage hearing.

(3)

(A) The legal owner or the legal owner's agent presents either lawful foreclosure documents or an affidavit of repossession for the vehicle, and a security agreement or title showing proof of legal ownership for the vehicle. All presented documents may be originals, photocopies, or facsimile copies, or may be transmitted electronically. The impounding agency shall not require a document to be notarized. The impounding agency may require the agent of the legal owner to produce a photocopy or facsimile copy of its repossession agency license or registration issued pursuant to **Chapter 11** (commencing with **Section 7500**) of **Division 3** of the **Business and Professions Code**, or to demonstrate, to the satisfaction of the impounding agency, that the agent is exempt from licensure pursuant to **Section 7500.2** or **7500.3** of the **Business and Professions Code**.

(B) Administrative costs authorized under **subdivision (a)** of **Section 22850.5** shall not be charged to the legal owner of the type specified in paragraph (1), who redeems the vehicle unless the legal owner voluntarily requests a post-storage hearing. A city, county, or state agency shall not require a legal owner or a legal owner's agent to request a post-storage hearing as a requirement for release of the vehicle to the legal owner or the legal owner's agent. The impounding agency shall not require any documents other than those specified in this paragraph. The impounding agency shall not require any documents to be notarized.

(C) As used in this paragraph, "*foreclosure documents*" means an "assignment" as that term is

defined in **subdivision (b)** of **Section 7500.1** of the **Business and Professions Code**.

(i)

(1) A legal owner or the legal owner's agent who obtains release of the vehicle pursuant to **subdivision (h)** may not release the vehicle to the registered owner of the vehicle or any agents of the registered owner, unless the registered owner is a rental car agency, until after the termination of the impoundment period.

(2) The legal owner or the legal owner's agent shall not relinquish the vehicle to the registered owner until the registered owner or that owner's agent presents his or her valid driver's license or valid temporary driver's license to the legal owner or the legal owner's agent. The legal owner or the legal owner's agent shall make every reasonable effort to ensure that the license presented is valid.

(3) Prior to relinquishing the vehicle, the legal owner may require the registered owner to pay all towing and storage charges related to the impoundment and any administrative charges authorized under **Section 22850.5** that were incurred by the legal owner in connection with obtaining custody of the vehicle.

(j)

(1) A vehicle removed and seized under **subdivision (b)** or **(c)** shall be released to a rental agency prior to the end of the impoundment period if the agency is either the legal owner or registered owner of the vehicle and the agency pays all towing and storage fees related to the seizure of the vehicle.

(2) The owner of a rental vehicle that was seized under this section may continue to rent the vehicle upon recovery of the vehicle. However, the rental agency shall not rent another vehicle to the driver of the vehicle that was seized until the impoundment period has expired.

(3) The rental agency may require the person to whom the vehicle was rented to pay all towing and storage charges related to the impoundment and any administrative charges authorized under **Section 22850.5** that were incurred by the

rental agency in connection with obtaining custody of the vehicle.

(k) Notwithstanding any other provision of this section, the registered owner, and not the legal owner, shall remain responsible for any towing and storage charges related to the impoundment, any administrative charges authorized under **Section 22850.5**, and any parking fines, penalties, and administrative fees incurred by the registered owner.

(*l*) The impounding agency is not liable to the registered owner for the improper release of the vehicle to the legal owner or the legal owner's agent provided the release complies with this section.

(m) This section does not authorize the impoundment of privately owned personal vehicles that are not common carriers nor the impoundment of vehicles used in transportation for compensation by charter-party carriers that are not required to carry individual permits.

(n) For the purposes of this section, a "*charter-party carrier*" means a charter-party carrier of passengers as defined by **Section 5360** of the **Public Utilities Code**.

(o) For purposes of this section, a "*passenger stage corporation*" means a passenger stage corporation as defined by **Section 226** of the **Public Utilities Code**.

Veh. Code § 14607.6**:** *Forfeiture of Motor Vehicle Driven by Driver with Suspended or Revoked License, or by Unlicensed Driver*:

(a) Notwithstanding any other provision of law, and except as provided in this section, a motor vehicle is subject to forfeiture as a nuisance if it is driven on a highway in this state by a driver with a suspended or revoked license, or by an unlicensed driver, who is a registered owner of the vehicle at the time of impoundment and has a previous misdemeanor conviction for a violation of **subdivision (a)** of **Section 12500** or **Section 14601**, **14601.1**, **14601.2**, **14601.3**, **14601.4**, or **14601.5**.

(b) A peace officer shall not stop a vehicle for the sole reason of determining whether the driver is properly licensed.

(c)

(1) If a driver is unable to produce a valid driver's license on the demand of a peace officer enforcing the provisions of this code, as required by **subdivision (b)** of **Section 12951**, the vehicle shall be impounded regardless of ownership, unless the peace officer is reasonably able, by other means, to verify that the driver is properly licensed. Prior to impounding a vehicle, a peace officer shall attempt to verify the license status of a driver who claims to be properly licensed but is unable to produce the license on demand of the peace officer.

(2) A peace officer shall not impound a vehicle pursuant to this subdivision if the license of the driver expired within the preceding 30 days and the driver would otherwise have been properly licensed.

(3) A peace officer may exercise discretion in a situation where the driver without a valid license is an employee driving a vehicle registered to the employer in the course of employment. A peace officer may also exercise discretion in a situation where the driver without a valid license is the employee of a bona fide business establishment or is a person otherwise controlled by such an establishment and it reasonably appears that an owner of the vehicle, or an agent of the owner, relinquished possession of the vehicle to the business establishment solely for servicing or parking of the vehicle or other reasonably similar situations, and where the vehicle was not to be driven except as directly necessary to accomplish that business purpose. In this event, if the vehicle can be returned to or be retrieved by the business establishment or registered owner, the peace officer may release and not impound the vehicle.

(4) A registered or legal owner of record at the time of impoundment may request a hearing to determine the validity of the impoundment pursuant to **subdivision (n)**.

(5) If the driver of a vehicle impounded pursuant to this subdivision was not a registered owner of the vehicle at the time of impoundment, or if the driver of the vehicle was a registered owner of the vehicle at the time of impoundment but the driver does not have a previous conviction for a violation of **subdivision (a)** of **Section 12500** or **Section 14601**, **14601.1**, **14601.2**, **14601.3**, **14601.4**, or **14601.5**, the vehicle shall be released pursuant to this code and is not subject to forfeiture.

(d)

(1) This subdivision applies only if the driver of the vehicle is a registered owner of the vehicle at the time of impoundment. Except as provided in **paragraph (5)** of **subdivision (c)**, if the driver of a vehicle impounded pursuant to **subdivision (c)** was a registered owner of the vehicle at the time of impoundment, the impounding agency shall authorize release of the vehicle if, within *three days* of impoundment, the driver of the vehicle at the time of impoundment presents his or her valid driver's license, including a valid temporary California driver's license or permit, to the impounding agency. The vehicle shall then be released to a registered owner of record at the time of impoundment, or an agent of that owner authorized in writing, upon payment of towing and storage charges related to the impoundment, and any administrative charges authorized by **Section 22850.5**, providing that the person claiming the vehicle is properly licensed and the vehicle is properly registered. A vehicle impounded pursuant to the circumstances described in **paragraph (3)** of **subdivision (c)** shall be released to a registered owner whether or not the driver of the vehicle at the time of impoundment presents a valid driver's license.

(2) If there is a community property interest in the vehicle impounded pursuant to **subdivision (c)**, owned at the time of impoundment by a person other than the driver, and the vehicle is the only vehicle available to the driver's immediate family that may be operated with a class C driver's license, the vehicle *shall* be released to a registered owner or to the community property interest owner upon compliance with all of the following requirements:

(A) The registered owner or the community property interest owner requests release of the vehicle and the owner of the community property interest submits proof of that interest.

(B) The registered owner or the community property interest owner submits proof that he or she, or an authorized driver, is properly licensed and that the impounded vehicle is properly registered pursuant to this code.

(C) All towing and storage charges related to the impoundment and any administrative charges authorized pursuant to **Section 22850.5** are paid.

(D) The registered owner or the community property interest owner signs a stipulated vehicle release agreement, as described in **paragraph (3)**, in consideration for the nonforfeiture of the vehicle. This requirement applies only if the driver requests release of the vehicle.

(3) A stipulated vehicle release agreement shall provide for the consent of the signator to the automatic future forfeiture and transfer of title to the state of any vehicle registered to that person, if the vehicle is driven by a driver with a suspended or revoked license, or by an unlicensed driver. The agreement shall be in effect for only as long as it is noted on a driving record maintained by the department pursuant to **Section 1806.1**.

(4) The stipulated vehicle release agreement described in **paragraph (3)** shall be reported by the impounding agency to the department not later than *10 days* after the day the agreement is signed.

(5) No vehicle shall be released pursuant to **paragraph (2)** if the driving record of a registered owner indicates that a prior stipulated vehicle release agreement was signed by that person.

(e)

(1) The impounding agency, in the case of a vehicle that has not been redeemed pursuant to **subdivision (d),** or that has not been otherwise released, shall promptly ascertain from the department the names and addresses of all legal and registered owners of the vehicle.

(2) The impounding agency, within *two days* of impoundment, shall send a notice by certified mail, return receipt requested, to all legal and registered owners of the vehicle, at the addresses obtained from the department, informing them that the vehicle is subject to forfeiture and will be sold or otherwise disposed of pursuant to this section. The notice shall also include instructions for filing a claim with the district attorney, and the time limits for

filing a claim. The notice shall also inform any legal owner of its right to conduct the sale pursuant to **subdivision (g)**. If a registered owner was personally served at the time of impoundment with a notice containing all the information required to be provided by this paragraph, no further notice is required to be sent to a registered owner. However, a notice shall still be sent to the legal owners of the vehicle, if any. If notice was not sent to the legal owner within two working days, the impounding agency shall not charge the legal owner for more than *15-days'* impoundment when the legal owner redeems the impounded vehicle.

(3) No processing charges shall be imposed on a legal owner who redeems an impounded vehicle within *15 days* of the impoundment of that vehicle. If no claims are filed and served within **15 days** after the mailing of the notice in **paragraph (2)**, or if no claims are filed and served within five days of personal service of the notice specified in **paragraph (2)**, when no other mailed notice is required pursuant to **paragraph (2)**, the district attorney shall prepare a written declaration of forfeiture of the vehicle to the state. A written declaration of forfeiture signed by the district attorney under this subdivision shall be deemed to provide good and sufficient title to the forfeited vehicle. A copy of the declaration shall be provided on request to any person informed of the pending forfeiture pursuant to **paragraph (2)**. A claim that is filed and is later withdrawn by the claimant shall be deemed not to have been filed.

(4) If a claim is timely filed and served, then the district attorney shall file a petition of forfeiture with the appropriate juvenile or superior court within 10 days of the receipt of the claim. The district attorney shall establish an expedited hearing date in accordance with instructions from the court, and the court shall hear the matter without delay. The court filing fee of *one hundred dollars* ($100) shall be paid by the claimant, but shall be reimbursed by the impounding agency if the claimant prevails. To the extent practicable, the civil and criminal cases shall be heard at the same time in an expedited, consolidated proceeding. A proceeding in the civil case is a limited civil case.

(5) The burden of proof in the civil case shall be on the prosecuting agency, by a preponderance of the evidence. All questions that may arise shall be decided and all other proceedings shall be conducted as in an ordinary civil

action. A judgment of forfeiture does not require as a condition precedent the conviction of a defendant of an offense which made the vehicle subject to forfeiture. The filing of a claim within the time limits specified in **paragraph (3)** is considered a jurisdictional prerequisite for the availing of the action authorized by that paragraph.

(6) All right, title, and interest in the vehicle shall vest in the state upon commission of the act giving rise to the forfeiture.

(7) The filing fee in **paragraph (4)** shall be distributed as follows:

(A) To the county law library fund as provided in **Section 6320** of the **Business and Professions Code**, the amount specified in **Sections 6321** and **6322.1** of the **Business and Professions Code**.

(B) To the Trial Court Trust Fund, the remainder of the fee.

(f) Any vehicle impounded that is not redeemed pursuant to **subdivision (d)** and is subsequently forfeited pursuant to this section shall be sold once an order of forfeiture is issued by the district attorney of the county of the impounding agency or a court, as the case may be, pursuant to **subdivision (e)**.

(g) Any legal owner who is a motor vehicle dealer, bank, credit union, acceptance corporation, or other licensed financial institution legally operating in this state, or the agent of that legal owner, may take possession and conduct the sale of the forfeited vehicle if the legal owner or agent notifies the agency impounding the vehicle of its intent to conduct the sale within *15 days* of the mailing of the notice pursuant to **subdivision (e)**. Sale of the vehicle after forfeiture pursuant to this subdivision may be conducted at the time, in the manner, and on the notice usually given for the sale of repossessed or surrendered vehicles. The proceeds of any sale conducted by or on behalf of the legal owner shall be disposed of as provided in **subdivision (i)**. A notice pursuant to this subdivision may be presented in person, by certified mail, by facsimile transmission, or by electronic mail.

(h) If the legal owner or agent of the owner does not notify the agency impounding the vehicle of its intent to conduct the sale as provided in **subdivision (g)**, the agency shall offer the forfeited

vehicle for sale at public auction within *60 days* of receiving title to the vehicle. Low value vehicles shall be disposed of pursuant to **subdivision (k)**.

(i) The proceeds of a sale of a forfeited vehicle shall be disposed of in the following priority:

(1) To satisfy the towing and storage costs following impoundment, the costs of providing notice pursuant to **subdivision (e)**, the costs of sale, and the unfunded costs of judicial proceedings, if any.

(2) To the legal owner in an amount to satisfy the indebtedness owed to the legal owner remaining as of the date of sale, including accrued interest or finance charges and delinquency charges, providing that the principal indebtedness was incurred prior to the date of impoundment.

(3) To the holder of any subordinate lien or encumbrance on the vehicle, other than a registered or legal owner, to satisfy any indebtedness so secured if written notification of demand is received before distribution of the proceeds is completed. The holder of a subordinate lien or encumbrance, if requested, shall furnish reasonable proof of its interest and, unless it does so upon request, is not entitled to distribution pursuant to this paragraph.

(4) To any other person, other than a registered or legal owner, who can reasonably establish an interest in the vehicle, including a community property interest, to the extent of his or her provable interest, if written notification is received before distribution of the proceeds is completed.

(5) Of the remaining proceeds, funds shall be made available to pay any local agency and court costs, that are reasonably related to the implementation of this section, that remain unsatisfied.

(6) Of the remaining proceeds, half shall be transferred to the Controller for deposit in the Vehicle Inspection and Repair Fund for the high-polluter repair assistance and removal program created by Article 9 (commencing with **Section 44090**) of **Chapter 5** of **Part 5** of **Division 26** of the **Health and Safety Code**, and half shall be transferred to the general fund of the city or county of the

impounding agency, or the city or county where the impoundment occurred. A portion of the local funds may be used to establish a reward fund for persons coming forward with information leading to the arrest and conviction of hit-and-run drivers and to publicize the availability of the reward fund.

(j) The person conducting the sale shall disburse the proceeds of the sale as provided in **subdivision (i)** and shall provide a written accounting regarding the disposition to the impounding agency and, on request, to any person entitled to or claiming a share of the proceeds, within 15 days after the sale is conducted.

(k) If the vehicle to be sold pursuant to this section is not of the type that can readily be sold to the public generally, the vehicle shall be conveyed to a licensed dismantler or donated to an eleemosynary institution. License plates shall be removed from any vehicle conveyed to a dismantler pursuant to this subdivision.

(*l*) No vehicle shall be sold pursuant to this section if the impounding agency determines the vehicle to have been stolen. In this event, the vehicle may be claimed by the registered owner at any time after impoundment, providing the vehicle registration is current and the registered owner has no outstanding traffic violations or parking penalties on his or her driving record or on the registration record of any vehicle registered to the person. If the identity of the legal and registered owners of the vehicle cannot be reasonably ascertained, the vehicle may be sold.

(m) Any owner of a vehicle who suffers any loss due to the impoundment or forfeiture of any vehicle pursuant to this section may recover the amount of the loss from the unlicensed, suspended, or revoked driver. If possession of a vehicle has been tendered to a business establishment in good faith, and an unlicensed driver employed or otherwise directed by the business establishment is the cause of the impoundment of the vehicle, a registered owner of the impounded vehicle may recover damages for the loss of use of the vehicle from the business establishment.

(n)

(1) The impounding agency, if requested to do so not later than *10 days* after the date the vehicle was impounded, shall provide the opportunity for a poststorage hearing to determine the validity of the storage to the persons who were the registered and legal owners of the vehicle at the

time of impoundment, except that the hearing shall be requested within three days after the date the vehicle was impounded if personal service was provided to a registered owner pursuant to **paragraph (2)** of **subdivision (e)** and no mailed notice is required.

(2) The poststorage hearing shall be conducted not later than two days after the date it was requested. The impounding agency may authorize its own officer or employee to conduct the hearing if the hearing officer is not the same person who directed the storage of the vehicle. Failure of either the registered or legal owner to request a hearing as provided in **paragraph (1)** or to attend a scheduled hearing shall satisfy the poststorage hearing requirement.

(3) The agency employing the person who directed the storage is responsible for the costs incurred for towing and storage if it is determined that the driver at the time of impoundment had a valid driver's license.

(o) As used in this section, "*days*" means workdays not including weekends and holidays.

(p) Charges for towing and storage for any vehicle impounded pursuant to this section shall not exceed the normal towing and storage rates for other vehicle towing and storage conducted by the impounding agency in the normal course of business.

(q) The Judicial Council and the Department of Justice may prescribe standard forms and procedures for implementation of this section to be used by all jurisdictions throughout the state.

(r) The impounding agency may act as the agent of the state in carrying out this section.

(s) No vehicle shall be impounded pursuant to this section if the driver has a valid license but the license is for a class of vehicle other than the vehicle operated by the driver.

(t) This section does not apply to vehicles subject to **Sections 14608** and **14609**, if there has been compliance with the procedures in those sections.

(u) As used in this section, "*district attorney*" includes a city attorney charged with the duty of prosecuting misdemeanor offenses.

(v) The agent of a legal owner acting pursuant to **subdivision (g)** shall be licensed, or exempt from licensure, pursuant to **Chapter 11** (commencing with **Section 7500**) **of Division 3** of the **Business and Professions Code**.

Cases Law:

> The trial court had authority to deny the State's petitions for forfeiture of motor vehicles under this statute, on a showing that the drivers had obtained valid licenses. (***People v. One 1986 Cadillac DeVille*** (1999), 70 Cal.App.4th 157.)
>
> The California Highway Patrol and two of its officers could not be held liable in a consolidated wrongful death action brought against them under **Gov't. Code § 815.6** for failing to perform mandatory duty because **Veh. Code § 14602.6(a)(1)** confers only discretionary authority on law enforcement to impound an individual's vehicle if an individual is arrested for driving with a suspended license under **Veh. Code § 14601.1**. The Legislature's use of "*shall*" instead of "*may*" in **Veh. Code § 14607.6(c)(1)** indicates that it understands the distinction between the two words and acts deliberately in choosing its vocabulary, and this clear distinction in the language employed in **Veh. Code § 14602.6** and **Veh. Code §14607.6**, as well as that employed in **Veh. Code § 14602.5** and **Veh. Code § 14602.7**, supports the conclusion that **Veh. Code § 14602.6(a)(1)** confers discretionary authority on law enforcement. (***California Highway Patrol v. Superior Court*** (2008), 162 Cal.App.4th 1144.)
>
> A police department's policy regarding impounding vehicles, which sought to implement **Veh. Code §§ 14602.6** and **14607.6**, was within the wide discretion of the police chief because it neither created new law nor conflicted with existing law but, rather, simply implemented existing law, helping to ensure uniform application of the state's laws among the department's sworn peace officers. A taxpayer thus lacked standing to challenge the chief's implementation of the statutes because he failed to demonstrate anything more than an

arguable mistake in exercising discretion, and the concern of an association representing sworn peace officers that its members might violate state law by complying with the policy was no longer a basis for its standing. (***Los Angeles Police Protective League v. City of Los Angeles*** (2014) 232 Cal.App.4th 907; depublished at (2015), 2015 Cal. LEXIS 1910.)

"Although California law authorizes impoundment of a vehicle where the driver does not have a valid driver's license, **Cal. Veh. Code § 14607.6**, this alone does not establish a valid community caretaking purpose that satisfies the **Fourth Amendment**. (***United States v. Anderson*** (9th Cir. 2022) 56 F.4th 748, 758-759; upholding the applicability of the community caretaking doctrine, finding that having stopped in a third party's driveway who wanted defendant's vehicle removed, "there was no one available to move (defendant's) truck because (defendant) did not have a valid driver's license, he had no passengers with him, and he told the deputies that he was not from the area where he was stopped."

The Court further held that the deputies were not obligated to wait for a friend of the defendant's to come to the scene to move defendant's truck. Per the Court: "(A)n officer 'is not required to consider the existence of alternative less intrusive means when [a] vehicle must in fact be moved to avoid the creation of a hazard or the continued unlawful operation of the vehicle.'" (***Id***., at p. 760; quoting ***Miranda v. City of Cornelius*** (9th Cir. 2005) 429 F.3rd 858, 865, fn. 6.)

Veh. Code § 22650**:** *Limitation on Authority; Burden of Proof at Hearings*:

(a) It is unlawful for a peace officer or an unauthorized person to remove an unattended vehicle from a highway to a garage or to any other place, except as provided in this code.

(b) Any removal of a vehicle is a seizure under the **Fourth Amendment** of the Constitution of the United States and **Section 13** of **Article I** of the California Constitution, and shall be reasonable and subject to the limits set forth in **Fourth Amendment** jurisprudence. A removal pursuant to an authority, including, but not limited to, as provided in **Section 22651**, that is

based on community caretaking, is only reasonable if the removal is necessary to achieve the community caretaking need, such as ensuring the safe flow of traffic or protecting property from theft or vandalism.

(c) Those law enforcement and other agencies identified in this chapter as having the authority to remove vehicles shall also have the authority to provide hearings in compliance with the provisions of **Section 22852**. During these hearings the storing agency shall have the burden of establishing the authority for, and the validity of, the removal.

> *Note*: **V.C. § 22852** describes the post-impound hearing requirements.

(d) This section does not prevent a review or other action as may be permitted by the laws of this state by a court of competent jurisdiction.

Case Law:

> "'The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge.' (***South Dakota v. Opperman*** (1976) 428 U.S. 364, 369 [49 L.Ed.2nd 1000, 96 S. Ct. 3092].) A vehicle impound search will be upheld if it is reasonable under all the circumstances. (***People v. Shafrir*** (2010) 183 Cal.App.4th 1238, 1247 . . .)" (***People v. Quick*** (2016) 5 Cal.App.5th 1006, 1010.)

Veh. Code § 22651*: *Circumstances In Which Removal of a Vehicle Permitted:

A peace officer, as defined in **Chapter 4.5** (commencing with **Section 830)** of **Title 3** of **Part 2** of **the Penal Code**, or a regularly employed and salaried employee, who is engaged in directing traffic or enforcing parking laws and regulations, of a city, county, or jurisdiction of a state agency in which a vehicle is located, may remove a vehicle located within the territorial limits in which the officer or employee may act, under the following circumstances:

> **(a)** If a vehicle is left unattended upon a bridge, viaduct, or causeway or in a tube or tunnel where the vehicle constitutes an obstruction to traffic.

(b) If a vehicle is parked or left standing upon a highway in a position so as to obstruct the normal movement of traffic or in a condition so as to create a hazard to other traffic upon the highway.

(c) If a vehicle is found upon a highway or public land and a report has previously been made that the vehicle is stolen or a complaint has been filed and a warrant thereon is issued charging that the vehicle was embezzled.

(d) If a vehicle is illegally parked so as to block the entrance to a private driveway and it is impractical to move the vehicle from in front of the driveway to another point on the highway.

(e) If a vehicle is illegally parked so as to prevent access by firefighting equipment to a fire hydrant and it is impracticable to move the vehicle from in front of the fire hydrant to another point on the highway.

(f) If a vehicle, except highway maintenance or construction equipment, is stopped, parked, or left standing for more than four hours upon the right-of-way of a freeway that has full control of access and no crossings at grade and the driver, if present, cannot move the vehicle under its own power.

(g) If the person in charge of a vehicle upon a highway or public land is, by reason of physical injuries or illness, incapacitated to an extent so as to be unable to provide for its custody or removal.

(h)

(1) If an officer arrests a person driving or in control of a vehicle for an alleged offense and the officer is, by this code or other law, required or permitted to take, and does take, the person into custody.

(2) If an officer serves a notice of an order of suspension or revocation pursuant to **Section 13388** or **13389**.

(i)

(1) If a vehicle, other than a rented vehicle, is found upon a highway or public land, or is removed pursuant to this code, and it is known that the vehicle has been issued *five or more* notices of parking violations to which the owner or person in control of the vehicle has not responded within *21 calendar days* of notice of citation issuance or citation issuance or *14 calendar days* of the mailing of a notice of delinquent parking violation to the agency responsible for processing notices of parking violations, or the registered owner of the vehicle is known to have been issued five or more notices for failure to pay or failure to appear in court for traffic violations for which a certificate has not been issued by the magistrate or clerk of the court hearing the case showing that the case has been adjudicated or concerning which the registered owner's record has not been cleared pursuant to **Chapter 6** (commencing with **Section 41500**) of **Division 17**, the vehicle may be impounded until that person furnishes to the impounding law enforcement agency all of the following:

(A) Evidence of his or her identity.

(B) An address within this state where he or she can be located.

(C) Satisfactory evidence that all parking penalties due for the vehicle and all other vehicles registered to the registered owner of the impounded vehicle, and all traffic violations of the registered owner, have been cleared.

(***Coalition on Homelessness v. City and County of San Francisco*** (2023) 93 Cal.App.5th 928.)

(2) The requirements in **subparagraph (C)** of **paragraph (1)** shall be fully enforced by the impounding law enforcement agency on and after the time that the Department of Motor Vehicles is able to provide access to the necessary records.

(3) A notice of parking violation issued for an unlawfully parked vehicle shall be accompanied by a warning that repeated violations may result in the impounding of the vehicle. In lieu of furnishing satisfactory evidence that the full amount of parking penalties or bail has been deposited, that person may demand to be taken without unnecessary delay before a magistrate, for traffic offenses, or a hearing examiner, for parking offenses, within the county where the offenses charged are alleged to have been committed and who has jurisdiction of the offenses and is nearest or most accessible with reference to the place where the vehicle is impounded. Evidence of current registration shall be produced after a vehicle has been impounded, or, at the discretion of the impounding law enforcement agency, a notice to appear for violation of **subdivision (a)** of **Section 4000** shall be issued to that person.

(4) A vehicle shall be released to the legal owner, as defined in Section 370, if the legal owner does all of the following:

(A) Pays the cost of towing and storing the vehicle.

(B) Submits evidence of payment of fees as provided in **Section 9561**.

(C) Completes an affidavit in a form acceptable to the impounding law enforcement agency stating that the vehicle was not in possession of the legal owner at the time of occurrence of the offenses relating to standing or parking. A vehicle released to a legal owner under this subdivision is a repossessed vehicle for purposes of disposition or sale. The impounding agency shall have a lien on any surplus that remains upon sale of the vehicle to which the registered owner is or may be entitled, as security for the full amount of the parking penalties for all notices of parking violations issued for the vehicle and for all local administrative charges imposed pursuant to **Section 22850.5**. The legal

owner shall promptly remit to, and deposit with, the agency responsible for processing notices of parking violations from that surplus, on receipt of that surplus, the full amount of the parking penalties for all notices of parking violations issued for the vehicle and for all local administrative charges imposed pursuant to **Section 22850.5**.

(5) The impounding agency that has a lien on the surplus that remains upon the sale of a vehicle to which a registered owner is entitled pursuant to **paragraph (4)** has a deficiency claim against the registered owner for the full amount of the parking penalties for all notices of parking violations issued for the vehicle and for all local administrative charges imposed pursuant to **Section 22850.5**, less the amount received from the sale of the vehicle.

(j) If a vehicle is found illegally parked and there are no license plates or other evidence of registration displayed, the vehicle may be impounded until the owner or person in control of the vehicle furnishes the impounding law enforcement agency evidence of his or her identity and an address within this state where he or she can be located.

(k) If a vehicle is parked or left standing upon a highway for *72 or more consecutive hours* in violation of a local ordinance authorizing removal.

(l) If a vehicle is illegally parked on a highway in violation of a local ordinance forbidding standing or parking and the use of a highway, or a portion thereof, is necessary for the cleaning, repair, or construction of the highway, or for the installation of underground utilities, and signs giving notice that the vehicle may be removed are erected or placed at least *24 hours* prior to the removal by a local authority pursuant to the ordinance.

(m) If the use of the highway, or a portion of the highway, is authorized by a local authority for a purpose other than the normal flow of traffic or for the movement of equipment, articles, or structures of unusual size, and the parking of a vehicle would prohibit or interfere with that use or movement, and signs giving notice that the vehicle

may be removed are erected or placed at least *24 hours* prior to the removal by a local authority pursuant to the ordinance.

(n) Whenever a vehicle is parked or left standing where local authorities, by resolution or ordinance, have prohibited parking and have authorized the removal of vehicles. Except as provided in **subdivisions (v)** and **(w)**, a vehicle shall not be removed unless signs are posted giving notice of the removal.

(o)

(1) If a vehicle is found or operated upon a highway, public land, or an off-street parking facility under any of the following circumstances:

(A) With a registration expiration date in excess of six months before the date it is found or operated on the highway, public lands, or the off-street parking facility.

The community caretaking doctrine applies as well to cars parked when unregistered for over six months. (***Leslie v. City of Sand City*** (N.D. Cal. 2009) 615 F. Supp.2nd 1121, 1125-1126.)

(B) Displaying in, or upon, the vehicle, a registration card, identification card, temporary receipt, license plate, special plate, registration sticker, device issued pursuant to **Section 4853**, or permit that was not issued for that vehicle, or is not otherwise lawfully used on that vehicle under this code.

(C) Displaying in, or upon, the vehicle, an altered, forged, counterfeit, or falsified registration card, identification card, temporary receipt, license plate, special plate, registration sticker, device issued pursuant to **Section 4853**, or permit.

(D)

(i) The vehicle is operating using autonomous technology, without the registered owner or manufacturer of the vehicle having first applied for, and obtained, a valid permit that is required to operate the vehicle on public roads pursuant to **Section 38750**, and **Article 3.7** (commencing with **Section 227.00**) and **Article 3.8** (commencing with **Section 228.00**) of **Title 13** of the **California Code of Regulations**.

(ii) The vehicle is operating using autonomous technology after the registered owner or person in control of the vehicle received notice that the vehicle's permit required for the operation of the vehicle pursuant to **Section 38750**, and **Article 3.7** (commencing with **Section 227.00**) and **Article 3.8** (commencing with **Section 228.00**) of **Title 13** of the **California Code of Regulations** is suspended, terminated, or revoked.

(iii) For purposes of this subdivision, the terms "autonomous technology" and "autonomous vehicle" have the same meanings as in **Section 38750**.

(iv) This subparagraph does not provide the authority for a peace officer to stop an autonomous vehicle solely for the purpose of determining whether the vehicle is operating using autonomous technology without a valid permit required to operate the autonomous vehicle on public roads pursuant to **Section 38750**, and **Article 3.7** (commencing with **Section 227.00**) and **Article 3.8** (commencing with **Section 228.00**) of **Title 13** of the **California Code of Regulations**.

(2) If a vehicle described in **paragraph (1)** is occupied, only a peace officer, as defined in **Chapter 4.5** (commencing with **Section 830**) of **Title 3** of **Part 2** of the **Penal Code**, may remove the vehicle.

(3) For the purposes of this subdivision, the vehicle shall be released under any of the following circumstances:

(A) If the vehicle has been removed pursuant to **subparagraph (A)**, **(B)**, or **(C)** of **paragraph (1)**, to the registered owner of, or person in control of, the vehicle only after the owner or person furnishes the storing law enforcement agency with proof of current registration and a valid driver's license to operate the vehicle.

(B) If the vehicle has been removed pursuant to **subparagraph (D)** of **paragraph (1)**, to the registered owner of, or person in control of, the autonomous vehicle, after the registered owner or person furnishes the storing law enforcement agency with proof of current registration and a valid driver's license, if required to operate the autonomous vehicle, and either of the following:

(i) Proof of a valid permit required to operate the autonomous vehicle using autonomous technology on public roads pursuant to **Section 38750**, and **Article 3.7** (commencing with **Section 227.00**) and **Article 3.8** (commencing with **Section 228.00**) of **Title 13** of the **California Code of Regulations**.

(ii) A declaration or sworn statement to the Department of Motor Vehicles that states that the autonomous vehicle will not be operated using autonomous technology upon public

roads without first obtaining a valid permit to operate the vehicle pursuant to **Section 38750**, and **Article 3.7** (commencing with **Section 227.00**) and **Article 3.8** (commencing with **Section 228.00**) of **Title 13** of the **California Code of Regulations**.

(C) To the legal owner or the legal owner's agency, without payment of any fees, fines, or penalties for parking tickets or registration and without proof of current registration, if the vehicle will only be transported pursuant to the exemption specified in **Section 4022** and if the legal owner does all of the following:

(i) Pays the cost of towing and storing the vehicle.

(ii) Completes an affidavit in a form acceptable to the impounding law enforcement agency stating that the vehicle was not in possession of the legal owner at the time of occurrence of an offense relating to standing or parking. A vehicle released to a legal owner under this subdivision is a repossessed vehicle for purposes of disposition or sale. The impounding agency has a lien on any surplus that remains upon sale of the vehicle to which the registered owner is or may be entitled, as security for the full amount of parking penalties for any notices of parking violations issued for the vehicle and for all local administrative charges imposed pursuant to **Section 22850.5**. Upon receipt of any surplus, the legal owner shall promptly remit to, and deposit with, the agency responsible for processing notices of parking violations from that surplus, the full amount of the parking penalties for

all notices of parking violations issued for the vehicle and for all local administrative charges imposed pursuant to **Section 22850.5**.

(4) The impounding agency that has a lien on the surplus that remains upon the sale of a vehicle to which a registered owner is entitled has a deficiency claim against the registered owner for the full amount of parking penalties for any notices of parking violations issued for the vehicle and for all local administrative charges imposed pursuant to **Section 22850.5**, less the amount received from the sale of the vehicle.

(5) As used in this subdivision, "*off-street parking facility*" means an off-street facility held open for use by the public for parking vehicles and includes a publicly owned facility for off-street parking, and a privately owned facility for off-street parking if a fee is not charged for the privilege to park and it is held open for the common public use of retail customers.

(p) If the peace officer issues the driver of a vehicle a notice to appear for a violation of **Section 12500**, **14601**, **14601.1**, **14601.2**, **14601.3**, **14601.4**, **14601.5**, or **14604 14604**, and the vehicle is not impounded pursuant to **Section 22655.5**. A vehicle so removed from the highway or public land, or from private property after having been on a highway or public land, shall not be released to the registered owner or his or her agent, except upon presentation of the registered owner's or his or her agent's currently valid driver's license to operate the vehicle and proof of current vehicle registration, to the impounding law enforcement agency, or upon order of a court.

(q) If a vehicle is parked for more than *24 hours* on a portion of highway that is located within the boundaries of a common interest development, as defined in **Section 4100** or **6534** of the **Civil Code**, and signs, as required by **paragraph (1)** of **subdivision (a)** of **Section 22658** of this code, have been posted on that portion of highway

providing notice to drivers that vehicles parked thereon for more than *24 hours* will be removed at the owner's expense, pursuant to a resolution or ordinance adopted by the local authority.

(r) If a vehicle is illegally parked and blocks the movement of a legally parked vehicle.

(s)

(1) If a vehicle, except highway maintenance or construction equipment, an authorized emergency vehicle, or a vehicle that is properly permitted or otherwise authorized by the Department of Transportation, is stopped, parked, or left standing for more than eight hours within a roadside rest area or viewpoint.

(2) Notwithstanding **paragraph (1)**, if a commercial motor vehicle, as defined in **paragraph (1)** of **subdivision (b)** of **Section 15210**, is stopped, parked, or left standing for more than *10 hours* within a roadside rest area or viewpoint.

(3) For purposes of this subdivision, a roadside rest area or viewpoint is a publicly maintained vehicle parking area, adjacent to a highway, utilized for the convenient, safe stopping of a vehicle to enable motorists to rest or to view the scenery. If two or more roadside rest areas are located on opposite sides of the highway, or upon the center divider, within seven miles of each other, then that combination of rest areas is considered to be the same rest area.

(t) If a peace officer issues a notice to appear for a violation of **Section 25279**.

(u) If a peace officer issues a citation for a violation of **Section 11700**, and the vehicle is being offered for sale.

(v)

(1) If a vehicle is a mobile billboard advertising display, as defined in **Section 395.5**, and is parked or left standing in violation of a local resolution or

ordinance adopted pursuant to **subdivision (m)** of **Section 21100**, if the registered owner of the vehicle was previously issued a warning citation for the same offense, pursuant to **paragraph (2)**.

(2) Notwithstanding **subdivision (a)** of **Section 22507**, a city or county, in lieu of posting signs noticing a local ordinance prohibiting mobile billboard advertising displays adopted pursuant to **subdivision (m)** of **Section 21100**, may provide notice by issuing a warning citation advising the registered owner of the vehicle that he or she may be subject to penalties upon a subsequent violation of the ordinance, that may include the removal of the vehicle as provided in **paragraph (1)**. A city or county is not required to provide further notice for a subsequent violation prior to the enforcement of penalties for a violation of the ordinance.

(w)

(1) If a vehicle is parked or left standing in violation of a local ordinance or resolution adopted pursuant to **subdivision (p)** of **Section 21100**, if the registered owner of the vehicle was previously issued a warning citation for the same offense, pursuant to **paragraph (2)**.

(2) Notwithstanding **subdivision (a)** of **Section 22507**, a city or county, in lieu of posting signs noticing a local ordinance regulating advertising signs adopted pursuant to **subdivision (p)** of **Section 21100**, may provide notice by issuing a warning citation advising the registered owner of the vehicle that he or she may be subject to penalties upon a subsequent violation of the ordinance that may include the removal of the vehicle as provided in **paragraph (1)**. A city or county is not required to provide further notice for a subsequent violation prior to the enforcement of penalties for a violation of the ordinance.

Case Law:

It has been held that **V.C. § 22651(p)** and "*established department practices*" are enough to meet the

"standardized procedures" requirement. (***People v. Benites*** (1992) 9 Cal.App.4th 309; ***People v. Steeley*** (1989) 210 Cal.App.3rd 887.)

Towing and impounding a vehicle merely because it is illegally parked, without prior notice to the vehicle's owner and a pre-seizure hearing, absent an exigency requiring immediate action (such as in an emergency, where notice would defeat the entire point of the seizure, or where the interests at stake are small relative to the burden that giving notice would impose; e.g., the car is parked in the path of traffic, blocking a driveway, obstructing a fire lane, or appears to be abandoned, or where there is no current registration stickers and there's no guarantee the owner won't move or hide the vehicle instead of paying the fine for illegal parking), is a **Fourteenth Amendment** due process violation despite statutes allowing for the towing, and may generate some civil liability for the police. (***Clement v. City of Glendale*** (9th Cir. 2008) 518 F.3rd 1090; an unregistered vehicle with a "planned non-operation (PNO) certificate" filed, parked in a publicly accessible parking lot in violation of **V.C. § 22651(o)**.)

See also ***Grimm v. City of Portland*** (9th Cir. 2020) 971 F.3rd 1060, where it was held in an action brought by a car owner against the City of Portland, where plaintiff alleged that the pre-towing notice provided was inadequate under the **Fourteenth Amendment's Due Process Clause**, that the district court had erred in applying the wrong case law in analyzing the owner's adequacy of notice claim. The Court held that some individualized form of pre-towing notice is required before the City can tow a vehicle where it was not blocking anyone's path, the City is able to obtain current information on the whereabouts of the owner, and the tow was not needed to provide security for the payment of the fine.

Veh. Code § 22651(b) provides that a peace officer may remove a vehicle: "When a vehicle is parked or left standing upon a highway in a position so as to obstruct the normal movement of traffic or in a condition so as to create a hazard to other traffic upon the highway," and is grounds under the Community Caretaking Doctrine to impound a vehicle. (***People v. Quick*** (2016) 5 Cal.App.5th 1006, 1010-1011.)

Veh. Code § 22651(h)(1) authorizes the impounding of a vehicle "(w)hen an officer arrests any person driving or in control of a vehicle for an alleged offense" and takes that person into custody." However, impounding a vehicle under authority of this section is constitutional only if impoundment serves some "*community caretaking function*." Whether or not the community caretaking function justifies the impounding of a vehicle depends upon the location of the vehicle and the police officer's duty to prevent it from creating a hazard to other drivers or from being a target for vandalism or theft. When it was found that an arrested defendant's vehicle was lawfully parked only two houses down from his own home, impounding it was held to be illegal. (***United States v. Caseres*** (9th Cir. 2008) 533 F.3rd 1064, 1074-1075; see also ***People v. Quick***, *supra*.)

Impounding a vehicle pursuant to **Veh. Code § 22651(p)**, when neither the driver nor the passenger could (or would) produce a valid driver's license, was held to be lawful. (***People v. Hoyos*** (2007) 41 Cal.4th 872, 892.)

> *Note*: *The* "*Community Caretaking Doctrine*" was not raised in this case.

It is also a reoccurring issue whether the *Community Caretaking Doctrine* applies when the officer's reason for impounding a vehicle is to prevent an unlicensed driver from continuing his unlicensed driving. (See ***People v. Torres et al.*** (2012) 205 Cal.App.4th 989, 792; ***United States v.*** Caseres (9th Cir. 2008) 533 F.3rd 1064, 1075; and ***Miranda v. City of Cornelius*** (9th Cir. 2005) 429 F.3rd 858, 865-866.) None of these cases, however, definitively decide the issue, although they do tend to lean toward *not* allowing the impounding of a vehicle in such a circumstance.

A police department has discretion to establish guidelines that would allow an impounded vehicle to be released in less than 30 days, under **Veh. Code § 22651(p)**, in situations where a fixed 30-day statutory impoundment period, under **Veh. Code § 14602.6(a)(1)**, may also potentially apply. (95 ***Ops.Cal.Atty.Gen*** 1 (2012).)

See "*The* '*Community Caretaking Doctrine*'," below.

***Veh. Code § 22651.05*:** *Removal of Vehicle by Trained Volunteer in Specified Circumstances*:

(a) A trained volunteer of a state or local law enforcement agency, who is engaged in directing traffic or enforcing parking laws and regulations, of a city, county, or jurisdiction of a state agency in which a vehicle is located, may remove or authorize the removal of a vehicle located within the territorial limits in which an officer or employee of that agency may act, under any of the following circumstances:

(1) When a vehicle is parked or left standing upon a highway for *72 or more consecutive hours* in violation of a local ordinance authorizing the removal.

(2) When a vehicle is illegally parked or left standing on a highway in violation of a local ordinance forbidding standing or parking and the use of a highway, or a portion thereof, is necessary for the cleaning, repair, or construction of the highway, or for the installation of underground utilities, and signs giving notice that the vehicle may be removed are erected or placed at least 24 hours prior to the removal by local authorities pursuant to the ordinance.

(3) Wherever the use of the highway, or a portion thereof, is authorized by local authorities for a purpose other than the normal flow of traffic or for the movement of equipment, articles, or structures of unusual size, and the parking of a vehicle would prohibit or interfere with that use or movement, and signs giving notice that the vehicle may be removed are erected or placed at least *24 hours* prior to the removal by local authorities pursuant to the ordinance.

(4) Whenever a vehicle is parked or left standing where local authorities, by resolution or ordinance, have prohibited parking and have authorized the removal of vehicles. A vehicle may not be removed unless signs are posted giving notice of the removal.

(5) Whenever a vehicle is parked for more than *24 hours* on a portion of highway that is located within the boundaries of a common interest development, as defined in **Section 4100** or **6534** of the **Civil Code**, and signs, as required by **Section 22658.2**, have been posted on that portion of

highway providing notice to drivers that vehicles parked thereon for more than *24 hours* will be removed at the owner's expense, pursuant to a resolution or ordinance adopted by the local authority.

(b) The provisions of this chapter that apply to a vehicle removed pursuant to **Section 22651** apply to a vehicle removed pursuant to **subdivision (a)**.

(c) For purposes of **subdivision (a)**, a "*trained volunteer*" is a person who, of his or her own free will, provides services, without any financial gain, to a local or state law enforcement agency, and who is duly trained and certified to remove a vehicle by a local or state law enforcement agency.

Veh. Code § 22651.07**:** *Duties of Person Charging for Towing or Storage; Exception; Rights of Vehicle Owner or Agent; Towing Fees and Access Notice; Contents of Itemized Invoice; Civil Liability for Violations*.

(a) A person, including a law enforcement agency, city, county, city and county, the state, a tow yard, storage facility, or an impounding yard, that charges for towing or storage, or both, shall do all of the following:

(1)

(A) Except as provided in **subparagraph (B)**, post in the office area of the storage facility, in plain view of the public, the Towing and Storage Fees and Access Notice and have copies readily available to the public.

(B) An automotive repair dealer, registered pursuant to **Article 3** (commencing with **Section 9884) of Chapter 20.3 of Division 3 of the Business and Professions Code**, that does not provide towing services is exempt from the requirements to post the *Towing and Storage Fees and Access Notice* in the office area.

(2) Provide, upon request, a copy of the Towing and Storage Fees and Access Notice to any owner or operator of a towed or stored vehicle.

(3) Provide a distinct notice on an itemized invoice for any towing or storage, or both, charges stating: "Upon request,

you are entitled to receive a copy of the Towing and Storage Fees and Access Notice. This notice shall be contained within a bordered text box, printed in no less than 10-point type."

(b) Prior to receiving payment for any towing, recovery, or storage-related fees, a facility that charges for towing or storage, or both, shall provide an itemized invoice of actual charges to the vehicle owner or his or her agent. If an automotive repair dealer, registered pursuant to **Article 3** (commencing with **Section 9884) of Chapter 20.3** of **Division 3** of the **Business and Professions Code**, did not provide the tow, and passes along, from the tower to the consumer, any of the information required on the itemized invoice, pursuant to **subdivision (g)** the automotive repair dealer shall not be responsible for the accuracy of those items of information that remain unaltered.

(c) Prior to paying any towing, recovery, or storage-related fees, a vehicle owner or his or her agent or a licensed repossessor shall, at any facility where the vehicle is being stored, have the right to all of the following:

(1) Receive his or her personal property, at no charge, during normal business hours. Normal business hours for releasing collateral and personal property are Monday through Friday from *8:00 a.m. to 5:00 p.m.*, inclusive, except state holidays.

(2) Retrieve his or her vehicle during the first *72 hours* of storage and not pay a lien fee.

(3)

(A) Inspect the vehicle without paying a fee.

(B) Have his or her insurer inspect the vehicle at the storage facility, at no charge, during normal business hours. However, the storage facility may limit the inspection to increments of *45 consecutive minutes* in order to provide service to any other waiting customer, after which the insurer may resume the inspection for additional increments of *45 consecutive minutes*, as necessary.

(4) Request a copy of the *Towing and Storage Fees and Access Notice*.

(5) Be permitted to pay by cash, insurer's check, or a valid bank credit card. Credit charges for towing and storage services shall comply with **Section 1748.1** of the **Civil Code**. Law enforcement agencies may include the costs of providing for payment by credit when agreeing with a towing or storage provider on rates.

(d) A storage facility shall be open and accessible during normal business hours, as defined in **subdivision (c)**. Outside of normal business hours, the facility shall provide a telephone number that permits the caller to leave a message. Calls to this number shall be returned no later than six business hours after a message has been left.

(e) The Towing and Storage Fees and Access Notice shall be a standardized document plainly printed in no less that 10-point type. A person may distribute the form using its own letterhead, but the language of the Towing and Storage Fees and Access Notice shall read as follows: (See section for form.)

(f) "*Insurer*," as used in this section, means either a first-party insurer or third-party insurer.

(g) "*Itemized invoice*," as used in this section, means a written document that contains the following information. Any document that substantially complies with this subdivision shall be deemed an "*itemized invoice*" for purposes of this section:

(1) The name, address, telephone number, and carrier identification number as required by subdivision (a) of **Section 34507.5** of the person that is charging for towing and storage.

(2) If ascertainable, the registered owner or operator's name, address, and telephone number.

(3) The date service was initiated.

(4) The location of the vehicle at the time service was initiated, including either the address or nearest intersecting roadways.

(5) A vehicle description that includes, if ascertainable, the vehicle year, make, model, odometer reading, license plate

number, or if a license plate number is unavailable, the vehicle identification number (VIN).

(6) The service dispatch time, the service arrival time of the tow truck, and the service completion time.

(7) A clear, itemized, and detailed explanation of any additional services that caused the total towing-related service time to exceed one hour between service dispatch time and service completion time.

(8) The hourly rate or per item rate used to calculate the total towing and recovery-related fees. These fees shall be listed as separate line items.

(9) If subject to storage fees, the daily storage rate and the total number of days stored. The storage fees shall be listed as a separate line item. Storage rates shall comply with the requirements of **subdivision (c)** of **Section 22524.5**.

(10) If subject to a gate fee, the date and time the vehicle was released after normal business hours. Normal business hours are Monday through Friday from 8:00 a.m. to 5:00 p.m., inclusive, except state holidays. A gate fee shall be listed as a separate line item. A gate fee shall comply with the requirements in **subdivision (c)** of **Section 22524.5**.

(11) A description of the method of towing.

(12) If the tow was not requested by the vehicle's owner or driver, the identity of the person or governmental agency that directed the tow. This paragraph shall not apply to information otherwise required to be redacted under **Section 22658**.

(13) A clear, itemized, and detailed explanation of any additional services or fees.

(h) "*Person*," as used in this section, includes those entities described in **subdivision (a)** and has the same meaning as described in **Section 470**.

(i) An insurer, insurer's agent, or tow hauler, shall be permitted to pay for towing and storage charges by a valid bank credit card, insurer's check, or bank draft.

(j) Except as otherwise exempted in this section, the requirements of this section apply to any facility that charges for the storage of a vehicle, including, but not limited to, a vehicle repair garage or service station, but not including a new motor vehicle dealer.

(k) A person who violates this section is civilly liable to a registered or legal owner of the vehicle, or a registered owner's insurer, for up to two times the amount charged. Liability in any action brought under this section shall not exceed *five hundred dollars* ($*500*) per vehicle.

(*l*) A suspected violation of this section may be reported by any person, including, without limitation, the legal or registered owner of a vehicle or his or her insurer.

(m) This section shall not apply to the towing or storage of a repossessed vehicle by any person subject to, or exempt from, the **Collateral Recovery Act** (**Chapter 11** (commencing with **Section 7500**) of **Division 3** of the **Business and Professions Code**).

(n) This section does not relieve a person from the obligation to comply with any other law.

(o) Notwithstanding this section, an insurer shall comply with all of its obligations under **Section 2695.8** of **Chapter 5** of **Title 10** of the **California Code of Regulations**.

***Veh. Code § 22651.1*:** *Payment of Towing and Storage Costs by Credit Card or Cash.*

Persons operating or in charge of any storage facility where vehicles are stored pursuant to **Section 22651** shall accept a valid bank credit card or cash for payment of towing and storage by the registered owner, legal owner, or the owner's agent claiming the vehicle. A credit card shall be in the name of the person presenting the card. "Credit card" means "credit card" as defined in **subdivision (a)** of **Section 1747.02** of the **Civil Code**, except, for the purposes of this section, credit card does not include a credit card issued by a retail seller. A person operating or in charge of any storage facility who refuses to accept a valid bank credit card shall be liable to the owner of the vehicle or to the person who tendered the fees for four times the amount of the towing and storage charges, but not to exceed five hundred dollars ($500). In addition, persons operating or in charge of the storage facility shall have sufficient funds on the premises to accommodate and make change in a reasonable monetary transaction.

Credit charges for towing and storage services shall comply with **Section 1748.1** of the **Civil Code**. Law enforcement agencies may include the costs of providing for payment by credit when agreeing with a towing or storage provider on rates.

Veh. Code § 22651.2**:** *Impoundment of Vehicle Used to Advertise Event or Function*:

(a) Any peace officer, as defined in **Chapter 4.5** (commencing with **Section 830**) of **Title 3** of **Part 2** of the **Penal Code**, or any regularly employed and salaried employee, who is engaged in directing traffic or enforcing parking laws and regulations of a city, county, or jurisdiction of a state agency in which a vehicle is located, may remove a vehicle located within the territorial limits in which the officer or employee may act when the vehicle is found upon a highway or any public lands, and if all of the following requirements are satisfied:

(1) Because of the size and placement of signs or placards on the vehicle, it appears that the primary purpose of parking the vehicle at that location is to advertise to the public an event or function on private property or on public property hired for a private event or function to which the public is invited.

(2) The vehicle is known to have been previously issued a notice of parking violation that was accompanied by a notice warning that an additional parking violation may result in the impoundment of the vehicle.

(3) The registered owner of the vehicle has been mailed a notice advising of the existence of the parking violation and that an additional violation may result in the impoundment of the vehicle.

(b) Subdivision (a) does not apply to a vehicle bearing any sign or placard advertising any business or enterprise carried on by or through the use of that vehicle.

(c) Section 22852 applies to the removal of any vehicle pursuant to this section.

Note: **V.C. § 22852** describes the post-impound hearing requirements.

Veh. Code § 22651.3*: *Impoundment of Vehicles in Off-street Public Parking Facility; Multiple Parking Violations:

(a) Any peace officer, as that term is defined in **Chapter 4.5** (commencing with **Section 830**) of **Title 3** of **Part 2** of the **Penal Code**, or any regularly employed and salaried employee, who is engaged in directing traffic or enforcing parking laws and regulations, of a city, county, or jurisdiction of a state agency in which any vehicle, other than a rented vehicle, is located may remove the vehicle from an off-street public parking facility located within the territorial limits in which the officer or employee may act when the vehicle is known to have been issued five or more notices of parking violation over a period of five or more days, to which the owner or person in control of the vehicle has not responded or when any vehicle is illegally parked so as to prevent the movement of a legally parked vehicle. A notice of parking violation issued to a vehicle which is registered in a foreign jurisdiction or is without current California registration and is known to have been issued five or more notices of parking violation over a period of five or more days shall be accompanied by a warning that repeated violations may result in the impounding of the vehicle.

(b) The vehicle may be impounded until the owner or person in control of the vehicle furnishes to the impounding law enforcement agency evidence of his or her identity and an address within this state at which he or she can be located and furnishes satisfactory evidence that bail has been deposited for all notices of parking violation issued for the vehicle. In lieu of requiring satisfactory evidence that the bail has been deposited, the impounding law enforcement agency may, in its discretion, issue a notice to appear for the offenses charged, as provided in **Article 2** (commencing with **Section 40500**) of **Chapter 2** of **Division 17**. In lieu of either furnishing satisfactory evidence that the bail has been deposited or accepting the notice to appear, the owner or person in control of the vehicle may demand to be taken without unnecessary delay before a magistrate within the county in which the offenses charged are alleged to have been committed and who has jurisdiction of the offenses and is nearest or most accessible with reference to the place where the vehicle is impounded.

(c) Evidence of current registration shall be produced after a vehicle has been impounded. At the discretion of the impounding law enforcement agency, a notice to appear for violation of **subdivision (a)** of **Section 4000** may be issued to the owner or

person in control of the vehicle, if the two days immediately following the day of impoundment are weekend days or holidays.

Veh. Code § 22651.4*: *Impounding of Commercial Motor Vehicles From Other Countries; Release:

(a) A peace officer, as defined in **Chapter 4.5** (commencing with **Section 830**) of **Title 3** of **Part 2** of the **Penal Code**, may impound a vehicle and its cargo pursuant to **Section 34517**.

(b) A member of the department may impound a vehicle and its cargo pursuant to **Section 34518**.

(c) A member of the department may store or impound a vehicle upon determination that the registrant of the vehicle or the driver of the vehicle has failed to pay registration, regulatory, fuel permit, or other fees, or has an outstanding warrant in a county in the state. The impoundment charges are the responsibility of the owner of the vehicle. The stored or impounded vehicle shall be released upon payment of those fees or fines or the posting of bail. The driver or owner of the vehicle may request a hearing to determine the validity of the seizure.

Veh. Code § 22651.5*: *Removal of Vehicle with Activated Alarm Device:

(a) Any peace officer, as defined in **Chapter 4.5** (commencing with **Section 830**) of **Title 3** of **Part 2** of the **Penal Code**, or any regularly employed and salaried employee who is engaged in directing traffic or enforcing parking laws or regulations, may, upon the complaint of any person, remove a vehicle parked within *500 feet* of any occupied building of a school, community college, or university during normal hours of operation, or a vehicle parked within a residence or business district, from a highway or from public or private property, if an alarm device or horn has been activated within the vehicle, whether continuously activated or intermittently and repeatedly activated, the peace officer or designated employee is unable to locate the owner of the vehicle within 20 minutes from the time of arrival at the vehicle's location, and the alarm device or horn has not been completely silenced prior to removal.

(b) Upon removal of a vehicle from a highway or from public or private property pursuant to this section, the peace officer or designated employee ordering the removal shall immediately report the removal and the location to which the vehicle is

removed to the Stolen Vehicle System of the Department of Justice.

Veh. Code § 22651.6: *Removal of Vehicle Used by Person Arrested for Speed Contest*:

A peace officer or employee specified in **Section 22651** may remove a vehicle located within the territorial limits in which the officer or employee may act when the vehicle was used by a person who was engaged in a motor vehicle speed contest, as described in **subdivision (a)** of **Section 23109**, and the person was arrested and taken into custody for that offense by a peace officer.

Veh. Code § 22651.7**:** *Immobilization of Vehicle as Alternative to Removal; Multiple Parking Violations*:

(a) In addition to, or as an alternative to, removal, a peace officer, as defined in **Chapter 4.5** (commencing with **Section 830**) of **Title 3** of **Part 2** of the **Penal Code**, or a regularly employed and salaried employee who is engaged in directing traffic or enforcing parking laws and regulations, of a jurisdiction in which a vehicle is located may immobilize the vehicle with a device designed and manufactured for the immobilization of vehicles, on a highway or any public lands located within the territorial limits in which the officer or employee may act if the vehicle is found upon a highway or public lands and it is known to have been issued five or more notices of parking violations that are delinquent because the owner or person in control of the vehicle has not responded to the agency responsible for processing notices of parking violation within *21 calendar days* of notice of citation issuance or citation issuance or *14 calendar days* of the mailing of a notice of delinquent parking violation, or the registered owner of the vehicle is known to have been issued five or more notices for failure to pay or failure to appear in court for traffic violations for which no certificate has been issued by the magistrate or clerk of the court hearing the case showing that the case has been adjudicated or concerning which the registered owner's record has not been cleared pursuant to **Chapter 6** (commencing with **Section 41500**) of **Division 17**. The vehicle may be immobilized until that person furnishes to the immobilizing law enforcement agency all of the following:

(1) Evidence of his or her identity.

(2) An address within this state at which he or she can be located.

(3) Satisfactory evidence that the full amount of parking penalties has been deposited for all notices of parking violation issued for the vehicle and any other vehicle registered to the registered owner of the immobilized vehicle and that bail has been deposited for all traffic violations of the registered owner that have not been cleared. The requirements in this paragraph shall be fully enforced by the immobilizing law enforcement agency on and after the time that the Department of Motor Vehicles is able to provide access to the necessary records. A notice of parking violation issued to the vehicle shall be accompanied by a warning that repeated violations may result in the impounding or immobilization of the vehicle. In lieu of furnishing satisfactory evidence that the full amount of parking penalties or bail, or both, have been deposited that person may demand to be taken without unnecessary delay before a magistrate, for traffic offenses, or a hearing examiner, for parking offenses, within the county in which the offenses charged are alleged to have been committed and who has jurisdiction of the offenses and is nearest or most accessible with reference to the place where the vehicle is immobilized. Evidence of current registration shall be produced after a vehicle has been immobilized or, at the discretion of the immobilizing law enforcement agency, a notice to appear for violation of **subdivision (a)** of **Section 4000** shall be issued to that person.

(b) A person, other than a person authorized under **subdivision (a)**, shall not immobilize a vehicle.

Case law: A private security firm, acting pursuant to a contract with a property owner, may *not* immobilize a vehicle that is impermissibly parked in a private parking lot by affixing a "boot" device to the vehicle. (87 ***Cal. Ops. Cal. Atty. Gen.*** 114.)

Veh. Code § 22651.8**:** *Satisfactory Evidence of Payment of Parking Violations*:

For purposes of **paragraph (1)** of **subdivision (i)** of **Section 22651** and **Section 22651.7**, "*satisfactory evidence*" includes, but is not limited to, a copy of a receipt issued by the department pursuant to **subdivision (a)** of **Section 4760** for the payment of notices of parking violations appearing on the department's records at the time of payment. The processing agency shall, within 72 hours of receiving that satisfactory evidence, update its records to

reflect the payments made to the department. If the processing agency does not receive the amount of the parking penalties and administrative fees from the department within four months of the date of issuance of that satisfactory evidence, the processing agency may revise its records to reflect that no payments were received for the notices of parking violation.

Veh. Code § 22651.9*: *Vehicle Left on Street with "For Sale" Sign:

(a) Any peace officer, as defined in **Chapter 4.5** (commencing with **Section 830)** of **Title 3** of **Part 2** of the **Penal Code**, or any regularly employed and salaried employee, who is engaged in directing traffic or enforcing parking laws and regulations, of a city, county, or city and county in which a vehicle is located, may remove a vehicle located within the territorial limits in which the officer or employee may act when the vehicle is found upon a street or any public lands, if all of the following requirements are satisfied:

(1) Because of a sign or placard on the vehicle, it appears that the primary purpose of parking the vehicle at that location is to advertise to the public the private sale of that vehicle.

(2) Within the past *30 days*, the vehicle is known to have been previously issued a notice of parking violation, under local ordinance, which was accompanied by a notice containing all of the following:

(A) A warning that an additional parking violation may result in the impoundment of the vehicle.

(B) A warning that the vehicle may be impounded pursuant to this section, even if moved to another street, so long as the signs or placards offering the vehicle for sale remain on the vehicle.

(C) A listing of the streets or public lands subject to the resolution or ordinance adopted pursuant to **paragraph (4)**, or if all streets are covered, a statement to that effect.

(3) The notice of parking violation was issued at least *24 hours* prior to the removal of the vehicle.

(4) The local authority of the city, county, or city and county has, by resolution or ordinance, authorized the removal of vehicles pursuant to this section from the street or public lands on which the vehicle is located.

(b) Section 22852 applies to the removal of any vehicle pursuant to this section.

Note: **V.C. § 22852** describes the post-impound hearing requirements.

Veh. Code § 22652*: *Removal of Vehicle From Stall or Space Designated for Disabled Persons:

(a) A peace officer, as defined in **Chapter 4.5** (commencing with **Section 830**) of **Title 3** of **Part 2** of the **Penal Code**, or any regularly employed and salaried employee engaged in directing traffic or enforcing parking laws and regulations of a city, county, or jurisdiction of a state agency may remove any vehicle from a stall or space designated for physically disabled persons pursuant to **Section 22511.7** or **22511.8**, located within the jurisdictional limits in which the officer or employee is authorized to act, if the vehicle is parked in violation of **Section 22507.8** and if the police or sheriff's department or the Department of the California Highway Patrol is notified.

(b) In a privately or publicly owned or operated off-street parking facility, this section applies only to those stalls and spaces if the posting requirements under **subdivisions (a)** and **(d)** of **Section 22511.8** have been complied with and if the stalls or spaces are clearly signed or marked.

Veh. Code § 22652.5*: *Removal of Vehicle From Disabled Parking Space; Immunity From Liability of Off-street Parking Facility:

The owner or person in lawful possession of an off-street parking facility, or any local authority owning or operating an off-street parking facility, who causes a vehicle to be removed from the parking facility pursuant to **Section 22511.8**, or any state, city, or county employee, is not civilly liable for the removal if the police or sheriff's department in whose jurisdiction the off-street parking facility or the stall or space is located or the Department of the California Highway Patrol has been notified prior to the removal.

Veh. Code § 22652.6*: *Removal of Vehicle From Disabled Parking Space by Peace Officer:

> Any peace officer, as defined in **Chapter 4.5** (commencing with **Section 830**) of **Title 3** of **Part 2** of the **Penal Code**, or any regularly employed and salaried employee engaged in directing traffic or enforcing parking laws and regulations of a city or county, may remove any vehicle parked or standing on the streets or highways or from a stall or space of a privately or publicly owned or operated off-street parking facility within the jurisdiction of the city or county when the vehicle is in violation of a local ordinance or resolution adopted pursuant to **Section 22511.57**.

Veh. Code § 22653*: *Removal From Private Property of Vehicle Reported Stolen Or Involved in Offense:

> **(a)** Any peace officer, as that term is defined in **Chapter 4.5** (commencing with **Section 830)** of **Title 3** of **Part 2** of the **Penal Code**, other than an employee directing traffic or enforcing parking laws and regulations, may remove a vehicle from private property located within the territorial limits in which the officer is empowered to act, when a report has previously been made that the vehicle has been stolen or a complaint has been filed and a warrant thereon issued charging that the vehicle has been embezzled.
>
> **(b)** Any peace officer, as that term is defined in **Chapter 4.5** (commencing with **Section 830**) of **Title 3** of **Part 2** of the **Penal Code**, may, after a reasonable period of time, remove a vehicle from private property located within the territorial limits in which the officer is empowered to act, if the vehicle has been involved in, and left at the scene of, a traffic accident and no owner is available to grant permission to remove the vehicle. This subdivision does not authorize the removal of a vehicle where the owner has been contacted and has refused to grant permission to remove the vehicle.
>
> **(c)** Any peace officer, as that term is defined in **Chapter 4.5** (commencing with **Section 830**) of **Title 3** of **Part 2** of the **Penal Code**, may, at the request of the property owner or person in lawful possession of any private property, remove a vehicle from private property located within the territorial limits in which the officer is empowered to act when an officer arrests any person driving or in control of a vehicle for an alleged offense and the officer is, by this code or other law, required or authorized to take, and does take the person arrested before a magistrate without unnecessary delay.

Case Law:

> When the California Highway Patrol (CHP) did not seek criminal prosecution after seizing a car while investigating a theft report, due process required the CHP to return the car because possession gave rise to presumed ownership, which the CHP proffered no evidence to rebut, and a third-party claimant lacked standing to participate in the proceeding. Mandamus relief was appropriate because the CHP had a clear, present, and ministerial duty to return the car to the person from whom it was seized. (***Lawrence v. Superior Court*** (2018) 21 Cal.App. 5th 513.)

***Veh. Code § 22654*:** *Authorized Moving of Vehicle*:

> **(a)** Whenever any peace officer, as that term is defined in **Chapter 4.5** (commencing with **Section 830**) of **Title 3** of **Part 2** of the **Penal Code**, or other employee directing traffic or enforcing parking laws and regulations, finds a vehicle standing upon a highway, located within the territorial limits in which the officer or employee is empowered to act, in violation of **Sections 22500** and **22504**, the officer or employee may move the vehicle or require the driver or other person in charge of the vehicle to move it to the nearest available position off the roadway or to the nearest parking location, or may remove and store the vehicle if moving it off the roadway to a parking location is impracticable.
>
> **(b)** Whenever the officer or employee finds a vehicle standing upon a street, located within the territorial limits in which the officer or employee is empowered to act, in violation of a traffic ordinance enacted by local authorities to prevent flooding of adjacent property, he or she may move the vehicle or require the driver or person in charge of the vehicle to move it to the nearest available location in the vicinity where parking is permitted.
>
> **(c)** Any state, county, or city authority charged with the maintenance of any highway may move any vehicle which is disabled or abandoned or which constitutes an obstruction to traffic from the place where it is located on a highway to the nearest available position on the same highway as may be necessary to keep the highway open or safe for public travel. In addition, employees of the Department of Transportation may remove any disabled vehicle which constitutes an obstruction to traffic on a freeway from the place where it is located to the nearest available location where parking is permitted; and, if the vehicle is

unoccupied, the department shall comply with the notice requirements of **subdivision (d)**.

(d) Any state, county, or city authority charged with the maintenance or operation of any highway, highway facility, or public works facility, in cases necessitating the prompt performance of any work on or service to the highway, highway facility, or public works facility, may move to the nearest available location where parking is permitted, any unattended vehicle which obstructs or interferes with the performance of the work or service or may remove and store the vehicle if moving it off the roadway to a location where parking is permitted would be impracticable. If the vehicle is moved to another location where it is not readily visible from its former parked location or it is stored, the person causing the movement or storage of the vehicle shall immediately, by the most expeditious means, notify the owner of the vehicle of its location. If for any reason the vehicle owner cannot be so notified, the person causing the vehicle to be moved or stored shall immediately, by the most expeditious means, notify the police department of the city in which the vehicle was parked, or, if the vehicle had been parked in an unincorporated area of a county, notify the sheriff's department and nearest office of the California Highway Patrol in that county. No vehicle may be removed and stored pursuant to this subdivision unless signs indicating that no person shall stop, park, or leave standing any vehicle within the areas marked by the signs because the work or service would be done, were placed at least *24 hours* prior to the movement or removal and storage.

(e) Whenever any peace officer finds a vehicle parked or standing upon a highway in a manner so as to obstruct necessary emergency services, or the routing of traffic at the scene of a disaster, the officer may move the vehicle or require the driver or other person in charge of the vehicle to move it to the nearest available parking location. If the vehicle is unoccupied, and moving the vehicle to a parking location is impractical, the officer may store the vehicle pursuant to **Sections 22850** and **22852** and **subdivision (a)** or **(b)** of **Section 22853**. If the vehicle so moved or stored was otherwise lawfully parked, no moving or storage charges shall be assessed against or collected from the driver or owner.

> *Note*: **Veh. Code § 11850** mandates the storage of an impounded vehicle. **Veh. Code §§ 22852** and **22853** describes the post-impound hearing requirements and the procedures to be used when the owner of the vehicle cannot be ascertained, respectively.

Case Law:

> Highway Patrol Officers have the right to move illegally parked vehicles. (8 ***Ops. Cal. Atty. Gen.*** 85.)
>
> The State Park Commission has the legal authority to adopt rules for removal of vehicles left in parking areas after closing time. (28 ***Ops. Cal. Atty. Gen*****.*** 66.)
>
> A County Sheriff has the legal authority to hire a supervisor's towing service where such service is indispensable to performance of the sheriff's prescribed duties. However, a hiring arrangement entered into between the sheriff and the supervisor as contractor is unenforceable. (57 ***Ops. Cal. Atty. Gen.*** 458.)

Veh. Code § 22655**:** *Removal of Vehicle Believed to Have Been Involved in Hit-And-Run Accident*:

> **(a)** When any peace officer, as that term is defined in **Chapter 4.5** (commencing with **Section 830**) of **Title 3** of **Part 2** of the **Penal Code** or any regularly employed and salaried employee who is engaged in directing traffic or enforcing parking statutes and regulations, has reasonable cause to believe that a motor vehicle on a highway or on private property open to the general public onto which the public is explicitly or implicitly invited, located within the territorial limits in which the officer is empowered to act, has been involved in a hit-and-run accident, and the operator of the vehicle has failed to stop and comply with **Sections 20002** to **20006**, inclusive, the officer may remove the vehicle from the highway or from public or private property for the purpose of inspection.
>
> **(b)** Unless sooner released, the vehicle shall be released upon the expiration of *48 hours* after the removal from the highway or private property upon demand of the owner. When determining the *48-hour period*, weekends, and holidays shall not be included.
>
> **(c)** Notwithstanding **subdivision (b)**, when a motor vehicle to be inspected pursuant to **subdivision (a)** is a commercial vehicle, any cargo within the vehicle may be removed or transferred to another vehicle.

This section shall not be construed to authorize the removal of any vehicle from an enclosed structure on private property that is not open to the general public.

Veh. Code § 22655.3*: *Removal and Storage of Vehicle Used to Flee or Evade a Peace Officer; Storage Fees:

Any peace officer, as defined in **Chapter 4.5** (commencing with **Section 830**) of **Title 3** of **Part 2** of the **Penal Code**, pursuing a fleeing or evading person in a motor vehicle may remove and store, or cause to be removed and stored, any vehicle used in violation of **Section 2800.1** or **2800.2** from property other than that of the registered owner of the vehicle for the purposes of investigation, identification, or apprehension of the driver if the driver of the vehicle abandons the vehicle and leaves it unattended. All towing and storage fees for a vehicle removed under this section shall be paid by the owner, unless the vehicle was stolen or taken without permission.

No vehicle shall be impounded under this section if the driver is arrested before arrival of the towing equipment or if the registered owner is in the vehicle.

As used in this section, "*remove and store a vehicle*" means that the peace officer may cause the removal of a vehicle to, and storage of a vehicle in, a private lot where the vehicle may be secured by the owner of the facility or by the owner's representative.

This section is not intended to change current statute and case law governing searches and seizures.

Veh. Code § 22655.5*: *Removal of Vehicle Used in Crime; Liens:

A peace officer, as defined in **Chapter 4.5** (commencing with **Section 830**) of **Title 3** of **Part 2** of the **Penal Code**, may remove a motor vehicle from the highway or from public or private property within the territorial limits in which the officer may act under the following circumstances:

(a) When any vehicle is found upon a highway or public or private property and a peace officer has probable cause to believe that the vehicle was used as the means of committing a public offense.

(b) When any vehicle is found upon a highway or public or private property and a peace officer has probable cause to believe that the vehicle is itself evidence which tends to show that a crime has been committed or that the vehicle contains evidence, which cannot readily be removed, which tends to show that a crime has been committed.

(c) Notwithstanding **Section 3068** of the **Civil Code** or **Section 22851** of this code, no lien shall attach to a vehicle removed under this section unless the vehicle was used by the alleged perpetrator of the crime with the express or implied permission of the owner of the vehicle.

(d) In any prosecution of the crime for which a vehicle was impounded pursuant to this section, the prosecutor may request, and the court may order, the perpetrator of the crime, if convicted, to pay the costs of towing and storage of the vehicle, and any administrative charges imposed pursuant to **Section 22850.5**.

(e) This section shall become operative on *January 1, 1993*.

Case Law:

The obvious purpose of **Veh. Code § 22651(p)** (officer may remove vehicle when driver receives citation for being unlicensed and no passenger has valid license), is to prevent an offender who is cited on a public street for driving without a valid license from again committing the offense when the officer has completed the citation process and departs. *Similarly*, **Veh. Code § 22655.5** (officer may remove vehicle used to commit public offense or involved in crime), provides the officer the same means to ensure an unlicensed driver cited on private property will not recommit the same offense upon the officer's departure. Also, although a peace officer may not impound a vehicle that is on private property under **Veh. Code § 22651** (circumstances in which removal is permitted), **Veh. Code § 22655.5** (removal of vehicle officer believes to be involved in crime), *does* apply to vehicles on private property. Accordingly, police officers were authorized to impound a vehicle from private property after citing a driver for driving with a suspended license (**Veh. Code § 14601.1**), a public offense. To the extent both sections apply to vehicles on public streets and property, **Veh. Code § 22651**, is the more specific of the two. Thus, **Veh. Code**

§ 22651 will prevail in its application to the specific situations within its terms and is not rendered surplus by **Veh. Code § 22655**. (***People v. Auer*** (1991) 1 Cal.App.4th 1664.)

When the California Highway Patrol (CHP) did not seek criminal prosecution after seizing a car while investigating a theft report, due process required the CHP to return the car because possession gave rise to presumed ownership, which the CHP proffered no evidence to rebut, and a third-party claimant lacked standing to participate in the proceeding. Mandamus relief was appropriate because the CHP had a clear, present, and ministerial duty to return the car to the person from whom it was seized. (***Lawrence v. Superior Court*** (2018) 21 Cal.App.5th 513.)

Veh. Code § 22656**:** *Removal of Vehicle From Railroad Right-Of-Way, Street Railway, or Light Rail Line*:

Any peace officer, as that term is defined in **Chapter 4.5** (commencing with **Section 830**) of **Title 3** of **Part 2** of the **Penal Code**, may remove a vehicle from the right-of-way of a railroad, street railway, or light rail line located within the territorial limits in which the officer is empowered to act if the vehicle is parked or abandoned upon any track or within *7½ feet* of the nearest rail. The officer may also remove a vehicle that is parked beyond *7½ feet* of the nearest rail but within the right-of-way of a railroad, street railway, or light rail if signs are posted giving notice that vehicles may be removed.

Veh. Code § 22658**:** *Removal of Vehicle From Private Property by Property Owner; Requirements; Notice; Recovery for Damages; Liability; Towing Charge; Excessive Charges; Liability; Payment by Cash or Credit Allowed; Written Authorization From Property Owner or Lessee as Prerequisite to Removal; Storage Facility Requirements; Legislative Intent:*

(a) The owner or person in lawful possession of private property, including an association of a common interest development as defined in **Sections 4080** and **4100** or **Sections 6528** and **6534** of the **Civil Code**, may cause the removal of a vehicle parked on the property to a storage facility that meets the requirements of **subdivision (n)** under any of the following circumstances:

(1) There is displayed, in plain view at all entrances to the property, a sign not less than *17 inches* by *22 inches* in size,

with lettering not less than one inch in height, prohibiting public parking and indicating that vehicles will be removed at the owner's expense, and containing the telephone number of the local traffic law enforcement agency and the name and telephone number of each towing company that is a party to a written general towing authorization agreement with the owner or person in lawful possession of the property. The sign may also indicate that a citation may also be issued for the violation.

(2) The vehicle has been issued a notice of parking violation, and *96 hours* have elapsed since the issuance of that notice.

(3) The vehicle is on private property and lacks an engine, transmission, wheels, tires, doors, windshield, or any other major part or equipment necessary to operate safely on the highways, the owner or person in lawful possession of the private property has notified the local traffic law enforcement agency, and *24 hours* have elapsed since that notification.

(4) The lot or parcel upon which the vehicle is parked is improved with a single-family dwelling.

(b) The tow truck operator removing the vehicle, if the operator knows or is able to ascertain from the property owner, person in lawful possession of the property, or the registration records of the Department of Motor Vehicles the name and address of the registered and legal owner of the vehicle, shall immediately give, or cause to be given, notice in writing to the registered and legal owner of the fact of the removal, the grounds for the removal, and indicate the place to which the vehicle has been removed. If the vehicle is stored in a storage facility, a copy of the notice shall be given to the proprietor of the storage facility. The notice provided for in this section shall include the amount of mileage on the vehicle at the time of removal and the time of the removal from the property. If the tow truck operator does not know and is not able to ascertain the name of the owner or for any other reason is unable to give the notice to the owner as provided in this section, the tow truck operator shall comply with the requirements of **subdivision (c)** of **Section 22853** relating to notice in the same manner as applicable to an officer removing a vehicle from private property.

(c) This section does not limit or affect any right or remedy that the owner or person in lawful possession of private property may have

by virtue of other provisions of law authorizing the removal of a vehicle parked upon private property.

(d) The owner of a vehicle removed from private property pursuant to **subdivision (a)** may recover for any damage to the vehicle resulting from any intentional or negligent act of a person causing the removal of, or removing, the vehicle.

(e)

(1) An owner or person in lawful possession of private property, or an association of a common interest development, causing the removal of a vehicle parked on that property is liable for double the storage or towing charges whenever there has been a failure to comply with **paragraph (1)**, **(2)**, or **(3)** of **subdivision (a)** or to state the grounds for the removal of the vehicle if requested by the legal or registered owner of the vehicle as required by **subdivision (f)**.

(2) A property owner or owner's agent or lessee who causes the removal of a vehicle parked on that property pursuant to the exemption set forth in **subparagraph (A)** of **paragraph (1)** of **subdivision (*l*)** and fails to comply with that subdivision is guilty of an infraction, punishable by a fine of one thousand dollars ($1,000).

(f) An owner or person in lawful possession of private property, or an association of a common interest development, causing the removal of a vehicle parked on that property shall notify by telephone or, if impractical, by the most expeditious means available, the local traffic law enforcement agency within one hour after authorizing the tow. An owner or person in lawful possession of private property, an association of a common interest development, causing the removal of a vehicle parked on that property, or the tow truck operator who removes the vehicle, shall state the grounds for the removal of the vehicle if requested by the legal or registered owner of that vehicle. A towing company that removes a vehicle from private property in compliance with **subdivision (*l*)** is not responsible in a situation relating to the validity of the removal. A towing company that removes the vehicle under this section shall be responsible for the following:

(1) Damage to the vehicle in the transit and subsequent storage of the vehicle.

(2) The removal of a vehicle other than the vehicle specified by the owner or other person in lawful possession of the private property.

(g)

(1)

(A) Possession of a vehicle under this section shall be deemed to arise when a vehicle is removed from private property and is in transit.

(B) Upon the request of the owner of the vehicle or that owner's agent, the towing company or its driver shall immediately and unconditionally release a vehicle that is not yet removed from the private property and in transit.

(C) A person failing to comply with **subparagraph (B)** is guilty of a misdemeanor.

(2) If a vehicle is released to a person in compliance with **subparagraph (B)** of **paragraph (1)**, the vehicle owner or authorized agent shall immediately move that vehicle to a lawful location.

(h) A towing company may impose a charge of not more than one-half of the regular towing charge for the towing of a vehicle at the request of the owner, the owner's agent, or the person in lawful possession of the private property pursuant to this section if the owner of the vehicle or the vehicle owner's agent returns to the vehicle after the vehicle is coupled to the tow truck by means of a regular hitch, coupling device, drawbar, portable dolly, or is lifted off the ground by means of a conventional trailer, and before it is removed from the private property. The regular towing charge may only be imposed after the vehicle has been removed from the property and is in transit.

(i)

(1)

(A) A charge for towing or storage, or both, of a vehicle under this section is excessive if the charge exceeds the greater of the following:

(i) That which would have been charged for that towing or storage, or both, made at the request of a law enforcement agency under an agreement between a towing company and the law enforcement agency that exercises primary jurisdiction in the city in which is located the private property from which the vehicle was, or was attempted to be, removed, or if the private property is not located within a city, then the law enforcement agency that exercises primary jurisdiction in the county in which the private property is located.

(ii) That which would have been charged for that towing or storage, or both, under the rate approved for that towing operator by the Department of the California Highway Patrol for the jurisdiction in which the private property is located and from which the vehicle was, or was attempted to be, removed.

(B) A towing operator shall make available for inspection and copying his or her rate approved by the Department of the California Highway Patrol, if any, within *24 hours* of a request without a warrant to law enforcement, the Attorney General, district attorney, or city attorney.

(2) If a vehicle is released within *24 hours* from the time the vehicle is brought into the storage facility, regardless of the calendar date, the storage charge shall be for only one day. Not more than one day's storage charge may be required for a vehicle released the same day that it is stored.

(3) If a request to release a vehicle is made and the appropriate fees are tendered and documentation establishing that the person requesting release is entitled to possession of the vehicle, or is the owner's insurance representative, is presented within the initial *24 hours* of storage, and the storage facility fails to comply with the request to release the vehicle or is not open for business during normal business hours, then only one day's storage charge may be required to be paid until after the first business day. A business day is any day in which the

lienholder is open for business to the public for at least eight hours. If a request is made more than *24 hours* after the vehicle is placed in storage, charges may be imposed on a full calendar day basis for each day, or part thereof, that the vehicle is in storage.

(j)

(1) A person who charges a vehicle owner a towing, service, or storage charge at an excessive rate, as described in **subdivision (h)** or **(i)**, is civilly liable to the vehicle owner for four times the amount charged.

(2) A person who knowingly charges a vehicle owner a towing, service, or storage charge at an excessive rate, as described in **subdivision (h)** or **(i)**, or who fails to make available his or her rate as required in **subparagraph (B)** of **paragraph (1)** of **subdivision (i)**, is guilty of a misdemeanor, punishable by a fine of not more than two thousand five hundred dollars ($2,500), or by imprisonment in a county jail for not more than three months, or by both that fine and imprisonment.

(k)

(1) A person operating or in charge of a storage facility where vehicles are stored pursuant to this section shall accept a valid bank credit card or cash for payment of towing and storage by a registered owner, the legal owner, or the owner's agent claiming the vehicle. A credit card shall be in the name of the person presenting the card. "*Credit card*" means "*credit card*" as defined in **subdivision (a)** of **Section 1747.02** of the **Civil Code**, except, for the purposes of this section, credit card does not include a credit card issued by a retail seller.

(2) A person described in **paragraph (1)** shall conspicuously display, in that portion of the storage facility office where business is conducted with the public, a notice advising that all valid credit cards and cash are acceptable means of payment.

(3) A person operating or in charge of a storage facility who refuses to accept a valid credit card or who fails to post the required notice under **paragraph (2)** is guilty of a misdemeanor, punishable by a fine of not more than two

thousand five hundred dollars ($2,500), or by imprisonment in a county jail for not more than three months, or by both that fine and imprisonment.

(4) A person described in **paragraph (1)** who violates **paragraph (1)** or **(2)** is civilly liable to the registered owner of the vehicle or the person who tendered the fees for four times the amount of the towing and storage charges.

(5) A person operating or in charge of the storage facility shall have sufficient moneys on the premises of the primary storage facility during normal business hours to accommodate, and make change in, a reasonable monetary transaction.

(6) Credit charges for towing and storage services shall comply with **Section 1748.1** of the **Civil Code**. Law enforcement agencies may include the costs of providing for payment by credit when making agreements with towing companies as described in **subdivision (i)**.

(*l*)

(1)

(A) A towing company shall not remove or commence the removal of a vehicle from private property without first obtaining the written authorization from the property owner or lessee, including an association of a common interest development, or an employee or agent thereof, who shall be present at the time of removal and verify the alleged violation, except that presence and verification is not required if the person authorizing the tow is the property owner, or the owner's agent who is not a tow operator, of a residential rental property of 15 or fewer units that does not have an onsite owner, owner's agent or employee, and the tenant has verified the violation, requested the tow from that tenant's assigned parking space, and provided a signed request or electronic mail, or has called and provides a signed request or electronic mail within *24 hours*, to the property owner or owner's agent, which the owner or agent shall provide to the towing company within *48 hours* of

authorizing the tow. The signed request or electronic mail shall contain the name and address of the tenant, and the date and time the tenant requested the tow. A towing company shall obtain, within *48 hours* of receiving the written authorization to tow, a copy of a tenant request required pursuant to this subparagraph. For the purpose of this subparagraph, a person providing the written authorization who is required to be present on the private property at the time of the tow does not have to be physically present at the specified location of where the vehicle to be removed is located on the private property.

(B) The written authorization under **subparagraph (A)** shall include all of the following:

(i) The make, model, vehicle identification number, and license plate number of the removed vehicle.

(ii) The name, signature, job title, residential or business address, and working telephone number of the person, described in **subparagraph (A)**, authorizing the removal of the vehicle.

(iii) The grounds for the removal of the vehicle.

(iv) The time when the vehicle was first observed parked at the private property.

(v) The time that authorization to tow the vehicle was given.

(C)

(i) When the vehicle owner or his or her agent claims the vehicle, the towing company prior to payment of a towing or storage charge shall provide a photocopy of the written authorization to the vehicle owner or the agent.

(ii) If the vehicle was towed from a residential property, the towing company shall redact the information specified in **clause (ii)** of **subparagraph (B)** in the photocopy of the written authorization provided to the vehicle owner or the agent pursuant to **clause (i)**.

(iii) The towing company shall also provide to the vehicle owner or the agent a separate notice that provides the telephone number of the appropriate local law enforcement or prosecuting agency by stating "If you believe that you have been wrongfully towed, please contact the local law enforcement or prosecuting agency at [insert appropriate telephone number]." The notice shall be in English and in the most populous language, other than English, that is spoken in the jurisdiction.

(D) A towing company shall not remove or commence the removal of a vehicle from private property described in **subdivision (a)** of **Section 22953** unless the towing company has made a good faith inquiry to determine that the owner or the property owner's agent complied with **Section 22953**.

(E)

(i) General authorization to remove or commence removal of a vehicle at the towing company's discretion shall not be delegated to a towing company or its affiliates except in the case of a vehicle unlawfully parked within *15 feet* of a fire hydrant or in a fire lane, or in a manner which interferes with an entrance to, or exit from, the private property.

(ii) In those cases in which general authorization is granted to a towing company or its affiliate to undertake the removal or commence the removal of a vehicle that is unlawfully parked within *15*

feet of a fire hydrant or in a fire lane, or that interferes with an entrance to, or exit from, private property, the towing company and the property owner, or owner's agent, or person in lawful possession of the private property shall have a written agreement granting that general authorization.

(2) If a towing company removes a vehicle under a general authorization described in **subparagraph (E)** of **paragraph (1)** and that vehicle is unlawfully parked within *15 feet* of a fire hydrant or in a fire lane, or in a manner that interferes with an entrance to, or exit from, the private property, the towing company shall take, prior to the removal of that vehicle, a photograph of the vehicle that clearly indicates that parking violation. Prior to accepting payment, the towing company shall keep one copy of the photograph taken pursuant to this paragraph, and shall present that photograph and provide, without charge, a photocopy to the owner or an agent of the owner, when that person claims the vehicle.

(3) A towing company shall maintain the original written authorization, or the general authorization described in **subparagraph (E)** of **paragraph (1)** and the photograph of the violation, required pursuant to this section, and any written requests from a tenant to the property owner or owner's agent required by **subparagraph (A)** of **paragraph (1)**, for a period of three years and shall make them available for inspection and copying within *24 hours* of a request without a warrant to law enforcement, the Attorney General, district attorney, or city attorney.

(4) A person who violates this subdivision is guilty of a misdemeanor, punishable by a fine of not more than two thousand five hundred dollars ($2,500), or by imprisonment in a county jail for not more than three months, or by both that fine and imprisonment.

(5) A person who violates this subdivision is civilly liable to the owner of the vehicle or his or her agent for four times the amount of the towing and storage charges.

(m)

(1) A towing company that removes a vehicle from private property under this section shall notify the local law enforcement agency of that tow after the vehicle is removed from the private property and is in transit.

(2) A towing company is guilty of a misdemeanor if the towing company fails to provide the notification required under **paragraph (1)** within *60 minutes* after the vehicle is removed from the private property and is in transit or *15 minutes* after arriving at the storage facility, whichever time is less.

(3) A towing company that does not provide the notification under **paragraph (1)** within *30 minutes* after the vehicle is removed from the private property and is in transit is civilly liable to the registered owner of the vehicle, or the person who tenders the fees, for three times the amount of the towing and storage charges.

(4) If notification is impracticable, the times for notification, as required pursuant to **paragraphs (2)** and **(3)**, shall be tolled for the time period that notification is impracticable. This paragraph is an affirmative defense.

(n) A vehicle removed from private property pursuant to this section shall be stored in a facility that meets all of the following requirements:

(1)

(A) Is located within a *10-mile* radius of the property from where the vehicle was removed.

(B) The *10-mile* radius requirement of **subparagraph (A)** does not apply if a towing company has prior general written approval from the law enforcement agency that exercises primary jurisdiction in the city in which is located the private property from which the vehicle was removed, or if the private property is not located within a city, then the law enforcement agency that exercises primary jurisdiction in the county in which is located the private property.

(2)

(A) Remains open during normal business hours and releases vehicles after normal business hours.

(B) A gate fee may be charged for releasing a vehicle after normal business hours, weekends, and state holidays. However, the maximum hourly charge for releasing a vehicle after normal business hours shall be one-half of the hourly tow rate charged for initially towing the vehicle, or less.

(C) Notwithstanding any other provision of law and for purposes of this paragraph, "normal business hours" are Monday to Friday, inclusive, from *8 a.m.* to *5 p.m.*, inclusive, except state holidays.

(3) Has a public pay telephone in the office area that is open and accessible to the public.

(o)

(1) It is the intent of the Legislature in the adoption of **subdivision (k)** to assist vehicle owners or their agents by, among other things, allowing payment by credit cards for towing and storage services, thereby expediting the recovery of towed vehicles and concurrently promoting the safety and welfare of the public.

(2) It is the intent of the Legislature in the adoption of **subdivision (*l*)** to further the safety of the general public by ensuring that a private property owner or lessee has provided his or her authorization for the removal of a vehicle from his or her property, thereby promoting the safety of those persons involved in ordering the removal of the vehicle as well as those persons removing, towing, and storing the vehicle.

(3) It is the intent of the Legislature in the adoption of **subdivision (g)** to promote the safety of the general public by requiring towing companies to unconditionally release a vehicle that is not lawfully in their possession, thereby avoiding the likelihood of dangerous and violent confrontation and physical injury to vehicle owners and towing operators, the stranding of vehicle owners and their passengers at a dangerous time and location, and impeding expedited vehicle recovery, without wasting law enforcement's limited resources.

(p) The remedies, sanctions, restrictions, and procedures provided in this section are not exclusive and are in addition to other remedies, sanctions, restrictions, or procedures that may be provided in other provisions of law, including, but not limited to, those that are provided in **Sections 12110** and **34660**.

(q) A vehicle removed and stored pursuant to this section shall be released by the law enforcement agency, impounding agency, or person in possession of the vehicle, or any person acting on behalf of them, to the legal owner or the legal owner's agent upon presentation of the assignment, as defined in **subdivision (b)** of **Section 7500.1** of the **Business and Professions Code**; a release from the one responsible governmental agency, only if required by the agency; a government-issued photographic identification card; and any one of the following as determined by the legal owner or the legal owner's agent: a certificate of repossession for the vehicle, a security agreement for the vehicle, or title, whether paper or electronic, showing proof of legal ownership for the vehicle. Any documents presented may be originals, photocopies, or facsimile copies, or may be transmitted electronically. The storage facility shall not require any documents to be notarized. The storage facility may require the agent of the legal owner to produce a photocopy or facsimile copy of its repossession agency license or registration issued pursuant to **Chapter 11** (commencing with **Section 7500)** of **Division 3** of the **Business and Professions Code**, or to demonstrate, to the satisfaction of the storage facility, that the agent is exempt from licensure pursuant to **Section 7500.2** or **7500.3** of the **Business and Professions Code**.

Case Law:

> Absent an allegation that a homeowners' association had not complied with the provisions of **Veh. Code § 22658(a)** in removing an inoperable van, inappropriate enforcement of an operating rule prohibiting inoperable vehicles could not be found. (***Sui v. Price*** (2011) 196 Cal.App.4th 933.)
>
> **Veh. Code §§ 22651.1** and **22658(k)**, requiring operators of towing and storage facilities to accept credit cards as payment from the owners of vehicles whose vehicles have been involuntarily towed, are not invalid under the legal tender clause of the federal Constitution (**U.S. Const., Art I § 10**). They do not establish credit card drafts as legal tender; they simply require that towing and storage

facilities accept credit cards as a manner of paying legal tender. Nor do they violate equal protection principles, even if they treat such operators differently from other providers of emergency services. The statutes are rationally related to the goal of expediting the recovery of vehicles by their owners. There is a rational basis for distinguishing towing facilities from other exigent service providers in that the towing services are not sought, nor were they consented to, by the vehicle owner. The Legislature might have required the acceptance of credit cards by other businesses, but a statute is not unconstitutional simply because it might have reached other evils, so long as there is a rational basis for the Legislature's decision to go no farther than it did. And lastly, the operator of a towing and storage facility was not deprived of property without due process of law. The operator was not deprived of property; his property interest was a lien requiring possession of the vehicle, and possession was required to be surrendered upon presentation of a valid bank credit card. (***Berry v. Hannigan*** (1992) 7 Cal.App.4th 587.)

When the Legislature amended **Veh. Code § 22658** to articulate its express intent to further public safety purposes by enacting **section 22658(*l*)** and **(k)**, but did not do so with respect **to section 22658(i)**, it made an implicit legislative determination that the remaining provisions of **section 22658**, including the storage fee limitation in **section 22658(i)**, were not enacted in response to public safety concerns. (***CPF Agency Corp. v. Sevel's 24 Hour Towing Service*** (2005) 132 Cal.App.4th 1034.)

Signs posted in a liquor store parking lot which purported to limit parking to customers did not comply with the statutory requirement that a person must post a sign prohibiting public parking before authorizing an impoundment (**Veh. Code § 22658(a)**), where those parking in the lot could reasonably conclude that so long as they patronized the liquor store they could utilize the lot as a public parking area while doing errands. Thus, the trial court in an unfair business practices action (per **Bus. & Prof. Code §§ 17200 et seq.**) properly enjoined the store owner from authorizing impounds unless he posted time limit signs. (***People v. James*** (1981) 122 Cal.App.3rd 25.)

Under **Veh. Code § 22851**, which provides for a keeper's lien when a vehicle "has been removed to a garage," the

lien attaches when the vehicle has been placed within a storage facility. To construe **section 22851** to provide for the attachment of a lien when a vehicle has been hoisted from the ground or removed from the private property where parked would be to distort the plain meaning of the statute. (***People v. James*** (1981) 122 Cal.App.3rd 25.)

In the People's civil action alleging a towing company charged more for towing vehicles than the amount allowed by local ordinance, the trial court properly entered judgment in favor of defendant on the ground that the Legislature has preempted the field of excessive charges by towing companies. Although **Veh. Code § 21100(g)** permits a local entity to license and regulate towing services, that section does not expressly convey to local entities the right to determine what constitutes an excessive towing charge. Also, the ordinance did not clarify **Veh. Code § 22658(i)** (excessive towing fees from private property) by stating that the city's agreement on behalf of the police department was to be the determinant of what constituted an excessive fee. Instead, the ordinance established a different, conflicting standard from the one set by the Legislature. Further, the evidence showed that defendant had several contracts with local law enforcement agencies to tow cars for fees from $100 to $116. Thus, defendant's charges of $100 for the time covered by the complaint did not exceed the Legislature's standard. The Court further held that **Veh. Code § 22658(i)** (excessive towing fees from private property), and **Veh. Code § 21100(g)** (local entity's licensing and regulation of towing services), taken together, state that local authorities may license and regulate tow truck services or drivers whose principal place of business or employment is within their jurisdiction. However, that regulation cannot include setting a separate standard for the determination of "excessive" charges for private tows from that established by the Legislature. (***People v. PKS, Inc.*** (26 Cal.App.4th 400.)

Veh. Code § 22658 and corresponding local regulations governing towing operations were not preempted by the **Federal Aviation Administration Authorization Act** (**FAAA**) (**49 USC § 14501**), since there was a public safety purpose in the protections provided by the state and local provisions, which thus fell within the **FAAA Act's** safety exception. Because the safety regulations fell within the

traditional police powers of the states, and because Congress had expressly excepted safety regulations from the preemption clause, the ability of local municipalities to respond to local safety concerns would not be curtailed without a clear expression that such was the intent of Congress. Accordingly, where, as here, the state had delegated authority to local authorities (**Veh. Code § 21100(g)**), municipal safety regulations fell within the exception of the **FAAA Act** and were not preempted. The Court further held that California's unfair competition law prohibits not only unlawful business practices, but also unfair business practices. Accordingly, the conduct of a tow truck operator in violation of **Veh. Code § 22658** also constituted an unlawful business practice in violation of **Bus. & Prof. Code §§ 17200 et seq**., where the injuries inflicted upon the unwitting victims were substantial and the defendant's conduct was entirely unethical and unscrupulous with no redeeming value. (***People ex rel. Renne v. Servante***s (2001) 86 Cal.App.4th 1081.)

The Ninth Circuit has also held that **Veh. Code § 22658(*l*)(1)** was not preempted by the **Federal Aviation Administration Authorization Act of 1994**, **49 USC §§ 14501 et seq.**, as subsequent legislative amendments clarified that the act was safety related and was intended to protect the public from towing mistakes and theft and as a result, the statute fell under **49 USC § 14501(c)(2)(A).** (***Tillison v. City of San Diego*** (9th Cir. 2005) 406 F.3rd 1126.)

Veh. Code § 22658(i)(2) is a regulation relating to the price of tow truck "*transportation*," as that term is broadly defined in the **Federal Aviation Administration Authorization Act of 1994** (**FAAAA**), performed without the vehicle owner's prior written consent or authorization, while the statutory definition of the **FAAAA** explicitly broadens "*transportation*" to include storage related to the movement of property (**49 USC § 13102(21)(B)**) which has been held to encompass tow truck storage facilities. Accordingly, there is little doubt the storage fee regulation that is a part of the regulatory scheme set out in **Veh. Code § 22658** relates to nonconsensual tows. (***CPF Agency Corp. v. R&S Towing*** (2005) 132 Cal.App.4th 1014.)

Although the storage fee regulation of **Veh. Code § 22658(i)(2)** does not fall within the **Federal Aviation**

Administration Authorization Act of 1994's (**FAAAA**) safety exception (**49 USC § 14501(c)(2)(A)**), it does fall within the nonconsensual towing exception of **49 USC § 14501(c)(2)(C)**, and thus is not preempted by the **FAAAA**. As a result, a trial court wrongly struck a vehicle owner's causes of action against a towing company that alleged overcharging of storage fees on grounds that **Veh. Code § 22658** was preempted by the **FAAAA**. The Court further held that certain statutory provisions regulating towing companies set out in **Veh. Code §§ 22658** and **22851.12** were not preempted by the **Federal Aviation Administration Authorization Act of 1994**, **49 USCS §§ 14501 et seq.** (***CPF Agency Corp. v. Sevel's 24 Hour Towing Service*** (2005) 132 Cal.App.4th 1034.)

***Veh. Code § 22659*: ** *Removal of a Vehicle From State Property*:

Any peace officer of the Department of the California Highway Patrol or any person duly authorized by the state agency in possession of property owned by the state, or rented or leased from others by the state and any peace officer of the Department of the California Highway Patrol providing policing services to property of a district agricultural association may, subsequent to giving notice to the city police or county sheriff, whichever is appropriate, cause the removal of a vehicle from the property to the nearest public garage, under any of the following circumstances:

(a) When the vehicle is illegally parked in locations where signs are posted giving notice of violation and removal.

(b) When an officer arrests any person driving or in control of a vehicle for an alleged offense and the officer is by this code or other law required to take the person arrested before a magistrate without unnecessary delay.

(c) When any vehicle is found upon the property and report has previously been made that the vehicle has been stolen or complaint has been filed and a warrant thereon issued charging that the vehicle has been embezzled.

(d) When the person or persons in charge of a vehicle upon the property are by reason of physical injuries or illness incapacitated to that extent as to be unable to provide for its custody or removal.

The person causing removal of the vehicle shall comply with the requirements of **Sections 22852** and **22853** relating to notice.

Note: **V.C. §§ 22852** and **22853** describe the post-impound hearing requirements and the procedures to be used when the owner of the vehicle cannot be ascertained, respectively.

***Veh. Code § 22659.5*: ** *Nuisance; Abatement; Impoundment*:

Notwithstanding any other provision of law, a city or a county may adopt an ordinance declaring a motor vehicle to be a public nuisance subject to seizure and an impoundment period of up to *30 days* when the motor vehicle is used in the commission or attempted commission of an act that violates **Section 266h** (pimping) or **266i** (pandering) of, **subdivision (h)** of **Section 374.3** (dumping commercial waste matter) of, or **subdivision (b)** of **Section 647** (prostitution) of, the **Penal Code**, if the owner or operator of the vehicle has had a prior conviction for the same offense within the past three years. An ordinance adopted pursuant to this section may incorporate any combination or all of these offenses. The vehicle may only be impounded pursuant to a valid arrest of the driver for a violation of one of these provisions. An ordinance adopted pursuant to this section shall, at a minimum, contain all of the following provisions:

(a) Within *two working days* after impoundment, the impounding agency shall send a notice by certified mail, return receipt requested, to the legal owner of the vehicle, at the address obtained from the department, informing the owner that the vehicle has been impounded. The notice shall also include notice of the opportunity for a post-storage hearing to determine the validity of the storage or to determine mitigating circumstances establishing that the vehicle should be released. The impounding agency shall be prohibited from charging for more than five days' storage if it fails to notify the legal owner within two working days after the impoundment when the legal owner redeems the impounded vehicle. The impounding agency shall maintain a published telephone number that provides information *24 hours* a day regarding the impoundment of vehicles and the rights of a legal owner and a registered owner to request a hearing. The notice shall include all of the following information:

(1) The name, address, and telephone number of the agency providing the notice.

(2) The location of the place of storage and description of the vehicle, that shall include, if available, the model or make, the manufacturer, the license plate number, and the mileage.

(3) The authority and purpose for the removal of the vehicle.

(4) A statement that, in order to receive a post-storage hearing, the owners, or their agents, shall request the hearing in person, writing, or by telephone within *10 days* of the date appearing on the notice.

(b) The post-storage hearing shall be conducted within *48 hours* of the request, excluding weekends and holidays. The public agency may authorize one of its own officers or employees to conduct the hearing if that hearing officer is not the same person who directed the seizure of the vehicle.

(c) Failure of the legal and the registered owners, or their agents, to request or to attend a scheduled hearing shall satisfy the post-storage hearing requirement.

(d) The agency employing the person who directed the storage shall be responsible for the costs incurred for towing and storage if it is determined in the post-storage hearing that reasonable grounds for the storage are not established.

(e) Any period during which a vehicle is subjected to storage under an ordinance adopted pursuant to this section shall be included as part of the period of impoundment.

(f) The impounding agency shall release the vehicle to the registered owner or his or her agent prior to the end of the impoundment period under any of the following circumstances:

(1) The driver of the impounded vehicle was arrested without probable cause.

(2) The vehicle is a stolen vehicle.

(3) The vehicle is subject to bailment and was driven by an unlicensed employee of a business establishment, including a parking service or repair garage.

(4) The driver of the vehicle is not the sole registered owner of the vehicle and the vehicle is being released to another registered owner of the vehicle who agrees not to allow the driver to use the vehicle until after the end of the impoundment period.

(5) The registered owner of the vehicle was neither the driver nor a passenger of the vehicle at the time of the alleged violation, or was unaware that the driver was using the vehicle to engage in activities subject to **Section 266h** or **266i** of, or **subdivision (b)** of **Section 647** of, the **Penal Code**.

(6) A spouse, registered domestic partner, or other affected third party objects to the impoundment of the vehicle on the grounds that it would create a hardship if the subject vehicle is the sole vehicle in a household. The hearing officer shall release the vehicle where the hardship to a spouse, registered domestic partner, or other affected third party created by the impoundment of the subject vehicle, or the length of the impoundment, outweigh the seriousness and the severity of the act in which the vehicle was used.

(g) Notwithstanding any provision of law, if a motor vehicle is released prior to the conclusion of the impoundment period because the driver was arrested without probable cause, neither the arrested person nor the registered owner of the motor vehicle shall be responsible for the towing and storage charges.

(h) Except as provided in **subdivision (g)**, the registered owner or his or her agent shall be responsible for all towing and storage charges related to the impoundment.

(i) A vehicle removed and seized under an ordinance adopted pursuant to this section shall be released to the legal owner of the vehicle or the legal owner's agent prior

to the end of the impoundment period if both of the following conditions are met:

(1) The legal owner is a motor vehicle dealer, bank, credit union, acceptance corporation, or other licensed financial institution legally operating in this state, or is another person who is not the registered owner and holds a security interest in the vehicle.

(2) The legal owner or the legal owner's agent pays all towing and storage fees related to the seizure and impoundment of the vehicle.

(j)

(1) No lien sale processing fees shall be charged to the legal owner who redeems the vehicle prior to the *15th day* of the impoundment period. Neither the impounding authority nor any person having possession of the vehicle shall collect from the legal owner as described in **paragraph (1)** of **subdivision (i)**, or the legal owner's agent, any administrative charges imposed pursuant to **Section 22850.5**, unless the legal owner voluntarily requested a post-storage hearing.

(2) A person operating or in charge of a storage facility where vehicles are stored pursuant to this section shall accept a valid bank credit card or cash for payment of towing, storage, and related fees by a legal or registered owner or the owner's agent claiming the vehicle. A credit card or debit card shall be in the name of the person presenting the card. For purposes of this section, "credit card" is as defined in **subdivision (a)** of **Section 1747.02** of the **Civil Code**. Credit card does not include a credit card issued by a retail seller.

(3) A person operating or in charge of a storage facility described in **paragraph (2)** who violates **paragraph (2)** shall be civilly liable to the owner of the vehicle or the person who tendered the fees for four times the amount of the towing, storage, and related fees not to exceed five hundred dollars ($500).

(4) A person operating or in charge of the storage facility described in **paragraph (2)** shall have sufficient funds on the premises of the primary storage facility during normal business hours to accommodate, and make change for, a reasonable monetary transaction.

(5) Credit charges for towing and storage services shall comply with **Section 1748.1** of the **Civil Code**. Law enforcement agencies may include the costs of providing for payment by credit when making agreements with towing companies on rates.

(6) A failure by a storage facility to comply with any applicable conditions set forth in this subdivision shall not affect the right of the legal owner or the legal owner's agent to retrieve the vehicle if all conditions required of the legal owner or legal owner's agent under this subdivision are satisfied.

(k)

(1) The legal owner or the legal owner's agent shall present to the law enforcement agency, impounding agency, person in possession of the vehicle, or any person acting on behalf of those agencies, a copy of the assignment, as defined in **subdivision (b)** of **Section 7500.1** of the **Business and Professions Code**, a release from the one responsible governmental agency, only if required by the agency, a government-issued photographic identification card, and any one of the following as determined by the legal owner or the legal owner's agent: a certificate of repossession for the vehicle, a security agreement for the vehicle, or title, whether or not paperless or electronic, showing proof of legal ownership for the vehicle. Any documents presented may be originals, photocopies, or facsimile copies, or may be transmitted electronically. The law enforcement agency, impounding agency, or other governmental agency, or any person acting on behalf of those agencies, shall not require any documents to be notarized.

The law enforcement agency, impounding agency, or any person acting on behalf of those agencies may require the agent of the legal owner to produce a photocopy or facsimile copy of its repossession agency license or registration issued pursuant to **Chapter 11** (commencing with **Section 7500)** of **Division 3** of the **Business and Professions Code**, or to demonstrate, to the satisfaction of the law enforcement agency, impounding agency, or any person acting on behalf of those agencies that the agent is exempt from licensure pursuant to **Section 7500.2** or **7500.3** of the **Business and Professions Code**.

(2) Administrative costs authorized under **subdivision (a)** of **Section 22850.5** shall not be charged to the legal owner of the type specified in **paragraph (1)** of **subdivision (i)** who redeems the vehicle unless the legal owner voluntarily requests a post-storage hearing. A city, county, city and county, or state agency shall not require a legal owner or a legal owner's agent to request a post-storage hearing as a requirement for release of the vehicle to the legal owner or the legal owner's agent. The law enforcement agency, impounding agency, or other governmental agency, or any person acting on behalf of those agencies, shall not require any documents other than those specified in this paragraph. The legal owner or the legal owner's agent shall be given a copy of any documents he or she is required to sign, except for a vehicle evidentiary hold log book. The law enforcement agency, impounding agency, or any person acting on behalf of those agencies, or any person in possession of the vehicle, may photocopy and retain the copies of any documents presented by the legal owner or legal owner's agent. The legal owner shall indemnify and hold harmless a storage facility from any claims arising out of the release of the vehicle to the legal owner or the legal owner's agent and from any damage to the vehicle after its release, including the reasonable costs associated with defending any such claims.

(*l*) A legal owner, who meets the requirements for release of a vehicle pursuant to **subdivision (i)**, or the legal

owner's agent, shall not be required to request a post-storage hearing as a requirement for release of the vehicle to the legal owner or the legal owner's agent.

(m)

(1) A legal owner, who meets the requirements for release of a vehicle pursuant to **subdivision (i)**, or the legal owner's agent, shall not release the vehicle to the registered owner of the vehicle or an agent of the registered owner, unless the registered owner is a rental car agency, until after the termination of the impoundment period.

(2) Prior to relinquishing the vehicle, the legal owner may require the registered owner to pay all towing and storage charges related to the seizure and impoundment.

(n)

(1) A vehicle removed and seized pursuant to an ordinance adopted pursuant to this section shall be released to a rental car agency prior to the end of the impoundment period if the agency is either the legal owner or registered owner of the vehicle and the agency pays all towing and storage fees related to the seizure and impoundment of the vehicle.

(2) The owner of a rental vehicle that was seized under an ordinance adopted pursuant to this section may continue to rent the vehicle upon recovery of the vehicle. However, the rental car agency shall not rent another vehicle to the driver of the vehicle that was seized until the impoundment period has expired.

(3) The rental car agency may require the person to whom the vehicle was rented to pay all towing and storage charges related to the seizure and impoundment.

Veh. Code § 22660*: *Abatement and Removal of Abandoned Vehicles as Public Nuisance; Local Ordinances:

> Notwithstanding any other provision of law, a city, county, or city and county may adopt an ordinance establishing procedures for the abatement and removal, as public nuisances, of abandoned, wrecked, dismantled, or inoperative vehicles or parts thereof from private or public property, and for the recovery, pursuant to **Section 25845** or **38773.5** of the **Government Code**, or assumption by the local authority, of costs of administration and the removal.
>
> *Case Law*:
>
> > A city ordinance that declared certain inoperable vehicles a nuisance per se did not exceed the city's legislative authority. Where the Legislature adopts a general scheme of regulation, control of that subject ceases as to local regulation. However, by enacting the **Vehicle Code**, the state Legislature did not preempt local regulation of inoperable vehicles. **Veh. Code § 22660** clearly allows a local ordinance declaring inoperable vehicles to be a public nuisance. The ordinance was also not preempted by **Pen. Code § 372**, which prescribes the punishment for maintaining a nuisance "the punishment for which is not otherwise prescribed." (***City of Costa Mesa v. Soffer*** (1992) 11 Cal.App.4th 378.)

Veh. Code § 22661*: *Contents of Ordinance Establishing Procedures for Removal of Abandoned Vehicles: Any ordinance establishing procedures for the removal of abandoned vehicles shall contain all of the following provisions:

> **(a)** The requirement that notice be given to the Department of Motor Vehicles within *five days* after the date of removal, identifying the vehicle or part thereof and any evidence of registration available, including, but not limited to, the registration card, certificates of ownership, or license plates.
>
> **(b)** Making the ordinance inapplicable to (1) a vehicle or part thereof that is completely enclosed within a building in a lawful manner where it is not visible from the street or other public or private property or (2) a vehicle or part thereof that is stored or parked in a lawful manner on private property in connection with the business of a licensed dismantler, licensed vehicle dealer, or a junkyard. This exception shall not, however, authorize the

maintenance of a public or private nuisance as defined under provisions of law other than this chapter.

(c) The requirement that not less than a *10-day* notice of intention to abate and remove the vehicle or part thereof as a public nuisance be issued, unless the property owner and the owner of the vehicle have signed releases authorizing removal and waiving further interest in the vehicle or part thereof. However, the notice of intention is not required for removal of a vehicle or part thereof that is inoperable due to the absence of a motor, transmission, or wheels and incapable of being towed, is valued at less than two hundred dollars ($200) by a person specified in **Section 22855**, and is determined by the local agency to be a public nuisance presenting an immediate threat to public health or safety, provided that the property owner has signed a release authorizing removal and waiving further interest in the vehicle or part thereof. Prior to final disposition under **Section 22662** of such a low-valued vehicle or part for which evidence of registration was recovered pursuant to subdivision (a), the local agency shall provide notice to the registered and legal owners of intent to dispose of the vehicle or part, and if the vehicle or part is not claimed and removed within *12 days* after the notice is mailed, from a location specified in **Section 22662**, final disposition may proceed. No local agency or contractor thereof shall be liable for damage caused to a vehicle or part thereof by removal pursuant to this section.

> This subdivision applies only to inoperable vehicles located upon a parcel that is (1) zoned for agricultural use or (2) not improved with a residential structure containing one or more dwelling units.

(d) The *10-day* notice of intention to abate and remove a vehicle or part thereof, when required by this section, shall contain a statement of the hearing rights of the owner of the property on which the vehicle is located and of the owner of the vehicle. The statement shall include notice to the property owner that he or she may appear in person at a hearing or may submit a sworn written statement denying responsibility for the presence of the vehicle on the land, with his or her reasons for such denial, in lieu of appearing. The notice of intention to abate shall be mailed, by registered or certified mail, to the owner of the land as shown on the last equalized assessment roll and to the last registered and legal owners of record unless the vehicle is in such condition that identification numbers are not available to determine ownership.

(e) The requirement that a public hearing be held before the governing body of the city, county, or city and county, or any other board, commissioner, or official of the city, county, or city and county as designated by the governing body, upon request for such a hearing by the owner of the vehicle or the owner of the land on which the vehicle is located. This request shall be made to the appropriate public body, agency, or officer within *10 days* after the mailing of notice of intention to abate and remove the vehicle or at the time of signing a release pursuant to **subdivision (c)**. If the owner of the land on which the vehicle is located submits a sworn written statement denying responsibility for the presence of the vehicle on his or her land within that time period, this statement shall be construed as a request for hearing that does not require the presence of the owner submitting the request. If the request is not received within that period, the appropriate public body, agency, or officer shall have the authority to remove the vehicle.

(f) The requirement that after a vehicle has been removed, it shall not be reconstructed or made operable, unless it is a vehicle that qualifies for either horseless carriage license plates or historical vehicle license plates, pursuant to **Section 5004**, in which case the vehicle may be reconstructed or made operable.

(g) A provision authorizing the owner of the land on which the vehicle is located to appear in person at the hearing or present a sworn written statement denying responsibility for the presence of the vehicle on the land, with his or her reasons for the denial. If it is determined at the hearing that the vehicle was placed on the land without the consent of the landowner and that he or she has not subsequently acquiesced to its presence, then the local authority shall not assess costs of administration or removal of the vehicle against the property upon which the vehicle is located or otherwise attempt to collect those costs from the owner.

Case Law:

> **Veh. Code § 22661**, which sets forth several mandatory provisions to be incorporated into any local ordinance "establishing procedures for the removal of abandoned vehicles," applies to ordinances concerning inoperable vehicles. Although the statute only uses the word "*abandoned*," it clearly relates back to **Veh. Code § 22660**, which governs ordinances concerning the control of "*abandoned, wrecked, dismantled, or inoperative vehicles or parts thereof*." (***City of Costa Mesa v. Soffer*** (1992) 11 Cal.App.4th 378.)

Veh. Code § 23594: *Duration of a DUI Impoundment*:

(a) Except as provided in **subdivision (b)**, the interest of any registered owner of a motor vehicle that has been used in the commission of a violation of **Section 23152** or **23153** for which the owner was convicted, is subject to impoundment as provided in this section. Upon conviction, the court may order the vehicle impounded at the registered owner's expense for not less than *one* nor more than *30 days*.

If the offense occurred within *five years* of a prior offense which resulted in conviction of a violation of **Section 23152** or **23153**, the prior conviction shall also be charged in the accusatory pleading and if admitted or found to be true by the jury upon a jury trial or by the court upon a court trial, the court shall, except in an unusual case where the interests of justice would best be served by not ordering impoundment, order the vehicle impounded at the registered owner's expense for not less than one nor more than *30 days*.

If the offense occurred within *five years* of two or more prior offenses which resulted in convictions of violations of **Section 23152** or **23153**, the prior convictions shall also be charged in the accusatory pleading and if admitted or found to be true by the jury upon a jury trial or by the court upon a court trial, the court shall, except in an unusual case where the interests of justice would best be served by not ordering impoundment, order the vehicle impounded at the registered owner's expense for not less than one nor more than *90 days*.

For the purposes of this section, the court may consider in the interests of justice factors such as whether impoundment of the vehicle would result in a loss of employment of the offender or the offender's family, impair the ability of the offender or the offender's family to attend school or obtain medical care, result in the loss of the vehicle because of inability to pay impoundment fees, or unfairly infringe upon community property rights or any other facts the court finds relevant. When no impoundment is ordered in an unusual case pursuant to this section, the court shall specify on the record and shall enter in the minutes the circumstances indicating that the interests of justice would best be served by that disposition.

(b) No vehicle which may be lawfully driven on the highway with a class C or class M driver's license, as specified in **Section 12804.9**, is subject to impoundment under this section if there is a community property interest in the vehicle owned by a person other than the defendant and the vehicle is the sole vehicle available to the defendant's immediate family which may be operated on the highway with a class C or class M driver's license.

Veh. Code § 2814.2*: *Impoundment of a Vehicle at a Sobriety Checkpoint:

(a) A driver of a motor vehicle who fails to stop and submit to a sobriety checkpoint inspection conducted by a law enforcement agency when signs and displays are posted requiring that stop is guilty of an infraction.

(b) Impoundment of a vehicle at a sobriety checkpoint is prohibited if the driver's only offense is a violation of **V.C. § 12500** (driving without a valid license).

(c) Requires a law enforcement officer, in the case of a driver who is in violation of **V.C. § 12500**, to make a reasonable attempt to identify the registered owner of the vehicle and release the vehicle to him or her if licensed, or to a licensed driver authorized by the registered owner. If a notice to appear is issued to the unlicensed driver, the name and driver's license number of the licensed driver to whom the car is released shall be listed on the officer's copy of the notice. When a vehicle cannot be released, it shall be *removed* pursuant to **V.C. § 22651(p)**, whether or not a notice to appear is issued.

Note: See **V.C. § 14602:** A vehicle removed pursuant to **V.C. § 2814.2** shall be released to the registered owner or his or her agent at any time the facility to which the vehicle has been removed is open, upon presentation of the registered owner's or his or her agent's valid driver's license and proof of current vehicle registration.

See "*DUI* (and other regulatory "*special needs*") *Checkpoints*," under "*Detentions*" (Chapter 4), above.

The "*Standardized Procedures*" *Requirement*:

Rule: Post impoundment inventory searches are only proper if done according to "*standardized procedures*" used by the involved law enforcement agency. (***United States v. Torres*** (9th Cir. 2016) 828 F.3rd

1113, 1118; ***United States v. Anderson*** (9th Cir. 2022) 56 F.4th 748, 754-758.)

Case Law:

> "Once a vehicle has been legally impounded, the police may conduct an inventory search, as long as it conforms to the standard procedures of the local police department." (***United States v. Cervantes*** (9th Cir. 2012) 703 F.3rd 1135, 1141; ***United States v. Anderson***, *supra*, at p. 757.)
>
> > "In the context of an inventory search, the individual's privacy interest is protected by routine administrative procedures that limit an officer's discretion in conducting the search." (***United States v. Anderson***, *supra*.)
> >
> > Note also that "*mixed motives*" do not invalidate an otherwise law inventory search. "(A)n 'otherwise reasonable inventory search' is not invalid merely because the police have a mixed motive for the search. (Citation) When an inventory search would have occurred in the absence of a motive to search for evidence of a crime, 'the mere presence of a criminal investigatory motive or dual motive—one valid, and one impermissible—does not render an [inventory] search invalid.'" (***United States v. Anderson***, *supra*, at p. 758; quoting ***United States v. Magdirila*** (9th Cir. 2020) 962 F.3rd 1152, 1157.)
> >
> > So long as the impounding officers show "substantial compliance" with the procedures with their department's procedures, which itself "supports the conclusion that the deputies performed the search in good faith, meaning it was not conducted solely for the purpose of obtaining evidence of a crime," then the impound and inventory search of a defendant's vehicle will be upheld. The test "applicable to an inventory search is not an administrative policy or a procedural manual, but rather the **Fourth Amendment** itself, which protects citizens from unreasonable searches and seizures. Under the **Fourth Amendment's** reasonableness standard, the question is not how the deputies' performance compares with the officers in other cases, . . . but the extent to which the deputies' noncompliance raises the inference that their sole motive was to obtain evidence of a crime." (***United States v. Anderson***, *supra*, at p. 760-762.)

Format:

Such "*standardized procedures*" need not be formal or even in written form, so long as the searching officer is not allowed to act in his own "*unfettered discretion*." (***People v. Needham*** (2000) 79 Cal.App.4th 260, 265; oral vehicle inventory search policy of sheriff's department taught to deputies justified an inventory search of property on a motorcycle.)

It has been held that **Veh. Code § 22651(p)** and "*established department practices*" are enough to meet this requirement. (***People v. Benites*** (1992) 9 Cal.App.4th 309; ***People v. Steeley*** (1989) 210 Cal.App.3rd 887.)

The *standard inventory procedures* which prevail throughout the country and approved by an overwhelming majority of courts, if followed by the searching officers, will provide the standards necessary to make an inventory search legal. (***People v. Green*** (1996) 46 Cal.App.4th 367.)

The officers' failure to precisely comply with the inventory search policy did not render the search of a vehicle invalid under the **Fourth Amendment** because, by creating a list of recovered items and incorporating it into the CHP 180 form, the officers complied substantially with the policy's direction to inventory the property in an impounded vehicle. Given the early stage at which an officer decided to impound the vehicle in which defendant was sitting, it was a reasonable view of the evidence that the officer's intent at the time the vehicle was impounded was administrative rather than investigatory (***United States v. Magdirila*** (9th Cir. 2020) 962 F.3rd 1152, 1157-1158.)

"For purposes of the **Fourth Amendment's** reasonableness test, the issue is whether the inventory search is pretextual, not whether it fails to achieve full compliance with the administrative procedures. '[R]easonable police regulations relating to inventory procedures administered in good faith satisfy the **Fourth Amendment**,' even if the police implementation of standardized inventorying procedure is 'somewhat slipshod.'" (***United States v. Anderson*** (9th Cir. 2022) 56 F.4th 748, 758, quoting ***Colorado v. Bertine*** (1987) 479 U.S. 367, 369, 374 [107 S.Ct. 738; 93 L.Ed.2nd 739].)

> "The failure to complete an inventory form or 'other comparable administrative errors' does not invalidate

the search if there is no evidence that the 'the officers were rummaging for evidence.'" (***United States v. Anderson***, *supra*, quoting ***United States v. Garay*** (9th Cir. 2019) 938 F.3rd 1111-1112.)

Containers in the Vehicle:

This includes *closed containers* in the vehicle (***South Dakota v. Opperman*** (1976) 428 U.S. 364 [96 S.Ct. 3092; 49 L.Ed.2nd 1000]; ***People v. Salcero*** (1992) 6 Cal.App.4th 720; ***People v. Smith*** (2020) 46 Cal.App.5th 375, 394.), at least if the department's standardized procedures include closed containers. (***Florida v. Wells*** (1990) 495 U.S. 1, 4 [109 L. Ed. 2d 1; 110 S. Ct. 1632]; citing ***Colorado v. Bertine*** (1987) 479 U.S. 367 [107 S.Ct. 738; 93 L.Ed.2nd 739].)

"'A police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself.'" (***People v. Smith***, *supra*, quoting ***Florida v. Wells***, *supra.*)

If containers are to be opened, the standardized procedures must cover that topic as well, so as to preclude the inventory search being used as a ruse for a general rummaging for any incriminatory evidence. (***Florida v. Wells***, *supra*, at p. 4 [109 L.Ed.2nd at p. 6]; ***People v. Williams*** (1999) 20 Cal.4th 119, 138.)

"'When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents. These procedures developed in response to *three distinct needs* (Italics added): the protection of the owner's property while it remains in police custody, [citation]; the protection of the police against claims or disputes over lost or stolen property, [citation]; and the protection of the police from potential danger.' (Citation.) 'Whether 'impoundment is warranted under this community caretaking doctrine depends on the location of the vehicle and the police officers' duty to prevent it from creating a hazard to other drivers or being a target for vandalism or theft.'" (***People v. Smith***, *supra*, at pp. 393-394; quoting ***People v. Williams*** (2006) 145 Cal.App.4th 756, 761.)

An inventory search may extend to a car trunk and closed containers located within the car, as well as a locked compartment under the seat of a motorcycle. (***People v. Smith***, *supra*, at p. 393; citing ***Colorado v. Bertine*** (1987) 479 U.S. 367, 375 [107 S.Ct. 738; 93 L.Ed.2nd 739].)

See ***People v. Nottoli*** (2011) 199 Cal.App.4th 531, 545-546, where the lack of any evidence as to the arresting officer's department's policies and procedures concerning the searching of containers, including cellphones, led to the finding that the cellphone in question could not be opened and searched as a part of the inventory search of a lawfully impounded vehicle.

Limitations:

The standardized criteria requirements, however, only relate to an inventory search. They were not intended to necessarily apply to an officer's decision to impound the vehicle in the first place. Although an impoundment decision made pursuant to standardized criteria is more likely to satisfy the **Fourth Amendment** than one not made pursuant to standardized criteria, it is not legally necessary that that be the case. The reasonableness of impounding a vehicle based upon the circumstances is the test under the **Fourth Amendment**. (***People v. Shafrir*** (2010) 183 Cal.App.4th 1238.)

Additional Case Law:

Removal of the dashboard console was held to be beyond the scope of an inventory search of an impounded vehicle in that it was inconsistent with the Sheriff's Department's inventory search protocol. (**People *v.* Zabala** (2018) 19 Cal.App.5th 335, 340-343; upholding the search instead on a theory of probable cause, under the "automobile exception.")

Unless required by the officer's department inventory procedures, the officer is *not* required to allow a subject to remove personal items prior to conducting the inventory of an impounded vehicle. (***United States v. Penn*** (9th Cir. 2000) 233 F.3rd 1111.)

Note: The evidence was suppressed in ***Penn*** in an unpublished decision on remand and after rehearing, based upon evidence that the officer opened and looked into a closed container in violation of his department's written inventory procedures. (***United States v. Penn*** (Dist. Ct. OR. 2001) 2001 U.S. Dist. LEXIS 19649.)

In a prosecution for being a felon in unlawful possession of a firearm, an officer's decision to impound defendant's vehicle after arresting him for driving while under the influence of alcohol, and when the car was parked near a red zone in a parking structure of an apartment complex in which defendant did not live, was permissible under the **Fourth Amendment** because it was consistent with his police department's policy and served legitimate community caretaking purposes; i.e., to promote other vehicles' convenient ingress and egress to the parking area and to safeguard the car from vandalism or theft. The inventory search of defendant's vehicle, including the air filter compartment of the vehicle, was also proper under the **Fourth Amendment** because, in fulfilling his duty to search all containers pursuant to department policy, the officer acted within the parameters of that policy when he unlatched the air filter compartment where he found a firearm. (***United States v. Torres*** (9th Cir. 2016) 828 F.3rd 1113, 1122.)

The officers' failure to precisely comply with the inventory search policy did not render the search of a vehicle invalid under the **Fourth Amendment** because, by creating a list of recovered items and incorporating it into the CHP 180 form, the officers complied substantially with the policy's direction to inventory the property in an impounded vehicle. Given the early stage at which an officer decided to impound the vehicle which defendant was sitting, it was a reasonable view of the evidence that the officer's intent at the time the vehicle was impounded was administrative rather than investigatory (***United States v. Magdirila*** (9th Cir. 2020) 962 F.3rd 1152, 1157-1158.)

Pretext Impounds: *Prohibition of an Investigatory Purpose*:

The impounding of a vehicle done merely as a *pretext* for conducting an investigatory search is not lawful, and the resulting evidence will be suppressed. (***People v. Aguilar*** (1991) 228 Cal.App.3rd 1049; ***People v. Lee*** (2019) 40 Cal.App.5th 853. 867-869; ***United States v. Woodard*** (10th Cir. OK, 2021) 5 F.4th 1148.)

"[A]n inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." (***United States v. Torres*** (9th Cir. 2016) 828 F.3rd 1113, 1118, quoting ***Florida v. Wells*** (1990) 495 U.S. 1, 4 [110 S.Ct. 1632; 109 L.Ed.2nd 1]; ***People v. Lee***, *supra*.)

See also ***People v. Valenzuela*** (1999) 74 Cal.App.4th 1202; noting that the rule allowing a "*pretext*" stop under ***Whren v. United States*** (1996) 517 U.S. 806 [116 S.Ct. 1769; 135 L.Ed.2nd 89] is inapplicable to stops or

detentions when the legal excuse is to conduct an "*administrative search*," such as inspecting the licensing of a taxicab or an *inventory search* of a vehicle.

The sole legal basis for doing inventory searches is to (1) protect the owner's property while it is in police custody, (2) insure against claims of lost, stolen or vandalized property, or (3) protect the police from danger. (***South Dakota v. Opperman*** (1976) 428 U.S. 364 [96 S.Ct. 3092; 49 L.Ed.2nd 1000].)

Using an inventory search of a vehicle as a "ruse for a general rummaging in order to discover incriminating evidence" is not a legal justification, or at least can't be the only reason why a car is searched. (***Florida v. Wells*** (1990) 495 U.S. 1 [110 S.Ct. 1632; 109 L.Ed.2nd 1]; ***People v. Williams*** (1999) 20 Cal.4th 119, 126.)

> *Note*: Officers *must* be familiar with their own department's policies for doing vehicle inventory searches and be prepared to testify to the correct factual justifications for conducting such a search.

Impounding a vehicle for the purpose of allowing the officer to do an inventory search of the vehicle in the hopes of finding narcotics-related evidence, when none of the "community caretaking function" elements apply, is illegal. While stopping the vehicle may be for an ulterior purpose, so long as there is also an objectively reasonable basis for doing so (e.g., seeing a traffic violation), the officer's subjective motivations *are* in issue when evaluating the legality of impounding the vehicle and conducting an inventory search. (***People v. Torres*** (2010) 188 Cal.App.4th 775, 785-793; impoundment and inventory search held to be illegal when the officer admitted that his purpose was to look for narcotics-related evidence. See also ***People v. Lee*** (2019) 40 Cal.App.5th 853. 867-869.)

The seizure and subsequent inventory search of defendant's car was held *not* to be justified by the community caretaking exception to the **Fourth Amendment's** warrant requirement. Under the community caretaking exception, police officers may impound vehicles that jeopardize public safety and the efficient movement of traffic. Neither officer provided testimony that defendant's car was parked illegally, posed a safety hazard, nor was vulnerable to vandalism or theft. Although defendant's car was not located close to his home when the officers impounded it, there was no evidence that it would have been vulnerable to vandalism or theft if it were left in its residential location or that it posed a safety hazard. The court concluded that seizure and inventory search of defendant's car was a pretext for an investigatory search for evidence of narcotics trafficking. (***United States v. Cervantes*** (9th Cir. 2012) 703 F.3rd 1135, 1140-1143.)

> Note, however, the dissent's argument that the Court should "*necessarily*" find that a vehicle left in any public place might be easily subject to vandalism or theft, citing ***Ramirez v. City of Buena Park*** (9th Cir. 2009) 560 F.3rd 1012, 1025. (***United States v. Cervantes***, *supra*, at p. 1144.)

There must be some evidence in the record that the vehicle was actually impounded. An arresting officer's testimony that he searched the vehicle as a pre-impound inventory search, without any evidence to support the theory that the officers in fact intended to impound the vehicle, or that it was it was actually impounded, is insufficient to sustain the trial court's conclusion that a warrantless search of the vehicle was a valid impound search. (***People v. Wallace*** (2017) 15 Cal.App.5th 82, 89-93.)

"The purpose of such a search is to 'produce an inventory' of the items in the car, in order 'to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger.' ***Florida v. Wells***, 495 U.S. 1, 4, 110 S.Ct. 1632, 109 L.Ed.2nd 1 (1990) (internal quotation marks omitted). Thus, the purpose of the search must be non-investigative; it must be 'conducted on the basis of something other than suspicion of evidence of criminal activity.' (***United States v.***) ***Torres***, (9th Cir. 2016) 828 F.3rd (1113) at 1118 (emphasis added) (internal quotation marks omitted). The search cannot be 'a ruse for a general rummaging in order to discover incriminating evidence.' ***Wells***, 495 U.S. at 4." (***United States v. Johnson*** (9th Cir. 2018) 889 F.3rd 1120, 1125.)

> See also ***Id.***, at p. 1128: ". . . the purpose of such a search must be unrelated to criminal investigation; it must function instead to secure and to protect an arrestee's property (and likewise to protect the police department against fraudulent claims of lost or stolen property)."

The impoundment of defendant's vehicle was found to be pretextual, and thus illegal, where: (1) It was on private property (a QuikTrip store parking lot) where public safety and convenience are less likely to be at risk; (2) the officers did not consult the QuikTrip employees to see if they wanted the vehicle impounded; (3) the officers had an alternative to impoundment, in that defendant had asked the officers if he could call someone, but the officers refused without providing an explanation (noting that neither party raised the issue of whether the police have a duty to allow an arrestee to contact someone else to pick up a vehicle before impounding it, but that this issue had nothing to do with whether alternatives existed to impoundment); (4) the government conceded that the vehicle was not implicated in a crime, so there was no need to preserve

evidence by impounding the car; and (5) defendant did not consent to impoundment. (***United States v. Woodard*** (10th Cir. OK 2021) 5 F.4th 1148.)

Defendant parking his vehicle in a third-person's driveway and where the resident asks law enforcement to remove it warrants the impoundment and inventory search of that vehicle, so long as the inventory search comports with the law enforcement agency's standard procedures. (***United States v. Anderson*** (9th Cir. 2022) 56 F.4th 748, 754-758.)

Inventory Searches as an Exception to the Rule of ***Whren v. United States***:

In ***Whren v. United States*** (1996) 517 U.S. 806 [116 S.Ct. 1769; 135 L.Ed.2nd 89], the U.S. Supreme Court established the rule that the use of a "*pretext*" to make a traffic stop (i.e., using a traffic infraction when the officers' real motivation involved an issue not supported by the necessary reasonable suspicion) was lawful, so long as there was some lawful reason justifying the stop.

"An action is 'reasonable' under the **Fourth Amendment**, regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify the action.' ***Brigham City v. Stuart***, 547 U.S. 398, 404, 126 S.Ct. 1943, 164 L.Ed.2nd 650 (2006) (internal quotation marks and alteration omitted); see also ***Bond v. United*** **States**, 529 U.S. 334, 338 n.2, 120 S.Ct. 1462, 146 L.Ed.2nd 365 (2000) ('[T]he subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the **Fourth Amendment**'); . . ." (***United States v. Johnson*** (9th Cir. 2018) 889 F.3rd 1120, 1125.)

See "*Pretext Stops*," under "*Detentions*" (Chapter 4), above.

The Ninth Circuit Court of Appeal, however, has held that the rule under ***Whren*** *does not* apply to the conducting of an administrative impoundment and inventory search of a vehicle. (***United States v. Orozco*** (9th Cir. 2017) 858 F.3rd 1204, 1210-1212; **United States *v.* Johnson** (9th Cir. 2018) 889 F.3rd 1120, 1125-1126.)

The Ninth Circuit in ***Johnson*** cites in the U.S. Supreme Court's decision in ***Ashcroft v. al-Kidd*** (2011) 563 U.S. 731, 736 [131 S.Ct. 2074; 179 L. Ed.2nd 1149], where it is noted that "(t)wo 'limited exception[s]' to this rule are our special-needs and administrative-search cases, where 'actual motivations' do matter (Citation omitted)," for its authority for this argument.

However, see the concurring opinion in ***United States v. Johnson***, supra, at pp. 1129-1133, where the two concurring justices note

that "such decision (i.e., ***Orozco***) contradicts earlier Supreme Court precedent and that ***Orozco*** therefore ought to be reconsidered by our court," and that the Supreme Court has explicitly—and unanimously—rejected the approach we adopted in ***Orozco***," citing ***Brigham City v. Stuart*** (2006) 547 U.S. 398 [126 S.Ct. 1943; 164 L.Ed.2nd 650], as authority for this argument.

> As pointed out by the concurring justices in ***United States v. Johnson***, the U.S. Supreme Court in ***Brigham City v. Stuart*** differentiates between the purpose behind conducting what the Court refers to as a "*progromatic search*" on the one hand, and the individual officers' subjective motivations on the other, noting that while the former (i.e., the purpose of a specific administrative "program," such as inventory searches in general) has to be done for a lawful non-investigatory purpose, the latter (i.e., the individual officers' subjective motivations) is irrelevant to the legality of the search. In discussing this issue, the Supreme Court points out that; "this inquiry is directed at ensuring that the purpose behind the program (such as inventory searches) is not 'ultimately indistinguishable from the general interest in crime control.' . . . The Court underscored that such an inquiry 'has nothing to do with discerning what is in the mind of the individual officer conducting the search.'" (See ***Brigham City v. Stuart***, *supra*, at p. 405.)
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> *Note*: Aside from this, the ***Johnson*** decision ignores the difference between conducting a warrantless, suspicionless inventory search of a lawfully impounded vehicle, and the "*plain sight*" observations and seizure of evidence of a crime during such a lawful search, noting only in a footnote that the Government having failed to attempt to justify the seizure of incriminating evidence discovered during an otherwise lawful inventory search, the issue is waived. (pg. 1128, fn. 2.) Why this blatantly bad decision has not been taken up to the U.S. Supreme Court is unknown, the record showing only that petitions for rehearing and rehearing en banc had been denied. (Sept. 13, 2018; 2018 U.S. App. LEXIS 26006.)
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> See, for instance, ***United States v. Williams*** (2nd Cir. N.Y. 2019) 930 F.3rd 44, where the Second Circuit Court of Appeal held that the police *did not* violate the **Fourth Amendment** by conducting a second inventory search of defendant's impounded vehicle after detectives overheard a

phone call by defendant that aroused their suspicion that they may have missed something of value in the car during their initial inventory search. Both searches were conducted in accordance with police department standardized procedures and the second search was reasonable to ensure a complete inventory, even though the second search was conducted with the subjective expectation that what they were looking for was something illegal (which, it in fact turned out to be; i.e., a firearm.)

There is also California authority for the argument an officer's subjective motivations in conducting an inventory search of a vehicle *are in fact relevant*, limiting the community caretaking theory to the officer's intent to protect personal valuables in a car and *not* for the subjective purpose of conducting criminal investigations and looking incriminating evidence. (***People v. Lee*** (2019) 40 Cal.App.5th 853, 867-869; citing ***People v. Torres*** (2010) 188 Cal.App.4th 775, 791, and ***Florida v. Wells*** (1990) 495 U.S. 1, 4 [109 L.Ed.2nd 1; 110 S. Ct. 1632].)

"Unlike the probable cause determination, which rests solely on an objective standard, the inventory search exception evaluates both the objective reasonableness of the impound decision and the subjective intent of the impounding officer to determine whether the decision to impound was "motivated by an improper investigatory purpose." (***People v. Lee*** (2019) 40 Cal.App.5th 853, 867, quoting ***People v. Torres***, *supra*, at p. 791.)

See also ***People v. Valenzuela*** (1999) 74 Cal.App.4th 1202; noting that the rule allowing a "*pretext*" stop under ***Whren v. United States*** (1996) 517 U.S. 806 [116 S.Ct. 1769; 135 L.Ed.2nd 89] is inapplicable to stops or detentions when the legal excuse is to conduct an "*administrative search*," such as inspecting the licensing of a taxicab or an *inventory search* of a vehicle.

The "*Community Caretaking Doctrine*:"

History: The "community caretaking" doctrine was first mentioned by the U.S. Supreme Court in ***Cady v. Dombrowski*** (1973) 413 U.S. 433 [93 S.Ct. 2523; 37 L.Ed.2nd 706]. "Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the

detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." (At p. 441; upholding the warrantless search of an impounded vehicle for an unsecured firearm.)

See also ***Coalition on Homelessness v. City and County of San Francisco*** (2023) 93 Cal.App.5th 928, 939-940, for a description of the facts, circumstances, and law under ***Cady v. Dombrowski***.

> "***Cady*** reasoned that the police had properly exercised control over the disabled car 'for elemental reasons of safety' because it was a 'nuisance along the highway,' and that the search of the car was '"standard procedure" . . . to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands.' (***Id.*** at pp. 442-443.) The court emphasized, 'like an obviously abandoned vehicle, [the car] represented a nuisance,' and the search was justified by the 'immediate . . . concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle.' (***Id.*** at p. 447.)"

The United States Supreme Court has specifically held that attempts to expand the community caretaking theory to justify a warrantless entry and/or search of a residence were not constitutional. The Court clearly and unequivocally *rejected* the argument that, "***Cady's*** acknowledgment of these 'caretaking' duties creates a standalone doctrine that justifies warrantless searches and seizures in the home." (***Caniglia v. Strom*** (May 17, 2021) __ U.S. __ [141 S.Ct. 1596; 209 L.Ed.2nd 604].) (See "*Welfare Checks; the* '*Community Caretaking Function*,' '*Exigencies*,' *and the* '*Emergency Aid Doctrine*,' under "*Searches of Residences and Other Buildings*" (Chapter 13), below.)

> Both the United States Supreme Court and California Supreme Court have held that "there is no recognized exception to the warrant requirement for community caretaking *outside the vehicular context*." (Italics in the original; ***Coalition on Homelessness v. City and County of San Francisco*** (2023) 93 Cal.App.5th 928, 940; citing ***Caniglia v. Strom***, *supra*, 141 S.Ct. 1596, and ***People v. Ovieda*** (2019) 7 Cal.5th 1034.)
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> Based upon the decisions of ***People v. Ovieda*** and ***Caniglia v. Strom***, *supra*, it can definitively be said that the Community Caretaking exception to the **Fourth Amendment** requirement applies only to vehicles.

(***Coalition on Homelessness v. City and County of San Francisco***, supra, at p. 941: "Based on those recent and authoritative pronouncements, it would be inaccurate to state there is a recognized 'community caretaking' exception to the warrant requirement. Instead, there is only a recognized *vehicular* community caretaking exception." (Italics in original.)

Rule: "The decision to impound the vehicle must be justified by a community caretaking function 'other than suspicion of evidence of criminal activity' [citation] because inventory searches are 'conducted in the absence of probable cause' [citation]." (***People v. Lee*** (2019) 40 Cal.App.5th 853, 867-869; quoting ***People v. Torres*** (2010) 188 Cal.App.4th 775, 787; see also ***Rodriguez v. City of San Jose*** (9th Cir. 2019) 930 F.3rd 1123, 1138.)

See also ***Miranda v. City of Cornelius*** (9th Cir. 2005) 429 F.3rd 858, 862-866; ***United States v. Cervantes*** (9th Cir. 2012) 703 F.3rd 1135, 1140-1143; ***United States v. Caseres*** (9th Cir. 2008) 533 F.3rd 1064, 1074-1075; ***United States v. Anderson*** (2022) 56 F.4th 748, 756-762.

An officer impounding a vehicle and conducting an inventory search must have "solid, non-investigatory reasons for impounding a car" and the decision to impound a car may not be a "mere subterfuge" to conduct a criminal investigation. (***United States v. Del-Rosario-Acosta*** (1st Cir. 2020) 968 F.3rd 123; seizure of drugs and a firearm from defendant's impounded vehicle was held to be in violation of the "community caretaking" doctrine, and illegal.)

Case Law:

Under the "Community Caretaking Doctrine," police may, without a warrant, impound and search a vehicle so long as they do so in conformance with the standardized procedures of the local police department and in furtherance of a community caretaking purpose. (***People v. Quick*** (2016) 5 Cal.App.5th 1006, 1010; citing ***People v. Williams*** (2006) 145 Cal.App.4th 756, 761-762.)

"'The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge.' (***South Dakota v. Opperman*** (1976) 428 U.S. 364, 369 [49 L. Ed.2nd 1000; 96 S.Ct. 3092].) A vehicle impound search will be upheld if it is reasonable under all the circumstances. (***People v. Shafrir*** (2010) 183 Cal.App.4th 1238, 1247 . . .)" (***People v. Quick***, *supra*. See also

Coalition on Homelessness v. City and County of San Francisco (2023) 93 Cal.App.5th 928, 941.)

> "'Factors relevant to whether a particular impoundment is justified include the location of the vehicle and the likelihood it will create a hazard to other drivers or be a target of vandalism or theft.'" (***Coalition on Homelessness v. City and County of San Francisco***, *supra*, at p. 942; quoting ***Halajian v. D & B Towing*** (2012) 209 Cal.App.4th 1, 15; and referencing ***People v. Williams*** (2006) 145 Cal.App.4th 756, 762-763.)

California courts have approved the use of the Community Caretaking theory to justify the impoundment of a vehicle when a vehicle is parked illegally, blocks traffic or passage, or stands at risk of theft or vandalism. Also relevant to the caretaking inquiry is whether someone other than the defendant could remove the car to a safe location. (***People v. Lee*** (2019) 40 Cal.App.5th 853. 867-869; ***People v. Torres*** (2010) 188 Cal.App.4th 775, 790; ***People v. Williams*** (2006) 145 Cal.App.4th 756, 762–763.)

The Ninth Circuit Court of Appeal has ruled that impounding a vehicle can be justified under the "*Community Caretaker Doctrine*" whenever such vehicle may impede traffic, threaten public safety, or be subject to vandalism. (***United States v. Jensen*** (9th Cir. 2005) 425 F.3rd 698, 706; ***United States v. Torres*** (9th Cir. 2016) 828 F.3rd 1113, 1118.)

> In ***Torres*** (at pp. 1118-1123), in a prosecution for being a felon in unlawful possession of a firearm, an officer's decision to impound defendant's vehicle after arresting him for driving while under the influence of alcohol, and when the car was parked near a red zone in a parking structure of an apartment complex in which defendant did not live, was permissible under the **Fourth Amendment** because it was consistent with his police department's policy and served legitimate community caretaking purposes; i.e., to promote other vehicles' convenient ingress and egress to the parking area and to safeguard the car from vandalism or theft. The inventory search of defendant's vehicle was also proper under the **Fourth Amendment** because, in fulfilling his duty to search all containers pursuant to department policy, the officer acted within the parameters of that policy when he unlatched the air filter compartment where he found a firearm.

> In ***United States v. Anderson*** (9th Cir. 2022) 56 F.4th 748, 756-762, the Ninth Circuit approved the impoundment of a vehicle where it was parked in a third person's driveway and the resident at that location asks that it be removed, ruling that: "[I]mpoundment serves some 'community caretaking' purpose if a vehicle is 'parked illegally, pose[s] a safety hazard, or [i]s vulnerable to vandalism or theft.'" (Quoting ***Miranda v. City of Cornelius*** (9th Cir. 2005) 429 F.3rd 858, 864.)

However, the Ninth Circuit has also held that a statute allowing for the pre-court-hearing impounding of a vehicle may be in violation of the **Fourth Amendment** absent a legitimate need to prevent it from again being driven illegally, from creating a hazard to others drivers, or being a target for vandalism. (***Miranda v. City of Cornelius*** (9th Cir. 2005) 429 F.3rd 858; driver driving without a license.)

> The mere fact that its driver is cited or even physically arrested does not necessarily implicate the "*community caretaking doctrine*." (***Ibid***.)

> On the issue of whether the officer has a duty to make sure the unlicensed driver doesn't continue to illegally drive the car, the Court noted that "the need to deter a driver's unlawful conduct is by itself insufficient to justify a tow under the '*caretaker*' rationale." However, the rule is otherwise (thus allowing for a tow) where it can be proved that "the driver is unable to remove the vehicle from a public location without continuing its illegal operation." (***Id***. at pp. 865-866.)

Where the defendant has been physically arrested and taken to jail, impounding the car merely to prevent him from continuing the offense is unlawful. (***United States v. Caseres*** (9th Cir. 2008) 533 F.3rd 1064, 2074-1075; see also ***People v. Torres*** (2010) 188 Cal.App.4th 775, 792, indicating that believing defendant may repeat his offense of driving without a valid license is *never* grounds for impounding his car.)

California is now in accord with the rule as set down in ***Miranda v. City of Cornelius***. (***People v. Williams*** (2006) 145 Cal.App.4th 756; impounding the car, per **V.C. § 22651(h)(1)**, subsequent to the driver's arrest on an outstanding warrant.)

> See also ***Quezada v. City of Los Angeles*** (2014) 222 Cal.App.4th 993, 1008: "As part of their '"community caretaking functions," ' police officers may constitutionally impound vehicles that 'jeopardize . . . public safety and the efficient movement of vehicular traffic.' [Citation.] Whether 'impoundment is warranted under this community caretaking doctrine depends on the location of the vehicle and the police officers' duty to prevent it from creating a hazard to other drivers or being a target for vandalism or theft.' [Citation.]" (Quoting ***Williams***, at p. 761.)

Towing and impounding a vehicle merely because it is illegally parked, without prior notice to the vehicle's owner and a pre-seizure hearing, absent an exigency requiring immediate action (such as in an emergency, where notice would defeat the entire point of the seizure, or where the interests at stake are small relative to the burden that giving notice would impose; e.g., the car is parked in the path of traffic, blocking a driveway, obstructing a fire lane, or appears to be abandoned, or where there is no current registration stickers and there's no guarantee the owner won't move or hide the vehicle instead of paying the fine for illegal parking), is a **Fourteenth Amendment** due process violation despite statutes allowing for the towing, and may generate some civil liability for the police. (***Clement v. City of Glendale*** (9th Cir. 2008) 518 F.3rd 1090; an unregistered vehicle with a "planned non-operation (PNO) certificate" filed, parked in a publicly accessible parking lot in violation of **V.C. § 22651(o)**.)

The vehicular community caretaking exception justified the towing of an unregistered truck from a parking lot because leaving the truck in the lot "would have created a risk that the truck would be driven again while unregistered, either by the unlicensed plaintiff or someone with a driver's license." "Factors relevant to whether a particular impoundment is justified include the location of the vehicle and the likelihood it will create a hazard to other drivers or be a target of vandalism or theft." (***Halajian v. D & B Towing*** (2012) 209 Cal.App.4th 1, 15-16.)

The decision to impound a vehicle following an arrest when made pursuant to standardized departmental criteria is more likely to satisfy the **Fourth Amendment** than one *not* made pursuant to such criteria. However, it is not legally necessary that that be the case. The reasonableness of impounding a vehicle based upon the circumstances is the test under the **Fourth Amendment**. (***People v. Shafrir*** (2010) 183 Cal.App.4th 1238; defendant's newer Mercedes lawfully impounded following his arrest for DUI

because, in the officers' opinions, the car would not be safe if left at the site of the arrest.)

Impounding a vehicle for the purpose of allowing the officer to do an inventory search of the vehicle in the hopes of finding narcotics-related evidence, when none of the "community caretaking function" elements apply, is illegal. While stopping the vehicle may be for an ulterior purpose, so long as there is also an objectively reasonable basis for doing so (e.g., seeing a traffic violation), the officer's subjective motivations *are* in issue when evaluating the legality of impounding the vehicle and conducting an inventory search. (***People v. Torres*** (2010) 188 Cal.App.4th 775, 785-793; impoundment and inventory search held to be illegal when the officer admitted that his purpose was to look for narcotics-related evidence. See also ***People v. Lee*** (2019) 40 Cal.App.5th 853. 867-869.)

Doing an inventory search of a vehicle under the theory that it is to be impounded, absent any evidence that any of the "community caretaking" factors apply (i.e.; it is abandoned, impeding traffic, or threatening public safety or convenience), is unlawful, particularly in light of the fact that the defendant told the officer that he had a friend who could come out and retrieve his vehicle. (***United States v. Maddox*** (9th Cir. 2010) 614 F.3rd 1046, 1049-1050.)

The seizure and subsequent inventory search of defendant's car was held *not* to be justified by the community caretaking exception to the **Fourth Amendment's** warrant requirement. Under the community caretaking exception, police officers may impound vehicles that jeopardize public safety and the efficient movement of traffic. Neither officer provided testimony that defendant's car was parked illegally, posed a safety hazard, or was vulnerable to vandalism or theft. Although defendant's car was not located close to his home when the officers impounded it, there was no evidence that it would have been vulnerable to vandalism or theft if it were left in its residential location or that it posed a safety hazard. Also, the court concluded that seizure and inventory search of defendant's car was a pretext for an investigatory search for evidence of narcotics trafficking. (***United States v. Cervantes*** (9th Cir. 2012) 703 F.3rd 1135, 1140-1143.)

The **Fourth Amendment** did not require suppression of evidence from an inventory search of defendant's vehicle because the trial court found that the vehicle was blocking a driveway and parked far enough out in the roadway to create a traffic hazard and that the

inventory search was pursuant to established police policy. (***People v. Quick*** (2016) 5 Cal.App.5th 1006, 1010-1011.)

Impounding defendant's vehicle after his arrest for driving while under the influence, when the vehicle was illegally parked blocking a handicap spot and with no one else present who could take charge of the vehicle, was lawful under the community caretaking theory. The discovery and seizure of an unlawful firearm (defendant being a convicted felon) was lawful despite the inventory search being completed, when the officer observed the firearm between the front seats as he was putting the keys to the vehicle in the ignition in order to facilitate its towing. (***United States v. Davis*** (1st Cir. NH 2018) 909 F.3rd 9.)

"(T)he fact that an inventory search is authorized (by statute) is not determinative of the search's constitutionality. Indeed, '[i]nventory search jurisprudence presumes some objectively reasonable basis supports the impounding.' (Citation.) Thus, 'statutory authorization does not, in and of itself, determine the constitutional reasonableness of the seizure.' (Citation)" (***People v. Lee*** (2019) 40 Cal.App.5th 853. 867-869; quoting ***People v. Torres*** (2010) 188 Cal.App.4th 775, at p. 791, and ***People v. Williams*** (2006) 145 Cal.App.4th 756, at p. 762-763.)

The community caretaking theory, however, was held not to apply to an officer's unconsented to opening up of the back lid to defendant's pickup truck shell, even though the officer was only attempting to retrieve defendant's girlfriend's personal items from the truck after a verbal dispute between defendant and the girlfriend. The Court held that the community-caretaking exception did not apply because the government did not establish that "state law or sound police procedure" warranted opening the camper shell nor had it demonstrated how opening the camper was "justified by concern for the safety of the general public." The court noted that the government failed to explain how allowing the girlfriend to open the camper herself to retrieve her belongings would have posed any danger to the officers. Specifically, the government identified "no specific and articulable facts" demonstrating that the deputy needed to stand behind the tail gate, lift the camper's latch, or look into the bed of the truck, nor was opening the camper "necessary to protect" the girlfriend, defendant, the officers, or others. (***United States v. Neugin*** (10th Cir. 2020) 958 F.3rd 924.)

The pre-impound inventory search of a vehicle was upheld where defendant was cited at the scene, the car was uninsured so it

couldn't be driven from the scene, and the actual owner of the car was contacted but showed no interest in coming to the scene to claim the car. Recovery of methamphetamine from a false compartment at the bottom of the center console was upheld as a part of the inventory search in that it was in an area where people would normally store valuables. Also, a firearm was found under a false bottom of the glove compartment. The Court found that this was not an area where people would store items, so searching this area could not be upheld as a part of the inventory search. However, the recovery of the firearm was instead upheld as an exercise of the officers' community-caretaking function, which is separate from an inventory search. Under the community-caretaking function, officers may search a vehicle that is being impounded if they have a reasonable belief that it might contain a firearm. Here, the court concluded that the officer had a reasonable belief that defendant's vehicle contained a firearm. Supplying that "reasonable belief" here was the fact that the officer had found an empty, concealed-carry handgun holster on the front passenger seat. Second, during the initial slow-speed pursuit, Kendall drove eight blocks at ten miles per hour before pulling over, during which time he appeared to be "moving objects around on the passenger seat." These facts gave rise to reasonable belief that there was a firearm somewhere in the vehicle near the front seat. In addition, pursuant to the department's standard inventory policy, the officers were required to inventory any guns in an impounded vehicle and remove them for safekeeping. As a result, the court held that it was reasonable for the officer to search for a hidden firearm in the front-passenger-seat area. (***United States v. Kendall*** (10th Cir. CO, 2021) 14 F.4th 1116.)

California's Third District Court of Appeal discussed two legal theories for searching vehicles in ***Blakes v. Superior Court*** (2021) 72 Cal.App.5th 904, 910-915. First, the Court ruled, *once again*, that unless the elements of the "*Community Caretaking Doctrine*" are met, you cannot impound a person's vehicle and expect a pre-impound inventory search of that vehicle to be upheld. In ***Blakes***, gang detectives observed defendant driving a vehicle with illegally tinted windows. Upon initiating a traffic stop, defendant lawfully parked his car in a parking space in a public parking lot. Defendant was found to be unlicensed (his driver's license having been suspended) so the officers decided to impound his car and do an inventory search of the car. However, "(t)here was no evidence petitioner's car blocked traffic or was at risk of theft or vandalism." Therefore, despite the officers' agency having a policy allowing officers, at their discretion, to impound vehicles driven by unlicensed drivers, this particular vehicle, under these

particular circumstances, did not meet the "community caretaking" requirements in that the vehicle was "parked illegally, was not blocking traffic or passage, or at risk of theft or vandalism," as required by the community caretaking doctrine. To be lawful, the impoundment of a vehicle must be *both* authorized by statute *and* in compliance with the Community Caretaking Doctrine.

The defendant, Isaac Ramos, was arrested after an altercation at a convenience store. His truck was impounded from the store's parking lot, and a subsequent inventory search revealed a machine gun and ammunition. Defendant was subsequently charged with unlawful possession of a machine gun and being a felon illegally in possession of ammunition. His motion to suppress the evidence was denied by the trial court. However, the Tenth Circuit reversed the lower court's decision, and found that the impoundment was not supported by a reasonable, non-pretextual community caretaking rationale. The court considered the five "***Sanders*** factors:" 1- Whether the vehicle was on public or private property; if on private property, 14 2- Whether the property owner had been consulted; 3- Whether an alternative to impoundment existed; 4- Whether the vehicle was implicated in a crime; and 5- Whether the vehicle's owner and/or driver had consented to the impoundment. (See ***United States v. Sanders*** (10th Cir. 2015) 796 F.3rd 1241, 1243.) The court found that all these factors weighed against the reasonableness of the impoundment, and thus, it violated the **Fourth Amendment**. To be reasonable, a search generally requires the obtaining of a judicial warrant. In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement. One such exception, and the only exception at issue is this case, is a search conducted pursuant to a police officer's community-caretaking function. This exception allows law enforcement to impound an automobile and, in connection with the impoundment, inventory the vehicle's contents. Such an impoundment, however, must be based on "something other than suspicion of evidence of criminal activity," such as "protecting public safety and promoting the efficient movement of traffic;" That is, a community-caretaking impoundment cannot be based on a suspicion or hope evidence of criminal activity will be found in the vehicle. The government has the burden of proving a vehicle impoundment satisfies the **Fourth Amendment**. The community-caretaking exception to the **Fourth Amendment's** warrant requirement operates differently depending on the nature of the property from which the vehicle is impounded. When the vehicle is located on public property, specifically, including streets, roads, and ways, officers have far greater authority to impound. When, on the other hand, police impound a

car located on private property, and that car is neither "obstructing traffic or creating an imminent threat to public safety," a community-caretaking rationale "is less likely to exist." Under these facts, the Court held that it was very feasible to have called the actual owner to come down and move the vehicle. (***United States v. Ramos*** (10th Cir. 2023) 88 F.4th 862.)

Relevant Statutes:

Veh. Code § 22650(b): "Any removal of a vehicle is a seizure under the **Fourth Amendment** of the Constitution of the United States and **Section 13** of **Article I** of the California Constitution, and shall be reasonable and subject to the limits set forth in **Fourth Amendment** jurisprudence. A removal pursuant to an authority, including, but not limited to, as provided in (**V.C.**) **Section 22651**, that is based on community caretaking, is only reasonable if the removal is necessary to achieve the community caretaking need, such as ensuring the safe flow of traffic or protecting property from theft or vandalism."

Veh. Code § 22651(b) provides that a peace officer may remove a vehicle: "When a vehicle is parked or left standing upon a highway in a position so as to obstruct the normal movement of traffic or in a condition so as to create a hazard to other traffic upon the highway," and is grounds under the Community Caretaking Doctrine to impound a vehicle. (***People v. Quick*** (2016) 5 Cal.App.5th 1006, 1010-1011.)

Veh. Code § 22651(h)(1) authorizes the impounding of a vehicle "(w)hen an officer arrests any person driving or in control of a vehicle for an alleged offense" and takes that person into custody." However, impounding a vehicle under authority of this section is constitutional only if impoundment serves some "*community caretaking function*." Whether or not the community caretaking function justifies the impounding of a vehicle depends upon the location of the vehicle and the police officer's duty to prevent it from creating a hazard to other drivers or from being a target for vandalism or theft. When it was found that an arrested defendant's vehicle was lawfully parked only two houses down from his own home, impounding it was held to be illegal. (***United States v. Caseres*** (9th Cir. 2008) 533 F.3rd 1064, 1074-1075; see also ***People v. Quick***, *supra*.)

Veh. Code § 22651(i):

In ***Coalition on Homelessness v. City and County of San Francisco*** (2023) 93 Cal.App.5th 928, the Court rejected the government's argument that the towing of vehicles with five or more unpaid parking tickets (per county ordinance) is within the scope of the vehicular community caretaking exception, the government arguing that "[p]arking laws promote the safe and efficient flow of traffic through the City, and thus protect the health and safety of City residents." (Quoting ***In re Thomas*** (*Bankr. N.D.Cal.* 2006) 355 B.R. 166, at p. 174.) The Court ultimately held in ***Coalition on Homelessness*** that the community caretaking doctrine does not justify the warrantless impoundment of vehicles in violation of this ordinance.

> **(S)ection 22651**, **subdivision (i)(1)** specifically provides that "tows of *legally* parked cars must be justified by some present, location-based obstacle to public safety or convenience." (pg. 942. fn. 10; Italics in the original; fn. 10.)
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> The government argued, unsuccessfully, that towing cars that accrue numerous unpaid tickets will deter violations of parking laws and that tows to achieve such deterrence are within the scope of the caretaking exception, noting instead that "the deterrence rationale is incompatible with the principles of the community caretaking doctrine." (pgs. 935, 939-948.)

Veh. Code § 22651(o)(1)(A): The community caretaking doctrine applies as well to cars parked when unregistered for over six months. (***Leslie v. City of Sand City*** (N.D. Cal. 2009) 615 F. Supp.2nd 1121, 1125-1126.)

Veh. Code § 22651(p): Impounding a vehicle pursuant to **V.C. § 22651(p)**, when neither the driver nor the passenger could (or would) produce a valid driver's license, was held to be lawful. (***People v. Hoyos*** (2007) 41 Cal.4th 872, 892.)

> *Note*: *The* "*Community Caretaking Doctrine*" was not raised in this case.
>
> A police department has discretion to establish guidelines that would allow an impounded vehicle to be released in

less than 30 days, under **V.C. § 22651(p)**, in situations where a fixed 30-day statutory impoundment period, under **V.C. § 14602.6(a)(1)**, may also potentially apply. (95 ***Ops.Cal.Atty.Gen*** 1 (2012).)

Impounding a vehicle where the driver was driving on a suspended license, with a *Washington state* statute allowing for the impoundment of the car where the driver has been cited once before for the same, was assumed to be lawful (without discussing the issue) when the car was on a freeway (Interstate 5), defendant was going to jail, and no one else was available to take possession of the car. (***United States v. Ruckes*** (9th Cir. 2009) 586 F.3rd 713, 719.)

When Alternatives to Impounding a Vehicle are Available:

An inventory search incident to impoundment was reasonable even though defendant could have made other arrangements for the safekeeping of his property. "[T]he real question is not what 'could have been achieved,' but whether the **Fourth Amendment** requires such steps . . . . The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means.'" (***Colorado v. Bertine*** (1987) 479 U.S. 367, 373-374 [107 S.Ct. 738; 93 L.Ed.2nd 739]; quoting ***Illinois v. Lafayette*** (1983) 462 U.S. 640, 647 [103 S.Ct. 2605; 77 L.Ed.2nd 65]; see also ***United States v. Dunn*** (8th Cir. MN 2019) 928 F.3rd 588.)

"(T)he **Fourth Amendment** (does not compel) officers to exhaust alternatives before they may impound a vehicle. (Citation)" (***United States v. Torres*** (9th Cir. 2016) 828 F.3rd 1113, 1119, fn. 2; where defendant complained that the officers did not offer her the option of having someone else come to take control of the vehicle.)

"[T]he police had no **Fourth Amendment** obligation to offer the driver an opportunity to avoid impoundment." (***United States v. Penn*** (9th Cir. 2000) 233 F.3rd 1111, 1116.)

The fact that the owner of a car about to be impounded upon his arrest was given the choice of what impound company was to take his car does not support defendant's argument that he released the car to a friend, negating the officer's right to conduct an impound search. The inventory search of his car was therefore upheld. (***United States v. Morris*** (8th Cir. 2021) 995 F.3d 665.)

Discovery:

> A city's (i.e., Los Angeles') right to access the Vehicle Information Impound Center (VIIC) and Laserfiche data regarding vehicles that towing companies had impounded at the direction of the police department was insufficient to establish constructive possession for purposes of the **California Public Records Act** (**Gov't. Code §§ 6250 et seq.**). The city did not direct what information the towing companies placed on the VIIC and Laserfiche databases, and had no authority to modify the data in any way. Nothing in ***City of San Jose v. Superior Court*** (2017) 2 Cal.5th 608, which was decided by the California Supreme Court in 2017, supported the view that an agency's contractual right to access a private entity's records qualifies as a form of "possession" of those records within the meaning of **Gov't. Code § 6253(c)**. (***Anderson-Barker v. Superior Court*** (2019) 31 Cal.App.5th 528, 537-541.)
>
> Per ***City of San Jose v. Superior Court***, *supra*, at p. 623: "'[A]n agency has constructive possession of records if it has the right to control the records, either directly or through another person.' [Citation.]"

***The "Protective Search" (or "Patdown") of a Vehicle for Weapons*:**

General Rule: Whenever, during a lawful contact with an individual, an officer develops a "*reasonable belief*," based on specific articulable facts, that the suspect's vehicle may contain a weapon, anywhere within the passenger area of that vehicle that a weapon may reasonably be expected to be found may be checked for that purpose. (***Michigan v. Long*** (1983) 463 U.S. 1032, 1049 [103 S.Ct. 3469; 77 L.Ed.2nd 1201]; authorizing a protective search of a vehicle's passenger compartment "when police have a reasonable belief that the suspect poses a danger.").

> Anything else seen in plain sight during such a check for weapons is admissible in court. (See "*Plain Sight Observations*," under "*Warrantless Searches and Seizures*" (Chapter 9), above.)

Subjective vs. Objective Belief that a Vehicle Contains a Firearm:

> Rhode Island officers responding to a "shots fired" call chased, and eventually stopped, a motor vehicle speeding from the area and driven by defendant. A search of the vehicle looking for a gun resulted in the recovery of ammunition only. In ***Michigan v. Long*** (1983) 463 U.S. 1032 [103 S.Ct. 3469; 77 L.Ed.2nd 1201], the U.S. Supreme Court held that when law enforcement officers conduct investigative detentions, or ***Terry*** stops (***Terry v. Ohio*** (1968) 392 U.S. 1 [88 S.Ct. 1868; 20 L.Ed.2nd 889].), involving automobiles, they may conduct a warrantless "*car frisk*" of the areas within the suspect's "*grab space*," so long as they have a reasonable

suspicion that a suspect could immediately access a weapon. Based upon this rule, defendant was charged in federal court with being a felon in the illegal possession of ammunition. The trial court, however, granted defendant's motion to suppress, noting that the law of the Circuit dictated that the officers must have both an "*objective belief*" that a vehicle contains a firearm, as well as an "*actual fear*," or "*subjective belief*," in order to conduct a "*frisk*" of that vehicle (See ***United States v. Lott*** (1st Cir. 1989) 870 F.2nd 778.); sometimes also referred to as a "*patdown*," or "*protective search*" of a vehicle. Finding an objective belief only, the trial court suppressed the ammunition. On appeal, the First Circuit Court of Appeal reversed, ruling that despite its prior decision in ***Lott***, subsequent U.S. Supreme Court decisions (E.g., ***Whren v. United States*** (1996) 517 U.S. 806 [116 S.Ct. 1769; 135 L.Ed.2nd 89].) indicate that an officer's subjective belief is irrelevant in such a case, and that other circuits (the 5th, 8th, and D.C.) have so held. The Court here, as a result, specifically rejected the relevance of an officer's subjective fear when reviewing the reasonableness of a car frisk under ***Long***. The Court therefore reversed the district court's ruling that had granted defendant's motion to suppress the evidence seized from the vehicle. (***United States v. Guerrero*** (1st Cir. RI 2021) 19 F.4th 547.)

> Note that ***Arizona v. Gant*** (2009) 556 U.S. 332 [173 L.Ed.2nd 485; 129 S.Ct. 1710] (warrantless search of a vehicle incident to the subject's arrest) does *not* apply to a car-frisk situation. ***Gant*** applies only when the subject has been arrested, handcuffed, and secured in a patrol car. In such a case, ***Gant's*** "*incident to arrest*" rules kick in. When arresting a person in his vehicle, you can do a warrantless search of the car *only* when the arrestee remains unsecured and within reaching distance of the passenger compartment at the time of the search. *Or*, under the alternate theory of ***Gant***, the car can be searched when it is "*reasonable to believe evidence relevant to the crime of arrest might be found in the car*." (***Arizona v. Gant***, *supra*, at pp. 343-344.) If the subject in ***United States v. Guerrero*** had been arrested for shooting from his vehicle, then ***Gant's*** alternate theory would allow for a warrantless search of that vehicle despite the suspect being arrested and secured in a patrol car. Another argument is that when the subject is stopped for shooting from the vehicle, assuming there is at least a "*fair probability*" (i.e., probable cause) to believe you have the right car, then you can do a warrantless "*probable cause search*" of the car for the gun. (E.g.; see ***Carroll v. United States*** (1925) 267 U.S. 132, 150-153 [45 S.Ct. 280; 69 L.Ed. 543]; ***United States v. Ross*** (1982) 456 US. 798 [102 S.Ct. 2157; 72 L.Ed.2nd 572]; ***Pennsylvania v. Labron*** (1996) 518 U.S. 938 [116 S.Ct. 2485; 135 L.Ed.2nd 89]; ***Maryland v. Dyson*** (1999) 527 U.S. 465 [119 S.Ct. 2013; 144 L.Ed.2nd 442]; ***People v. Superior Court***

[*Nasmeh*] (2007) 151 Cal.App.4th 85, 100-102; ***United States v. Davis*** (9th Cir. 2008) 530 F.3rd 1069, 1084; ***United States v. Noster*** (9th Cir. 2009) 590 F.3rd 624, 633-634; ***People v. Xinos*** (2011) 192 Cal.App.4th 637, 653-659.) Either way, the warrantless frisk of a vehicle when there is a reasonable suspicion to believe there's a gun in it is lawful.

Case Law:

Observation of a knife in the vehicle in plain sight during a traffic stop, whether the knife is legal or not, justifies a search of the vehicle for additional weapons. (***People v. Lafitte*** (1989) 211 Cal.App.3rd 1429.)

Contact of two people in a car behind a 24-hour market, in a dark area, with knowledge that one of the suspects was recently arrested for a weapons offense, justifies a search of the vehicle for weapons. (***People v. Brueckner*** (1990) 223 Cal.App.3rd 1500.)

Observation of a passenger reaching under the seat (i.e., a "*furtive movement*") and the sound of metal hitting metal justifies checking under that seat for weapons. (***People v. King*** (1990) 216 Cal.App.3rd 1237.)

An officer may constitutionally search the compartments of a vehicle upon a "*reasonable belief*" that "the suspect poses a roadside danger" arising from "the possible presence of weapons in the area surrounding a suspect." (***People v. Bush*** (2001) 88 Cal.App.4th 1048; based upon six-year-old information that the person stopped was a kick-boxer and had a history of violence.)

Checking the passenger area of vehicle for firearms based upon a "*reasonable suspicion*," which came as a result of an identified citizen's report to law enforcement, enhanced by the driver's lack of cooperation, that the occupants may have guns, held to be lawful. (***Haynie v. County of Los Angeles*** (9th Cir. 2003) 339 F.3rd 1071.)

Based upon anonymous information that defendant was sitting in his vehicle with a handgun, such information being sufficiently corroborated to amount to a reasonable suspicion, the detention of the defendant and other passengers and a search of the vehicle for the gun was legally justified. (***People v. Dolly*** (2007) 40 Cal.4th 458.)

But, searching a vehicle for weapons, despite the driver's attempt to evade the officer by making a couple of quick turns and hiding in the dark, is illegal absent specific and articulable reasons to believe that the driver is dangerous or that he might gain immediate control of a weapon. (***Liberal v. Estrada*** (9th Cir. 2011) 632 F.3rd 1064, 1083-1084.)

It is irrelevant that the subject has already been removed from the vehicle. The courts feel that the subject may break away from police control, or may be permitted to reenter the vehicle and retrieve a weapon before the "***Terry***" investigation is over. (***Michigan v. Long*** (1983) 463 U.S. 1032, at pp. 1051-1052 [103 S.Ct. 3469; 77 L.Ed.2nd 1201].)

> Referring to ***Terry v. Ohio*** (1968) 392 U.S. 1 [88 S.Ct. 1868; 20 L.Ed.2nd 889].)

See also ***McHam v. State of South Carolina*** (2013) 746 S.E. 2nd 41, where the South Carolina Supreme Court upheld the opening of the defendant's car door by a state trooper during a lawful traffic stop as the vehicle's passengers were rummaging around in the vehicle, ostensibly looking for the vehicle's registration and proof of insurance. When the door was opened, contraband was observed in plain sight. While opening the door was ruled to be a search, it was justified due to the officer's reasonable safety concerns.

***Statutory Automobile Inspections*:**

Veh. Code § 2805(a)*: Authority to Inspect Title and Registration of Vehicles: Elements*:

Any law enforcement officer who is member of:

- The California Highway Patrol;
- A city police department;
- A county sheriff's office; *or*
- A district attorney's office as an investigator;

Whose primary responsibility is to conduct vehicle theft inspections;

For the purpose of locating stolen vehicles;

May inspect:

- Any vehicle of a type required to be registered under the Vehicle Code; *or*
- Any identifiable vehicle component thereof;

When found on a highway; or at any public:

- Garage;
- Repair shop;
- Terminal;

- Parking lot;
- New or used car lot;
- Automobile dismantler's lot;
- Vehicle shredding facility;
- Vehicle leasing or rental lot;
- Vehicle equipment rental yard;
- Vehicle storage pool; *or*
- Other similar establishment; *or*

Any agricultural or construction work location where work is being actively performed;

May inspect the *title* and *registration* of such vehicles;

In order to establish, as to that vehicle or identifiable vehicle component, the rightful:

- Ownership; *or*
- Possession.

Veh. Code § 2805(b): *Authority to Inspect Implements of Husbandry, Etc.,*: *Elements*:

Provides the same authority to inspect:

The following equipment:

- Implements of husbandry;
- Special construction equipment;
- Forklifts;
- Special Mobile equipment;

When at:

The places listed in **subd. (a)** (above); *or*

Upon a highway either while:

- Incidentally operated; *or*
- Being transported.

Note: **Subd. (c)** provides that, whenever possible, such inspections shall be conducted at *a time and in a manner* so as to minimize any interference with, or delay of, business operations.

Penalties for Refusal to Comply:

Refusing to comply with an officer's request to conduct a lawful search pursuant to **P.C. § 2805(a)** or **(b)** is a *misdemeanor*. (See **V.C. § 2800(a)** and **P.C. § 148(a)(1)**; and ***People v. Woolsey*** (1979) 90 Cal.App.3rd 994, 1000, 1001, fn. 3)

Relevant Definitions:

Veh. Code § 2805(a): *Identifiable Vehicle Component*: Any component which can be distinguished from other similar components by a serial number or other unique distinguishing number, sign, or symbol.

Veh. Code § 340: *Garage*: A building or other place wherein the business of storing or safekeeping vehicles of a type required to be registered under this code and which belong to members of the general public is conducted for compensation.

Veh. Code § 510: *Repair Shop*: A place where vehicles subject to registration under this code are repaired, rebuilt, reconditioned, repainted, or in any way maintained for the public at a charge.

Veh. Code § 595: *Terminal*: A place where a vehicle of a type listed in **V.C. § 34500** is regularly garaged or maintained, or from which the vehicle is operated or dispatched.

Note: **Section 34500** lists "*motortrucks*," "*truck tractors*," "*buses*," large trailers, and similar large vehicles.

Veh. Code § 220: *Automobile Dismantler*: Any person (not excluded by **V.C. § 221**) who is engaged in the business of buying, selling, or dealing in vehicles of a type required to be registered under this code, including nonrepairable vehicles, for the purpose of dismantling the vehicles, who buys or sells the integral parts and component materials thereof, in whole or in part, or deals in used motor vehicle parts.

See this section and **Veh. Code § 221** for exceptions.

Case Law:

Veh. Code § 2805 has been held to meet the standards for a "*closely regulated business*," and thus have a relaxed search and seizure standard, and are constitutional. (***People v. Calvert*** (1993) 18 Cal.App.4th 1820, 1831-1834; ***People v. Woolsey*** (1979) 90 Cal.App.3rd 994, 1001-1002; ***Solander v. Municipal Court*** (1975) 45 Cal.App.3rd 664, 667.)

An auto repair garage may be subjected to a warrantless search by auto theft detectives under authority of **Veh. Code § 2805**, whether or not the business is open to the public. (***People v. Potter*** (2005) 128 Cal.App.4th 611.)

> Such a statute is constitutional under the **Fourth Amendment** if it serves a substantial governmental interest, the warrantless search is done to further the statutory scheme, and the inspection program serves the two basic functions of a search warrant; i.e., giving the owner notice that the search is being made pursuant to law and limiting the scope of the search. **Section 2805** meets these requirements. (***Ibid***.)

Commercial vehicles may be constitutionally subjected to warrantless administrative inspections under the **Fourth Amendment**, commercial trucking being a "*pervasively regulated industry*" under the criteria as set out in ***New York v. Burger*** (1987) 482 U.S. 691, 699 [107 S.Ct. 2636; 96 L.Ed.2nd 601, 612]. (***United States v. Delgado*** (9th Cir. 2008) 545 F.3rd 1195; upholding a Missouri statute allowing for such inspections.)

A Legislature may enact statutes authorizing warrantless *administrative* searches of commercial property without violating the **Fourth Amendment**. (***Donovan v. Dewey*** (1981) 452 U.S. 594, 598-599 [101 S.Ct. 2534; 69 L.Ed.2nd 262, 268-269]; ***People v. Paulson*** (1990) 216 Cal.App.3rd 1480, 1483-1484.)

However, there are *limitations*:

> **Veh. Code § 2805** *does not* authorize the warrantless search of property *not* being used for commercial purposes or otherwise open to the public. (***People v. Roman*** (1991) 227 Cal.App.3rd 674; ***People v. Calvert***, *supra*, at pp. 1828-1829.)
>
> Such a warrantless "*search*" is justified as an administrative search of a "*closely regulated business*," and must be done in a reasonable manner. (***People v. Potter*** (2005) 128 Cal.App.4th 611; see also ***People v. Lopez*** (1981) 116 Cal.App.3rd 600.) (See "*Closely Regulated Businesses or Activities*," under "*Warrantless Searches and Seizures*" (Chapter 9), above.)
>
> "The regulatory scheme authorizing warrantless inspections must meet three requirements: (1) the scheme must serve a substantial government interest; (2) the warrantless inspections must be necessary to further the regulatory scheme; and (3) the inspection program "must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search

is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." (***People v. Potter***, *supra*, at p. 619; citing (***New York v. Burger*** (1987) 482 U.S. 691, 702-703 [107 S.Ct. 2636; 96 L.Ed.2nd 601].)

However, see ***People v. Turner*** (1994) 8 Cal.4th 137, 182, where **Veh. Code § 2805** was cited by the California Supreme Court as authority for an officer to check an already lawfully stopped vehicle, in an other-than-commercial context, for its registration.

The **Fourth Amendment** prohibition on unreasonable searches and seizures applies to commercial premises as well as private homes. (***New York v. Burger*** (1987) 482 U.S. 691, 699 [107 S.Ct. 2636; 96 L.Ed.2nd 601, 612]; ***People v. Doty*** (1985) 165 Cal.App.3rd 1060, 1066.)

Absent a statute authorizing a warrantless, suspicionless administrative inspection of a commercial truck for a permit to drive on a parkway, and without any articulable reasonable suspicion to believe that defendant did not have such a permit, stopping the vehicle to check for a permit is unlawful. (***United States v. Feliciana*** (4th Cir. 2020) 974 F.3rd 519.)

Non-Commercial Property: **Section 2805** does *not* authorize the warrantless search of property not being used for commercial purposes or is otherwise open to the public. (***People v. Roman*** (1991) 227 Cal.App.3rd 674; ***People v. Calvert*** (1993)18 Cal.App.4th 1820, 1828-1829.)

Use of Force: Should the owner/occupant of the business refuse, he or she is subject to arrest. However, forcible entry of the business is not lawful. An administrative search warrant must first be obtained. (See ***People v. Woolsey*** (1979) 90 Cal.App.3rd 994, 1004; and ***Colonade Catering Corp. v. United States*** (1970) 397 U.S. 72, 74, 77 [90 S.Ct. 774; 25 L.Ed.2nd 60, 63-65].)

Statutory Automobile Searches:

***Veh. Code § 9951(c)(2)*:** Downloading the Contents of an "*Event Data Recorder*" (i.e., "*EDR*"):

Court Order Requirement: A court order is required for law enforcement to retrieve data from a "*Event Data Recorder*" ("*EDR*"), which is a part of a "*Sensing and Diagnostic Module*" ("*SDM*"), also known as a "*Black Box*."

But see ***People v. Christmann*** (Just. Ct. 2004) 3 Misc. 3rd 309, 314 [776 N.Y.S.2nd 437]; holding that downloading data from the SDM *does not* require a search warrant.

Note: This *may not* be good law for California.

See ***People v. Diaz*** (2013) 213 Cal.App.4th 743, at p. 746, fn. 2, for a complete physical description of an "*EDR*" and "*SDM*."

See **P.C. § 1524(a)(19),** authorizing the issuance of a search warrant for the "recording device" in a vehicle.

Note also that commercial trucks also contain what is known as an "*Engine Control Module*," or "*ECM*." (See ***State v. West*** (Mo.Ct.App. 2018) 548 S.W.3d 406.) "The ECM is like the brain of the truck. It controls all the functions of braking, throttle, transmission. Without an ECM on a diesel—modern diesel engine, they can't run. They need that ECM to operate. [¶] … [¶] As part of their function, they store data." (at p. 411.) (Referenced at ***People v. Tran*** **(**2019) 42 Cal.App.5th 1, 10, and fn. 3.)

Subd. (b): "*Recording Device*," *Defined*: As used in this section, "*recording device*" means a device that is installed by the manufacturer of the vehicle and does one or more of the following, for the purpose of retrieving data after an accident:

(1) Records how fast and in which direction the motor vehicle is traveling.
(2) Records a history of where the motor vehicle travels.
(3) Records steering performance.
(4) Records brake performance, including, but not limited to, whether brakes were applied before an accident.
(5) Records the driver's seatbelt status.
(6) Has the ability to transmit information concerning an accident in which the motor vehicle has been involved to a central communications system when an accident occurs.

Subd. (d): *Information Retrieved for Diagnostic Purposes*: Information retrieved by a motor vehicle dealer or automotive technician for diagnostic purposes, as allowed under **subd. (c)(3)** or **(4)**, may not be released to law enforcement.

Subd. (f): *Vehicles Manufactured After July 1, 2004, Only*: By its own terms, **Veh. Code § 9951** applies only to "motor vehicles manufactured on or after July 1, 2004."

Case Law:

People v. Diaz (2013) 213 Cal.App.4th 743: The warrantless retrieval of data from an SDM from a lawfully seized vehicle where there is probable cause to believe it was driven with the driver under the influence, resulting in a vehicular manslaughter, is lawful as:

(1) A search based upon probable cause (***Id.***, at 753-754);

(2) The vehicle being the instrumentality of a crime (***Id.***, at pp. 754-757); *and*

(3) There being no reasonable expectation of privacy in the contents of the SDM (***Id.***, at pp. 757-758.)

Violating the court order requirements of the section (i.e., failing to get a search warrant) does not require suppression of the retrieved data in that suppression is not required by the United States Constitution. (***People v. Xinos*** (2011) 192 Cal.App.4th 637, 653-654 [review denied and case depublished May 18, 2011].)

See also ***People v. Christmann*** (Just. Ct. 2004) 3 Misc. 3rd 309, 314 [776 N.Y.S.2nd 437]; downloading data from the SDM *does not* require a search warrant.

In order to invoke the provisions of this section, a criminal defendant must show that she was prejudiced by the warrantless downloading of the data from the SDM, under the standards as provided for in ***People v. Watson*** (1956) 46 Cal.2nd 818, 836. (See ***People v. Diaz***, *supra*, at p. 760.)

I.e.: "(W)hether the error has resulted in a miscarriage of justice." (***People v. Watson***, *supra*.)

In ***Diaz***, *supra*, **V.C. § 9951** didn't apply to her vehicle anyway in that she was driving a 2002 Chevrolet Tahoe. (***People v. Diaz***, *supra*, at p. 759.)

Veh. Code § 2814.1*: *Vehicle Checkpoints: A County Board of Supervisors is authorized by statute to establish a vehicle-inspection checkpoint to check for violations of **V.C. §§ 27153** and **27153.5** (exhaust and excessive smoke violations).

***Veh. Code* § 2814.1(d)**: Motorcycle-only checkpoints are prohibited.

See "*Other Regulatory Checkpoints*," under "*Detentions*" (Chapter 4), above.

Veh. Code § 2810.2(d) & (e)*: *Vehicle Stops Involving Agricultural Irrigation Supplies:

> Where a vehicle stop is made pursuant to this section (allowing for the inspection of agricultural supplies that are in plain view for the purpose of inspecting the bills of lading, shipping, or delivery papers, or other evidence, to determine whether the driver is in legal possession of the load, whenever the vehicle is on an unpaved road within the jurisdiction of the Department of Parks and Recreation, the Department of Fish & Game, the Department of Forestry and Fire Protection, the State Lands Commission, a regional park district, the U.S. Forest Service, or the Bureau of Land Management, or is in a timberland production zone), if the driver is in violation of **Veh. Code § 12500** (driving without a valid license), the peace officer who makes the stop shall make a reasonable attempt to identify the registered owner of the vehicle and release the vehicle to him or her. Impoundment of the vehicle is prohibited if the driver's only offense is **Veh. Code § 12500**.

***Searching a Vehicle* for a *Driver's License* and/or *Vehicle Registration, VIN Number, Proof of Insurance, etc.*:**

General Rule: The general rule, now perhaps totally eaten up by the exceptions, not to mention the recognized dangerousness of a traffic stop, is that an officer making a traffic stop must allow an occupant of a motor vehicle to locate and produce his own driver's license and registration. (***People v. Jackson*** (1977) 74 Cal.App.3rd 361.)

Exceptions: Case law has been quick to find exceptions. For instance, a police officer may check for registration without permission when:

- The circumstances call for further investigation of the vehicle's ownership. (***People v. Webster*** (1991) 54 Cal.3rd 411, 430-431.)

- The driver tells the officer where it is and does not object to the officer entering to look for it. (***Ingle v. Superior Court*** (1982) 129 Cal.App.3rd 188, 194; ". . . *it would defy common sense not to hold that an officer, who has a right to see a motorist's driver's license, may enter a vehicle to obtain the license when the motorist, who is outside the vehicle, has told him [or her] where it is and has not otherwise objected to his [or her] entering the car without a warrant*." (Italics added.)

- Under the circumstances, the officer reasonably felt that it was necessary for his or her own protection. (***People v. Martin*** (1972) 23 Cal.App.3rd 444, 447.)

- Where a legitimate concern for "*officer's safety*" dictates that the officer control the movements of the occupant of a vehicle. (***People v. Faddler*** (1982) 132 Cal.App.3rd 607, 610-611; see also ***People v. Hart*** (1999) 74 Cal.App.4th 479.)

- The vehicle is abandoned. (***People v. Turner*** (1994) 8 Cal.4th 137, 181-183.)

- See also ***People v. Lopez*** (2019) 8 Cal.5th 353, below; overturning the contrary decision in ***In re Arturo D.*** (2002) 27 Cal.4th 60), ruling that making even a limited search of a vehicle for a driver's license to drive, or other "satisfactory evidenced of identification," after being told by the driver that he did not have any with him, violates the **Fourth Amendment**.

Warrantless Searches of a Vehicle for the Driver's Identification: Overruling its own prior precedent (See ***In re Arturo D.*** (2002) 27 Cal.4th 60; which was joined with a companion case, ***People v. Hinger*** under the same cite), the California Supreme Court held that the **Fourth Amendment** is violated when an officer, without a warrant, exigent circumstances, and/or probable cause, enters a vehicle to search for a driver's identification when that driver indicates that he/she does not have his/her license with him/her. (***People v. Lopez*** (2019) 8 Cal.5th 353.)

> In so holding, the Court noted that its decision in ***Lopez*** is limited to searches for identification, and does *not* purport to overrule prior cases that have upheld searches of vehicles under similar circumstances where the officer is looking for vehicle documentation. (***Id***., at p. 385, fn. 3; see below.)
>
> The Court in ***Lopez*** based its decision upon the conclusion that the intrusion into a vehicle driver's privacy is outweighed by the need to locate a driver's license to drive, despite its contrary ruling in ***Arturo D***. Per the Court, this is particularly true due to the fact that an officer has other means of determining the driver's identity and whether or not that driver has been untruthful in verbally identifying himself. *E.g.*:
>
> > The officer can require the driver to place a thumbprint on the notice to appear, and the officer can accept that thumbprint as "*satisfactory evidence*" of identity. (**Veh. Code §§ 40302(a)**, **40500(a);** see **Veh. Code § 40504.**) (***Id***., at pp. 385-386.)

The officer can make a custodial arrest of the driver for failure to carry a driver's license. (**Veh. Code §§ 12500**, **12951**, **40302**; ***People v. McKay*** (2002) 27 Cal.4th 601, 618, 625.) The officer can then search the person of the driver incident to that arrest. (***United States v. Robinson*** (1973) 414 U.S. 218 [94 S.Ct. 467; 38 L.Ed.2nd 427].)

But see ***Arizona v. Gant*** (2009) 556 U.S. 332, 338 [173 L.Ed.2nd 485; 129 S.Ct. 1710], and the U.S. Supreme Court's restrictions on searching the vehicle itself incident to arrest.) (***Id***., at p. 386.)

The officer can "*ask questions*," making routine inquiries via the radio and law enforcement's computers, comparing the driver's physical characteristics with what is available through the government's many data bases, either verifying the fact that the driver is who he says he is or developing probable cause to believe that he is not which in turn would give the officer the right to search the vehicle based upon that newly developed probable cause. (See **Pen. Code § 148.9;** and **Veh. Code §§ 31, 40000.5.**) (***Id***., at p. 370.)

The officer may seek consent to search the vehicle for identification. (***Id***., at p. 371.)

Checking for a Vehicle's Identification Number ("*VIN*"):

Merely moving papers off the dash so as to make visible the VIN commonly found in that location, resulting in observation of a gun on the floor, was held to be lawful. (***New York v. Class*** (1986) 475 U.S. 106 [106 S. Ct. 960; 89 L.Ed.2nd 81].)

However, looking under the hood of a car has been held to be a search, and is illegal absent probable cause. (***United States v. Soto*** (9th Cir. 1979) 598 F.2nd 545.)

And lifting an opaque car cover and opening the car's door while looking for a VIN is also illegal. (***United States v. $277,000.00 U.S. Currency*** (9th Cir. 1991) 941 F.2nd 898.)

See also ***People v. Webster*** (1991) 54 Cal.3rd 411, 430, and the cases cited therein. "(W)e conclude (the California Highway Patrol officer) acted properly when he removed the occupants of the Chrysler and entered the car for the limited purpose of finding the registration."

See ***Veh. Code § 2805(a)***, authorizing "(1) any member of the California Highway Patrol, or (2) a member of a city police department, a member of a county sheriff's office, or a district attorney investigator, whose primary responsibility is to conduct vehicle theft investigations," to "inspect any vehicle of a type required to be registered under this code, or any identifiable vehicle component thereof, on a highway or in any public garage, repair shop, terminal, parking lot, new or used car lot, automobile dismantler's lot, vehicle shredding facility, vehicle leasing or rental lot, vehicle equipment rental yard, vehicle salvage pool, or other similar establishment, or any agricultural or construction work location where work is being actively performed," and to "inspect the title or registration of vehicles, in order to establish the rightful ownership or possession of the vehicle or identifiable vehicle component."

See ***People v. Turner*** (1994) 8 Cal.4th 137, 182, where **Veh. Code § 2805** was cited by the California Supreme Court as authority for an officer to check an already lawfully stopped vehicle, in an other-than-commercial context, for its registration.

***Seizure and Searching of Vessels*:**

Har. & Nav. Code § 523*: *Removal of Vessels from Public Waterways:

(a) *A peace officer*, as described in **Har. & Nav. Code § 663**, or a lifeguard or marine safety officer employed by a county, city, or district while engaged in the performance of official duties, *may remove a vessel* from, and, if necessary, store a vessel removed from, a public waterway *under any of the following circumstances*:

(1) When the vessel is left unattended and is moored, docked, beached, or made fast to land in a position that obstructs the normal movement of traffic or in a condition that creates a hazard to other vessels using the waterway, to public safety, or to the property of another.

(2) When the vessel is found upon a waterway and a report has previously been made that the vessel has been stolen or a complaint has been filed and a warrant thereon issued charging that the vessel has been embezzled.

(3) When the person or persons in charge of the vessel are by reason of physical injuries or illness incapacitated to an extent as to be unable to provide for its custody or removal.

(4) When an officer arrests a person operating or in control of the vessel for an alleged offense, and the officer is, by any provision of this code or other statute, required or permitted to take, and does take, the person arrested before a magistrate without unnecessary delay.

(5) When the vessel interferes with, or otherwise poses a danger to, navigation or to the public health, safety, or welfare.

(6) When the vessel poses a threat to adjacent wetlands, levies, sensitive habitat, any protected wildlife species, or water quality.

(7) When a vessel is found or operated upon a waterway with a registration expiration date in excess of one year before the date on which it is found or operated on the waterway.

(b) *Costs* incurred by a public entity pursuant to removal of vessels under **subdivision (a)** may be recovered through appropriate action in the courts of this state.

(c)

(1) *A peace officer*, as described in **Har. & Nav. Code § 663**, or marine safety officer employed by a city, county, or district, while engaged in the performance of official duties, *may remove a vessel* from, *and, if necessary, store a vessel* removed from, public property within the territorial limits in which the officer may act, in either of the following circumstances:

(A) When any vessel is found upon the public property and the officer has probable cause to believe the vessel was used in the commission of a crime.

(B) When a vessel is found upon public property and an officer has probable cause to believe that the vessel itself provides evidence that a crime was committed or the vessel contains evidence of a possible crime that was committed and the evidence cannot be easily removed from the vessel.

(2) Notwithstanding **Civ. Code § 3068**, or **Veh. Code § 22851**, no lien shall attach to a vessel removed under this subdivision unless it is determined that the vessel was used in the commission of a crime with the express or implied consent of the owner of the vessel.

> **(3)** In any prosecution of a crime for which a vessel was removed and impounded under this subdivision, a court may order a person convicted of a crime involving the use of a vessel to pay the costs of towing and storage of the vessel and any administrative charges imposed in connection with the removal, impoundment, storage, or release of the vessel.
>
> **(d)** For purposes of this section, "*vessel*" includes both the vessel and any trailer used by the operator to transport the vessel.

Har. & Nav. Code § 668.5: *Impoundment of a Vessel Upon the Owner being Convicted of DUI with the Unlawful Killing of a Person*:

> A court, upon the conviction of a vessel owner for a violation of **Har. & Nav. Code § 655(b)** (operating a vessel, water skis, aquaplane, or similar device while under the influence of alcohol) that resulted in the unlawful killing of a person, is authorized to impound the vessel for between one and 30 days. The court is permitted to consider factors such as whether impoundment would result in the loss of employment by the vessel owner or a member of the owner's family, whether the vessel might be lost due to an inability to pay impoundment fees, unfair infringement on community property rights, or other factors the court finds to be relevant.

Har. & Nav. Code § 651: *Operator of a Vessel Defined*:

> The definition of a vessel "*operator*" includes (1) a person aboard a vessel who is steering the vessel while underway, to also include (2) a person aboard a vessel who is responsible for the operation of the vessel while underway, and (3) a person aboard a vessel who is at least 18 years of age and is attentive and supervising the operation of the vessel by a person age 12, 13, 14, or 15, pursuant to **H&N § 658.5**.
>
> > *Note*: **Har. & Nav. § 658.8** provides that a person *age 12 through 15* is prohibited from operating a specified vessel unless accompanied by a person who is at least *18 years old* and who is attentive and supervising the operation of the vessel.

Har. & Nav. Code § 663: *Peace Officer Defined*: A "*peace officer*" is "every peace officer of this state or of any city, county, city and county, or other political subdivision of the state . . .", providing such officers authority to "enforce this chapter and any regulations adopted by the department pursuant to this chapter and in the exercise of that duty shall have the authority to stop and board any vessel subject to this chapter, where the peace officer has probable cause to believe that a violation of state law or regulations or local ordinance exists."

***Chapter 13*:**

Searches of Residences and Other Buildings:

General Rule: More so than any other thing or place which is subject to search, a warrantless entry into a residence is *presumptively unreasonable* and, therefore, absent proof of an exception to the rule, is unlawful. (***Payton v. New York*** (1980) 445 U.S. 573, 586 [100 S.Ct. 1371; 63 L.Ed.2nd 639]; ***People v. Williams*** (1988) 45 Cal.3rd 1268, 1297; ***People v. Bennett*** (1998) 17 Cal.4th 373, 384; ***United States v. Arreguin*** (9th Cir. 2013) 735 F.3rd 1168, 1174; ***Lange v. California*** (June 23, 2021) __ U.S.__, __ [141 S.Ct. 2011; 219 L.Ed.2nd 486].)

> "At 'the very core [of the **Fourth Amendment**] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" (***People v. Smith*** (2020) 46 Cal.App.5th 375, 384, quoting ***Payton v. New York***, *supra*, at pp. 589-590; see also ***People v. Rubio*** (2019) 43 Cal.App.5th 342, 348.)
>
> > "Thus, '[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.'" (***People v. Rubio***, *supra*; quoting ***Kyllo v. United States*** (2001) 533 U.S. 27, 31 [121 S.Ct. 2038; 150 L.Ed.2nd 94].)
>
> "It is a basic principle of **Fourth Amendment** law that searches and seizures inside a home without a warrant are presumptively unreasonable." (***Smith v. City of Santa Clara*** (9th Cir. 2017) 876 F.3rd 987, 991; quoting ***Payton v. New York***, *supra*; and ***United States v. Ped*** (9th Cir. 2019) 943 F.3rd 427, 430; citing ***Kentucky v. King*** (2011) 563 U.S. 452, 459 [131 S.Ct. 1849; 179 L.Ed.2nd 865]. See also ***United States v. Holiday*** (9th Cir. 2021) 998 F.3rd 888, 893.)
>
> The rules are the same whether we're talking about a warrantless search of a residence, or a warrantless entry. "The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home." (***Bonivert v. City of Clarkston*** (9th Cir. 2018) 883 F.3rd 865, 874; quoting ***Payton v. New York***, supra, at p. 589.)
>
> "Evidence recovered following an illegal entry of the home is inadmissible and must be suppressed." (United States v. Shaibu (9th Cir. 1990) 920 F.2nd 1432, 1425.)
>
> *Query*: Does not the *human body* enjoy an even higher expectation of privacy? See "*Searches of Persons*" (Chapter 11), above.

***Two Types of Searches*:**

> "The Supreme Court has held that a **Fourth Amendment** search can occur in one of two ways. First, under the ***Katz*** test, a search occurs when the 'government violates a subjective expectation of privacy that society recognizes as reasonable.' ***Kyllo v. United States***, 533 U.S. 27, 33, 121 S.Ct. 2038, 150 L.Ed.2nd 94 (2001) (citing ***Katz v. United States***, 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2nd 576 (1967) . . . . Second, under the 'unlicensed physical intrusion' test, a search occurs when the government 'physically occupie[s] private property for the purpose of obtaining information,' ***Jones***, 565 U.S. at 404, 'to engage in conduct not explicitly or implicitly permitted' by the property owner, ***Jardines***, 569 U.S. at 6. (fn. omitted; see below.) Each test is independently sufficient to determine whether government conduct amounts to a **Fourth Amendment** search: a search occurs if police conduct satisfies either the *Katz* test or the unlicensed physical intrusion test, even if that conduct does not amount to a search under the other test. *See* ***Jones***, 565 U.S. at 406 ('**Fourth Amendment** rights do not rise or fall with the ***Katz*** formulation.')." (***United States v. Esqueda*** (9th Cir. 2023) 88 F.4th 818, 823; citing ***United States v. Jones*** (2012) 565 U.S. 400 [132 S. Ct. 945, 181 L.Ed.2nd 911]; and ***Florida v. Jardines*** (2013) 569 U.S. 1 [133 S.Ct. 1409; 185 L.Ed.2nd 495].)

Private Residences enjoy the perhaps highest "*expectation of privacy*" of any object or place that may be subject to a search. (***People v. Ramey*** (1976) 16 Cal.3rd 263; ***Payton v. New York***, *supra.*)

> "(W)hen it comes to the **Fourth Amendment**, the home is first among equals " (***Florida v. Jardines*** (2013) 569 U.S. 1, 6 [133 S.Ct. 1409; 185 L.Ed.2nd 495]; see also ***United States v. Garcia*** (9th Cir. 2020) 974 F.3rd 1071, 1080-1081, fns 6 & 7; and ***Lange v. California*** (June 23, 2021) __ U.S.__, __ [141 S.Ct. 2011; 219 L.Ed.2nd 486].)
>
> > "The 'very core' of this guarantee is 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" (***Caniglia v. Strom*** (May 17, 2021) __ U.S. __ [141 S.Ct. 1596; 209 L.Ed.2nd 604]; quoting ***Florida v. Jardines***, *supra*.)
>
> "A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle." (***Lavan v. City of Los Angeles*** (9th Cir. 2012) 693 F.3rd 1022, 1028, fn. 6; quoting ***Silverman v. United States*** (1961) 365 U.S. 505, 511, fn. 4 [81 S.Ct. 679; 5 L.Ed.2nd 734].)

See also ***United States v. On Lee*** (2nd Cir. 1951) 193 F.2nd 306, 315-316; explaining that a trespass constitutes an unreasonable search if the officer gains entry "without any express or implied consent."

"It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the **Fourth Amendment** is directed.'" (***Welsh v. Wisconsin*** (1984) 466 U.S. 740, 748 [104 S.Ct. 2091; 80 L.Ed.2nd 732]; ***United States v. United States District Court*** (1972) 407 U.S. 297, 313 [92 S.Ct. 2125; 32 L.Ed.2nd 752, 764; ***United States v. Brooks*** (9th Cir. 2004) 367 F.3rd 1128, 1133; ***People v. Thompson*** (2006) 38 Cal.4th 811, 817; ***Bonivert v. City of Clarkston*** (9th Cir. 2018) 883 F.3rd 865, 873; ***People v. Ovieda*** (2019) 7 Cal.5th 1034, 1041.)

Individuals ordinarily possess the highest expectation of privacy within their homes, which is an area that typically is "afforded the most stringent **Fourth Amendment** protection." (***United States v. Martinez-Fuerte*** (1976) 428 U.S. 543, 561 [96 S.Ct. 3074; 49 L.Ed.2nd 1116, 1130].)

This same degree of privacy is accorded *the curtilage* of the home, as well. (***Florida v. Jardines*** (2013) 569 U.S. 1, 6 [133 S.Ct. 1409; 185 L.Ed.2nd 495]; ***United States v. Warner*** (9th Cir. 1988) 843 F.2nd 401, 405; ***United States v. Romero-Bustamente*** (9th Cir. 2003) 337 F.3rd 1104, 1109; ***United States v. Davis*** (9th Cir. 2008) 530 F.3rd 1069; see below.)

> However, the protections afforded the "*curtilage*" of one's home *do not* apply "to an empty structure used occasionally as sleeping quarters." (***United States v. Barajas-Avalos*** (9th Cir. 2004) 359 F.3rd 1204, 1209-1216.)
>
> See the dissenting opinion in ***Florida v Jardines*** (2013) 569 U.S.1, 18-20 [133 S.Ct. 1409; 185 L.Ed.2nd 495, discussing the limits between where persons may come upon the private property of a homeowner and where they may not: "It is said that members of the public may lawfully proceed along a walkway leading to the front door of a house because custom grants them a license to do so. ***Breard* v. *Alexandria***, 341 U.S. 622, 626, 71 S. Ct. 920, 95 L. Ed. 1233, 62 Ohio Law Abs. 210 (1951); ***Lakin v. Ames***, 64 Mass. 198, 220, 10 Cush. 198 (1852); J. Bishop, Commentaries on the Non-Contract Law § 823, p. 378 (1889). This rule encompasses categories of visitors whom most homeowners almost certainly wish to allow to approach their front doors--friends, relatives, mail carriers, persons making deliveries. But it also reaches categories of visitors who are less universally welcome—'solicitors,' 'hawkers,' 'peddlers,' and the like. The law might attempt to draw fine lines between categories of welcome and unwelcome visitors, distinguishing, for example, between tolerable and intolerable door-to-door peddlers (Girl Scouts selling cookies versus adults selling aluminum siding) or between police officers on agreeable and disagreeable missions (gathering information about a

bothersome neighbor versus asking potentially incriminating questions). But the law of trespass has not attempted such a difficult taxonomy. See ***Desnick* v. *American Broadcasting Cos.***, 44 F. 3d 1345, 1351 (CA7 1995) ('[C]onsent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent'); cf. ***Skinner* v. *Ogallala Pub. School Dist.***, 262 Neb. 387, 402, 631 N. W. 2d 510, 525 (2001) ('[I]n order to determine if a business invitation is implied, the inquiry is not a subjective assessment of why the visitor chose to visit the premises in a particular instance'); ***Crown Cork & Seal Co.* v. *Kane***, 213 Md. 152, 159, 131 A. 2d 470, 473-474 (1957) (noting that 'there are many cases in which an invitation has been implied from circumstances, such as custom,' and that this test is 'objective in that it stresses custom and the appearance of things' as opposed to 'the undisclosed intention of the visitor'). [⁋] Of course, this license has certain spatial and temporal limits. A visitor must stick to the path that is typically used to approach a front door, such as a paved walkway. A visitor cannot traipse through the garden, meander into the backyard, or take other circuitous detours that veer from the pathway that a visitor would customarily use. See, e.g., Robinson v. Commonwealth, 47 Va. App. 533, 549-550, 625 S.E.2d 651, 659 (2006) (en banc);***United States* v. *Wells***, 648 F. 3d 671, 679-680 (CA8 2011) (police exceeded scope of their implied invitation when they bypassed the front door and proceeded directly to the backyard); ***State* v. *Harris***, 919 S.W.2d 619, 624 (Tenn. Crim. App. 1995) ('Any substantial and unreasonable departure from an area where the public is impliedly invited exceeds the scope of the implied invitation . . . ' (internal quotation marks and brackets omitted)); 1 W. LaFave, Search and Seizure § 2.3(c), p. 578 (2004) . . . ; *id*., § 2.3(f), at 600-603 ('[W]hen the police come on to private property to conduct an investigation or for some other legitimate purpose and restrict their movements to places visitors could be expected to go (e.g., walkways, driveways, porches), observations made from such vantage points are not covered by the **Fourth Amendment** (footnotes omitted)'). Nor, as a general matter, may a visitor come to the front door in the middle of the night without an express invitation. See ***State* v. *Cada***, 129 Idaho 224, 233, 923 P.2d 469, 478 (App. 1996) ('Furtive intrusion late at night or in the predawn hours is not conduct that is expected from ordinary visitors. Indeed, if observed by a resident of the premises, it could be a cause for great alarm'). [⁋] Similarly, a visitor may not linger at the front door for an extended period. See 9 So. 3d 1, 11 (Fla. App. 2008) . . . (Cope, J., concurring in part and dissenting in part) ('[T]here is no such thing as squatter's rights on a front porch. A stranger may not plop down uninvited to spend the afternoon in the front porch rocking chair, or throw down a sleeping bag to spend the night, or lurk on the front porch, looking in the windows'). The license is limited to the amount of time it would

customarily take to approach the door, pause long enough to see if someone is home, and (if not expressly invited to stay longer) leave."

See "*Curtilage of the Home*," below.

However, the rule of ***Jardines*** may not apply to the common hallway outside an apartment when used by anyone who might be living in or visiting an apartment that uses that hallway. (See ***State v. Nguyen*** (2013) 841 N.W.2nd 676; citing, among other cases, ***United States v. Nohara*** (9th Cir. 1993) 3 F.3rd 1239, 1241-1242; holding the defendant had no legitimate expectation of privacy in hallway of secured apartment building even though the officers may have been trespassing.)

Note also ***United States v. Diaz*** (2nd Cir. 2017) 854 F.3rd 197, holding that an officer's conclusion that a "common-area stairwell" in an apartment building was a "public place" was reasonable.

Warrantless entries by police into a residence are presumed illegal unless justified by either consent, or probable cause with exigent circumstances. (***Payton v. New York*** (1980) 445 U.S. 573, 586 [100 S.Ct. 1371; 63 L.Ed.2nd 639]; ***People v. Coddington*** (2000) 23 Cal.4th 529, 575; ***People v. Suarez*** (2020) 10 Cal.5th 116, 151.)

"As a general rule, to satisfy the **Fourth Amendment**, a search of a home must be supported by probable cause, *and* there must be a warrant authorizing the search." (***United States v. Brooks*** (9th Cir. 2004) 367 F.3rd 1128, 1133, citing ***Nathanson v. United States*** (1933) 290 U.S. 41, 47 [54 S.Ct. 11; 78 L.Ed. 159].)

"Government officials 'bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests' (within one's home). [Citation]" (***Conway v. Pasadena Humane Society*** (1996) 45 Cal.App.4th 163, 172.)

"While the '**Fourth Amendment** protects the individual's privacy in a variety of settings,' in none of these settings 'is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated."'"" (***People v. Superior Court* [*Corbett*]** (2017) 8 Cal.App.5th 670, 680; quoting ***Payton v. New York*** (1980) 445 U.S. 573, 589 [100 S.Ct. 1371; 63 L.Ed.2nd 639].)

Refusing to allow a female resident to use the bathroom in private while the house was being searched with a search warrant was held to make the "intrusion more egregious," given the heightened expectation of privacy one has in her home. (***Ioane v. Hodges*** (9th Cir. 2019) 939 F.3rd 945.)

"The **Fourth Amendment** 'reflects the recognition of the Framers that certain enclaves should be free from arbitrary government interference,' and 'the Court since the enactment of the **Fourth Amendment** has stressed "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic."'" (***People v. Ovieda*** (2019) 7 Cal.5th 1034, 1051; quoting ***Oliver v. United States*** (1984) 466 U.S. 170, 178 [80 L.Ed.2nd 214; 104 S.Ct. 1735].)

Trashcans: There is no reasonable expectation of privacy in the trash containers one places out on the curb for pick up. (***California v. Greenwood*** (1988) 486 U.S. 35 [108 S.Ct. 1625; 100 L.Ed.2nd 30].)

Note that this rule applies only to trashcans that were placed out on the curb for pick up, at which time the owner of the trashcan loses any expectation of privacy. A trashcan located within the curtilage of a suspect's home (e.g., at the side of the house) requires a search warrant (or consent) in order to be lawfully searched. (See ***People v. Lepere*** (2023) 91 Cal.App.5th 727, and footnote 1, citing ***Florida v. Jardines*** (2012) 569 U.S. 1, 6 [185 L.Ed.2nd 495; 133 S.Ct. 1409].)

Other Buildings and Places:

Commercial Businesses:

The **Fourth Amendment's** search and seizure rules apply "to commercial premises as well as to homes." (***Marshall v. Barlow's, Inc.*** (1978) 436 U.S. 307, 312 [98 S.Ct. 1816; 56 L.Ed.2nd 305]; ***City of Los Angeles v. Patel*** (2015) 576 U.S. 409 [135 S.Ct. 2443, 192 L.Ed.2nd 435].)

However, such protection from governmental intrusions apply only to the private areas of a commercial establishment. It is not a **Fourth Amendment** violation for government officials (i.e., police officers) to enter areas of a commercial establishment that are open to the general public, even when the entry is done for the purpose of conducting an investigation. (***Patel v. City of Montclair*** (9th Cir. 2015) 798 F.3rd 895.)

See also ***Camara v. Municipal Court of the City and County of San Francisco*** (1967) 387 U.S. 523 [87 S.Ct. 1727; 18 L.Ed.2nd 930], and ***See v. City of Seattle*** (1967) 387 U.S. 541 [87 S.Ct. 1737; 18 L.Ed.2nd 943]; holding that the entry of an inspector into an area of a private business being used as a residence constituted a search, and that entry into a locked warehouse, respectively, were illegal. These cases, however, have since been limited to areas of a business where a person has a reasonable expectation of privacy, as described in ***Katz v. United States*** (1967) 389 U.S. 347, 3612 [88 S.Ct. 507; 19 L.Ed.2nd 576, 588]. (See ***Patel v. City of Montclair***, *supra*., at pp. 898-900.)

Hotel and *Motel Rooms* are accorded the same protection as one's residence.

Hotels: ***Stoner v. California*** (1964) 376 U.S. 483, 490 [84 S.Ct. 889; 11 L.Ed.2nd 856, 861]; ***United States v. Alvarez*** (9th Cir. 1987) 810 F.2nd 879; see also ***United States v. Brooks*** (9th Cir. 2004) 367 F.3rd 1128; ***United States v. McClenton*** (3rd Cir. 1995) 53 F.3rd 584, 587-588; see also ***People v. Villalobos*** (2006) 145 Cal.App.4th 310; ***United States v. Young*** (9th Cir. 2009) 573 F.3rd 711, 715-716; ***People v. Torres et al.*** (2012) 205 Cal.App.4th 989, 993.)

See ***United States v. Cervantes*** (9th Cir. 2017) 859 F.3rd 1175, differentiating one's "premises," which would include a hotel room, from his "residence," where the person lives on a more permanent basis, when interpreting search and seizure conditions of one's "mandatory supervision" previsions pursuant to **P.C. § 1170(h)(5)**, under California's "**Post-Release Community Supervision Act of 2011**."

Motels: ***People v. Williams*** (1988) 45 Cal.3rd 1268, 1297, ***People v. Bennett*** (1998) 17 Cal.4th 373, 384-386; ***United States v. Cormier*** (9th Cir. 2000) 220 F.3rd 1103, 1108-1108; ***United States v. Bautista*** (9th Cir. 2004) 362 F.3rd 584; ***People v. Villalobos*** (2006) 145 Cal.App.4th 310; ***People v. Parson*** (2008) 44 Cal.4th 332, 345; ***United States v. Franklin*** (9th Cir. 2010) 603 F.3rd 652.)

Even though the occupant intends to use the motel room for only one night for some illicit purpose, having a home nearby, it is still an "*inhabited dwelling*" for purposes of finding a first degree burglary and a first degree robbery **(Pen. Code §§ 460(a)**, **212.5(a)**, respectively.) that occurs in the room. (***People v. Villalobos***, *supra*.)

Law In General:

Expired Tenancy:

After a hotel (or motel) guest's rental period has expired, or has been lawfully terminated, or the defendant has abandoned the room, the guest no longer has a legitimate expectation of privacy in the hotel room. (***United States v. Haddad*** (9th Cir. 1977) 558 F.2nd 968, 975; see also ***United States v. Procknow*** (7th Cir. 2015) 784 F.3rd 421.)

However, it has also been held that any additional time established by the hotel/motel's pattern and practice for

allowing guests to stay past the listed checkout time, and taking into account any specific agreement between the management and the guest, will be added to the time period the guest is lawfully in the room. He or she does not lose his or her expectation of privacy until this occurs, making a warrantless entry up until then unlawful. (***United States v. Dorais*** (9th Cir. 2001) 241 F.3rd 1124.)

> In contrast, however, where defendants did not have a pattern or practice of staying past checkout time and the hotel had a strict policy of enforcing checkout times, defendants' reasonable expectation of privacy in the room expired at the checkout time. (United States v. ***Kitchens*** (4th Cir 1997) 114 F.3d 29, 32.)

Defendant lost any expectation of privacy he had earlier in his motel room after the motel's 11:00 o'clock checkout time, allowing for officers' warrantless entry done with the motel manager's permission. (***United States v. Ross*** (11th Cir. 2019) 941 F.3rd 1058.)

Renting a Room by Fraud:

One who rents a hotel room with a *stolen credit card does not* have standing to challenge the otherwise unlawful entry of the room by law enforcement. (***People v. Satz*** (1998) 61 Cal.App.4th 322.)

The Ninth Circuit Court of Appeal disagrees, and has held that despite renting a motel room with a *stolen credit card*, the defendant did not lose his standing to challenge an unlawful entry until the motel's manager took some affirmative steps to repossess the room. In this case, the manager was still seeking payment for the room. The Court noted that at the time the officers entered the defendant's room, the status of the credit card as stolen was yet to be confirmed. (***United States v. Bautista*** (9th Cir. 2004) 362 F.3rd 584.)

Defendant has not lost his expectation of privacy in his hotel room (which was later, after the fact, discovered to have been rented with a *stolen credit card*) by the hotel *locking him out* where he was locked out pursuant to a policy to do so after a dangerous weapon (a firearm) is found in the room by hotel employees. Locking him out, in

this case, was not done with the intent to evict him. (***United States v. Young*** (9th Cir. 2009) 573 F.3rd 711, 715-720.)

However: The Ninth Circuit, straining to differentiate the facts of ***Bautista***, also held that the occupant of a hotel room has no reasonable expectation of privacy when the occupancy is achieved *through credit card fraud*. (Also see ***United States v. Cunag*** (9th Cir. 2004) 386 F.3rd 888.)

> In ***Cunag***, the defendant was never a lawful occupant. In ***Bautista***, the Court ruled that the defendant was a lawful occupant, despite the use of a stolen credit card, until the motel's manager took affirmative steps to repossess the room; a questionable distinction.

Paying the rent with *counterfeit bills* does not deprive a defendant of her expectation of privacy in her motel room absent evidence that she knew the bills she used were counterfeit. Also, the defendant's expectation of privacy does not abate absent evidence to the effect that the motel manager had attempted to evict the defendant, or enlist the police to help him do so. (***People v. Munoz*** (2008) 167 Cal.App.4th 126.)

Abandonment:

Whether or not a defendant abandoned a motel room is a question of the defendant's intent, as determined by "*objective factors*" (as opposed to his actual subjective intent) such as the defendant's words and actions. Abandonment does not "necessarily" turn on whether a motel's management elects to repossess. (***People v. Parson*** (2008) 44 Cal.4th 332, 342-348; defendant fled from the motel room in order to avoid arrest.)

> The issue is "whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search." (***Id***., at p. 346.)
>
> The Court, in ***Parson***, also rejected the argument that abandonment may not be found where the motel manager did not retake physical possession of

the motel room from the guest prior to the challenged search. (***Id***., at pp. 347-348.)

The Guest Register:

There is no reasonable expectation of privacy in the guest register of a hotel or motel, at least as far as the tenant is concerned. (See ***City of Los Angeles v. Patel*** (2015) 576 U.S. 409 [135 S.Ct. 2443; 192 L.Ed.2nd 435].) Police officers, therefore, are not constitutionally precluded from viewing such a register for the purpose of checking the residents for warrants (***United States v. Cormier*** (9th Cir. 2000) 220 F.3rd 1103, 1107-1108.), at least when done with the consent of the hotel or motel.

However, it was also held in ***Patel*** that a provision of the **Los Angeles Municipal Code** (**§41.49(3)(a)**), authorizing warrantless on–site inspections of hotel (and motel) guest records upon the demand of any police officer, is facially invalid under the **Fourth Amendment** because a police officer's non-consensual inspection of hotel guest records constitutes a **Fourth Amendment** search and that such searches are unreasonable where the record inspection scheme does not afford an opportunity for pre-compliance judicial review.

A search warrant, however, is legally unnecessary. All that is needed is to provide a hotel or motel's management an opportunity for a pre-inspection determination of reasonableness by a neutral decision-maker. An administrative subpoena or warrant, even if issued ex-parte, is legally sufficient, so long as the hotel or motel's management is given the opportunity to file a motion to quash.

Note: There is no statutory provision for an "*administrative subpoena*," at least as issued by a law enforcement agency, in California. Administrative, or "inspection" warrants, are authorized under **CCP Code §§ 1822.50-1182.60**. (See "*Inspection* (or *Administrative*) *Warrants*," under "*Other Warrants*," under "*Search Warrants*" (Chapter 10), above.)

However, a City Council is empowered to issue an administrative subpoena for documentary records, per **Govt. Code § 37104**. (***City of Santa Cruz v. Patel*** (2007) 155 Cal.App.4th 234.)

The Supreme Court further held, however, that: "(N)othing in our opinion calls into question those parts of **§ 41.49** that require hotel operators to maintain guest registries . . . . And, even absent legislative action to create a procedure along the lines discussed above . . . police will not be prevented from obtaining access to these documents. As they often do, hotel operators remain free to consent to searches of their registries and police can compel them to turn them over if they have a proper administrative warrant . . . or if some other exception to the warrant requirement applies, including exigent circumstances." (***City of Los Angeles v. Patel***, *supra*, 423-424.)

Note: The Ninth Circuit Court of Appeal indicated in ***Patel v. City of Montclair*** (9th Cir. 2015) 798 F.3rd 895, 900, fn. 3, that it is in accord. "We do not understand the Supreme Court's recent decision in a similar case involving the constitutionality of a city ordinance allowing for warrantless inspection of hotel records to hold otherwise (referring to ***City of Los Angeles v. Patel***, *supra*.).

Civ. Code § 53.5: *Releasing Guest Information to Non-California Peace Officers*:

Hotels, motels, lodging establishments, bus companies, or any employee of these entities, *are prohibited* from disclosing or releasing, except to a California peace officer, guest information to a third party without a court-issued subpoena, warrant, or order.

This section "shall not be construed to prevent a private business from disclosing records in a criminal investigation if a law enforcement officer in good faith believes that an emergency involving imminent danger of death or serious bodily injury to a person requires a warrantless search, to the extent permitted by law."

Note: This prohibition has the effect of preventing the release of the listed guest information to U.S. Immigration and Customs Enforcement (ICE) agents, as a part of California's "sanctuary state" policy, in that such federal officers are not peace officers under California law. (See **Pen. Code § 830.85**, and "*Rules as to*

Others Who are Not California Peace Officers," under "*Service and Return*," under "*Searches with a Search Warrant*" (Chapter 10), above.

A rented room in a *boarding house* receives the same protections. (***United States v. McDonald*** (1948) 335 U.S. 451 [69 S.Ct. 191; 93 L.Ed. 153].)

A *garage* to one's residence receives the same constitutional protections as the residence itself. (***United States v. Oaxaca*** (9th Cir. 2000) 233 F.3rd 1154.)

A *weekend fishing retreat* is an "*inhabited dwelling*." (***United States v. Graham*** (8th Cir. 1992.) 982 F.2nd 315.)

A *hospital room* may, depending upon the circumstances, be considered an "*inhabited dwelling*." (***People v. Fond*** (1999) 71 Cal.App.4th 127, 131-132.)

However, a warrantless entry into a hospital room in order to question a suspect, as opposed to searching the room, does not constitute a **Fourth Amendment** violation. (***People v. Brown*** (1979) 88 Cal.App.3rd 283; ***In re M.S.*** (2019) 32 Cal.App.5th 1177, 1186-1187.)

"[N]o **Fourth Amendment** violation occurs when a nurse permits an officer to enter a sentient patient's hospital room for purposes unrelated to a search, [and] the patient does not object to the visit." (People v. Brown, supra, at p. 292.)

See ***People v. Caro*** (2019) 7 Cal.5th 463, 495-498, where the California Supreme Court expressed "concerns about incursions on the privacy we maintain in our bodies (which) are heightened during medical procedures. (See, e.g., ***Sanders v. American Broadcasting Companie****s* (1999) 20 Cal.4th 907, 917 . . . [citing cases where pictures of a patient in a hospital constituted an actionable intrusion upon seclusion under tort law]; but see ***Hernandez v. Hillsides, Inc****.* (2009) 47 Cal.4th 272, 294, fn. 9 . . . [indicating that state tort law privacy rights are not necessarily coextensive with the **4th Amend.**].)," but finding it unnecessary to resolve the issue of an officer entering the defendant's hospital room during emergency procedures in that any error in admitting evidence of photographs taken there was harmless.)

However, bloody clothing seen in plain view by officers from the hallway that was on a hospital's trauma room floor, and it's later retrieval by investigators after defendant (with a gunshot wound he received during an attempted robbery) had been airlifted to another hospital, did *not* violate defendant's **Fourth Amendment** right to privacy. (***United States v. Clancy*** (6th Cir. 2020) 979 F.3rd 1135.)

> As for the investigators' seizure of defendant's clothing, the ***Clancy*** Court held that the investigators had lawful access to defendant's clothes. The "*lawful access*" requirement ensures that police officers do not conduct warrantless entries and trespass onto private property just because they see incriminating evidence located there. In this case, the court found that no trespass occurred in the hospital room in that defendant had been airlifted to another hospital by the time the crime scene investigators seized his clothing from the trauma room. The Court added that even if defendant had a reasonable expectation of privacy in his hospital room while the being treated, this expectation of privacy did not continue after he left the hospital and hospital staff began preparing the room for new patients.

Even a *jail cell* is considered, at least by one court, to be an "*inhabited dwelling*." (***People v. McDade*** (1991) 230 Cal.App.3rd 118, 127-128; a first degree robbery case.)

> But see "*Jail Cells*," under "*Prisoner Searches*," under "*Searches of Persons*" (Chapter 11), above.

A shack, located behind the main residence, but with an attached air conditioner and an electrical cord leading from the main residence, was held to be the occupant's residence. (***Mendez v. County of Los Angeles*** (9th Cir. 2018) 897 F.3rd 1067, 1074-1984.)

Recreational Vehicles: Where the victim lives in her RV (which had a truck-style cab with doors and was described as a class C-style, with a bed over the cab) full time, entering into the RV with the intent to commit a felony is a residential first degree burglary. (***People v. Trevino*** (2016) 1 Cal.App.5th 120.)

Military Housing:

> Military personnel, living off base in a motel, but with the housing paid for by the military as an alternative to living in the on-base barracks, retain the same privacy protections as anyone else in the civilian world. (***People v. Rodriguez*** (1966) 242 Cal.App.2nd 744.)
>
> > The same rule applies to any off-base military housing, at least when the case is a state case being investigated by state law enforcement officers for presentation in state court. (***People v. Miller*** (1987) 196 Cal.App.3rd 307.)
>
> However, on the base, a commanding officer may authorize a warrantless search of property, including the serviceman's locker (***People v. Shepard***

(1963) 212 Cal.App.2nd 697, 700.) and his room in the barracks. (***People v. Jasmin*** (2008) 167 Cal.App.4th 98.)

> Evidence properly being seized pursuant to a service member's commanding officer's (or "competent military authority's") oral or written authorization to search a person or an area, for specified property or evidence or for a specific person (see **Military Rules of Evidence, Rule 315(a)** & **(b)**), the results may be used in state court. (***People v. Jasmin***, *supra*, at p. 110.)

Curtilage of the Home:

Rule: The **Fourth Amendment** protections against warrantless searches and seizures extend to the *curtilage* around one's home; i.e., that area around the house normally used for living purposes. (***Florida v. Jardines*** (2013) 569 U.S. 1, 6 [133 S.Ct. 1409; 185 L.Ed.2nd 495]; ***United States v. Warner*** (9th Cir. 1988) 843 F.2nd 401, 405; ***United States v. Romero-Bustamente*** (9th Cir. 2003) 337 F.3rd 1104, 1109; ***Florida v. Jardines*** (2013) 569 U.S. 1 [133 S.Ct. 1409; 185 L.Ed.2nd 495].)

> "The **Fourth Amendment** 'indicates with some precision the places and things encompassed by its protections': persons, houses, papers, and effects. ***Oliver* v. *United States***, 466 U.S. 170, 176, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984). The **Fourth Amendment** does not, therefore, prevent all investigations conducted on private property; for example, an officer may (subject to ***Katz*** (***v. United States*** (1967) 389 U.S. 347 [88 S.Ct. 507; 19 L.Ed.2nd 576].)) gather information in what we have called 'open fields"—even if those fields are privately owned—because such fields are not enumerated in the Amendment's text. (***Hester v. United States***, 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924). But when it comes to the **Fourth Amendment**, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' ***Silverman* v. *United States***, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961). This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window. We therefore regard the area 'immediately surrounding and associated with the home'—what our cases call the curtilage—as 'part of the home itself for **Fourth Amendment** purposes.' ***Oliver***, *supra*, at 180, 104 S. Ct. 1735, 80 L. Ed. 2d 214." (***Florida v. Jardines*** (2013) 569 U.S. 1, 6 [133 S.Ct. 1409; 185 L.Ed.2nd 495].)

> "While law enforcement officers need not 'shield their eyes' when passing by the home 'on public thoroughfares,' . . . an officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the **Fourth Amendment's** protected areas." (***Id***., at p. 7.)

See also ***People v. Nunes*** (2021) 64 Cal.App.5th 1, 5-6: The exigent circumstances exception to the **Fourth Amendment** warrant requirement did not justify searching a cabinet in defendant's backyard shed while investigating a report of a possible house fire, and evidence taken from the cabinet thus had to be suppressed under **Pen. Code § 1538.5**. Because the fire captain became aware of the cabinet only after no active fire was found and because a persistent smell of smoke, without a specific articulation of an emergency threatening life or destruction of property and an explanation of immediate necessity, did not provide a basis to search a cabinet that did not appear to be the source of the smell, no exigent circumstances excused the lack of warrant. Cases applying the exigent circumstances exception to a search for the origin of an extinguished fire were distinguishable because it did not appear that any fire had originated in the cabinet.

General Case Law:

> "At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,' [Citation], and therefore has been considered part of the home itself for **Fourth Amendment** purposes. Thus, courts have extended **Fourth Amendment** protection to the curtilage; and they have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private." (***Oliver v. United States*** (1984) 466 U.S. 170, 180 [104 S.Ct. 1735; 80 L.Ed.2nd 214, 225]; see also ***People v. Strider*** (2009) 177 Cal.App.4th 1393, 1399, fn. 3.)

The curtilage of a home extends to those areas immediately proximate to a dwelling, which "harbors those intimate activities associated with domestic life and the privacies of the home." (***United States v. Dunn*** (1987) 480 U.S 294, 301, fn. 4 [107 S.Ct. 1134; 94 L.Ed.2nd 326, 334-335].)

The factors to consider in determining the boundaries of the curtilage include:

- The proximity of the area to the house;
- Whether the area is included within an enclosure around the house;
- The nature of the uses made of the area; *and*
- Steps taken to protect the area from observation by people passing by.

(***United States v. Dunn***, *supra*; ***United States v. Davis*** (9th Cir. 2008) 530 F.3rd 1069, 1077-1080; ***People v. Lieng*** (2010) 190 Cal.App.4th 1213; ***United States v. Perea-Rey*** (9th Cir. 2012) 680 F.3rd 1179, 1183-1185; ***United States v. Johnson*** (9th Cir. 2001) 256 F.3rd 895, 900-904; ***People v. Williams*** (2017) 15 Cal.App.5th 111, 120; ***United States v. Alexander*** (2nd Cir. 2018) 888 F.3rd 628.)

Specific Examples:

In a drug-trafficking case, where officers did a warrantless drug detection dog-sniff of defendant's vehicle parked in an apartment complex covered parking space near the entrance to defendant's apartment, the court recognized, "it is well-settled that the warrantless search of a home's curtilage with a drug-sniffing dog violate[s] the **Fourth Amendment**." To determine if an area falls within the curtilage of a home, the court was required to examine four factors; (1) the proximity of the area to the home, (2) whether the area is within an enclosure around the home, (3) how that area is used, and (4) what the owner has done to protect the area from observation from passersby. In this case, the court found that the proximity of the carport to defendant's apartment and the fact that the carport was not located within an enclosure that surrounded his apartment weighed against defendant's argument that the space was within the protected curtilage of his apartment. Second, although defendant regularly parked his car in the carport, he did not have any legal right to exclude others from it. Finally, because officers could see into the carport from a camera set onto a nearby pole, it was apparent that defendant did not take significant steps to protect the area from observation. Based on these facts, the court held that the carport was not within the curtilage of defendant's apartment. Therefore, the drug dog sniff did not constitute a search under the **Fourth Amendment**. (***United States v. May-Shaw*** (6th Cir. 2020) 955 F.3rd 563.)

"Land or structures immediately adjacent to and intimately associated with one's home, referred to as "curtilage," are ordinarily considered part of the home itself for **Fourth Amendment** purposes." (***People v. Williams*** (2017) 15 Cal.App.5th 111, 120.)

The curtilage will commonly include a driveway leading up to the residence. (See ***Collins v. Virginia*** (2018) 584 U.S. 586 [138 S.Ct. 1663; 201 L.Ed.2nd 9].)

One's porch, at the front door, is part of the curtilage of a home, and is in fact the "*classic exemplar* of an area 'to which the activity of home life extends.'" (***Florida v. Jardines*** (2013) 569 U.S. 1, 7 [133 S.Ct. 1409, 1415; 185 L.Ed.2nd 495]; ***United States v. Lundin*** (9th Cir. 2016) 817 F.3rd 1151, 1158.)

> Use of a drug-sniffing dog at the front door of a suspect's home, which is within the curtilage, is a search and illegal absent a search warrant. (***Florida v. Jardines***, *supra*.)

See also ***United States v. Burston*** (8th Cir. 2015) 806 F.3rd 1123; applying the rule of ***Jardines*** to a drug-dog's sniff in the area immediately outside defendant's apartment, within six to ten inches of a window.

A person's fenced off backyard is within the curtilage of his home. (***United States v. Struckman*** (9th Cir 2010) 603 F.3rd 731, 739.)

A carport attached to the side of defendant's house was within the curtilage of the home. (***United States v. Perea-Rey*** (9th Cir. 2012) 680 F.3rd 1179, 1183-1189.)

The portion of the driveway in front of defendant's shed formed part of the curtilage. (***United States v. Alexander*** (2nd Cir. 2018) 888 F.3rd 628.)

The hallway in front of defendant's apartment, when the hallway is open to anyone who might come into that area, is not part of the curtilage of defendant's residence. Placing a motion detecting camera in the hallway, showing the entrance to defendant's apartment, was held not to be a violation of the **Fourth Amendment** in that it did not violate any reasonable expectation of privacy defendant might have had in that area outside his apartment. (***United States v. Trice*** (6th Cir. 2020) 966 F.3rd 506.)

A closed shed in defendant's backyard was within the curtilage of his home, and thus accorded the same **Fourth Amendment** protections as the home itself. (***People v. Nunes*** (2021) 64 Cal.App.5th 1; finding illegal a warrantless search by a fire department captain of a metal cabinet inside the shed.

Warrantless Entry into the Curtilage:

Officers who enter the curtilage (i.e., *the front porch*) of the defendant's home at 4:00 a.m. with the intent to make a warrantless arrest do so unlawfully absent exigent circumstances, and therefore cannot rely upon any resulting exigency (i.e., defendant attempting to escape from the back of the house) to justify an arrest in the backyard. (***United States v. Lundin*** (9th Cir. 2016) 817 F.3rd 1151, 1158, reiterating the rule that "exigent circumstances cannot justify a warrantless search when the police 'create the exigency by engaging . . . in conduct that violates the **Fourth Amendment**.'" (Quoting ***Kentucky v. King*** (2011) 563 U.S. 452, 462 [131 S.Ct. 1849; 179 L.Ed.2nd 865].)

Note: The continuing validity of this case is questionable, given the U.S. Supreme Court's rejection of the Ninth Circuit Court of Appeal's so-called "*Provocation Rule*," in ***County of Los Angeles v. Mendez*** (2017) 581 U.S. 420, 422-423, 425-432 [137 S.Ct. 1539; 198 L.Ed.2nd 52].) See "*Provocation Rule*," under "*Use of Force*" (Chapter 6), above.

In ***Sims v. Stanton*** (9th Cir. 2013) 706 F.3rd 954 (certiorari granted), the Ninth Circuit Court of Appeal held that entering the curtilage of a home in pursuit of a suspect with the intent to detain him when the subject is ignoring the officer's demands to stop, at worst a misdemeanor violation of **P.C. § 148**, is illegal. The warrantless fresh or hot pursuit of a fleeing suspect into a residence (or the curtilage of a residence) is limited to felony suspects only. The United States Supreme Court, however, reversed this decision in ***Stanton v. Sims*** (2013) 571 U.S. 3 [134 S.Ct. 3; 187 L.Ed.2nd 341].

The Ninth Circuit's decision was based upon the Court's interpretation of the United States Supreme Court decision in ***Welsh v. Wisconsin*** (1984) 466 U.S. 740 [104 S.Ct. 2091; 80 L.Ed.2nd 732], and conflicts with the California Supreme Court's reasoning in ***People v. Thompson*** (2006) 38 Cal.4th 811 (see "Warrantless entry to arrest a DUI (i.e.,

"*Driving while Under the Influence*") suspect," under "*Detentions*" (Chapter 4), above).

However, the United States Supreme Court, in interpreting its own decision on ***Welsh***, noted that they only held there that a warrantless entry into a residence for a minor offense *not involving hot pursuit* was an exception to the normal rule that a warrant is "usually" going to be required. Per the Court, there is no rule that residential entries involving hot pursuit are limited to felony cases. In this case, there was a "*hot pursuit*." (***Stanton v. Sims***, *supra*, citing ***Welsh***, at p. 750.)

It is an open, undecided issue, with authority going both ways, as to whether it is lawful for an officer to conduct a "*knock and talk*" at other than the front door. The U.S. Supreme Court declined to resolve the issue. (See ***Carroll v. Carman*** (2014) 574 U.S. 13 [135 S.Ct. 348; 190 L.Ed.2nd 311]; determining that the officer was entitled to qualified immunity in that the issue is the subject of conflicting authority.)

However, while declining to decide the correctness of the generally held opinion that a police officer, in making contact with a resident, is constitutionally bound to do no more than restrict his "movements to walkways, driveways, porches and places where visitors could be expected to go," the Court cited a number of lower federal and state appellate court decisions which have so held: E.g., ***United States v. Titemore*** (2nd Cir. 2006) 437 F.3rd 251; ***United States v. James*** (7th Cir 1994) 40 F.3rd 850, vacated on other grounds at 516 U.S. 1022; ***United States v. Garcia*** (9th Cir. 1993) 997 F.2nd 1273, 1279-1280; and ***State v. Domicz*** (2006) 188 N.J. 285, 302. (***Carroll v. Carman***, supra, at pp. 19-20.)

Officers who made repeated warrantless entries into the curtilage of plaintiff's home attempting to conduct a "knock and talk," following repeated complaints by plaintiff's girlfriend that he was harassing her, where three prior attempts to get plaintiff to respond and come out to talk were unsuccessful, were not entitled to qualified immunity when later sued by plaintiff. In discussing the "implicit social license" allowing persons to enter the curtilage of one's home, the Court held that the officers exceeded the scope of that implicit social license that authorized their presence on plaintiff's property where repeated prior attempts to get plaintiff to respond to knocks were unsuccessful. Under these circumstances,

Jardines clearly established the officer's entries into the curtilage of plaintiff's home as a **Fourth Amendment** violation. As a result, the Court held that the officers were not entitled to qualified immunity. (***French v. Merrill*** (1st Cir. 2021) 15 F.4th 116.)

Exceptions:

Even though within the curtilage of a suspect's home, a hole in the ground which is in a "*common area*" of an apartment complex does not carry with it the same privacy expectations. Therefore, it was not unlawful for police, observing defendant from a vantage point outside the cartilage while he was engaged in apparent narcotic transactions, to come onto the property and lift a board covering the hole where defendant keep contraband, despite the lack of a warrant. (***People v. Shaw*** (2002) 97 Cal.App.4th 833.)

Also, the protections afforded the "*curtilage*" of one's home *do not* apply when the alleged home was nothing more than "an empty structure used occasionally as sleeping quarters." (***United States v. Barajas-Avalos*** (9th Cir. 2004) 377 F.3rd 1040, 1054-1058; a twelve-foot travel trailer on the property without any hookups or other indications that it "harbor(ed) those intimate activities associated with domestic life and the privacies of the home.")

Observations made into the curtilage of the home from the defendants' driveway, when the driveway was an area accessible to the neighbors, were properly used to obtain a search warrant. The use of night vision goggles was irrelevant. (***People v. Lieng*** (2010) 190 Cal.App.4th 1213.)

"The protection afforded one's home by the **Fourth Amendment** 'has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. [Citation.] "What a person knowingly exposes to the public, even in his own home. . . , is not a subject of **Fourth Amendment** protection.'" (***People v. Williams*** (2017) 15 Cal.App.5th 111, 120-121; quoting ***People v. Camacho*** (2000) 23 Cal.4th 824, 831.)

Entering the defendant's driveway, through an open or unlocked gate to a low, chain-link fence, to contact and talk with (consensual encounter) a subject observed working in the driveway, even if that area is considered to be part of the curtilage of the residence, is not

illegal. (***People v. Lujano*** (2014) 229 Cal.App.4th 175, 182-185; "(T)he officers exercised no more than the same license to intrude as a reasonably respectful citizen—any door-to-door salesman would reasonably have taken the same approach the house.")

> The "constitutionality of police incursion into curtilage depends on 'whether the officer's actions are consistent with an attempt to initiate consensual contact with the occupants of the home'" (***Id***., at p. 184; citing ***United States v. Perea-Rey*** (9th Cir. 2012) 680 F.3rd 1179, 1188.)

When the police have "legitimate business" in approaching a person's front door, they may enter areas of the curtilage which are impliedly open to the general public. "A sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter which necessarily negates any reasonable expectancy of privacy in regard to observations made there. The officer who walks upon such property so used by the public does not wear a blindfold; the property owner must reasonably expect him to observe all that is visible. In substance the owner has invited the public and the officer to look and to see." (***People v. Williams*** (2017) 15 Cal.App.5th 111, 121; quoting ***People v. Chavez*** (2008) 161 Cal.App.4th 1493, 1500.)

Officers using a drug-sniffing dog outside a storage unit rented by defendant, after which a search warrant was obtained for the storage unit itself, was held to be lawful, it being a place that was open to the public and where defendant did not have a reasonable expectation of privacy. (***United States v. McKenzie*** (2nd Cir. NY 2021) 13 F.4th 223.)

Temporary or Impermanent Residences:

General Rule:

The same rules may apply to *temporary* or *impermanent residences*, such as a *tent* in a public campground (***United States v. Gooch*** (9th Cir. 1993) 6 F.3rd 673, 678; see below.) or *migrant farm housing* on private property. (***LaDuke v. Nelson*** (9th Cir. 1985) 762 F.2nd 1318, 1331-1332.)

"(T)here is no **Fourth Amendment** rule that provides for protection only for traditionally constructed houses." (***United States v. Barajas-Avalos*** (9th Cir. 2004) 377 F.3rd 1040, 1055-1056; a trailer and a Quonset hut.)

Tents:

A defendant's *tent*, located on Bureau of Land Management property, exhibited a reasonable expectation of privacy under the circumstances (purposely hidden), and that it was therefore illegal to search it without a search warrant. (***United States v. Sandoval*** (9th Cir. 2000) 200 F.3rd 659.)

The **Fourth Amendment** was held to protect the defendant's privacy interests in his tent, which was located on a public campground. The Court found that defendant had both a subjective and an objectively reasonable expectation of privacy in the tent. There were no exigent circumstances that justified the warrantless arrest of defendant in his tent. The Court found that the tent was more like a house than a car for the purpose of **Fourth Amendment**. The court held that defendant's tent was a "non-public" place for the purpose of the **Fourth Amendment** analysis, even though the tent was pitched on public property. The Court further found that defendant had no less of a reasonable expectation of privacy at a public campground than he would have at a private campground. (***United States v. Gooch*** (9th Cir. 1993) 6 F.3rd 673.)

The Ninth Circuit held, however, that the area immediately around a tent, at a campsite, which is open to the public and exposed to public view, did *not* have an expectation of privacy. (***United States v. Basher*** (9th Cir. 2011) 629 F.3rd 1161, 1169.)

However, in a Washington States case, a tent set up on public property was found *not* to be protected by the **Fourth Amendment**. (***State v. Cleator*** (1993) 857 P.2nd 306, 308-309.)

The area around defendant's tent which he had set up illegally (having been cited there before for illegal camping) in a public preserve where camping required a permit, which defendant did not have, was also *not* protected by the **Fourth Amendment**. (***People v. Nishi*** (2012) 207 Cal.App.4th 954, 957-963; no legitimate expectation of privacy in the area under a tarp next to his tent.)

Defendant was found to have "a reasonable expectation of privacy" for **Fourth Amendment** purposes in an aluminum frame covered with tarps that was erected within a designated site on land specifically set aside for camping during a music festival. The court declared: "One should be free to depart the campsite for the day's adventure without fear of this expectation of privacy being

violated." (***People v. Hughston*** (2008) 168 Cal.App.4th 1062, 1068-1071.)

A *cardboard box*, located on a public sidewalk, in which defendant lived, *did not* have the same reasonable expectation of privacy, and therefore could be searched without a search warrant. (***People v. Thomas*** (1995) 38 Cal.App.4th 1331, 1333-1335.)

A *cave* on federal property where defendant did not have a legal right to be. (***United States v. Ruckman*** (10th Cir. 1986) 806 F.2nd 1471, 1474; the court noting that the lack of a "legal right to occupy the land and build structures on it," were factors "highly relevant" to the issue of the defendant's expectation of privacy.)

A "*squatter's community*" on public property is *not* protected by the **Fourth Amendment**. (***Amezquita v. Hernandez-Colon*** (1st Cir. 1975) 518 F.2nd 8, 11-12.)

Neither is *under a bridge abutment*. (***State v. Mooney*** (1991) 588 A.2nd 145, 152, 154.)

The Homeless Issue: See "*Homeless*," under "*The Bill of Rights Protections*" (Chapter 7), above.

Businesses:

Rule: A warrantless arrest in a private area of a business, when the area entered is not exposed or visible to the public and not the subject of any lawful business regulation by law enforcement, and without an exigency excusing the lack of a warrant, violates the occupant's expectation of privacy. (***People v. Lee*** (1986) 186 Cal.App.3rd 743; citing ***G.M. Leasing Corp. v. United States*** (1977) 429 U.S. 338 [97 S.Ct. 619; 50 L.Ed.2nd 530]; see also ***United States v. Driver*** (9th Cir. 1985) 776 F.2nd 807, 809-810.)

Case Law:

There is a "plainly . . . reasonable, legitimate, and objective expectation of privacy within the interior of . . . covered buildings, and it is equally clear that expectation is one society is prepared to observe. (***Dow Chemical Co. v. United States*** (1986) 476 U.S. 227, 236 [106 S.Ct. 1819; 90 L.Ed.2nd 226, 236].)

This extension of ***Ramey*** does *not* include areas of a business which are "*freely accessible to the public*." ***People v. Lee*** (1986) 186 Cal.App.3rd 743, 746-747.)

Referring to ***People v. Ramey*** (1976) 16 Cal.3rd 263, involving warrantless arrests within one's own residence. See "***Ramey***; *Within One's Own Residence*," under "*Case Law Limitations*," under "*Arrests*" (Chapter 5), above.

Lee does *not* affect the applicability of a regulatory scheme authorizing warrantless inspections of the private areas of some regulated businesses, unless the search is being conducted for the purpose of seeking contraband or evidence of crime under the guise of an administrative warrant. (***People v. Lee***, *supra*, at p. 749; ***Donovan v. Dewey*** (1981) 452 U.S. 594, 598, fn. 6 [101 S.Ct. 2534; 69 L.Ed.2nd 262, 268].)

Use of an administrative, or "*inspection*" warrant, issued by a court for the purpose of regulating building, fire, safety, plumbing, electrical, health, labor or zoning codes, does not justify an entry by police to make an arrest given the lesser proof standards needed to obtain an administrative warrant. If an entry is effected for the purpose of arresting the occupant, an arrest warrant will have to be obtained. (***Alexander v. City and County of San Francisco*** (9th Cir. 1994) 29 F.3rd 1355.)

Where law enforcement officers were asked to assist in the execution of an administrative warrant authorizing the inspection of a private residence for city code violations, they violated the **Fourth Amendment** because their primary purpose in executing the warrant was to gather evidence in support of a criminal investigation, and, accordingly, defendant was entitled to suppression of evidence obtained during the search. Although law enforcement had initiated a criminal investigation of defendant before the administrative search, it had concluded that it did not have probable cause to arrest defendant or obtain a search warrant for his home, but it knew that a city was going to obtain an inspection warrant for defendant's home and to request assistance at the inspection, and while accompanying the city on its inspection, law enforcement officers photographed incriminating evidence. (***United States v. Grey*** (9th Cir. 2020) 959 F.3rd 1166.)

There is no reasonable expectation of privacy in the guest register of a hotel or motel, at least as far as the tenant is concerned. Police officers, therefore, are not precluded from viewing such a register for the purpose of checking the residents for warrants. (***United States v. Cormier*** (9th Cir. 2000) 220 F.3rd 1103, 1107-1108.)

However, if the hotel or motel management objects, in which case law enforcement must use some form of administrative subpoena or warrant, or other court order, that affords the hotel/management an opportunity to seek a pre-inspection determination by a neutral

decision-maker as to the legitimacy of the request for inspection of the records. (***City of Los Angeles v. Patel*** (2015) 576 U.S. 409 [135 S.Ct. 2443; 192 L.Ed.2nd 435].)

However, where officers unsuccessfully rang a "call bell" on the counter in the public area of a business, knocked and announced their presence before entering the work area of the business, entry was held to lawful, at least after no one responded. Contacting defendant in an office off of the work area was upheld holding that there was no reasonable expectation of privacy in the work area in that a reasonable employee would expect someone to enter the work area under these circumstances. (***United States v. Lewis*** (8th Cir. 2017) 864 F.3rd 937.)

Workplace Searches of Government Employees:

Rule: "Searches and seizures by government employers or supervisors of the private property of their employees . . . are subject to the restraints of the **Fourth Amendment**." However, "(p)ublic employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation." (***O'Connor v. Ortega*** (1987) 480 U.S. 709, 715, 717 [107 S.Ct. 1492; 94 L.Ed.2nd 714, 721, 723].)

"The workplace includes those areas and items that are related to work and are generally within the employer's control . . . even if the employee has placed personal items in them, . . ." (***Id.***, at pp. 715-716 [94 L.Ed.2nd at p. 722].)

Reasonableness: "(*R*)*easonableness* rather than probable cause (is) the standard, balancing the 'employees' legitimate expectation of privacy against the government's need for supervision, control, and the efficient operation of the workplace." (***United States v. Gonzalez*** (9th Cir. 2002) 300 F.3rd 1048, 1049-1050; citing ***O'Connor v. Ortega***, *supra,* at pp. 719-720 [107 S.Ct. 1492; 94 L.Ed.2nd at p. 724].)

In ***Gonzalez***, a warrantless, suspicionless search of a government employee's backpack was conducted as a part of a program to combat employee theft. Upholding the lawfulness of such a search, the Court noted that the fact that the defendant had signed a form upon initial employment acknowledging that such random searches would be conducted (lessening the defendant's expectation of privacy) added to the reasonableness of the search.

See also ***United States v. Taketa*** (9th Cir. 1991) 923 F.2nd 665, 673-674, where a search of a D.E.A. agent's office by his supervisors was tested by the ***O'Connor*** standard of "*reasonableness*" and not probable cause

because the search was a part of an internal, employee misconduct investigation, the search was upheld.

In ***United States v. Shelton*** (7th Cir. 2021) 997 F.3rd 749, the Court analyzed a number of factors in determining that an undercover agent for an FBI agent violated the defendant's reasonable expectation of privacy in her office when he collected certain private documents that were later used in defendant's prosecution for wire fraud and other offenses. The factors considered by the Court included that: 1) Defendant was the sole occupant of her private, fully enclosed office for more than seven years; 2) although business invitees visited it for limited purposes, including in her absence, defendant did not share her office or her desk with anyone else; 3) defendant's office had a door, and she used it to exercise her right to exclude co-workers and visitors from her office; 4) one of the documents that the informant delivered to the FBI agent during his evidence collection efforts was an email from defendant "to all staff of (her government employer) . . . , advising that her door will be closed during work hours for more privacy;" 5) on one occasion when the informant was visiting defendant in her office, another employee came to visit, and defendant turned papers face-down on her desk so that the visitor could not see them; 6) when the informant visited defendant's office, he normally knocked before entering; 7) there was a separate waiting area outside defendant's office for visitors; and, 8) defendant kept personal, non-work related items in her office. In rejecting other factors used by the trial court to deny defendant's motion to suppress, the Seventh Circuit reversed.

Public Restrooms, Adult Bookstore Booths and Dressing Rooms:

Rule: It is considered to be a "*general exploratory search*," and thus, a **Fourth Amendment** violation, to spy on persons using public toilets, but perhaps *not* in other areas where there is a lesser expectation of privacy. (See below)

Examples:

Pay toilets in an amusement park, where officers watched from an observation pipe leading from the roof to the individual booths; observations suppressed. (***Bielicki v. Superior Court*** (1962) 57 Cal.2nd 602.)

Men's restroom in a department store, where the police officers positioned themselves in the crawl space between the ceiling and the next floor, watching through a legitimately installed vent; observations suppressed. (***Britt v. Superior Court*** (1962) 58 Cal.2nd 469.)

Note: There is no reason to believe the same rule wouldn't apply to the women's restroom.

"The bathroom, including a public bathroom stall, is perhaps the epitome of a private place. . . . (F)or over 50 years California case law has ensured that persons in a public toilet may reasonably expect they are not being secretly watched." (***In re M.H.*** (2016) 1 Cal.App.5th 699, 706-707; finding that videotaping a person in a doorless high school bathroom stall violated that person's right to privacy and constituted a violation of **Pen. Code § 647(j)(1)**; disorderly conduct.)

Doorless stalls in a public restroom with the police officer in the ceiling, looking down into the stall. Although the officer could have lawfully observed the illegal activity by simply walking into the bathroom, observing that same activity from inside the ceiling above the stall violated the **Fourth Amendment**. (***People v. Triggs*** (1973) 8 Cal.3rd 884; disapproved on other grounds.)

However, looking into a *curtained booth* where sexually explicit films were shown in an "*adult bookstore*" was upheld. The curtains were found to be there to exclude light; not to provide the occupant with any reasonable expectation of privacy. Looking into the individual booths, therefore, was lawful. (***People v. Freeman*** (1977) 66 Cal.App.3rd 424, 432-433; see also ***Tily B., Inc. v. City of Newport Beach*** (1998) 69 Cal.App.4th 1; involving an adult entertainment business, where a city ordinance required an attendant to be stationed in the restroom "to prevent specified activities" was upheld.)

It was also held to be lawful to look over and under a department store *fitting room* door where there was a two-foot gap under the three-foot high door, and another two-foot gap between the top of the door and the ceiling. While the door was intended to provide a minimal protection to modesty, it did not reasonably provide the occupant with an expectation of privacy. (***In re Deborah C.*** (1981) 30 Cal.3rd 125, 137-139.)

Spying Into Bathrooms, Etc.; *Statutes*:

Pen. Code § 647(k)(1) makes it a misdemeanor to look through a hole or opening, or otherwise view, by means of any instrumentality including, but not limited to, a periscope, telescope, binoculars, camera, motion picture camera, or camcorder, into the interior of a bathroom, changing room, fitting room, dressing room, or tanning booth, or into the interior of any other area in which the occupant has a reasonable expectation of privacy.

Pen. Code § 647(k)(3) makes it a misdemeanor to "use a concealed camcorder, motion picture camera, or photographic camera of any time to secretly videotape, film, photograph, or record by electronic means," someone "in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person," without the victim's knowledge or consent, while "in the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person."

Pen. Code § 653n; *Two-Way Mirrors*: It a misdemeanor to install or maintain a "*two-way mirror*" permitting the observation of any restroom, toilet, bathroom, washroom, shower, locker room, fitting room, motel room, or hotel room. The section specifically excludes state or local public penal, correctional, custodial, or medical institutions.

> **Pen. Code § 653n**, prohibiting the installation or maintenance of such disguised surfaces as two-way mirrors in certain specified places, enunciates a public policy against clandestine observation of public restrooms and renders it reasonable for users thereof to expect that their privacy will not be surreptitiously violated. (***People v. Metcalf*** (1971), 22 Cal.App.3rd 20.)
>
> While **Pen. Code § 653n**, concerning video surveillance in locker rooms and enunciating a public policy against clandestine observation of public restrooms, rendering it reasonable for users thereof to expect that their privacy will not be surreptitiously violated, was enacted after the relevant conduct in a case involving covert video surveillance of a police department's locker room and represents society's understanding that a locker room is a private place requiring special protection. (***Trujillo v. City of Ontario*** (2006), 428 F. Supp.2nd 1094.)

Problem: *When Officers Trespass*: The fact that an officer might be "*trespassing*" upon the defendant's property (within the *curtilage*, without entering the premises), at least until recently (i.e., see "*Curtilage of the Home*," above) has historically been relatively insignificant when determining whether the **Fourth Amendment** has been violated. The issue is one of "*reasonableness*" under the circumstances. The fact that a trespass may be involved is but one factor to consider when determining reasonableness. (***People v. Manderscheid*** (2002) 99 Cal.App.4th 355, where walking around to the back of the defendant's house to knock, while looking for an armed parolee-at-large, held to be lawful, differentiating the rule of ***People v. Camacho*** (2000) 23 Cal.4th 824 [see below], on the facts and the relative seriousness of the crime involved.)

See also ***People v. Chavez*** (2008) 161 Cal.App.4th 1493, where walking to the side of the house and climbing over a six foot fence, past a locked gate, was lawful when the officer observed, in plain sight, a cocked revolver on the ground at the side of the house. The necessity to retrieve the weapon, for safety purposes, allowed for the entry of the side yard.

It is an open, undecided issue, with authority going both ways, as to whether it is lawful for an officer to conduct a "*knock and talk*" at other than the front door. The U.S. Supreme Court declined to resolve the issue. (***Carroll v. Carman*** (2014) 574 U.S. 13 [135 S.Ct. 348; 190 L.Ed.2nd 311]; determining that the officer was entitled to qualified immunity in that the issue is the subject of some conflicting authority.)

> However, while declining to decide the correctness of the generally held opinion that a police officer, in making contact with a resident, is constitutionally bound to do no more than restrict his "movements to walkways, driveways, porches and places where visitors could be expected to go," the Court cited a number of lower federal and state appellate court decisions which have so held: E.g., United States v. Titemore (2nd Cir. 2006) 437 F.3rd 251; United States v. James (7th Cir 1994) 40 F.3rd 850, vacated on other grounds at 516 U.S. 1022; United States v. Garcia (9th Cir. 1993) 997 F.2nd 1273, 1279-1280; and State v. Domicz (2006) 188 N.J. 285, 302. (***Carroll v. Carman***, supra, at pp. 19-20.)

See "*Curtilage of the Home*," above. See also "*Open Fields*" (Chapter 15), below.

Securing the Premises Pending the Obtaining of a Search Warrant:

Fourth Amendment: The securing of a residence by police, pending the obtaining of a warrant, is subject to **Fourth Amendment** protections. (***United States v. Lindsey*** (9th Cir. 1989) 877 F.2nd 777, 780.)

> Such a "*securing*" of a house is in fact a **Fourth Amendment** seizure. (***United States v. Shrum*** (10th Cir. KS 2018) 908 F.3rd 1219.)

General Rule: Where police officers are already at a residence without a warrant when evidence is lawfully discovered (e.g., by a *plain sight observation*), the discovery of which provides probable cause to search the rest of the residence, but when any other evidence in the house is likely to disappear or be destroyed while a search warrant is obtained (i.e., an "*exigency*;" see ***People v. Superior Court* [*Irwin*]** (1973) 33 Cal.App.3rd 475.), the officers have three options:

- Seize only that which is in plain sight, and ignore what might be found in the rest of the house.

- Seek *consent* to search the entire residence from the residents. (See "*Consent Searches*," below)

- *Secure the residence* (i.e., detain its occupants and guard the house) pending the obtaining of a search warrant. (See below)

Exigency of the Officers' Own Making: The old rule was that although a police officer may, with exigent circumstances, enter and secure a residence (or other protected place) pending the obtaining of a warrant or consent to search, the law did not allow a warrantless entry and securing of the premises if the exigency was of the officers' own making.

With Probable Cause: Officers, with probable cause which would have justified the obtaining of a search warrant, but hoping to obtain an oral consent to search instead, knock on the front door only to be told by the occupants that admission is being denied. The fact that evidence may now be destroyed, etc., while a warrant is obtained is not an excuse to make a warrantless entry to secure the house. (***People v. Shuey*** (1973) 13 Cal.App.3rd 835; see also ***United States v. Driver*** (9th Cir. 1985) 776 F.2nd 807.)

The continuing validity of ***Shuey*** and ***Driver*** has been somewhat restricted in light of the United States Supreme Court decision in ***Kentucky v. King*** (2011) 563 U.S. 452, 459-472 [131 S.Ct. 1849; 179 L.Ed.2nd 865], below.

"(S)ome lower court cases suggest that law enforcement officers may be found to have created or manufactured an exigency if the court concludes that the course of their investigation was 'contrary to standard or good law enforcement practices (or to the policies or practices of their jurisdictions).' (***United States v.***) ***Gould*** ((5th Cir. 2004)) 364 F.3rd (578) at 591. This approach fails to provide clear guidance for law enforcement officers and authorizes courts to make judgments on matters that are the province of those who are responsible for federal and state law enforcement agencies." (***Kentucky v. King***, *supra*, at pp. 467-468.)

See also ***United States v. Iwai*** (9th Cir. 2019) 930 F.3rd 1141, 1146-1147, fn. 4, citing ***Kentucky v. King***, at pp. 469-470, noting that, "(w)hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do."

Note: The rule of ***Kentucky v. King*** can be analyzed as follows: Where officer without a warrant merely knock (even though

loudly) and announce their presence, seeking no more than a "knock and talk," the Fourth Amendment is not violated in that anyone can lawfully do that. Any attempt by the occupants at that point to destroy evidence provides the necessary exigent circumstance allowing for a forced entry. "Occupants who choose *not* to stand on their constitutional rights (under such circumstances) but instead elect to attempt to destroy evidence (thus creating an exigent circumstance) have only themselves to blame for the warrantless exigent-circumstances search that may ensue." (***Kentucky v. King***, *supra*, at p. 470. Italics added.) Should the officers, however, threaten to break in (i.e., by "demanding entry") or otherwise violate the Fourth Amendment (e.g., to make an unlawful entry, search, and/or arrest), then the attempted destruction of evidence is the product of that threatened constitutional violation, and cannot be used by the Government as an excuse to force entry. Any destruction of evidence by the occupants under such circumstances is the direct product of the officers' illegal actions, and such evidence will be suppressed. (See ***United States v. Iwai***, *supra*. (dissenting opinion), at pp. 1159-1161.)

However, assuming the continuing validity of ***Shuey*** and ***Driver***, when a residence *is* illegally entered and secured by law enforcement under these circumstances, and a warrant is thereafter obtained using *only* that information developed prior to, and independent of the illegal entry as the probable cause, a subsequent search of the premises under authority of the warrant will be upheld. (***Segura v. United States*** (1984) 468 U.S. 796 [104 S.Ct. 3380; 82 L.Ed.2nd 599]; ***People v. Angulo*** (1988) 199 Cal.App.3rd 370; ***People v. Lamas*** (1991) 229 Cal.App.3rd 560, 571.)

Even when observations made during an illegal entry are used in the warrant affidavit, the courts have held that that part may be excised from the affidavit and the remainder then retested for the existence of probable cause. If it is there, the search will be upheld. (***People v. Gesner*** (1988) 202 Cal.App.3rd 581; see also ***People v. Williams*** (2017) 15 Cal.App.5th 111, 124-125.)

> If it is not, the evidence must be suppressed. (***People v. Machupa*** (1994) 7 Cal.4th 614.)
>
> If the retested warrant is held to be valid, those items illegally observed during the initial illegal entry may still be admissible under the "*inevitable discovery rule*." (***People v. Gesner***, *supra*, at pp. 591-592.)

See ***United States v. Lundin*** (9th Cir. 2016) 817 F.3rd 1151, 1158, reiterating the rule that "exigent circumstances cannot justify a warrantless search when the police 'create the exigency by engaging . . . in conduct that violates the **Fourth Amendment**.'" (Quoting ***Kentucky v. King*** (2011) 563 U.S. 452, 462 [131 S.Ct. 1849; 179 L.Ed.2nd 865].)

In ***Lundin***, the Ninth Circuit held that officers who enter the curtilage (i.e., the front porch) of the defendant's home at 4:00 a.m. with the intent to make a warrantless arrest do so unlawfully, and therefore cannot rely upon any resulting exigency (i.e., defendant attempting to escape from the back of the house) to justify an arrest in the backyard.

Note: The continuing validity of this case is questionable, given the U.S. Supreme Court's rejection of the Ninth Circuit Court of Appeal's so-called "*Provocation Rule*," in ***County of Los Angeles v. Mendez*** (2017) 581 U.S. 420, 422-423, 425-432 [137 S.Ct. 1539; 198 L.Ed.2nd 52].) See "*Provocation Rule*," under "*Use of Force*" (Chapter 6), above.

When exigency is not of the officers' own making:

If, however, there was legitimately no opportunity to get a warrant before the exigency develops (i.e., the exigency was *not* of the officers' own making), the premises may be entered and secured and the status quo maintained while a warrant is obtained. (***People v. Superior Court* [*Irwin*]** (1973) 33 Cal.App.3rd 475.)

Questioning defendant outside his home about his contacts with Pilipino sex traffickers, where he was paying them thousands of dollars, the Eighth Circuit held that federal agents did not create the exigency by "engaging or threatening to engage in conduct that violates the **Fourth Amendment**." By the time the agents mentioned their concern that defendant might destroy evidence, he had already made a number of suspicious comments, including offering multiple excuses for his refusal to cooperate. Consequently, the court held that officers could not have manufactured or created an exigency that already existed. (***United States v. Meyer*** (8th Cir. IA Dec. 2, 2021) 19 F.4th 1028; agents made a warrantless entry to seize defendant's computers, etc., before getting a warrant authorizing the search of the devices.)

New Rule? The United States Supreme Court has provided considerable clarification on this issue, appearing to establish a new rule. If so, the new rule is that so long as the officers' actions in knocking on the door and identifying themselves, and presumably seeking a consensual entry, does not itself constitute a violation or threatened violation of the **United States Constitution** (i.e., the **Fourth Amendment**), there is no penalty for doing so. Should the occupants then attempt to destroy or secret evidence, that's their choice. (***Kentucky v. King*** (2011) 563 U.S. 452, 459-472 [131 S.Ct. 1849; 179 L.Ed.2nd 865].)

Note: The ***King*** case, however, specifically does not decide what is, and what is not, an exigent circumstance allowing for an immediate warrantless entry. In ***King***, the officers were in pursuit of a fleeing felon when they heard noises from inside consistent with evidence being destroyed. The issue whether being denied a consensual entry is itself an exigent circumstance was not discussed.

When the Exigency is Over:

"(T)he justification for searching based on exigent circumstances 'ends when the emergency passes.'" (***People v. Nunes*** (2021) 64 Cal.App.5th 1, 6; quoting ***People v. Duncan*** (1986) 42 Cal.3rd 91, 99.)

Securing Cases:

Securing a residence as a crime scene is a "*seizure*" subject to **Fourth Amendment** protection. (***United States v. Alaimalo*** (9th Cir. 2002) 313 F.3rd 1188, 1192, fn. 1.)

Such a "securing" of a house is in fact a **Fourth Amendment** seizure. (***United States v. Shrum*** (10th Cir. KS 2018) 908 F.3rd 1219.)

But, with "*probable cause*" to believe a residence may contain evidence of a crime, the residence may constitutionally be seized as a "*crime scene*." (***Dixon v. Wallowa County*** (9th Cir. 2003) 336 F.3rd 1013.)

With *probable cause to* believe that contraband is contained in a particular residence, and a *reasonable belief* that if the house is not immediately secured the evidence will be destroyed, officers may enter to secure the house pending the obtaining of a search warrant or a consent to do a complete search. (***United States v. Alaimalo***, *supra*.)

A five-hour seizure of the defendant's residence, pending the obtaining of a search warrant, was justified when the officers had probable cause to believe weapons from a drive-by shooting, which had occurred shortly before, might be in the house. (***In re Elizabeth G.*** (2001) 88 Cal.App.4th 496.)

Where it appears that confederates of a person arrested for selling narcotics will learn of the arrest and destroy or secret contraband still in the house, it is lawful to secure the house pending the obtaining of a search warrant. (***Ferdin v. Superior Court*** (1974) 36 Cal.App.3rd 774, 781; ***People v. Freeny*** (1974) 37 Cal.App.3rd 20.)

A three-minute sweep of a house to check for persons reasonably believed to be in the house who might destroy evidence, was held to be lawful. (***People v. Seaton*** (2001) 26 Cal.4th 598.)

Entering and securing a residence pending the obtaining of a search warrant was supported by exigent circumstances when officers received information that the occupant was about to destroy or remove contraband from the residence. (***United States v. Fowlkes*** (9th Cir. 2015) 804 F.3rd 954, 969-971.)

> The fact that it took about an hour to coordinate the officers necessary to make the warrantless entry and securing of defendant's apartment was irrelevant; the exigency still existed. (***Id***., at p. 971.)

See also ***United States v. Dent*** (1st Cir. ME. 2017) 867 F.3rd 37, where the court held that pending the obtaining of a search warrant, the securing of the residence, including doing a protective sweep during which illegal contraband was observed, did not affect the legality of the search warrant where there was no evidence that either the warrant or the decision to seek the warrant was based on anything the officers discovered during their warrantless entry. The court found that the process of applying for the search warrant had already been initiated based on other independent sources of information and that drugs observed under an air mattress were not included in the search warrant affidavit.

See "*Detention of a Residence*," immediately below.

***Miscellaneous Issues*:**

Detention of a Residence: It is proper for the police to temporarily "*detain*" a residence, guarding it from the outside and preventing people from entering, when there is a *reasonable suspicion* that contraband or evidence of a crime is inside, at least until the officers can determine through their investigation whether or not to seek a search warrant. (***Illinois v. McArthur*** (2001) 531 U.S. 326 [121 S.Ct. 946; 148 L.Ed.2nd 838]; ***People v. Bennett*** (1998) 17 Cal.4th 373.)

In determining what is reasonable, a court must balance the privacy-related concerns of the resident with the law enforcement-related concerns, considering four factors: (1) Whether the police had probable cause to believe that the defendant's residence contained evidence of a crime or contraband; (2) whether the police had good cause to fear that, unless restrained, the defendant would destroy the evidence or contraband before the police could return with a warrant; (3) whether the police made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy; and (4) whether the police imposed the restraint for a limited period of time; i.e., whether the time period was no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant. (***United States v. Cha*** (9th Cir. 2010) 587 F.3rd 995, 1000; citing ***Illinois v. McArthur***, *supra*., at p. 331-332.)

In ***United States v. Cha***, *supra*, detaining the defendant's residence for 26½ hours while a search warrant was obtained was held to be unreasonable, requiring the suppression of the resulting evidence.

In ***Segura v. United States*** (1984) 468 U.S. 796 [104 S.Ct. 3380; 82 L.Ed.2nd 599], 19 hours (during which the house was detained from inside) was held to be reasonable in that the officers did not exploit the delay, only eight of the 19 hours was when a judge was available, and the defendants were both in custody anyway.

Note: It is difficult to see how this might differ from "*securing a residence*," as discussed above.

A thirteen hour seizure of a hotel room held to be reasonable in that the seizure occurred at midnight with the warrant obtained by the following afternoon, at 1:00 p.m., and the defendants were in custody during this time period. (***United States v. Holzman*** (9th Cir. 1989) 871 F.2nd 1496, 1507-1508.)

Detention of the Residents Outside: Also, with probable cause justifying the obtaining of a search warrant, the residents may be lawfully detained outside pending the arrival of the search warrant. (***Illinois v. McArthur*** (2001) 531 U.S. 326 [121 S.Ct. 946; 148 L.Ed.2nd 838].)

But see ***United States v. Bailey*** (2nd Cir. 2011) 652 F.3rd 197, reversing the Second Circuit Court of Appeal, where the defendant wasn't detained until after driving at least a mile from his home, and resolving a split of authority among other circuits, the United States Supreme Court held that ***Michigan v. Summers*** (1981) 452 U.S. 692 [101 S.Ct. 2587; 69 L.Ed.2nd 340, 349-350], does not permit the detention of occupants beyond the immediate vicinity of the premises which is the subject of a search warrant, at least when the sole reason for the detention is that the person's home was about to be searched. If police officers elect to detain an individual after he leaves the immediate vicinity of the premises being searched, that detention must be justified by some other rationale.

See "*Detentions Away from the Place being Searched*," under "*Detentions*" (Chapter 4), above.

Knock and Talk:

Rule: Where the officer *does not* have probable cause prior to the contact (thus, he is not able to obtain a search warrant), there is generally no constitutional impediment to conducting what is known as a "*knock and talk*;" making contact with the occupants of a residence for the purpose of asking for a consent to enter. (***United States v. Cormier*** (9th Cir. 2000) 220 F.3rd 1103, 1108-1109.)

Test: The key to conducting a lawful "*knock and talk*," when there is no articulable suspicion that can be used to justify an "*investigative detention*," is whether "a reasonable person would feel free 'to disregard the police and go about his business.'" [Citation] If so, no articulable suspicion is required to merely knock on the defendant's door and inquire of him who he is and/or to ask for consent to search. (***People v. Jenkins*** (2004) 119 Cal.App.4th 368.)

Legal Knock and Talks:

> "Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof—whether the questioner be a pollster, a salesman, or an officer of the law." (***Davis v. United States*** (9th Cir. 1964) 327 F.3rd 301. 303.)

Knocking at the defendant's motel room door and asking (as opposed to demanding) the occupants to open the door to speak with them, when the defendant comes outside, is no more than a lawful consensual encounter when nothing is said or done which would have indicated to defendant that he was not free to leave or return to his room. (***United States v. Crapser*** (9th Cir. 2007) 472 F.3rd 1141, 1145-1147.)

State authority similarly upholds the practice. (See ***People v. Colt*** (2004) 118, Cal.App.4th 1404, 1410-1411.)

See also ***People v. Michael*** (1955) 45 Cal.2nd 751, at page 754, where the California Supreme Court noted that: "It is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes. Such inquiries, although courteously made and not accompanied with any assertion of a right to enter or search or secure answers, would permit the criminal to defeat his prosecution by voluntarily revealing all of the evidence against him and then contending that he acted only in response to an implied assertion of unlawful authority."

The information motivating an officer to conduct a knock and talk may be from an anonymous tipster. There is no requirement that officers corroborate anonymous information before conducting a knock and talk. (***People v. Rivera*** (2007) 41 Cal.4th 304.)

The trial court did not err in denying defendant's motion to suppress evidence from a warrantless motel-room entry and search which began as a knock and talk, because there was an exigency to justify the warrantless search; i.e., an officer could hear running throughout the room and toilet-flushing sounds, suggesting that the room's occupants might have been attempting to destroy evidence. The court further held that the agents did not create the exigency that justified their entry and search of the motel room despite knocking for some two minutes. Although the agents knocked "vigorously," the knocking was relatively brief, and the agents did not attempt to force entry until after they heard the toilet flush. (***United States v. Daniels*** (5th Cir. 2019) 930 F.3rd 393].)

Illegal Knock and Talks:

See ***Orhorhaghe v. INS*** (9th Cir. 1994) 38 F.3rd 488, where officers positioned themselves so as to be certain the defendant could not escape or leave, they deliberately revealed their previously concealed firearms, the contact occurred in a non-public place, the

officers acted in an aggressive manner suggesting that compliance was not optional, and the officers outnumbered defendant four-to-one. The contact was held to be an unlawful detention.

And see ***United States v. Jerez*** (7th Cir. 1997) 108 F.3rd 684, where a similar situation was held to constitute an "*investigative detention*," thus requiring an "*articulable reasonable suspicion*" to be lawful, because the officers knocked on the motel room door in the middle of the night continually for a full three minutes, while commanding the occupants to open the door.

An otherwise lawful "*knock and talk*" was converted into an "extended" detention where officers continued to press the defendant for permission to enter his apartment after his denial of any illegal activity, causing the Court to conclude that a later consent-to-search was the product of the illegal detention, and thus invalid. (***United States v. Washington*** (9th Cir. 2004) 387 F.3rd 1060.)

An anonymous 911-hangup call, traceable to a particular motel, but without sufficient information to determine which room the call may have come from, did not allow for the non-consensual entry into the defendant's room merely because of the suspicious attempts by the person who answered the door to keep the officers from looking inside, and her apparent lies concerning no one else being there. (***United States v. Deemer*** (9th Cir. 2004) 354 F.3rd 1130.)

In greatly restricting the "knock and talk" theory for contacting a resident at his front door, the Ninth Circuit Court of Appeal has held that to be lawful, the attempt to contact the resident of a home within its curtilage must do so during "normal waking hours" and without the subjective intent to conduct a warrantless arrest (absent exigent circumstances). (***United States v. Lundin*** (9th Cir. 2016) 817 F.3rd 1151, 1158-1159.)

> "First, unexpected visitors are customarily expected to knock on the front door of a home only during normal waking hours." . . . (⁋) "Second, the scope of a license is often limited to a specific purpose, *(Citation),* and the customary license to approach a home and knock is generally limited to the "purpose of asking questions of the occupants,' (Citation). Officers who knock on the door of a home for other purposes generally exceed the scope of the customary license and therefore do not qualify for the 'knock and talk' exception." (Id., at p. 1159; citing ***Florida v. Jardines*** (2013) 569 U.S. 1, at p. 7 [133 S.Ct. 1409; 185

L.Ed.2nd 495], and ***United States v. Perea-Rey*** (9th Cir. 2012) 680 F.3rd 1179, at 1187, respectively.)

Despite the decision in ***Lundin***, above, it is an open, undecided issue, with authority going both ways, as to whether it is lawful for an officer to conduct a "knock and talk" at other than the front door. The U.S. Supreme Court declined to resolve the issue. (***Carroll v. Carman*** (2014) 574 U.S. 13 [135 S.Ct. 348; 190 L.Ed.2nd 311]; determining that the officer was entitled to qualified immunity in that the issue is the subject of some conflicting authority.)

> For example, although police officers are generally allowed to approach a home to contact individuals inside and conduct a "knock and talk," in this case, the evidence did not support the Border Patrol Agents' argument that they entered defendant's property to initiate a consensual encounter with him. The court concluded that it was not objectively reasonable, as part of a knock-and-talk, for the agent to bypass the front door, which he had seen defendant open in response to a knock by a suspected illegal alien moments earlier, and intrude into an area of the curtilage where an uninvited visitor would not be expected to appear (i.e., carport attached to the side of the house). By trespassing onto the curtilage and detaining defendant, the agent violated defendant's **Fourth Amendment** rights. (***United States v. Perea-Rey*** (9th Cir. 2012) 680 F.3rd 1179, 1183-1189.)
>
> However, while declining to decide the correctness of the generally held opinion that a police officer, in making contact with a resident, is constitutionally bound to do no more than restrict his "movements to walkways, driveways, porches and places where visitors could be expected to go," the Court cited a number of lower federal and state appellate court decisions which have so held. (E.g., ***United States v. Titemore*** (2nd Cir. 2006) 437 F.3rd 251; ***United States v. James*** (7th Cir 1994) 40 F.3rd 850, vacated on other grounds at 516 U.S. 1022; ***United States v. Garcia*** (9th Cir. 1993) 997 F.2nd 1273, 1279-1280; and ***State v. Domicz*** (2006) 188 N.J. 285, 302. (***Carroll v. Carman***, supra, at pp. 19-20.)
>
> Opening the front door, even without entering, is a "search," and illegal absent consent, a warrant, or exigent circumstances. (See ***United States v. Holiday*** (9th Cir. 2021) 998 F.3rd 888, 892-894.)

See "*Knock and Talk*," under "*Detentions*" (Chapter 4), above.

The Doctrine of "*Consent Once Removed*:"

In the situation where an undercover police officer, or even a paid informant, has already been invited into a criminal suspect's home where, through observations while there, probable cause is established resulting in the undercover officer or informant signaling other officers, the backup officers may then lawfully make a warrantless entry. (***United States v Bramble*** (9th Cir. 1966) 103 F.3rd 1475, 1478-1479; ***United States v. Yoon*** (6th Cir. 2005) 398 F.3rd 802.)

> "Once consent has been obtained from one with authority to give it, any expectation of privacy has been lost. We seriously doubt that the entry of additional officers would further diminish the consenter's expectation of privacy, and, in the instant case, any remaining expectation of privacy was outweighed by the legitimate concern for the safety of [the officers inside]. (Citations omitted.)" **(*United States v Bramble*, *supra*,** at p. 1478.)

Observing Contraband from Outside a Residence:

Rule: When a law enforcement officer observes contraband in plain sight from outside the house, such as through an open window or door, the officer *cannot* make a warrantless entry to seize that evidence absent an exigent circumstance. (***Horton v. California*** (1990) 496 US. 128, 137, fn. 7 (and cases cited therein) [110 S.Ct. 2301; 110 L.Ed.2nd 112, 123]; see also ***Soldal v. Cook County*** (1992) 506 U.S. 56, 63-64 [113 S.Ct. 538; 121 L.Ed.2nd 450].)

Exception; Exigent Circumstances: Exigent circumstances might be present when occupants of the house observe the police officer observing the contraband, thus creating the circumstance where it is reasonable to believe the evidence will be destroyed before a warrant can be obtained. In such a case, it might be appropriate to make an immediate entry for purposes of "*securing*" the residence pending the obtaining of a search warrant. (See "*Securing the Premises*," above.)

> "One exception is when an exigent circumstance makes the needs of law enforcement so compelling that a warrantless search becomes objectively reasonable." (***People v. Nunes*** (2021) 64 Cal.App.5th 1, 6; citing ***Kentucky v. King*** (2011) 563 U.S. 452, 460 [179 L.Ed.2nd 865; 131 S.Ct. 1849].)

Exigent circumstances allowing an immediate entry were found where the suspect was observed through the open door near the contraband under circumstances where it appeared he might have been the victim of an overdose. (***People v. Zabelle*** (1996) 50 Cal.App.4th 1282.)

Observing what appeared to be a cocked revolver at the side of a house (i.e., in the cartilage) behind a six foot fence with a locked gate, allowed for the officer to scale the fence to recover the weapons for officer safety purposes, and because it was believed that a child might be present in the house. (***People v. Chavez*** (2008) 161 Cal.App.4th 1493.)

Exigent circumstances was held to justify the immediate warrantless entry of defendant's trailer to secure two rifles (which were in fact seized and removed from the trailer) known to be inside when a female victim reported to police that she had just been raped inside the trailer, defendant's whereabouts was unknown, and the rape victim's two children and husband were missing. (***People v. Suarez*** (2020) 10 Cal.5th 116, 151-152.)

However, the officer must have been operating under the reasonable belief that there was no opportunity to obtain a warrant. In ***United States v. Banks*** (7th Cir. 2023) 60 F.4th 386, defendant posted a Snapchat video of himself barbequing on his porch with a gun on the grill's shelf. Springfield police officer Redding saw the post and knew defendant to be a convicted felon. Within minutes, Officer Redding and other officers headed to defendant's home and saw defendant on his porch, next to the grill. Attempting to pat him down for weapons, the officers struggled with defendant, eventually arresting him inside the house. A pat down revealed a loaded semi-automatic pistol in his pocket. The officers also saw a box of ammunition. They did not have a warrant to enter defendant's porch or to search his home. At a suppression hearing, Officer Redding stated that he did not believe he needed a warrant to enter the porch because the police had reasonable suspicion that defendant, as a convicted felon, was committing a crime by possessing a gun nor did he believe he had enough time to obtain a warrant. The district court denied defendant's motion to suppress. The court further held that the patdown for weapons was lawful. Defendant entered a conditional guilty plea. The Seventh Circuit reversed. Because defendant was a convicted felon, the officers needed nothing more than the video to request a warrant to arrest him. A front porch—part of a home's "curtilage"—receives the same protection as the home itself, so the officers' entry was illegal

without a warrant. No exception to the warrant requirement applied.

Lawfulness of the Initial Observation; *The* "*Lawful Access*" *Requirement*:

Before exigent circumstances, or a resulting search warrant, can be used as a basis for entering a residence, it must be first determined whether the police officer's initial observations were in fact lawful; i.e., made from a position or location the officer had a legal right to be. (***United States v. Garcia*** (9th Cir. 1993) 997 F.2nd 1273, 1279; ***People v. Ortiz*** (1994) 32 Cal.App.4th 286, 291; see also ***People v. Camacho*** (2000) 23 Cal.4th 824; where observations from the side of defendant's house held to be illegal.)

Investigators following up on a robbery case, seized defendant's clothing from a hospital's trauma room floor without a warrant, defendant having been shot during the robbery and later showed up at the hospital for treatment. Defendant had been airlifted to another hospital before the seizure of his clothing. The Court held that the investigators had lawful access to defendant's clothes. The "*lawful access*" requirement ensures that police officers do not conduct warrantless entries and trespass onto private property just because they see incriminating evidence located there. In this case, the court found that no trespass occurred in the hospital room in that defendant had been airlifted to another hospital by the time the crime scene investigators seized his clothing from the trauma room. The Court added that even if defendant had a reasonable expectation of privacy in his hospital room while the being treated, this expectation of privacy did not continue after he left the hospital and hospital staff began preparing the room for new patients. (***United States v. Clancy*** (6th Cir. 2020) 979 F.3rd 1135.)

Using a Ruse to Cause a Suspect to Open his Door or Gain Entry:

Split of Authority: While "*knock and talks*" are generally held to be legal (see above), whether or not an officer, without probable cause, may use a ruse or subterfuge to make warrantless observations or entry inside a residence depends upon the circumstances. The difference, apparently, is whether the officer making entry is working undercover (legal), and does not misrepresent who he is, but instead misrepresents the purpose of the entry (illegal).

Held to be Illegal:

Causing a suspect to open his door for the purpose of allowing the officer the opportunity to make a "*plain sight observation*" of

contraband within the residence is illegal. (***People v. Reeves*** (1964) 61 Cal.2nd 268.)

The Ninth Circuit Court of Appeal, in holding observations made were illegal, ruled that in order to lawfully gain an intentional visual access to the inside of a residence, one or more of three circumstances must be present:

- The occupant voluntarily and knowingly opens the door in response to a request, but not a threat or command, such as in a "*knock and talk*" (see above);
- The officers have a search warrant; *or*
- The offices have probable cause and exigent circumstances justifying the lack of a warrant.

(***United States v. Washington*** (9th Cir. 2004) 387 F.3rd 1060, 1070-1071; officers refused to allow defendant to shut the door during an otherwise lawful "*knock and talk*," making the inside of defendant's apartment clearly visible.)

Using a ruse to trick people outside during a narcotics investigation at an apartment complex, for the purpose of confronting as many people as they could lure outside, resulted in the defendant's illegal detention when he was surrounded by a team of officers all dressed in raid gear. "A deception used to gain entry into a home and a ruse that lures a suspect out of a residence is a distinction without much difference. . . ." (***People v. Reyes*** (2000) 83 Cal.App.4th 7, 12-13.)

Use of an administrative, or "inspection" warrant, issued by a court for the purpose of regulating building, fire, safety, plumbing, electrical, health, labor or zoning codes, does not justify a concurrent entry (i.e., entering with the inspectors) by police to make an arrest when the police attempt to use the lower standard of proof needed to obtain an administrative warrant as their justification for entering. If an entry is effected for the purpose of arresting the occupant, an arrest warrant will have to be obtained. (***Alexander v. City and County of San Francisco*** (9th Cir. 1994) 29 F.3rd 1355.)

In a case out of Washington State, a state patrol officer identified himself as a law enforcement officer and requested a social security benefit applicant's assistance in a fictitious investigation, gaining entry into her home using a ruse. Because he lied to the resident about his real purpose of his entry into her residence—to conduct a civil investigation of her possible social security fraud—

her consent to the officer's entry into her home was vitiated by his deception. By observing and videotaping the resident inside her home without her consent, the officer conducted a "search" within the meaning of the **Fourth Amendment**. However, even though the warrantless ruse-entry into the resident's home was an unreasonable search, it was not clearly established that the officer's conduct, in the context of a civil or administrative investigation related to a determination of benefits eligibility, was a search or was unreasonable. The officer, therefore, was entitled to qualified immunity. (***Whalen v. McMullen*** (9th Cir. 2018) 907 F.3rd 1139.)

> See ***United States v. Esqueda*** (9th Cir. Dec. 12, 2023) 88 F.4th 818, 826, at fn. 4, where the court explains the difference between entering under false pretenses, while not misrepresenting who the officer is but lying to the occupant about the purpose of the entry (illegal), and gaining consent to enter while the officers are undercover (legal). "In contrast to a ruse entry, an undercover entry does not violate the **Fourth Amendment** "as long as the undercover agent does not exceed the scope of his invitation while inside the home."

Where law enforcement officers were asked to assist in the execution of an administrative warrant authorizing the inspection of a private residence for city code violations, they violated the **Fourth Amendment** because their primary purpose in executing the warrant was to gather evidence in support of a criminal investigation, and, accordingly, defendant was entitled to suppression of evidence obtained during the search. Although law enforcement had initiated a criminal investigation of defendant before the administrative search, it had concluded that it did not have probable cause to arrest defendant or obtain a search warrant for his home, but it knew that a city was going to obtain an inspection warrant for defendant's home and to request assistance at the inspection, and while accompanying the city on its inspection, law enforcement officers photographed incriminating evidence. (***United States v. Grey*** (9th Cir. 2020) 959 F.3rd 1166.)

Posing as a potential buyer of a residence, thus gaining entry for the purpose of making observations of illegal activity, was held to be an illegal ruse. (***People v. De Caro*** (1981) 123 Cal.App.3rd 454.)

> *But see* ***People v. Lucatero*** (2008) 166 Cal.App.4th 1110, below.

A real estate agent who, upon showing a house to potential buyers, observed an abnormal amount of electronic equipment and suspected that the items were stolen. She called police who made a warrantless entry with the agent and, after an extensive search, seized stolen property. Although criticizing the reasoning of ***De Caro*** to some extent, the Court still held the warrantless entry to be illegal. The Court held that the agent, while authorized to show prospective buyers the house, was not authorized to allow the police in for the purpose of conducting a criminal investigation. The authority of a real estate agent, "is limited, as is all consensual authority, by the terms of the consent and the purpose for which it was given. [Citations] A real estate agent is authorized to consent to the entry of persons the agent believes in good faith to be potential purchasers of the property." (***People v. Jaquez*** (1985) 163 Cal.App.3rd 918.)

Held to be Legal:

Defendant was free on bail pending trial when a wired informer, who was an old acquaintance of defendant, entered defendant's store and engaged him in conversation. Unbeknownst to defendant, the acquaintance was wired for sound with a small microphone in his inside overcoat pocket and a small antenna running along his arm. An agent of the Narcotics Bureau had stationed himself outside with a receiving set properly tuned to pick up any sounds the microphone transmitted. At trial, the agent testified to defendant's incriminating admissions that he heard via a receiving set that picked up the conversation. His conviction was affirmed on appeal. On certiorari, the Supreme Court held that: (1) the conduct of the informer and the agent did not violate the **Fourth Amendment** because the informer entered a place of business with defendant's consent, the tort doctrine of trespass ab initio did not apply, and eavesdropping on a conversation with the connivance of one of the parties was not an unreasonable search or seizure. Exclusion of the agent's testimony was not justified because there was no good policy reason to exclude otherwise relevant evidence to penalize the government for the low morals of its informer in breaching defendant's confidence. (***On Lee v. United States*** (1952) 343 U.S. 747, 752-753 [72 S.Ct. 967; 96 L.Ed. 1270].)

It has since been held that the rule of ***On Lee*** continues to apply (***United States v. Esqueda*** (9th Cir. 2023) 88 F.4th 818, 828; and cites the case numerous times with approval.

An internal revenue agent wearing a secret recording device met with the defendant in the defendant's private office and pretended to be receptive to a bribe. The defendant made incriminating statements which led to his later indictment for attempted bribery. The recording was introduced into evidence. The defendant argued on appeal from his conviction that the secret recording violated the **Fourth Amendment** because the agent had gained access to the "office by misrepresentation and all evidence obtained in the office i.e., his conversation with petitioner, was illegally 'seized.'" The Supreme Court held that no **Fourth Amendment** violation had occurred. The agent's secret use of recording equipment *did not* render the consensual encounter a **Fourth Amendment** search, because "the electronic device [was] not . . . planted by an unlawful physical invasion of a constitutionally protected area." Instead, the device "was carried in and out by an agent who was there with petitioner's assent, and it neither saw nor heard more than the agent himself." As the Court put it, the recording "device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose." The Court's reasoning was unequivocal: Stripped to its essentials, defendant's argument amounted to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that *the agent could testify to from memory*. The Court held that defendant took a risk in offering a bribe to the IRS agent that fairly included the risk that the offer would be accurately reproduced in court, "*whether by faultless memory or mechanical recording*." (***Lopez v. United States*** (1963) 373 U.S. 427, 438-439 [83 S.Ct. 1381; 10 L.Ed.2nd 462].)

> It has since been held that the rule of ***Lopez*** continues to apply. (***United States v. Esqueda*** (9th Cir. 2023) 88 F.4th 818, 828.) See also ***United States v. White*** (1971) 401 U.S. 745, 749-753 [91 S.Ct. 1122; 28 L.Ed.2nd 453], citing ***Lopez*** with approval.)

Merely knocking on the defendant's door and then stepping to the side for purposes of insuring the safety of the officers (a common police practice) *is not* an illegal ruse merely because the defendant (who was under the influence of methamphetamine at the time) came out about 20 feet looking for the source of the knocking and got himself arrested. (***People v. Colt*** (2004) 118, Cal.App.4th

1404; ***United States v. Crapser*** (9th Cir. 2007) 472 F.3rd 1141, 1145-1147.)

When police officers who knock at the door are invited in by the occupants who did not know it was the police at the door when they made the invitation, there is no subterfuge requiring the suppression of any observations made by the officers as they enter. (***Mann v. Superior Court*** (1970) 3 Cal.3rd 1.)

Making an anonymous phone call to the occupant of a residence, warning him that "the police are coming; get rid of the stuff," causing defendant to leave the house with his contraband in hand, is not illegal. (***People v. Rand*** (1972) 23 Cal.App.3rd 579; "Where the ruse does no more than to cause a defendant, activated by his own decision, to do an incriminating act—whether that act be a sale to an undercover agent or a jettisoning of incriminating material—no illegality exists." (***Id***., at p. 583; see also ***People v. Martino*** (1985) 166 Cal.App.3rd 777, 789; phone call to cocaine dealer.)

A police officer who, with information from an untested informant that drugs were in a house that was for sale, posed as a potential buyer and was shown the house by the real estate agent, during which entry the officer made corroborating observations with which he later obtained a search warrant. The entry was held to be lawful where the officer did no more than could any prospective buyer. (***People v. Lucatero*** (2008) 166 Cal.App.4th 1110.)

> The ***Lucatero*** Court differentiated its facts from ***People v. De Caro***, *supra*, noting that the prior ruling's conclusion that the entry was illegal was "*dicta*" only (i.e., not necessary to its decision) and incorrectly decided.

The ***Lucatero*** Court also differentiated its facts from those of ***People v. Jaquez***, *supra*, where the officers entered with the real estate agent's permission for the known purpose of conducting a warrantless police investigation. In ***Jaquez***, the real estate agent was not authorized to allow police into the house to conduct a criminal investigation. In ***Lucatero***, where the officer posed as a potential buyer, the real estate agent *was* authorized to allow in potential buyers.

Lastly, the ***Lucatero*** Court differentiated this case from others were ruses were held to be illegal, the Court noting that "(t)his is not a ruse in which the officer is invited in under the ruse that he is a meter reader and then does not

> read the meter, or that he is a friend of the repairman, but then engages in investigatory behavior inconsistent with a friend's visit." (Citing ***State v. Nedergard*** (Wash. Ct.App. 1988) 753 P.2nd 526.)

Undercover Entry Into a Suspect's Home or Business:

> An undercover narcotics agent, misrepresenting his identity by claiming to be a potential buyer of narcotics, acts lawfully when invited into the defendant's home for the purpose of purchasing narcotics despite the lack of a warrant. (***Lewis v. United States*** (1966) 385 U.S. 206, 208-209 [87 S.Ct. 424; 17 L.Ed.2nd 312].)
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> > "It is well-settled that undercover agents may misrepresent their identity to obtain consent to entry." (***United States v. Bramble*** (9th Cir. 1966) 103 F.3rd 1475, 1478; citing ***Lewis v. United States***, supra, at p. 211.)
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> "(N)o interest legitimately protected by the **Fourth Amendment** is involved" where an informant is physically present in the space "by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence." (***Hoffa v. United States*** (1966) 385 U.S. 293, 302 [87 S.Ct. 408; 17 L.Ed.2nd 374].)
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> In ***United States v. Esqueda*** (9th Cir. 2023) 88 F.4th 818, 821, the Ninth Circuit precedent foreclosed any claim that a **Fourth Amendment** search occurred under the ***Katz*** test. (See below) In ***United States v. Wahchumwah*** (9th Cir. 2013) 710 F.3rd 862, at pg. 868, the Ninth Circuit held that "an undercover agent's warrantless use of a concealed audio-video device in a home into which he has been invited by a suspect" is not a **Fourth Amendment** search under the ***Katz*** framework. However, the Court in ***Wahchumwah*** declined (at p. 868, fn. 2) to decide the question presented here: whether the same conduct is a search under the unlicensed physical intrusion test discussed in ***Jones*** and ***Jardines***.
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> > *The Two Tests*: "The Supreme Court has held that a **Fourth Amendment** search can occur in one of two ways. First, under the ***Katz*** test, a search occurs when the 'government violates a subjective expectation of privacy that society recognizes as reasonable.' ***Kyllo v. United States***, 533 U.S. 27, 33, 121 S.Ct. 2038, 150 L.Ed.2nd 94 (2001) (citing ***Katz v. United States***, 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2nd 576 (1967) . . . . Second, under the

'unlicensed physical intrusion' test, a search occurs when the government 'physically occupie[s] private property for the purpose of obtaining information,' ***Jones***, 565 U.S. at 404, 'to engage in conduct not explicitly or implicitly permitted' by the property owner, ***Jardines***, 569 U.S. at 6. (fn. omitted; see below.) Each test is independently sufficient to determine whether government conduct amounts to a **Fourth Amendment** search: a search occurs if police conduct satisfies either the *Katz* test or the unlicensed physical intrusion test, even if that conduct does not amount to a search under the other test. *See* ***Jones***, 565 U.S. at 406 ('**Fourth Amendment** rights do not rise or fall with the ***Katz*** formulation.')." (***United States v. Esqueda*** (9th Cir. Dec. 12, 2023) 88 F.4th 818, 821; citing ***United States v. Jones*** (2012) 565 U.S. 400 [132 S. Ct. 945, 181 L.Ed.2nd 911]; and ***Florida v. Jardines*** (2013) 569 U.S. 1 [133 S.Ct. 1409; 185 L.Ed.2nd 495].)

> At fn. 3 (pg. 823) the ***Esqueda*** Court also commented: "The Supreme Court has also referred to this test as the 'common-law trespassory test' because the **Fourth Amendment** 'embod[ies] a particular concern for government trespass; on constitutionally protected areas. ***Jones***, 565 U.S. at 406."
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> The Court in ***Esqueda*** ultimately upheld the undercover entry into defendant's motel room, video and audio-taping the purchase of a firearm from defendant. In so ruling, the Court (at pp. 825-826) indicated that the result would be different if:
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> > The officers physically attached recording devices to defendant's property. (See ***Silverman v. United States*** (1961) 365 U.S. 505, 509-512 [81 S.Ct. 679; 5 L.Ed.2nd 734].)
> >
> > Surreptitiously entered any part of the motel room without consent. (See ***Gouled v. United States*** (1921) 255 U.S. 298, 306 [41 S.Ct. 261; 65 L.Ed. 647].)
> >
> > Leave the recording devices inside the room after they departed. (***United States v.***

Nerber (9th Cir. 2000) 222 F.3rd 597, 604-605).

Note that the Court also held that it is irrelevant whether the area entered is one's residence or his business. (***Id.***, at pp. 829-830.)

Also note the following limitation: "Our holding today is a limited one. We express no view as to whether an undercover agent's use of other, more advanced technologies during a consensual encounter—such as those that might allow the government to detect more than the agent's natural senses could detect—might constitute a **Fourth Amendment** search." (***Id.***, at p. 830.)

See also ***United States v. Thompson*** (7th Cir. 2016) 811 F.3rd 944, 948-949: "That the informant recorded his observations on video did not transform the consensual encounter into a search for purposes of the **Fourth Amendment**.")

Possible Resolution; ***Kentucky v. King***: The issue has possibly been resolved by the Supreme Court in the decision of ***Kentucky v. King*** (2011) 563 U.S. 452, 459-472 [131 S.Ct. 1849; 179 L.Ed.2nd 865]:

So long as the officers' actions in knocking on the door and identifying themselves, and presumably seeking a consensual entry, does not itself constitute a violation or threatened violation of the **United States Constitution** (i.e., the **Fourth Amendment**), there is no penalty for doing so. Arguably, therefore, any observations made in the process of doing so should be lawful.

Searches Incident to Arrest: Whenever a person is arrested, officers *may* (with some limitations) search the person and the area within that person's immediate reach. (***Chimel v. California*** (1969) 395 U.S. 752 [89 S.Ct. 2034; 23 L.Ed.2nd 685].)

Legal Justification: "(W)hen an officer begins an encounter with another person, and probable cause to arrest exists, danger to the police officer "flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, *and not from the grounds for arrest*." (***United States v. Johnson*** (9th Cir. 2019) 913 F.3rd 793, 800, indicating that the officer's mistaken belief in what the proper grounds for the arrest are to be is irrelevant; citing ***United States v. Robinson*** (1973) 414 U.S. 218, 234, fn. 5 [94 S.Ct. 467; 38 L.Ed.2nd 427].)

In a Residence: This includes within a house, and may involve, as a part of a "*protective sweep*" (see below), looking "in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." (***Maryland v. Buie*** (1990) 494 U.S. 325, 334 [110 S.Ct. 1093; 108 L.Ed.2nd 276].)

However, looking any further than the adjoining rooms require "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." (***Maryland v. Buie***, *supra*, at pp. 327, 334 [108 L.Ed.2nd at pp. 282, 286]; ***United States v. Lemus*** (9th Cir. 2009) 582 F.3rd 958, 962.)

See "*Protective Sweeps*," below.

Arresting a subject in his home justifies a search of the ***Chimel*** "lunging area" incident to arrest, at least where there are still unsecured people and possibly unaccounted for third parties in the residence. (***People v. Summers*** (1999) 73 Cal.App.4th 288.)

However, the U.S. Supreme Court recently restricted searches incident to arrest when searching a vehicle in ***Arizona v. Gant*** (2009) 556 U.S. 332 [129 S.Ct. 1710; 173 L.Ed.2nd 485]. In ***Gant***, it was held that a warrantless search of a vehicle incident to arrest is lawful *only* when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. This same rule is likely to apply to searches incident to arrest in a residence, or anywhere else.

Although the United States Supreme Court has indicated that ***Gant*** is limited to "circumstances unique to the vehicle context" (See ***Riley v. California*** ((2014) 573 U.S. 373, 398-399 [134 S.Ct. 2473; 189 L.Ed.2nd 430], citing ***Gant*** at p. 343), at least one California court has applied it to the residential situation. (See ***People v. Leal*** (2009) 178 Cal.App.4th 1051; arrest in a residence.)

The ***Leal*** court, citing ***Summers*** and ***Gant***, noted that there are limitations to this rule: "A different rule of reasonableness applies when the police have a degree of control over the suspect but do not have control of the entire situation. In such circumstances—e.g., in which third parties known to be nearby are unaccounted for, or in which a

suspect has not yet been fully secured and retains a degree of ability to overpower police or destroy evidence—the **Fourth Amendment** does not bar the police from searching the immediate area of the suspect's arrest as a search incident to an arrest." (***Id***., at p. 1060.)

The ***Leal*** Court also held that the rule of ***Gant*** was retroactive (see pp. 1065-1066); a questionable decision in light of the decision in ***Davis v. United States*** (2011) 564 U.S. 229, 236-239 [131 S.Ct. 2419; 180 L.Ed.2nd 285], where it was held that decisions such as ***Gant*** are *not* retroactive. (See "*Is* ***Gant*** *Retroactive*?" under "*Searches of Vehicles*," above.)

Citing ***United States v. Fleming*** (7th Cir. 1982) 667 F.2nd 602, 605-608, the ***Leal*** Court noted that handcuffing alone is probably not enough to fully secure the suspect. (***Id***., at p. 1062.)

"*Protective Sweeps*:"

Rule: A quick, limited premises search incident to a *lawful arrest* in a residence has been upheld by the U.S. Supreme Court if the arresting officers have a "*reasonable belief*" that there is another person on the premises who poses a danger to those on the arrest scene. (***Maryland v. Buie*** (1990) 494 U.S. 325 [110 S.Ct. 1093; 108 L.Ed.2nd 276, 282, 286]; ***People v. Dyke*** (1990) 224 Cal.App.3rd 648, 661; ***People v. Block*** (1971) 6 Cal.3rd 239.)

"A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." (***People v. Ormonde*** (2006) 143 Cal.App.4th 282, 292.)

First, after a suspect is arrested inside a residence, officers may "as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." Second, officers may "sweep" other areas in the home *if* there are "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." (Italics added; ***United States v. Garges*** (8th Cir. 2022) 46 F.4th 682; the

Court finding that all the rooms in a hotel room were adjoining the main room, making them all subject to a protective sweep with or without any reason to believe others might be in the hotel room.)

The protective sweep doctrine allows officers to make a "quick and limited search of the premises, incident to an arrest and conducted to protect the safety of police officers or others." Officers are allowed to look in areas immediately adjoining the place of arrest "in closets and other spaces" from which "an attack could be launched." In addition, officers may sweep beyond these adjoining areas if they have a reasonable belief "that the area searched harbors a person posing a danger to the officer or others." The court added that justification for a protective sweep does not automatically end when the suspect is arrested. (***United States v. Ford*** (8th Cir. IA 2018) 888 F.3rd 922.)

Case Law:

A protective sweep of a trailer upheld when a suspect in a narcotics trafficking case, upon seeing the officers' approach, ducked back out of sight, attempted to close the door, and closed the blinds. (***United States v. Arellano-Ochoa*** (9th Cir. 2006) 461 F.3rd 1142; protective sweep made after an immediate warrantless entry was made, defendant was arrested, and a gun was observed on the floor near the front door.)

A protective sweep (although not referred to it as such) during the execution of a search warrant, where the officers had knowledge that a suspect had a firearm registered to him, is also reasonable at least when that suspect had not yet been found. (See ***Los Angeles County v. Rettele*** (2007) 550 U.S. 609 [127 S.Ct. 1989; 167 L.Ed.2nd 974].)

"(T)he type of criminal conduct underlying the arrest or search is significant in determining if a protective sweep is justified." (***People v. Ledesma*** (2003) 106 Cal.App.4th 857; 865; see ***People v. Werner*** (2012) 207 Cal.App.4th 1195, 1208; an earlier incident of domestic violence does not indicate that someone inside with weapons might be present.

Having detained outside all the members of a family at a birthday party, such detentions having been held to be illegal, and with no reason to believe anyone else was in the plaintiffs' apartment, the warrantless search of the apartment could not be upheld as a protective sweep. (***Sialoi v. City of San Diego*** (9th Cir. 2016) 823 F.3rd 1223, 1237-1238.)

A protective sweep of a residence, where the resident is a parolee, is lawful with or without a suspicion that others might be present in that the whole house was subject to search anyway under the parolee's **Fourth** waiver conditions. (***United States v. Lopez*** (9th Cir. 2007) 474 F.3rd 1208.)

A cursory check of the immediately adjoining living room was upheld where defendant was arrested at the threshold. The plain sight observation of a firearm under the couch cushion upheld. (***United States v. Lemus*** (9th Cir. 2009) 582 F.3rd 958.)

> See dissenting opinion to the Court's denial of an en banc rehearing, at (9th Cir. 2010) 596 F.3rd 512, by Kozinski, C.J.

Upon responding to a 911 call reporting a burglary at defendant's house, officers heard a home security siren blaring and saw broken windows on the main and storm doors, and blood on the porch floor and on a window shade stuck through the broken glass. The officers also saw footprints on the front door, which was ajar. Suspecting that a burglary was in progress, or that someone inside was in need of assistance, the officers conducted a protective sweep. As they did so, they observed in plain sight drugs, firearms, and drug paraphernalia on the floor in a hallway near a bedroom. In the basement, officers saw a bag containing a white powdery substance hanging out of a hole in the wall. Finding no one to be home, the officers seized the items observed. Defendant was later charged in federal court with various drug and firearms-related offenses. Upon defendant's motion to suppress, the trial court, and as upheld by the Eighth Circuit Court of Appeal, found that exigent circumstances justified the conducting of the protective sweep, and that the evidence, observed in plain sight during a lawful protective sweep for suspects and/or victims, was lawfully seized. (***United States v. Williams*** (8th Cir. MO. 2020) 951 F.3rd 892.)

Based upon defendant's emergency 911 call, telling the dispatcher that he had been shot, and witness information upon arrival at the scene, the officers' entry into defendant's residence in response to the call for medical aid for a shooting victim did not violate the **Fourth Amendment**. Given the fact of the shooting and the other information known to the officers at the time, the court concluded that exigent circumstances made it reasonable to enter the residence and, as a "*protective sweep*," look into the rooms to ensure the absence of a shooter or additional victims. Plain sight observation of at least one firearm while in the residence was

lawful. Then, an officer's entry into the kitchen, and remaining there, did not unreasonably extend the duration of the protective sweep in that area. The court found that the officer in the kitchen remained there out of a concern that a witness and acquaintance of the defendant's was attempting to retrieve suspected narcotics observed in plain view on the table. Finally, the Court held that no information obtained by officers who might have "lingered" in the house during the initial entry, nor after their re-entry after the ambulance departed, aided in securing the search warrant. Instead, the Court found that in obtaining a search warrant, the officers relied on information obtained permissibly and almost immediately upon entry into defendant's residence as the basis for the search warrant. The court added that to the extent that any officer might have exceeded the permissible scope of a security sweep, any such transgression led, at most, to the discovery of evidence that inevitably would have been discovered upon execution of the valid search warrant. (***United States v. Crutchfield*** (8th Cir 2020) 979 F.3rd 614.)

In a case where officers had already arrested a hotel room's occupant (i.e., defendant) on an outstanding attempted kidnapping warrant, and where the room was dark, the officers saw movement, and they could not tell how many people were there, combined with the defendant's extensive criminal history, the court found that these facts gave the officers a reasonable belief that there might be others in the room who posed a danger to them. It was also noted that the search was "quick and limited," as it lasted approximately two minutes and was limited to looking only in places in which a person might be hiding. The court added that the officers did not exceed the scope of a protective sweep by checking under the mattress (which an illegal firearm was observed), given that one of the officers testified that, in his experience, fugitives sometimes hide there. (***United States v. Whitehead*** (8th Cir. 2021) 995 F.3rd 624.)

> *Note*: The gun was later recovered following a consent search given by a co-occupant of the room, making the earlier observation of the gun of the gun a moot issue.

Following defendant's arrest in another's home, a 10-minute protective sweep of the house, including into the attic, was upheld where defendant was suspected of stealing several guns from a pawn shop in a burglary, committing a robbery, and possessing a handgun during a gunfight. Based on these facts, the Court reasoned that (1) defendant could have left guns in the house for another person to use against officers. (2) After announcing their

presence, officers were forced to wait for eight minutes while the blinds on either side of the door moved and they heard movement, and possible preparation for an attack inside. (3) The officers thought that the defendant's girlfriend might be in the house. (4) After the homeowner, who had answered the door, was asked whether anyone else was still in the house, he was silent at first and then gave the odd, ambiguous answer that there was "nobody else" in the home "that he knew of." (5) Defendant was covered in dust and cobwebs, suggesting that he had just been in a dusty place like an attic or basement. The court held that these facts support the officers' reasonable belief that "someone else could be inside posing a danger to [officers] during or following the arrest." Finally, the court held that extending the sweep to the closet, and then to the attic after seeing the scuff mark on the wall of the closet was reasonable. The Court noted that sweeping a space that requires a boost or ladder to access, like an attic, is at the outer boundary of the protective sweep doctrine, but held that officers' conduct in this case was reasonable. (***United States v. Thompson*** (8th Cir. MO, 2021) 6 F.4th 789.)

Under circumstances almost identical to ***Maryland v. Buie***, *supra*, upon officers responding to a domestic violence call, defendant was found at the bottom of the stairs in the basement. Ordered to the top of the stairs with his hands in front of him, he was taken into custody at that point, and handcuffed. Officers then went into the basement to conduct a protective sweep. In a room immediately adjacent to the basement, officers found illegally possessed firearms and drugs. The Eighth Circuit Court of Appeal held that defendant had been arrested at the bottom of the basement stairs, even though not handcuffed until he came up the stairs. Thus, under the rule of ***Buie***, the room adjacent to the basement was subject to a protective sweep without any cause having to be shown. (***United States v. Ackerman*** (8th Cir. 2023) 87 F.4th 925.)

Limitation: *Protective sweeps* of the areas of the home beyond the immediate area (i.e., beyond any immediately adjoining rooms) of the arrest will *not* be upheld absent an *articulable reason* for believing someone in the home is present who constitutes a potential danger to the officers. (***United States v. Furrow*** (9th Cir. 2000) 229 F.3rd 805; see also ***People v. Sanders*** (2003) 31 Cal.4th 318; ***United States v. Lemus*** (9th Cir. 2009) 582 F.3rd 958, 962; ***United States v. Lundin*** (9th Cir. 2016) 817 F.3rd 1151, 1161; ***People v. Ovieda*** (2019) 7 Cal.5th 1034, 1043.)

Areas immediately adjacent to the location of the arrest, such as closets and other spaces immediately adjoining the place of arrest

from which an attack could be launched, may be searched without any cause to believe there may be people there. (See ***Maryland v. Buie***, *supra*, at p. 334 [110 S.Ct. 1093; 108 L.Ed.2nd 276, 286]; and see "*Searches Incident to Arrest*," above.)

To search beyond the areas immediately adjacent to the location of an arrest, the courts have been lenient on the reasons, so long as it can be argued that the officer was reasonably in fear for his safety. (E.g.; See ***People v. Ledesma*** (2003) 106 Cal.App.4th 857; A **Fourth** Waiver search of a probationer's room, on probation for narcotics related offenses, when a resident appeared to be under the influence of drugs and others were known to be in the house during a prior contact.)

But the courts will *not* uphold a protective sweep where there are no specific articulable facts indicating the presence of someone who might be a danger to the officers. (E.g., see ***United States v. Chaves*** (11th Cir. 1999) 169 F.3rd 687, 692; ***United States v. Colbert*** (6th Cir. 1996) 76 F.3rd 773, 777-778; ***United States v. Delgado-Pérez*** (1st Cir. P.R. 2017) 867 F.3rd 244.)

> A "lack of knowledge cannot constitute the specific, articulable facts required by ***Buie***." (***United States v. Bagley*** (10th Cir. KS 2017) 877 F.3rd 1151.)

An exception to the probable cause requirement for entering and searching a residence is when an officer has a "*reasonable belief*" (or "*reasonable suspicion*") to believe that other people might be inside who constitute a danger to the officers or others at the scene. In such a case, the law allows a limited "*protective sweep*" to insure that no one might be there who constitutes such a danger. (***People v. Ormonde*** (2006) 143 Cal.App.4th 282; entry into a residence following a domestic violence-related arrest out front held to be illegal when the officer only wanted to check to see if anyone might be there, with no reason to believe that there was.)

See also ***People v. Werner*** (2012) 207 Cal.App.4th 1195, 1205-1210, where it was held that an earlier incident of domestic violence does not indicate by itself that someone inside with weapons might be present. After defendant's arrest on the front porch, a warrantless entry under the theory of a protective sweep, with no articulable facts indicating the presence of anyone inside who might be a danger, held to be illegal.

> An officer's general experience that domestic violence incidents often involve danger to responding officers held

to be insufficient to justify a protective sweep. (***Id***., at pp. 1208-1209.)

In ***Werner***, the protective sweep argument was used by the Attorney General on appeal to justify an officer following a friend of the arrestee back into the house to retrieve personal items for the arrestee, during which excursion contraband was observed in plain sight. While such an entry was held to be an illegal protective sweep, given the lack of any articulable reason to believe there might be someone inside who constituted a danger, it was noted that the same is not true where it is the arrestee himself who is asking permission to go back into the residence. In such a circumstance, entering with the arrestee even without permission would be lawful. (***Id.*** at p. 1210, fn. 9; citing ***Washington v. Chrisman*** (1982) 455 U.S. 1 [102 S.Ct. 812; 70 L.Ed.2nd 788].)

Also citing ***Washington v. Chrisman***, *supra*, the federal Sixth Circuit Court of Appeal upheld an officer's plain sight observations of drugs and an illegal firearm (defendant admitting to being a convicted felon) when the officer followed (without permission) defendant to the back of his store, to his living quarters, where defendant went to retrieve his identification. The Court held that it did not matter whether defendant had impliedly consented to the officer's entry into the back room or not. The Court found that, by this point, the officer had a reasonable basis to conclude that the man was the person listed in an arrest warrant (defendant having admitted as much). It was therefore reasonable for the officer to monitor his movements inside the residence. (***United States v. Baker*** (6th Cir. 2020) 976 F.3rd 636.)

Further, protective sweeps "may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete [the police action] and depart the premises. [fn. omitted]" (***Maryland v. Buie***, *supra*., at pp. 335-336 [110 S.Ct. 1093; 108 L.Ed.2nd at p. 287].)

A protective sweep is *not* justified by the fact that the defendant is arrested at the door holding a weapon absent evidence to believe that there is someone else inside who might constitute a threat to the officers. (***United States v. Murphy*** (9th Cir. 2008) 516 F.3rd 1117, 1120-1121; protective sweep upheld, however, because there was a second outstanding suspect who might have been inside.)

The detention of two individuals found opening the garage of a residence where officers were present for reasons not explained in the record, where one of them (i.e., defendant) appeared to be nervous and wore baggie clothing apparently containing a number of unknown items, *did not* justify the detention of the individuals nor the patdown of defendant for weapons under the theory of a protective sweep. (***United States v. Job*** (9th Cir. 2017) 871 F.3rd 852, 860-862.)

Neither exigent circumstances nor the alleged need to conduct a protective sweep of defendant's residence was justified under the facts of this case where defendant had pointed a shotgun at his neighbors and was already under arrest when the officer entered the house to seize the shotgun. In order to show exigent circumstances based on a "risk of danger to police officers or others on the scene," a warrantless entry into a home "must be supported by *probable cause* to believe that *a dangerous person* will be found inside." The prosecution did not argue that defendant's wife—the only occupant—was a dangerous person. Also, the officer had no "articulable facts which, taken together with the rational inferences from those facts, warranted a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene" (Citing ***Maryland v. Buie*** (1990) 494 U.S. 325, 334 [108 L. Ed.2nd 276, 110 S.Ct. 1093]). "As the officer testified at the suppression hearing, she saw no signs that defendant's wife posed a danger and had no information indicating to her that anyone else was in the home. The mere fact she could not exclude the possibility of a dangerous person in the home, without more, failed to justify a protective sweep. (See, e.g., ***People v. Celis*** (2004) 33 Cal.4th 667, at pp. 679–680 [protective sweep unjustified where officers had no information "'as to whether anyone was inside the house'" and no indication that anyone was armed]; ***People v. Werner*** (2012) 207 Cal.App.4th 1195, 1207 . . . [protective sweep unjustified where "there was no evidence that deputies were aware of any ongoing criminal activity in the home, or that there were others even present inside, let alone that it 'harbor[ed] a dangerous person'].)" (***People v. Chen*** (2020) 50 Cal.App.5th 952, 955-958; the error in admitting the shotgun into evidence, however, found to be harmless under the circumstances.)

Defendant was charged with six drug distribution and firearms offenses in an eight-count indictment, arising from his involvement in extended criminal activity relating to drugs and firearms in Cumberland County, North Carolina. He moved to suppress

evidence collected during his arrest as being in violation of the requirements of the "Protective Sweep" exception to **Fourth Amendment's** general search warrant mandate. The protective sweep in this case occurred after defendant was seized outside his residence, based on an arrest warrant, and the sweep constituted a three and-a-half-minute walkthrough of the residence. During the sweep, the officers observed, THC gummies and firearms. They used these observations to secure the residence while a search warrant was obtained. Armed with the search warrant, they conducted a thorough search of the residence and seized marijuana, tramadol, THC wax, eight loaded firearms, at least $65,000 in cash, and drug packaging materials. Defendant challenged the protective sweep as unconstitutional. In denying the motion to suppress, the district court rested its ruling on the proposition that the protective sweep of the residence was justified. Such a sweep can be justified when law officers have an interest "in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack." Recognizing that a protective sweep is on an adversary's turf, this exception to the warrant mandate requires "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." The protective sweep exception requires more than a generalized worry of danger. That is, "a lack of information cannot provide an articulable basis upon which to justify a protective sweep." (See ***United States v. Jones*** (4th Cir. 2012) 667 F.3rd 477, 484.0 Here, the Government asserted that the facts available to the officers were sufficient to justify a reasonably prudent officer to believe that the residence had a dangerous person present. Those facts, as found by the district court include, that (1) the officers knew that defendant was involved in a large-scale drug-trafficking operation with multiple confederates who likely were armed. (2) The officers had found a firearm at the defendant's former residence, and thus had good reason to believe that this residence might contain firearms. (3) The officers saw that surveillance cameras covered the exterior of the residence, which reasonably suggested that those inside could be watching the officers. And (4), when the officers entered the residence, they were surprised by the presence of an unexpected person, which supported the proposition that other unknown persons could be there. In this situation, the officers knew that defendant was involved in an extended multi-party and multi-drug enterprise. The officers had been "climbing the ladder" and were up to the defendant. When defendant's compatriots were arrested, firearms were either found on their

person or seized nearby. The Court also noted that it is "general knowledge that guns are common in drug transactions," and that "entrance into a situs of drug trafficking activity carries all too real dangers to law enforcement officers." In the case at hand, the protective sweep lasted for only three-and-a-half minutes. The officers engaged in a cursory inspection, looking only in locations where a human being might be hiding. (***United States v. Everett*** (4th Cir. 2024) 91 F.4th 698.)

Arrests Outside of the House: *Arresting* a person immediately *outside* of the house, with cause to believe that there may be others inside who could constitute a danger to the officers, warrants a protective sweep of the house. (***People v. Maier*** (1991) 226 Cal.App.3rd 1670, 1675; ***People v. Ledesma*** (2003) 106 Cal.App.4th 857, 864, fn. 3; ***United States v. Hoyos*** (9th Cir. 1989) 892 F.2nd 1387 [reversed on other grounds]; ***United States v. Wilson*** (5th Cir. 2001) 306 F.3rd 231, 238-239; ***United States v. Watson*** (5th Cir. 2001) 273 F.3rd 599, 603; ***Sharrar v. Felsing*** (3rd Cir. 1997) 128 F.3rd 823; ***United States v. Colbert*** (6th Cir. 1996) 76 F.3rd 773; ***United States v. Henry*** (D.C. Cir. 1995) 48 F.3rd 1282, 1284; ***United States v. Paopao*** (9th Cir. 2006) 469 F.2rd 760, 765; see also ***United States v. Pile*** (8th Cir. 2016) 820 F.3rd 314; ***United States v. Alatorre*** (8th Cir. 2017) 863 F.3rd 810.)

However, merely knowing that the defendant's wife and son live with him, but having no reason to believe they were dangerous or that they were even home at the time, is insufficient cause to do a protective sweep of the home after detaining the defendant immediately outside. (***People v. Celis*** (2004) 33 Cal.4th 667, 676-680.)

Celis also raises, but does not answer the question, whether to make entry into the house to conduct the protective sweep after an arrest that occurs outside requires only a "*reasonable suspicion*" that persons are inside who constitute a threat to the officers, or whether full-blown "*probable cause*" is needed. (***Id***., at p. 678.)

But with defendant already arrested and secured (handcuffed and put into a patrol car), and with no reason to believe anyone else was in the house, a protective sweep was held *not* to be justified. (***United States v. Lundin*** (9th Cir. 2016) 817 F.3rd 1151, 1161.)

An exception to the probable cause requirement for entering and searching a residence is when an officer has a "*reasonable belief*" (or "*reasonable suspicion*") to believe that other people might be inside who constitute a danger to the officers or others at the scene.

In such a case, the law allows a limited "*protective sweep*" to insure that no one might be there who constitutes such a danger. (***People v. Ormonde*** (2006) 143 Cal.App.4th 282.)

However, entry into a residence in this case, following a domestic violence-related arrest out front, was held to be illegal when the officer only wanted to check to see if anyone might be there, with no reason to believe that there was.

Detentions Outside of the House: The California Supreme Court left open the question of whether merely "*detaining*" someone outside the home will allow for a "*protective sweep*" of the home for dangerous suspects, absent "*probable cause*" to believe someone is in fact inside who constitutes a danger to the officers. (***People v. Celis*** (2004) 33 Cal.4th 667, 680.)

The legality of making a protective sweep of a house where officers are lawfully in the house for some purpose other than to make an arrest was specifically left unanswered by the California Supreme Court. (***People v. Celis***, *supra*, at pp. 678-679.)

At least one other state has upheld such a protective sweep upon detaining a suspect outside on the front porch. (***State v. Revenaugh*** (1999) 173 Idaho 774, 776-777.)

Commercial Establishments: A protective sweep of a commercial establishment (i.e., a gambling house) when an arrest is made outside has also been upheld where the officers had a "*reasonable suspicion*" that a second robbery suspect might be inside. (***United States v. Paopao*** (9th Cir. 2006) 469 F.3rd 760, 765-767.)

Other Situations: Protective sweeps have also been upheld in situations other than with an arrest. For instance:

In conducting a **Fourth** Waiver search where the suspect was on probation for narcotics-related offenses, a resident appeared to be under the influence of drugs, and others were known to be in the house during a prior contact. (***People v. Ledesma*** (2003) 106 Cal.App.4th 857.)

Officers lawfully inside the house with consent. (***United States v. Gould*** (5th Cir. 2004) 364 F.3rd 578.)

A protective sweep by an officer left behind to secure a residence while a search warrant was being obtained is lawful. (***United States v. Taylor*** (6th Cir. 2001) 248 F.3rd 506, 513.)

While executing a search warrant. (***Drohan v. Vaughn*** (1st Cir. 1999) 176 F.3rd 17, 22.)

Protective sweep of a bedroom after the lessee had given consent to search other parts of an apartment. (***United States v. Patrick*** (D.C. Cir. 1992) 959 F.2nd 991, 996-997.)

Some cases, however, have indicated that to be lawful, a protective sweep must follow a lawful arrest within the home. (See ***United States v. Davis*** (10th Cir. 2002) 290 F.3rd 1239, 1242, fn. 4; ***United States v. Reid*** (9th Cir. 2000) 226 F.3rd 1020, 1027.)

A protective sweep of a residence, where the resident is a parolee, is lawful with or without a suspicion that others might be present in that the whole house was subject to search anyway under the parolee's **Fourth** waiver conditions. (***United States v. Lopez*** (9th Cir. 2007) 474 F.3rd 1208.)

The officers' protective sweep, which included an entry into the basement and an adjacent locked room, was held to be reasonable where the court noted that defendant had been in the basement just prior to his arrest and the locked room was connected to the area in which the officers arrested him. In addition, the officers knew that other people lived in the house, one firearm had already been found, and officers needed to investigate the large amount of drugs discovered on the basement floor and nearby loveseat. Based on these facts, the court concluded that the officers had a reasonable belief that the basement and locked room could harbor a person posing a danger to the officers in the house. (***United States v. Coleman*** (8th Cir. AR 2018) 909 F.3rd 925.)

Plain Sight Observations:

Rule: Plain sight observations from a location the police officer has a legal right to be, are lawful and not considered to be a search. (***People v. Block*** (1971) 6 Cal.3rd 239, 243; ***North v. Superior Court*** (1972) 8 Cal.3rd 301, 306.) Thus, evidence so observed when an officer is already lawfully inside, or otherwise may lawfully enter a residence or its curtilage, is subject to seizure.

Case Law:

Observations of contraband located within the curtilage of the defendant's home from a lawful position outside that curtilage are lawful. (***People v. Channing*** (2000) 81 Cal.App.4th 985.)

Observation of defendant's growing marijuana plants from a neighbor's property, without the neighbor's knowledge or permission, looking into defendant's adjacent backyard, held to be lawful. Defendant did not have standing to challenge the trespass into the neighbor's yard, and did not have a reasonable expectation of privacy in what was growing in his own yard, in that his marijuana plants were plainly visible. (***People v. Claeys*** (2002) 97 Cal.App.4th 55.)

Observations of defendant retrieving contraband from a hole in the ground in the common area of an apartment complex, while the observing officers were standing on adjacent private property with the permission of the property's owner, were lawful. (***People v. Shaw*** (2002) 97 Cal.App.4th 833.)

The observations of contraband within the "*curtilage*" of the defendant's home, while the officers were walking around the house in an attempt to find an occupant, was upheld. (***United States v. Hammett*** (9th Cir. 2001) 236 F.3rd 1054.)

But see ***People v. Camacho*** (2000) 23 Cal.4th 824, where the California Supreme Court held that observations from the side of the residence, 40 feet from the sidewalk, with nothing there to indicate that the public was inferably invited to that side or to that close to the house, were unlawful, at least when the officers were checking nothing more than a complaint of loud music, it was late at night, and they failed to first try knocking at the front door.

> See also the dissent, at pp. 832 et seq., listing numerous federal circuit court decisions seemingly in disagreement with the rule of ***Camacho***.

Observation of contraband in plain sight by police officers who made a warrantless entry into a residence, responding to an emergency call from someone in apparent distress, was lawful, and justified the obtaining of a search warrant to search the residence. (***United States v. Snipe*** (9th Cir. 2008) 515 F.3rd 947.)

An officer standing on his tiptoes, adding about three inches to his height, in order to see over a six foot fence, was lawful.

Observation of a firearm behind the fence by so doing was a "plain sight observation." (***People v. Chavez*** (2008) 161 Cal.App.4th 1493, 1499-1502.)

When evidence of a different crime is discovered during a lawful warrant search, even if the officers are participating in the search hoping to find evidence of a different crime for which there is not yet probable cause, such "plain sight" observations are lawful and may therefore be used to obtain a second search warrant and/or in the interrogation of the in-custody suspect. (***People v. Carrington*** (2009) 47 Cal.4th 145, 160, 164-168, impliedly overruling ***People v. Albritton*** (1982) 138 Cal.App.3rd 79, which previously held such plain sight observations, unless totally "inadvertent," were unlawful.)

> In ***People v. Carrington***, *supra*, officers from agency #2 accompanied officers from agency #1 who were executing a lawful search warrant in their own case. The officers from agency #2 were there for the purpose of making "plain sight" observations of evidence related to their agency's own investigation. Upon making such observations, this information was used to obtain a second warrant directed specifically at agency #2's investigation. This procedure was approved by the California Supreme Court.
>
> "Even assuming the officers (from the agency #2) . . . hoped to find evidence of other offenses, their subjective state of mind would not render their conduct unlawful. . . . The existence of an ulterior motivation does not invalidate an officer's legal justification to conduct a search." (***Id***., at p. 168; citing ***Whren v. United States*** (1996) 517 U.S. 806 [116 S.Ct. 1769; 135 L.Ed.2nd 89], for the argument that an officer's subjective motivations for being on the search party are irrelevant so long as the search, viewed "*objectively*," is lawful.)

Observations made into the curtilage of the home from the defendants' driveway, when the driveway was an area accessible to the neighbors, were properly used to obtain a search warrant. The use of night vision goggles was irrelevant. (***People v. Lieng*** (2010) 190 Cal.App.4th 1213.)

Evidence observed in plain view by officers entering a residence with the suspect's consent and with exigent circumstances, while the officers did a protective sweep and check for victims of a

shooting, justified a later warrantless entry to seize and process that evidence so long as the police did not give up control of the premises. (***People v. Superior Court* [*Chapman*]** (2012) 204 Cal.App.4th 1004, 1014-1021.)

Plain sight observations of illegal guns and narcotics paraphernalia while lawfully in a person's home are lawful. (***People v. Ovieda*** (2019) 7 Cal.5th 1034, 1042, 1046-1047; which assumes the officers are in the home lawfully. If not (and they were not, in this case), such observations will be held to be illegal.)

Bloody clothing seen in plain view by officers from the hallway in a hospital that was on a hospital's trauma room floor, and it's later retrieval by investigators after defendant (with a gunshot wound he received during an attempted robbery) had been airlifted to another hospital, did *not* violate defendant's **Fourth Amendment** right to privacy. (***United States v. Clancy*** (6th Cir. 2020) 979 F.3rd 1135.)

> As for the investigators' seizure of defendant's clothing, the ***Clancy*** Court held that the investigators had lawful access to defendant's clothes. The "*lawful access*" requirement ensures that police officers do not conduct warrantless entries and trespass onto private property just because they see incriminating evidence located there. In this case, the court found that no trespass occurred in the hospital room in that defendant had been airlifted to another hospital by the time the crime scene investigators seized his clothing from the trauma room. The Court added that even if defendant had a reasonable expectation of privacy in his hospital room while the being treated, this expectation of privacy did not continue after he left the hospital and hospital staff began preparing the room for new patients.

See "*Plain Sight Observations*," under "*Warrantless Searches and Seizures*" (Chapter 9), above.

Limitation: *When a Search Warrant is Required*:

A plain view observation of sizeable evidence from outside a residence, however, does not justify the warrantless entry into the residence to seize that evidence. *Absent an exigency*, a search warrant (or a free and voluntary consent) must be obtained before entering the residence. (***Horton v. California*** (1990 496 U.S. 128, 137, fn. 7 [110 S.Ct. 2301; 110 L.Ed.2nd 112, 123]; ***United States v. Murphy*** (9th Cir. 2008) 516 F.3rd 1117, 1121; see also ***Soldal v.***

Cook County (1992) 506 U.S. 56, 63-64 [113 S.Ct. 538; 121 L.Ed.2nd 450].)

Note: An "*exigency*" would likely be found in circumstances where an officer is observed by suspects making his plain sight observation. Under such a circumstance, an immediate entry, at least for the purpose of securing the scene pending the obtaining of a search warrant or consent, would likely be upheld. See "*Preventing the Destruction of Evidence*," below.)

The same rule holds true when a searchable item is observed from outside the curtilage of a home, and a warrantless entry into the curtilage is made for the purpose of uncovering that item (a stolen motorcycle parked in a driveway in this case) to verify that it is in fact the stolen motorcycle. (***Collins v. Virginia*** (2018) 584 U.S. 586 [138 S.Ct. 1663; 201 L.Ed.2nd 9].)

The Court in ***Collins*** notes an exception to this rule when officers, observing a searchable vehicle on the street, follow the driver of that vehicle into the curtilage of a home. Under these unique circumstances, the "automobile exception" would allow for the warrantless search of the vehicle. (See ***Scher* v. *United States*** (1938) 305 U.S. 251 [59 S.Ct. 174; 83 L.Ed. 151].)

Contraband observed through the open door of a motel room while arresting the defendant just outside, may be seized. But a search warrant must be used, or probable cause and exigent circumstances must be found, or the suspect's consent must be obtained, in order to lawfully search of the rest of the room. (***People v. LeBlanc*** (1998) 60 Cal.App.4th 157.)

Preserving the Peace:

Rule: The lawfulness of a warrantless entry into a residence was upheld by the United States Supreme Court, at least when there was a fight going on inside the residence and the officers had "*an objectively reasonable basis for believing*" that immediate action was necessary in order to prevent someone from being seriously injured. (***Brigham City v. Stuart*** (2006) 547 U.S. 398 [126 S.Ct. 1943; 164 L.Ed.2nd 650], a case appealed from a decision of the Utah Supreme Court finding the entry to be a violation of the **Fourth Amendment**.)

"[L]aw enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect

an occupant from imminent injury." (***City & County of San Francisco v. Sheehan*** (2015) 575 U.S. 600, 612 [135 S.Ct. 1765; 191 L.Ed.2nd 856]; quoting ***Brigham City v. Stuart***, *supra*, at p. 403.)

Case Law:

A warrantless entry into a residence when necessary to "*preserve the peace*" in the execution of a restraining order, allowing the defendant's daughter to retrieve certain property, was held to be lawful. Reasonable force was also properly used when necessary to effectively preserve the peace. (***Henderson v. City of Simi Valley*** (9th Cir. 2002) 305 F.3rd 1052.)

Officers responding to a call of a disturbance, finding a pickup truck in the driveway which had apparently been in an accident, blood on the truck and on clothes in the truck, broken windows in the house, and defendant, barricaded inside, screaming and throwing things. Defendant had a visible cut on his hand. One officer forced his way in and defendant pointed a rifle at him. Noting that, "(i)t requires only 'an objective reasonable basis for believing' that 'a person within [the house] is in need of immediate aid,'" and that the officer was acting reasonably when he made the warrantless entry into defendant's home, the Court found the entry to be lawful. (Citations Omitted; ***Michigan v. Fisher*** (2009) 558 U.S. 45 [130 S.Ct. 546; 175 L.Ed.2nd 410].)

> "Officers do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the emergency aid exception (to the warrant requirement." Also, the officer's subjective motivations for entering were irrelevant, the test being an objection one. (***Id***., at p. 49.)
>
> Also, the Court noted the reality of such a situation when a police officer is forced to decide what to do:
>
> > "It does not meet the needs of law enforcement or the demands of public safety to require officers to walk away from a situation like the one they encountered here. Only when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances. But '[t]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties.' (Citing ***Brigham City***, *supra*, at p. 406.)" (***Ibid***.)

Note: While the Supreme Court in neither ***Brigham City v. Stuart*** nor ***Fisher*** used the label, it can be argued that these cases are consistent with the "*community caretaking doctrine*" theory of conducting a warrantless entry into the respective residences. (See below.)

Entry into a unlocked side door of a house after finding a car with its engine running in the driveway, and with no one responding to knocking at the front door, out of concern that someone inside may be possibly unconscious and in need of help, was held to be illegal. (***People v. Smith*** (2020) 46 Cal.App.5th 375, 385-392.)

Preventing the Destruction of Evidence: A warrantless entry into a residence for the purpose of preventing the destruction of evidence may be lawful, depending upon what the evidence is. (***Kentucky v. King*** (2011) 563 U.S. 452, 460 [179 L. Ed.2nd 865; 131 S.Ct. 1849]; ***People v. Huber*** (1965) 232 Cal.App.2nd 663; ***Ker v. California*** (1963) 374 U.S. 23, 40-41 [83 S.Ct. 1623; 10 L.Ed.2nd 726].)

Rule: "*Probable cause*" to believe that evidence will "imminent(ly)" be destroyed (or a suspect will escape) will justify a warrantless entry into a residence. (***People v. Strider*** (2009) 177 Cal.App.4th 1393; entry into a residence while chasing a subject with a firearm in his pocket, a potential violation of **P.C. § 12031(a)(1)** (loaded firearm in public; now **P.C. § 25850(a)**), held to be illegal in that the front yard defendant was in was not a "public place" under the circumstances, as required by the statute.)

Case Law:

A three-minute sweep of a house to check for persons *reasonably believed* to be in the house who might destroy evidence in a homicide case was held to be lawful. (***People v. Seaton*** (2001) 26 Cal.4th 598.)

Where it appears that confederates of a person arrested for selling narcotics will learn of the arrest and destroy or secret contraband still in the house, it is lawful to secure the house pending the obtaining of a search warrant. (***Ferdin v. Superior Court*** (1974) 36 Cal.App.3rd 774, 781; ***People v. Freeny*** (1974) 37 Cal.App.3rd 20.)

With "*probable cause*" to believe that contraband is contained in a particular residence, and a "*reasonable belief*" that if the house is not immediately secured the evidence will be destroyed, officers may enter to secure the house pending the obtaining of a search warrant or a consent to do a complete search. (***United States v.***

Alaimalo (9th Cir. 2002) 313 F.3rd 1188; see also ***Sandoval v. Las Vegas Metro. Police Dep't.*** (9th Cir. 2014) 756 F.3rd 1154, 1161; ***Sialoi v. City of San Diego*** (9th Cir. 2016) 823 F.3rd 1238.)

Differentiating Felony vs. Misdemeanor cases:

The entry by police into a residence in pursuit of a felony suspect has long since been upheld as lawful. (See ***United States v. Santana*** (1976) 427 U. S. 38 [96 S.Ct. 2406; 49 L.Ed.2nd 300].)

A warrantless entry into a residence in pursuit of a fleeing misdemeanant, however, can be an issue.

The U.S. Supreme Court has specifically noted that; "(i)n misdemeanor cases, flight does not always supply the exigency that this Court has demanded for a warrantless home entry," given the many other possible reasons—not necessarily involving an exigency—why a misdemeanor suspect has fled into his home. (***Lange v. California*** (June 23, 2021) __ U.S.__, __ [141 S.Ct. 2011; 219 L.Ed.2nd 486].)

On remand, California's First District Court of Appeal (Div. 5) held that under the good faith exception to the **Fourth Amendment** exclusionary rule, it was not necessary to suppress evidence from an officer's warrantless entry into defendant's garage after the officer observed defendant blaring loud music and honking unnecessarily and defendant, rather than pulling over, drove up his driveway and into his attached garage. When the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply. (***People v. Lange*** (2021) 72 Cal.App.5th 1114.)

Entering a house without consent to take a suspected DUI driver into custody and to remove him from the house for identification and arrest by a private citizen who saw defendant's driving, and to preserve evidence of his blood/alcohol level, has been held to be legal by the California Supreme Court. (***People v. Thompson*** (2006) 38 Cal.4th 811.)

Note: The Court differentiated on its facts ***Welsh v. Wisconsin*** (1984) 466 U.S. 740 [104 S.Ct. 2091; 80

L.Ed.2nd 732], where it was held that a first time DUI, being no more than a civil offense with a $200 fine under Wisconsin law, was not aggravated enough to allow for a warrantless entry into a residence to arrest the perpetrator. The cut off between a minor and a serious offense seems to be whether or not the offense is one for which incarceration is a potential punishment. (***People v. Thompson***, *supra*, at pp. 821-824, citing ***Illinois v. McArthur*** (2001) 531 U.S. 326, 336, 337 [121 S.Ct. 946; 148 L.Ed.2nd 838].)

See also ***People v. Hampton*** (1985) 164 Cal.App.3rd 27, 34: A warrantless entry was upheld to prevent the destruction of evidence (the blood/alcohol level) and there was reason to believe defendant intended to resume driving. ***Welsh*** can be distinguished by the simple fact that California treats DUI cases as serious misdemeanors as well as the defendant, in ***Welsh***, no longer had his car available to him.

But the Ninth Circuit Court of Appeal, arguing against the continuing validity of ***Welsh***, has held that California's interpretation under ***Thompson*** is wrong, and that a warrantless entry into a home to arrest a misdemeanor driving–while-under-the-influence suspect is a **Fourth Amendment** violation. (***Hopkins v. Bonvicino*** (9th Cir. 2009) 573 F.3rd 752, 768-769; finding that the commission of a misdemeanor "will seldom, if ever, justify a warrantless entry into the home.")

In ***Sims v. Stanton*** (9th Cir. 2013) 706 F.3rd 954 (certiorari granted), the Ninth Circuit Court of Appeal held that entering the curtilage of a home in pursuit of a suspect with the intent to detain him when the subject is ignoring the officer's demands to stop—at worst a misdemeanor violation of **P.C. § 148**—is illegal. The warrantless fresh or hot pursuit of a fleeing suspect into a residence (or the curtilage of a residence) is limited to felony suspects only. The United States Supreme Court, however, reversed this decision in ***Stanton v. Sims*** (2013) 571 U.S. 3 [134 S.Ct. 3; 187 L.Ed.2nd 341].

The Ninth Circuit's decision was, again, based upon the Court's interpretation of the United States Supreme Court decision in ***Welsh v. Wisconsin*** (1984) 466 U.S. 740 [104 S.Ct. 2091; 80 L.Ed.2nd 732], and conflicts with the California Supreme Court's reasoning in ***People v.***

> ***Thompson*** (2006) 38 Cal.4th 811 (see "Warrantless entry to arrest a DUI (i.e., "*Driving while Under the Influence*") suspect," above).
>
> However, the United States Supreme Court, in discussing its own decision on ***Welsh***, noted that they only held there that a warrantless entry into a residence for a minor offense *not involving hot pursuit* was an exception to the normal rule that a warrant is "*usually*" going to be required. Per the Court, there is no rule that residential entries involving hot pursuit are limited to felony cases. In this case, there was a "*hot pursuit*." (***Stanton v. Sims***, *supra,* citing ***Welsh***, at p. 750.)

See also ***United States v. Johnson*** (9th Cir. 2001) 256 F.3rd 895, 908, fn. 6; "In situations where an officer is truly in hot pursuit and the underlying offense is a felony, the **Fourth Amendment** usually yields. (Citation) However, in situations where the underlying offense is only a misdemeanor, law enforcement must yield to the **Fourth Amendment** in all but the 'rarest' cases." (Citing ***Welsh v. Wisconsin*** (1984) 466 U.S. 740, 753 [104 S.Ct. 2091; 80 L.Ed.2nd 732], and failing to discuss what those "rarest (of) cases" might be.)."

Officers entering a home on a loud music complaint was upheld despite the Supreme Court's holding in ***Welsh***, ruling that the situation was more akin to a "*community caretaking*" issue than the one where it was necessary to find an exigent circumstance. (***United States v. Rohrig*** (6th Cir. 1996) 98 F.3rd 1506.)

In the case of a *non-bookable infraction*, however, California tends to agree with the Ninth Circuit's reasoning:

> Entering a residence with probable cause to believe only that the non-bookable offense of possession of less than an ounce of marijuana is occurring (**H&S § 11357(b)**), is closer to the ***Welsh*** situation, and a violation of the **Fourth Amendment** when entry is made without consent or a warrant. (***People v. Hua*** (2008) 158 Cal.App.4th 1027; ***People v. Torres et al.*** (2012) 205 Cal.App.4th 989, 993-998.)
>
> > The ***Torres*** Court also rejected as "speculation" the People's argument that there being four people in the defendants' hotel room indicted that a "marijuana-smoking party" was occurring, which

probably involved a bookable amount of marijuana. (***People v. Torres et al.***, *supra*, at p. 996.)

Welfare Checks; the "*Community Caretaking Function*," "*Exigencies*," *and the* "*Emergency Aid Doctrine*:"

Rule: Checking for victims in a residence upon a "*reasonable belief*" that someone inside a residence is in need of aid, or that there is an imminent threat to the life or welfare of someone inside, justifies an immediate warrantless entry. (***People v. Ray*** (1999) 21 Cal.4th 464; ***Tamborino v. Superior Court*** (1986) 41 Cal.3rd 919; ***People v. Ammons*** (1980) 103 Cal.App.3rd 20; (***Bonivert v. City of Clarkston*** (9th Cir. 2018) 883 F.3rd 865, 876-878; ***People v. Ovieda*** (2019) 7 Cal.5th 1034, 1041-1043; ***People v. Smith*** (2020) 46 Cal.App.5th 375, 385-392; ***Caniglia v. Strom*** (May 17, 2021) __ U.S. __, __ [141 S.Ct. 1596; 209 L.Ed.2nd 604], concurring opinion.)

Community Caretaking:

Does Community Caretaking Apply to Residences?

Up until recently, there has been some debate whether the "*community caretaking*" theory applies to anything other than vehicles. (See ***Ray v. Township of Warren*** (3rd Cir. 2010) 626 F.3rd 170, 175-177.) However, California and the Ninth Circuit, at least up until now (see below), have both used the community caretaking argument to justify warrantless entries of residences on various occasions. (See ***People v. Ray*** (1999) 21 Cal.4th 464; ***United States v. Cervantes*** (9th Cir. 2000) 219 F.3rd 882, 888-890; ***Martin v. City of Oceanside*** (9th Cir. 2004) 360 F.3rd 1078, 1081-1083; ***United States v. Russell*** (9th Cir. 2006) 436 F.3rd 1086; ***United States v Snipe*** (9th Cir. 2008) 515 F.3rd 947, 951-952.)

History:

The California Supreme Court:

The California Supreme Court has recognized that the U.S. Supreme Court has never used the term "*community caretaking*" in its residential search cases. "(T)he United States Supreme Court has never applied the concept of a community caretaking search outside the context of an

automobile inventory." (***People v. Ovieda*** (2019) 7 Cal.5th 1034, 1049.)

The ***Ovieda*** Court cites ***Cady v. Dombrowski*** (1973) 413 U.S. 433 [37 L.Ed.2nd 706; 93 S.Ct. 2523], at pp. 1049-1051, as an example of the United States Supreme Court's belief that community caretaking does *not* apply to residences, noting the use of the community caretaking theory in the case of a vehicle, stressing the differences between the privacy aspects of a vehicle searches and residential searches:

> "Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. … Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." (Pg. 1050.)

The United States Supreme Court:

Although the U.S. Supreme Court never used the phrase "community caretaking, it has upheld warrantless entries into residences where there is "*an objectively reasonable basis for believing*" that immediate action was necessary in order to prevent someone from being seriously injured. (See ***Brigham City v. Stuart***, *supra*; ***Michigan v. Fisher*** (2009) 558 U.S. 45 [130 S.Ct. 546; 175 L.Ed.2nd 410]; and ***Caniglia v. Strom*** (May 17, 2021) __ U.S. __, __ (concurring opinion) [141 S.Ct. 1596; 209 L.Ed.2nd 604]; ***United States v. Sanders*** (8th Cir. IA 2021) 4 F.4th 672; and see below.)

See "*United States Supreme Court*," below.

The Ninth Circuit Court of Appeals has used "Community Caretaking" to justify residential warrantless entries:

> Under the "*emergency exception*," an officer may enter a home without a warrant to investigate an emergency that threatens life or limb so long as there is "*objectively reasonable grounds to believe that an emergency exists and that his immediate response is needed*." The Court noted that this exception derives from a police officer's "*community caretaking function*." The other possible exception to the warrant requirement is known as the "*exigency exception*," which stems from the officer's investigatory function. Under this theory, an officer may enter a residence without a warrant if he has "probable cause to believe that a crime has been or is being committed and a reasonable belief that his entry is needed to stop the destruction of evidence or a suspect's escape or to carry out other crime prevention or law enforcement efforts." Both exceptions require that the officer have an objectively reasonable belief that the circumstances justify an immediate entry. (***Espinosa v. City and County of San Francisco*** (9th Cir. 2010) 598 F.3rd 528, 534-536; see also ***Sandoval v. Las Vegas Metro. Police Dep't.*** (9th Cir. 2014) 756 F.3rd 1154, 1161; ***Sialoi v. City of San Diego*** (9th Cir. 2016) 823 F.3rd 1238, ***Bonivert v. City of Clarkston*** (9th Cir. 2018) 883 F.3rd 865, 878-879.)
>
> The Ninth Circuit has also applied the community caretaking theory, along with the conclusion that exigent circumstances applied, to the warrantless seizure of firearms from the home of a person taken into custody pursuant to **Welf. & Insti. Code § 5150.** "A seizure of a firearm in the possession or control of a person who has been detained because of an acute mental health episode likewise responds to an immediate threat to community safety. We believe the same factors at issue in the context of emergency exception home entries and vehicle impoundments—(1) the public safety interest; (2) the urgency of that public interest; and (3) the

individual property, liberty, and privacy interests—must be balanced, based on all of the facts available to an objectively reasonable officer, when asking whether such a seizure of a firearm falls within an exception to the warrant requirement." In balancing these factors, the Court held that the warrantless seizure of the mental patient's firearms (plus one owned separately by his wife) was lawful. (***Rodriguez v. City of San Jose*** (9th Cir. 2019) 930 F.3rd 1123, 1136-1141; limiting its conclusions to the specific facts of this case, and noting that the appellant had failed to establish that the telephonic search warrant procedure would have sufficed to insure that a warrant could be obtained before her mentally [**Welf. & Inst. Code § 5150**] committed husband might return.)

See also ***United States v Snipe*** (9th Cir. 2008) 515 F.3rd 947, 951-952. While the Ninth Circuit here doesn't use the term "community caretaking," it does take the rules as announced in ***United States v. Cervantes*** (9th Cir. 2017) 859 F.3rd 1175, and modifies the elements of the doctrine based upon the U.S. Supreme Court's decision in ***Brigham City v. Stuart*** (2006) 547 U.S. 398 [126 S.Ct. 1943; 164 L.Ed.2nd 650].

Other Federal Circuits have gone both ways on this issue:

The First Circuit Court of Appeals:

See ***Caniglia v. Strom*** (1st Cir. 2020) 953 F.3rd 112 (Certiorari granted), where the federal First Circuit Court of Appeal held that (1) the "community caretaking" theory did in fact apply to residences, and (2) that entering the plaintiff's residence to seize his firearms and ammunition while he was being evaluated for mental issues at a local mental facility was lawful as a function of the officers' community caretaking responsibilities where plaintiff was reported to have talked about suicide, he had guns in the house, it was believed that he could be released from the hospital at any time, and the officers searched only where they were

told by plaintiff's wife that the guns were located.

> This decision was reversed in ***Caniglia v. Strom*** (May 17, 2021) __ U.S. __, __ (concurring opinion) [141 S.Ct. 1596; 209 L.Ed.2nd 604]. See "*United States Supreme Court*," below.

The federal First Circuit again upheld a warrantless entry into a residence, done for the purpose of locating the owners of that residence in which a loud party was in progress, in order to have the owners quiet the party, as well as to check on the welfare of under aged drinkers. The court concluded that any expectation of privacy in the home was greatly diminished given the open front door, the evident lack of supervision by the homeowner(s) of guests trafficking in and out of the home, and the owner's failure to respond to the officers. As a result, the court held that it under the Community Caretaking doctrine, it was reasonable for the officers to enter the apartment through the open front door and attempt to locate the homeowner to address these issues. (***Castagna v. Jean*** (1st Cir. 2020) 955 F.3rd 211.)

The Sixth Circuit Court of Appeals:

The "*community caretaking*" theory was held to justify officers entering a home on a loud music complaint. In balancing (1) whether immediate government action was required, (2) whether the governmental interest was sufficiently compelling to justify a warrantless intrusion, and (3) whether the defendant's expectation of privacy was diminished in some way by his actions of generating the loud music, the Court ruled that a warrantless entry to address the problem of the loud music was

reasonable. (***United States v. Rohrig*** (6th Cir. 1996) 98 F.3rd 1506.)

> In so ruling, the Sixth Circuit cites the California Supreme Court case of ***People v. Lanthier*** (1971) 5 Cal.3rd 751, where the warrantless search of a college student's locker was upheld when it was noted that a "noxious odor" was emanating from it, much to the discomfort of the other students. The "ongoing nuisance" justified a warrantless intrusion into the student's locker.

Subsequently, however, the Sixth Circuit seems to have had second thoughts whether "community caretaking" applies to residences. (See ***United States v. Williams*** (6th Cir. 2003) 354 F.3rd 497, 508; "(D)espite references to the doctrine in ***Rohrig***, we doubt that community caretaking will generally justify warrantless entries into private homes.")

The Eighth Circuit Court of Appeals:

Under the "*Community Caretaking Function*," a police officer may enter a residence without a warrant, as a community caretaker, where the officer has a reasonable belief that an emergency exists that requires his attention. In addition, the "reasonable belief" standard "is a less exacting standard than probable cause." Finally, a search or seizure under the community caretaking function is reasonable if the governmental interest in law enforcement's exercise of that function, based on specific and articulable facts, outweighs the individual's interest in freedom from government intrusion. (***United States v. Smith*** (8th Cir. 2016) 820 F.3rd 356; upholding the warrantless entry into a residence for the purpose of checking for a person the officers reasonably believed

was being held by defendant against her will.)

The Eighth Circuit also held that the warrantless entry into a house was reasonable under the Community Caretaking exception to the **Fourth Amendment's** warrant requirement, noting that this Circuit has applied community caretaking to residences since 2006, allowing a police officer to "enter a residence without a warrant as a community caretaker where the officer has a reasonable belief that an emergency exists requiring his or her attention." In this case, officers responded to a 911 call from the grandmother of an 11-year-old child who had called her grandmother, complaining that her mother and the mother's boyfriend were fighting. Upon arrival, and in contacting the mother, despite her telling the officers that everything was okay, the officers noted that she was visibly upset and had red marks on her face and neck. Upon hearing someone inside crying, the officers make entry into the residence to check the welfare of those inside. Once inside, information from the 11-year-old daughter led the officers to believe that defendant might be in possession of a firearm; a fact verified by the mother. Limiting the search to those areas where the daughter and the mother said the gun might be, the gun was found in the cushions of the couch. Defendant, charged with being in illegal possession of a firearm, moved to suppress. The Court held that based on the facts known to the officers, it was reasonable for the officers to believe that an emergency situation existed that required their immediate attention by entering the residence to ensure that no one inside was injured or in danger. The "Community Caretaking" theory allowed for such an entry. Then, with probable cause to believe defendant was in illegal possession of a firearm, the warrantless search for the

firearm, limited to those areas where it was suspected to be, was lawful. (***United States v. Sanders*** (8th Cir. 2020) 956 F.3rd 534.)

California's lower courts have not applied Community Caretaking to residences:

The "*community caretaking function*" has been held to be inapplicable to the situation where police officers make a warrantless entry into a mental patient's home after his detention for a mental evaluation per **W&I § 5150**, despite the fact that **W&I § 8102(a)** commands a peace officer to confiscate firearms and other deadly weapons in such a situation. (***People v. Sweig*** (2008) 167 Cal.App.4th 1145; petition granted.)

The ***Sweig*** Court also found, however, that a search warrant is not permitted under **P.C. § 1524** (see "*Statutory Grounds for Issuance* (**P.C. § 1524(a)**)," under "*Searches with a Search Warrant*" (Chapter 10, above) when the defendant is detained pursuant to **H&S § 5150** only. The Court suggested that the Legislature should fix the problem with a legislative amendment to **Section 1524**.

The California Supreme Court granted a petition in ***Sweig***, making it unavailable for citation pending the Court's decision.

As a result of ***Sweig***, however, the California Legislature amended **P.C. § 1524**, effective *January 1, 2010*, adding a number of additional grounds for obtaining a search warrant, including to recover firearms and other deadly weapons where a person has been committed for observation pursuant to **H&S § 5150**.

The "*community caretaking*" theory was also found to be *inapplicable* when officers entered the defendant's locked-off property based upon little more than a neighbor's unsubstantiated belief that the defendants might have been the victims of a "drug rip-off" the night before. Finding a small amount of marijuana debris at the edge of the defendants' property and a small depression leading

under the fence was not legally sufficient. Also, the officers appeared more concerned with investigating allegations that the defendants were cultivating marijuana. The community caretaking theory is inapplicable when the police act to solve crime as opposed to coming to the aid of persons. (***People v. Morton*** (2003) 114 Cal.App.4th 1039.)

The Fourth District Court of Appeal, in ***People v. Smith*** (2020) 46 Cal.App.5th 375, at p. 385, rejected the applicability of the community caretaking theory for justifying an officer's warrantless entry into a residence after finding an unoccupied car with its engine running in the driveway and with no one responding to the officers' knocking at that front door. (Citing ***People v. Ovieda*** (2018) 19 Cal.App.5th 614, below.)

> Also note that the Fourth District Court of appeal, in ***People v. Smith*** (at pp. 390-392) declined to apply the "good faith" exception to a warrantless entry into a residence based upon no more than the fact that a vehicle was left out front with the engine running, and no one answered the door upon the officers knocking. Rejecting the People's argument that the officer was using the rational of ***People v. Ray***, applying the "*community caretaking*" theory to warrantless residential entries, the Court here noted that because ***Ray*** was only a "*plurality*" opinion, it was not binding precedent. Reliance on the rule in ***Ray***, therefore, does not trigger the "good faith" exception. (Citing ***People v. Karis*** (1988) 46 Cal.3d 612, 632.)

Final Resolution: *The California Supreme Court* finally resolved the issue, so far as California courts are concerned:

> In ***People v. Ray*** (1999) 21 Cal.4th 464, a "*plurality*" (short of a "*majority*") of the California Supreme Court ruled that under the so-called "*emergency aid doctrine*," which is a subcategory of a law enforcement officer's "*community caretaking*" duties, a warrantless entry into a residence may

be allowed whenever police officers "*reasonably believe*" someone inside is in need of assistance or action must be taken to preserve the occupant's property.

> "The appropriate standard under the community caretaking exception is one of reasonableness: Given the known facts, would a prudent and reasonable officer have perceived a need to act in the proper discharge of his or her community caretaking functions?" (***Id***. at pp. 476-477.)
>
> Three justices in ***Ray*** found the "*emergency aid doctrine*" to be a subcategory of the "*community caretaking*" rationale, and *not* a form of "*exigent circumstance*." (***People v. Ray***, *supra*, at p. 471.) Three concurring justices found such a situation to come within the standard "*exigent circumstance*" rationale. (***Id***., at p. 480.)

People v. Ovieda (2019) 7 Cal.5th 1034: The California Supreme Court finally ruled that the "community caretaking" doctrine does *not* apply at all to residences, overruling a contrary split decision out of the Second District Court of Appeal (see ***People v. Ovieda*** (2018) 19 Cal.App.5th 614, 619-623; petition granted.), as well as its own contrary plurality ruling in ***People v. Ray***, *supra*. (***People v. Ovieda*** at pp. 1044-1053; concluding that "no such exception exists (as it relates to searches of residences) and that the ***Ray*** lead opinion was wrong to create one," noting that the community caretaking theory applies only to vehicles.)

> "(T)o the extent the lead opinion in ***Ray*** authorized warrantless entry into a private home for community caretaking in circumstances short of an emergency, ***Ovieda*** disapproved it." (***People v. Rubio*** (2019) 43 Cal.App.5th 342, 351.)

The United States Supreme Court:

The United States Supreme Court finally resolved this issue once and for all in ***Caniglia v. Strom*** (May 17, 2021) __ U.S. __ [141 S.Ct. 1596; 209 L.Ed.2nd 604], where it specifically held that the federal First Circuit Court of Appeal in ***Caniglia v. Strom*** (1st Cir. 2020) 953 F.3rd 112

(see above), inappropriately expanded its community caretaking theory—first established by the Supreme Court for purposes of justifying a warrantless search of an impounded vehicle for an unsecured firearm, in ***Cady v. Dombrowski*** (1973) 413 U.S. 433 [37 L.Ed.2nd 706; 93 S.Ct. 2523]—to residences. The Court clearly and unequivocally *rejected* the argument that, "***Cady*'s** acknowledgment of these 'caretaking' duties creates a standalone doctrine that justifies warrantless searches and seizures in the home." (***Id***., at p. __.)

Conclusion:

Based upon the decisions of ***People v. Ovieda*** and ***Caniglia v. Strom***, *supra*, it can definitively be said that the Community Caretaking exception to the **Fourth Amendment** requirement applies only to vehicles. (***Coalition on Homelessness v. City and County of San Francisco*** (2023) 93 Cal.App.5th 928, 941: "Based on those recent and authoritative pronouncements, it would be inaccurate to state there is a recognized 'community caretaking' exception to the warrant requirement. Instead, there is only a recognized *vehicular* community caretaking exception.") (Italics in original.)

Emergency Aid Exception:

General Rule:

"The emergency aid exception to the warrant requirement allows police to 'enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.'" (***People v. Rubio*** (2019) 43 Cal.App.5th 342, 349, quoting ***Brigham City v. Stuart*** (2006) 547 U.S. 398, 400 [164 L.Ed.2nd 650; 126 S. Ct. 1943], and citing ***People v. Troyer*** (2011) 51 Cal.4th 599, 606.)

The Ninth Circuit Court of Appeal:

In earlier cases, the Ninth Circuit Court of Appeal applied a three-point standard in order to employ what the Court referred to as the "*emergency aid*" exception to the **Fourth Amendment** as a function of law enforcement's "*community caretaking function*," and required a finding of three circumstances to be applicable:

- The police must have "*reasonable grounds*" to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property; *and*

- The search must *not* be primarily motivated by an intent to arrest and seize evidence; *and*

- There must be some reasonable basis, "*approximating probable cause*," to associate the emergency with the area or place to be searched.

  (***United States v. Cervantes*** (9th Cir. 2000) 219 F.3rd 882, 888-890; ***Martin v. City of Oceanside*** (9th Cir. 2004) 360 F.3rd 1078, 1081-1083; ***United States v. Martinez*** (9th Cir. 2005) 406 F.3rd 1160; ***United States v. Russell*** (9th Cir. 2006) 436 F.3rd 1086.)

However, in ***United States v Snipe*** (9th Cir. 2008) 515 F.3rd 947, 951-952, the Ninth Circuit modified these rules in light of ***Brigham City v. Stuart*** (2006) 547 U.S. 398 [126 S.Ct. 1943; 164 L.Ed.2nd 650] (*see below*) and ***Whren v. United States*** (1996) 517 U.S. 806 [116 S.Ct. 1769; 135 L.Ed.2nd 89], deleting altogether the officers' subjective motivations as being irrelevant, and finding only as necessary a "objectively reasonable basis for concluding that an emergency is unfolding in the place to be entered." (See below.)

Now, the Ninth Circuit finds the following factors to be necessary: Whether (1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm, and (2) the search's scope and manner were reasonable to meet the need. (***United States v Snipe***, *supra*., at p. 952; see also ***Hopkins v. Bonvicino*** (9th Cir. 2009) 573 F.3rd 752, 763, fn. 5.)

"[T]he exigency doctrine is inapplicable because the officer did not believe that evidence of a crime would be found inside the house. When the domestic violence victim is still in the home, circumstances may justify an entry pursuant to the exigency doctrine. In ***Brooks***, we applied the exigency doctrine to allow entry when loud fighting had been heard,

the officers saw the room in disarray, and the victim was still on the premises but not visible to the officers. As we noted in that case, the officers had probable cause to suspect evidence of crime and had an exigent need to enter the premises to make sure that the victim was safe. Here, in contrast, the victim had left the premises and the officer did not have probable cause to believe there was contraband or evidence of a crime in the house." (***United States v. Martinez*** (9th Cir. 2005) 406 F.3rd 1160, 1164; referencing ***United States v. Brooks*** (9th Cir. 2004) 367 F.3rd 1128.)

A police officer's entry into a residence, motivated out of a concern for the welfare of a nine-year-old child who the officers suspected had been left home alone at night, was lawful under the so-called "*emergency doctrine*," which is derived from the officers' "*community caretaking function*." The "*emergency doctrine*" is an exception to the **Fourth Amendment's** restrictions on warrantless residential entries, and "may be justified by the need to protect life or avoid serious injury." (***United States v. Bradley*** (9th Cir. 2003) 321 F.3rd 1212.)

The "*Emergency Aid*" exception to the search warrant requirement has been understood to permit law enforcement officers to enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant or other officers from imminent injury. There has to be a "*reasonable basis*" for concluding that there is an imminent threat of violence to the occupants to justify this exception to the search warrant requirement. The government bears the burden of showing specific and articulable facts to justify invoking this exception. (***Sandoval v. Las Vegas Metro. Police Dep't.*** (9th Cir. 2014) 756 F.3rd 1154, 1163-1165; finding the officers' warrantless entry into the residence under the circumstances of this case, where there was no probable cause to believe a burglary was occurring, and where the observed occupants were attempting to comply with the officers' commands, to be illegal.)

Making a warrantless entry into defendant's residence and bedroom where the officer believed that defendant may be concealing a victim inside was held to be reasonable. Although defense counsel was legally ineffective for not having made a motion to suppress the weapons and ammunition found therein ("There was at least a chance

that such a motion would have succeeded."), the state habeas courts were not unreasonable in denying the writ in that although the officer inarticulately referred to the entry as a "protective sweep," the "emergency aid doctrine" arguably allowed for the warrantless entry. (***Mahrt v. Beard*** **(**9th Cir. 2017) 849 F.3rd 1164, 1171-1172.)

Where the victim of alleged domestic violence is no longer in the house, and the defendant is left alone inside and in no apparent need of assistance, the emergency aid doctrine is not applicable. There was at least a triable issue of fact for a civil jury as to whether entry into the house by police was lawful. (***Bonivert v. City of Clarkston*** (9th Cir. 2018) 883 F.3rd 865, 876-878.)

"Pursuant to the emergency exception, police need not obtain a search warrant to enter a dwelling if '(1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search's scope and manner were reasonable to meet the need.'" (United States v. Holiday (9th Cir. 2021) 998 F.3rd 888, 892-894; quoting ***United States v. Snipe*** (9th Cir. 2008) 515 F.3rd 947, 952; and finding that although the police had information suggesting that a child was in need of assistance and was in a blue Jaguar registered to defendant's address, they had no reason to believe that the child was in defendant's home.

The California Courts' Analysis:

Police responded to a report that two gunshots had been fired within a residence. When they approached and knocked on the door, an officer "heard from within the residence what sounded to be like a shotgun being chambered." The Court upheld the warrantless entry in that the police had evidence that shots had just been fired inside the home and that somebody inside was again preparing to use a firearm even as the police stood by outside. (***People v. Stamper*** (1980) 106 Cal.App.3rd 301, 304.)

Where the police responded to a report of a robbery at an address where a victim "was believed to be injured and bleeding." Officers responding to the scene observed blood outside the defendant's apartment building and outside his

apartment door. Also, a witness "confirmed that an injured person was inside the apartment." The Court held that these facts gave officers sufficient reason to enter in search of injured persons. (***Tamborino v. Superior Court*** (1986) 41 Cal.3rd 919.)

Responding to a radio call concerning a male being shot several times, and finding a wounded female and an injured male on the front porch, with blood on the front entrance indicating someone with injuries either entered or exited the residence, without any other way to determine whether the reported male with a gunshot wound might be in the house requiring aid, forcing entry into the residence (conceded by the parties) and then into a locked upstairs bedroom (the issue in the case) was lawful under the "*emergency aid doctrine*." Also, for the protection of the police, not knowing where the shooter(s) might be, forcing entry into the bedroom to make sure the suspects weren't there was also reasonable for the officers' protection as they conducted an investigation. (***People v. Troyer*** (2011) 51 Cal.4th 599.)

> The Court further rejected defendant's argument that the officers needed "*probable cause*" to believe someone inside needed aid. The test, citing ***Brigham City v. Stuart***, *supra*, at p. 400, is merely having an "objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with injury." (***Id***. at pp. 606-607.)
>
> The Court rejected the dissenting justices' conclusion that there were other reasonable, innocent explanations for what the police first found. It is not the officers' responsibility to eliminate the possibility of other reasonable explanations, but rather to act on the reasonable belief that additional victims who need immediate assistance may be somewhere in that house. (***Id***. at p. 613.)

However, the need to render emergency aid was rejected as grounds to make a warrantless entry into defendant's home where police officers responded to a 9-1-1 call to check the residence and found the front door to be open and the inside appeared to have been ransacked. To lawfully enter

under the "*emergency aid*" doctrine," California's Supreme Court ruled that officers must (1) have probable cause for a search or seizure; and (2) show that, because of the circumstances, there is no time to obtain a warrant. The circumstances of this case failed to meet this standard. (***People v. Ray*** (1999) 21 Cal.4th 464, 473; overruled on other grounds (i.e., applicability of "community caretaking") in ***People v. Ovieda*** (2019) 7 Cal.5th 1034, 1049.)

> A three-justice concurrence in ***Ray*** ruled that rather than community caretaking, an "exigency" (i.e., to render aid) analysis justified the warrantless entry into defendant's home. (***People v. Ray***, *supra*, at p. 482.)
>
> "(T)o the extent the lead opinion in ***Ray*** authorized warrantless entry into a private home for community caretaking in circumstances short of an emergency, ***Ovieda*** disapproved it." (***People v. Rubio*** (2019) 43 Cal.App.5th 342, 351.)

Quoting ***Brigham City v. Stuart*** (2006) 547 U.S. 398, 401 [126 S.Ct. 1943; 164 L.Ed.2nd 650], and ***Michigan v. Fisher*** (2009) 558 U.S. 45 [130 S.Ct. 546; 175 L.Ed.2nd 410] (below), California's Second District Court of Appeal, citing the "*emergency aid doctrine*," noted that; "police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury." Where officers are told by the radio dispatch operator that someone had reported hearing a screaming woman and distressed moaning at the location, and upon arrival, consistent with the radio dispatch call information, the officers hear from the outside loud voices—both male and female—engaged in an argument inside the house, plus one officer also sees through the window that two males in the house are gesturing as if arguing, the Court held that it was objectively reasonable for an officer to believe that immediate entry was necessary in order to render emergency assistance to a screaming female victim inside or to prevent a perpetrator from inflicting additional immediate harm to that victim or others inside the house. Finding two females inside who told the officers that they were okay did not make unreasonable a check of the rest of the house for another female who was reported to be in

distress. The plain sight observation of illegal drugs in a closet, where a victim or a suspect could have been hiding, was upheld. (***People v. Pou*** (2017) 11 Cal.App.5th 143, 151-153.)

> Later discovering that the original call actually concerned a different residence across the street did not make the search of defendant's home unreasonable. "We do not with a 'hindsight determination' upend the officers' objectively reasonable conclusion that an exigency existed at the location simply because we subsequently learn of contrary facts unknown to the officers at the time they made their decision" (citing ***People v. Troyer*** (2011) 51 Cal.4th 599, 613.) (***Id***., at pp. 152-153.)

Breaking down defendant's door and entering his home when he had refused to invite police in to investigate was *not* justified under the **Fourth Amendment**, even though someone had discharged a firearm outside the home in a high crime neighborhood, overruling the Court's own prior decision in ***People v Rubio*** (2019) 37 Cal.App.4th 622, and in light of the California Supreme Court decision of ***People v. Ovieda*** (2019) 7 Cal.5th 1034, 1049.). The *emergency aid exception* does not apply because the police had no reasonable basis to conclude there was anyone inside the apartment who was in danger or distress, and the *exigent circumstances exception* does not apply because police had no reason to believe a shooter was hiding in the apartment or that evidence of criminal conduct would be destroyed before they had a chance to obtain a warrant. (***People v. Rubio*** (2019) 43 Cal.App.5th 342, 348-355.)

However, entry into a unlocked side door of a house after finding a car with its engine running in the driveway, and with no one responding to knocking at the front door, out of concern that someone inside may be possibly unconscious and in need of help, *or that criminal activity was* "*afoot*," was held to be illegal. (***People v. Smith*** (2020) 46 Cal.App.5th 375, 385-392.)

> In so ruling, the Fourth District Court of Appeal (Div. 1), at p. 386, cites the following legal standards: "'The well-recognized emergency aid exception "require[s] that articulable facts support a reasonable belief that an emergency exists." (***People***

v.*) *Ovieda, . . . 7 Cal.5th (1034) at p. 1048.) It is not enough that officers seek to rule out "the possibility that someone … might require aid." (***Id.*** at p. 1047.) "Officers do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the emergency aid exception." (***Michigan v. Fisher*** (2009) 558 U.S. 45, 49 [175 L.Ed.2nd 410; 130 S.Ct. 546] . . . .) "[T]he test . . . [is] whether there was 'an objectively reasonable basis for believing' that medical assistance was needed, or persons were in danger . . , ." (***Ibid.***)'"

And in so ruling, the Court (at p. 386.) cites the case of ***People v. Smith*** (1972) 7 Cal.3rd 282 (different Smith) where entry was made into an apartment where drugs were seen in plain sight, the entry being made for the purpose of checking on the welfare of a 7-year-old child who was left outside alone. The California Supreme Court found the entry to be unlawful.

The United States Supreme Court's Rule:

In ***Brigham City v. Stuart*** (2006) 547 U.S. 398 [126 S.Ct. 1943; 164 L.Ed.2nd 650]: The Supreme Court ignored efforts by the lower courts to categorize the entry into a house upon viewing an altercation through the window as coming within the "*emergency aid doctrine*," "*community caretaking*," or any other label, and merely noted the exigency of protecting the occupants from being hurt. In so doing, the Court held that a warrantless entry into a residence is lawful when police have "*an objectively reasonable basis for believing*" that an occupant is seriously injured or imminently threatened with such injury, and then the manner of the officers' entry was also reasonable.

Expanding upon the discussion in ***Brigham City***, but still not using the phrase "*community caretaking*," the Supreme Court further held that officers responding to a call of a disturbance, finding a pickup truck in the driveway which had apparently been in an accident, blood on the truck and on clothes in the truck, broken windows in the house, and defendant, barricaded inside, screaming and throwing things. Defendant had a visible cut on his hand. One officer forced his way in only to have defendant point a

rifle at him. Noting that "(i)t requires only 'an objective reasonable basis for believing' that 'a person within [the house] is in need of immediate aid,' and that the officer was acting reasonably when he made the warrantless entry into defendant's home, the Court found the entry to be lawful. (Cites Omitted; ***Michigan v. Fisher*** (2009) 558 U.S. 45 [130 S.Ct. 546; 175 L.Ed.2nd 410].)

> "Officers do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the emergency aid exception (to the warrant requirement. Also, the officer's subjective motivations for entering were irrelevant, the test being an objection one. (***Id***., at p. 49.)
>
> Also, the Court noted the reality of such a situation when a police officer is forced to decide what to do: "It does not meet the needs of law enforcement or the demands of public safety to require officers to walk away from a situation like the one they encountered here. Only when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances. But '[t]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties.' (citing ***Brigham City***, *supra*, at p. 406.)" (***Ibid***.)

Where officers entered a mentally ill woman's room at a group home, were threatened with a knife, retreated to the hallway, called for backup, but then forced their way back into the room without waiting for the backup to arrive, and shot her, the officers were held to have been justified as a matter of law in making the first entry under the emergency aid exception under the **Fourth Amendment**. (***City & County of San Francisco v. Sheehan*** (2015) 575 U.S. 600, 612-613 [135 S.Ct. 1765; 191 L.Ed.2nd 856].)

> The Supreme Court declined to decide whether making the second entry of plaintiff's room, having initially backed out when confronted by the knife-wielding plaintiff, was constitutional under the circumstances, it not having been briefed on appeal, but rather (in overruling the Ninth Circuit Court of Appeal) found that the officers had qualified immunity from civil liability in that the officers'

choice to reenter the room without waiting for backup or otherwise planning a strategy did not violate clearly established law. (***Id.***, 135 S.Ct. at pp. 1174-1178.)

Police officers may make a warrantless entry into a residence whenever they have "*an objectively reasonable basis for believing*" that an occupant or the officers are imminently threatened with serious injury. (***Ryburn v. Huff*** (2012) 565 U.S. 469 [132 S.Ct. 987; 181 L.Ed.2nd 966]; reversing the Ninth Circuit Court of Appeal's earlier decision that had held that unverified rumors that the plaintiffs' son had threated to "shoot up" a high school, along with the son's mother, who was generally uncooperative, running back into the house when asked about firearms in the house, was insufficient to justify an immediate entry.

Other Cases:

Two warrantless entries to look for a missing eight-year-old girl based upon probable cause to believe that she, or her body, might be in the apartment. (***People v. Panah*** (2005) 35 Cal.4th 395, 464-469.)

Information that "*suspicious activity*" was taking place at a home, finding a rear sliding door slightly ajar, with the lights and a television on inside, but with no one responding to the officers' attempts to get the attention of the occupants, was sufficient "*probable cause*" to believe that a resident in the house might have been in danger or injured. (***Murdock v. Stout*** (9th Cir. 1995) 54 F.3rd 1437.)

Sheriff's Deputies responding to a shooting call, not knowing whether the defendant had shot himself or whether there was a second victim or a possible shooter in the house, were justified in making a warrantless entry to look for more victims and/or a possible shooter. (***United States v. Russell*** (9th Cir. 2006) 436 F.3rd 1086.)

The warrantless entry of the defendant's trailer, based upon "*probable cause*" to believe a kidnap victims were inside, was justified. (***People v. Coddington*** (2000) 23 Cal.4th 529, 580.)

> Whether or not the FBI agents in ***Coddington*** actually needed full-blown "*probable cause*" to believe the victims were inside and in immediate need of rescue was not discussed. Arguably, a simple "*reasonable suspicion*" would have been sufficient.

An emergency 911 call reporting an accidental stabbing justified a warrantless entry of a hotel room for the limited purpose of ensuring the safety of those inside. (***People v. Snead*** (1991) 1 Cal.App.4th 380, 386.)

Responding to a domestic violence call, officers contacted a woman who, although denying there was a problem, appeared to be frightened and apparently had been struck. The warrantless entry was upheld based upon what the Court determined to be sufficient "*probable cause*." (***People v. Higgins*** (1994) 26 Cal.App.4th 247, 252-255.)

Responding to a call concerning a "*shooting*," a bullet hole was found in a patio door and blood on the patio floor. Entry was justified for the purpose of checking for possible shooting victims. (***People v. Soldoff*** (1980) 112 Cal.App.3rd 1.)

And see ***United States v. Martinez*** (9th Cir. 2005) 406 F.3rd 1160, a questionable legal analysis attempting to differentiate the differences between "*exigent circumstance*" and the "*emergency doctrine*" as it relates to a domestic violence situation. The Court found that checking a residence for a potential domestic violence victim fell under the later.

Entry into a residence to check for the possible presence of a domestic violence victim who had telephoned police minutes earlier to ask for assistance in returning to the apartment to retrieve her belongings, but who couldn't be found upon the officers' arrival, was held to be lawful under the circumstances. (***United States v. Black*** (9th Cir. 2007) 482 F.3rd 1035.)

> While the ***Black*** case was analyzed as a "*welfare check*" and "*exigent circumstances*," the Court noted in a footnote (fn. 1) that the same result

would be applicable if analyzed under the "*emergency aid doctrine*."

See dissenting opinion to the Court's denial of an en banc rehearing, at (9th Cir. 2007) 482 F.3rd 1044, by Kozinski, C.J.

Entry into a motel room to check the welfare of the occupant whose four-year old son and an employee of the motel told officers that the occupant was unconscious and could not be woken up, held to be sufficient of an "*exigent circumstance*," supported by "*probable cause*," to justify a warrantless entry. (***People v. Seminoff*** (2008) 159 Cal.App.4th 518, 528-530.)

Observation of contraband in plain sight by police officers who made a warrantless entry into a residence, responding to an emergency call from someone in apparent distress ("*Get the cops here now*," followed by the caller being disconnected), was lawful, and justified the obtaining of a search warrant to search the residence. (***United States v. Snipe*** (9th Cir. 2008) 515 F.3rd 947.)

The Third District Court of Appeal (Shasta County) found that although, under the "*emergency aid*" doctrine, an officer must have "*an objectively reasonable basis*" to believe someone inside is seriously injured or imminently threatened with such injury in order to justify a warrantless entry (citing ***Brigham City v. Stuart***, *supra*.), the officer may look through the defendant's side window (which the Court found to be at a location, at the side of the house, that implicated the **Fourth Amendment**), an admittedly lesser intrusion than making entry, with no more than a "*reasonable suspicion*" to believe that someone inside might need their assistance. (***People v. Gemmill*** (2008) 162 Cal.App.4th 958.)

Also see ***Calabretta v. Floyd*** (9th Cir. 1999) 189 F.3rd 808, where it was held that an entry of a residence for the purpose of investigating a possible child abuse, where there were no exigent circumstances requiring an immediate entry, requires full "*probable cause*" and a search warrant.

And see ***United States v. Deemer*** (9th Cir. 2004) 354 F.3rd 1130; where it was held that an anonymous 911-hangup call, traceable to a particular motel, but without sufficient

information to determine which room the call may have come from, did not allow for the non-consensual entry into the defendant's room to see is anyone needed help merely because of the suspicious attempts by the person who answered the door to keep the officers from looking inside, and her apparent lies concerning no one else being there.

With a citizen's report that plaintiff had been in a minor traffic accident and had the odor of alcohol on his breath, officers forced entry into his home under the supposition that a layperson might misinterpret the fruity smell of a person's breath who is on the brink of a diabetic coma as being under the influence of alcohol. Absent any other evidence that plaintiff was in fact about to suffer a diabetic coma, the Court rejected this argument as "both simple and audacious." The Court also rejected the officers' claim that they felt plaintiff might have been injured given the fact that the traffic accident was so minor that there was no damage to either car. (***Hopkins v. Bonvicino*** (9th Cir. 2009) 573 F.3rd 752, 759, 763-766.)

With a missing victim, and sufficient suspicious circumstances causing an officer to reasonably believe that the victim may die if immediate action is not taken, a warrantless entry into a private area may be lawful. No warrant is required "when an emergency situation requires swift action to prevent imminent danger to life." "(I)f the facts available to the officer at the moment of the entry would cause a person of reasonable caution to believe that the action taken was appropriate," the officer may lawfully make a warrantless entry into a residence or other private area. (***People v. Rogers*** (2009) 46 Cal.4th 1136, 1144-1145, 1153-1161; with prior information that defendant may have secreted a missing victim in a storage room, and the defendant's nervousness and lack of cooperation, the immediate, warrantless entry into the storage area was held to be lawful.)

Following the reasoning in ***Rogers***, the Court held that officers were justified in making entry into a darkened apartment when no one would answer their knocking to check the welfare of a woman and her child who hadn't been heard from all day following a violent "domestic violence" incident with her live-in boyfriend the night before, when no one could locate her and it was known that it was uncharacteristic of her not to answer her home or

cellphone for the whole day. (***People v. Hockstraser*** (2009) 178 Cal.App.4th 883, 895-901.)

Plain sight observations made while lawfully inside the apartment provided probable cause to search the defendant's vehicle parked outside the apartment, where the victim's dismembered body was then found. (***Id.***, at pp. 901-905.)

The warrantless entry and search of a residence is lawful so long as there is an objectively reasonable basis for believing that someone inside or the officer is in serious danger, the manner of entry is reasonable, and the scope of the subsequent search is reasonable. (***United States v. Reyes-Bosque*** (9th Cir. 2010) 596 F.3rd 1017, 1029-1030.)

Check-the-Welfare Cases:

Although some of the existing "exigent circumstance" cases talk about the need to make a warrantless entry into a residence to "check the welfare" of someone believed to be in distress inside, the U.S. Supreme Court has noted that whether an entry under such a circumstance complies with the **Fourth Amendment's** requirements has never been considered by the High Court. (***Caniglia v. Strom*** (May 17, 2021) __ U.S. __, __ (concurring opinion) [141 S.Ct. 1596; 209 L.Ed.2nd 604]; suggesting that states should consider instigating a search warrant procedure for such cases.

But see the concurring opinion at pg. __, where Justice Kavanaugh notes that the Court's decision "does not prevent police officers from taking reasonable steps to assist those who are inside a home and in need of aid," and that the test is what is "reasonable," under the circumstances. "The **Fourth Amendment** allows officers to enter a home if they have 'an objectively reasonable basis for believing' that such help is needed, and if the officers' actions inside the home are reasonable under the circumstances. (Id., at p. __, citing ***Brigham City v. Stuart*** (2006) 547 U.S. 398, at p. 406 [126 S.Ct. 1943; 164 L.Ed.2nd 650], using as an example a typical "check the welfare" situation; i.e., where a concerned relative reports to police that an elderly person is uncharacteristically absent and does not respond to telephone calls.

Miscellaneous Exigent Circumstances: "The exigency exception (to the search warrant requirement) permits warrantless entry where officers 'have both probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is necessary to prevent . . . the destruction of

relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.'" (***Sandoval v. Las Vegas Metro. Police Dep't.*** (9th Cir. 2014) 756 F.3rd 1154, 1161; ***Sialoi v. City of San Diego*** (9th Cir. 2016) 823 F.3rd 1238; ***Lange v. California*** (June 23, 2021) __ U.S.__, __ [141 S.Ct. 2011; 219 L.Ed.2nd 486].)

> The government bears the burden of establishing exigent circumstances. (***People v. Rubio*** (2019) 43 Cal.App.5th 342, 353-354; citing ***People v. Troyer*** (2011) 51 Cal.4th 599, 606.)
>
> "A warrantless search of a home is 'presumptively unreasonable' because 'the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' ***Payton v. New York***, 445 U.S. 573, 585-86, 100 S.Ct. 1371, 63 L.Ed.2nd 639 (1980) (quotations and citation omitted). This presumption is overcome only 'when "the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the **Fourth Amendment**.' ***Kentucky v. King***, 563 U.S. 452, 460, 131 S.Ct. 1849, 179 L.Ed.2nd 865 (2011) (quoting ***Mincey v. Arizona***, 437 U.S. 385, 394, 98 S.Ct. 2408, 57 L.Ed.2nd 290 (1978)). Preventing the imminent destruction of evidence is one such exigency, and exists when 'officers, acting on probable cause and in good faith, reasonably believe from the totality of the circumstances that [] evidence or contraband will imminently be destroyed . . . .' ***United States v. Ojeda***, 276 F.3rd 486, 488 (9th Cir. 2002) (per curiam) (quoting ***United States v. Kunkle***r, 679 F.2nd 187, 191-192 (9th Cir. 1982)). Probable cause exists where, under the totality of the circumstances, there is 'a fair probability or substantial chance of criminal activity.' ***United States v. Alaimalo***, 313 F.3rd 1188, 1193 (9th Cir. 2002). 'The government bears the burden of showing specific and articulable facts to justify the finding of exigent circumstances.' ***Ojeda***, 276 F.3rd at 488." (***United States v. Iwai*** (9th Cir. 2019) 930 F.3rd 1141, 1144.)
>
> A possible trafficker in narcotics, ducking back into his residence upon the approach of peace officers, while attempting to shut the door and close the blinds, is an exigent circumstance justifying an immediate, warrantless entry. ***United States v. Arellano-Ochoa*** (9th Cir. 2006) 461 F.3rd 1142.)
>
> With probable cause to believe a burglary is in progress, a warrantless forced entry into a residence would be appropriate. However, under circumstances where the officers should have known that the occupant of a house was not a burglar (e.g., the ex-wife of the person believed to be the resident, with the ex-wife having been given the residence in the divorce, and under circumstances where it was not reasonable to believe that she was burglarizing the house), a forced entry and confronting the occupant at gunpoint is a **Fourth Amendment** violation subjecting the

officers to civil liability. (***Frunz v. City of Tacoma*** (9th Cir. 2006) 468 F.3rd 1141.)

Responding to a 911 call concerning a person climbing over a fence into a residential backyard, and finding defendant who matched the description, where defendant did not resist or attempt to flee and without any indication of the presence of burglar tools or that the house was being broken into, was held to be insufficient cause to enter the curtilage of defendant's home (i.e., his fenced-off backyard) nor probable cause to arrest him for attempted burglary or even trespass. A gun found on him in a search incident to arrest should have been suppressed. (***United States v. Struckman*** (9th Cir 2010) 603 F.3rd 731, 739-747; suggesting that the officers should asked him more questions and check his claims that he was in his own backyard before arresting him.)

Following a suspected illegal alien to defendant's home, and observing the illegal alien to walk to a carport at the side of the house, held not to justify an warrantless entry of the carport by Border Patrol agents, where defendant and the alien were arrested. (***United States v. Perea-Rey*** (9th Cir. 2012) 680 F.3rd 1179, 1183-1189.)

Where officers respond to a call concerning two while males, ages 18 to 20, going over a backyard fence and looking in windows, but find instead three Hispanic male juveniles sitting in a bedroom of the house, ages 14 to 18, listening to music, watching TV, and playing video games, it was held that there was insufficient probable cause to make entry into the residence or to take the males into custody. (***Sandoval v. Las Vegas Metro. Police Dep't.*** (9th Cir. 2014) 756 F.3rd 1154, 1161-1163.)

With only a reasonable suspicion to believe that the occupant of a house might be involved in criminal activity, ordering him out of the house and to back up as he did so, and holding onto him (albeit without handcuffs) with his hands behind his back while asking for his consent to search his person, was illegal. Full probable cause was necessary. The subsequent consent to search his person and his house was the product of that illegal detention. (***People v. Lujano*** (2014) 229 Cal.App.4th 175, 185-189.)

Upon hearing a conversation during a lawful wiretap that defendant was about to destroy or remove drugs from his apartment, officers were reasonable in making an immediate entry to secure the apartment pending the obtaining of a search warrant. The fact that it took an hour from the time of the overheard phone call until entry could be made did not detract from the exigency. (***United States v. Fowlkes*** (9th Cir. 2015) 804 F.3rd 954, 968-969.)

Having detained outside all the members of a family at a birthday party, such detentions being illegal, and it already having been determined that none of the family members were not even close to the description given of some suspects seen carrying firearms, and without any reason to believe that any of the family members were in possession of any firearms, officers were not justified in making a warrantless entry into the family's apartment for the purpose of looking for a second weapon. (***Sialoi v. City of San Diego*** (9th Cir. 2016) 823 F.3rd 1223, 1238.)

> A warrantless search of a residence based upon an exigency is unlawful absent both probable cause to believe that a crime has been or is being committed and a reasonable belief that entry is necessary to prevent the destruction of evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts. (***Id***., at p. 1238, citing ***Sandoval v. Las Vegas Metro. Police Dep't.*** (9th Cir. 2014) 756 F.3rd 1154, 1161.)

Entering a residence to search for an arrest warrant subject, where the subject's documentation all said that he lived there, and despite his mother's verbal claim that he did not, was reasonable. (***Sharp v. County of Orange*** (9th Cir. 2017) 871 F.3rd 901, 917-919.)

Under the exigent circumstances exception, "a warrantless entry into a dwelling may be lawful when there a pressing need for the police to enter but no time for them to secure a warrant." Defendant here challenged the warrantless entry into his locked bedroom where, when searched, explosive materials were recovered. Under the facts of this case, explosive materials, including pipe bombs, had been found in defendant's car hours earlier. *Second*, state and federal explosives experts testified that pipe bombs are very volatile and dangerous, especially "homemade" pipe bombs. *Third*, defendant had admitted that more explosives could be at his residence and then falsely told the officers that he lived at his parents' house, but a consensual search of that house uncovered no explosives. *Fourth*, defendant's actual residence was determined to be at an apartment which was surrounded by residential neighbors and businesses. *Finally*, because of the significant concern for public safety and at the hour at which the officers were urgently proceeding (i.e., 4:00 a.m.), there was no time to obtain a warrant. Based on these facts, the court held that the warrantless search of defendant's bedroom fell within the exigent circumstances exception to the **Fourth Amendment's** warrant requirement. (***United States v. Haldorson*** (7th Cir. 2019) 941 F.3rd 284.)

Merely knowing that defendant has a gun in his residence does not by itself constitute an exigent circumstance allowing for the warrantless entry into his home. A warrantless entry into defendant's home to secure a

firearm they knew to be inside (he was a Puerto Rico police officer) was held to be unlawful under circumstances where the officers encountered defendant outside, he was unarmed, he had not threatened violence, he had no history of violence, and the presence of a firearm was not connected to the domestic violence complaint. In addition, the officers did not handcuff Rodriguez during the encounter because he "was very cooperative and his family looked like really decent people." (***United States v. Rodríguez-Pacheco*** (1st Cir. 2020) 948 F.3rd 1.)

However, entry into a unlocked side door of a house after finding a car with its engine running in the driveway, and with no one responding to knocking at the front door, out of concern that someone inside may be possibly unconscious and in need of help, *or that criminal activity was* "*afoot*," was held to be illegal; insufficient "reasonable belief" that a burglary was in progress. (***People v. Smith*** (2020) 46 Cal.App.5th 375, 384-390.)

The Eighth Circuit also held that the warrantless entry into a house was reasonable under the Community Caretaking exception to the **Fourth Amendment's** warrant requirement, noting that this Circuit has applied community caretaking to residences since 2006, allowing a police officer to "enter a residence without a warrant as a community caretaker where the officer has a reasonable belief that an emergency exists requiring his or her attention." In this case, officers responded to a 911 call from the grandmother of an 11-year-old child who had called her grandmother, complaining that her mother and the mother's boyfriend were fighting. Upon arrival, and in contacting the mother, despite her telling the officers that everything was okay, the officers noted that she was visibly upset and had red marks on her face and neck. Upon hearing someone inside crying, the officers make entry into the residence to check the welfare of those inside. Once inside, information from the 11-year-old daughter led the officers to believe that defendant might be in possession of a firearm; a fact verified by the mother. Limiting the search to those areas where the daughter and the mother said the gun might be, the gun was found in the cushions of the couch. Defendant, charged with being in illegal possession of a firearm, moved to suppress. The Court held that based on the facts known to the officers, it was reasonable for the officers to believe that an emergency situation existed that required their immediate attention by entering the residence to ensure that no one inside was injured or in danger. The "Community Caretaking" theory allowed for such an entry. Then, with probable cause to believe defendant was in illegal possession of a firearm, the warrantless search for the firearm, limited to those areas where it was suspected to be, was lawful. (***United States v. Sanders*** (8th Cir. 2020) 956 F.3rd 534.)

Breaking down defendant's door and entering his home when he had refused to invite police in to investigate was *not* justified under the **Fourth Amendment**, even though someone had discharged a firearm outside the home in a high crime neighborhood, overruling the Court's own prior decision in ***People v Rubio*** (2019) 37 Cal.App.4th 622, and in light of the California Supreme Court decision of ***People v. Ovieda*** (2019) 7 Cal.5th 1034, 1049.). The *emergency aid exception* does not apply because the police had no reasonable basis to conclude there was anyone inside the apartment who was in danger or distress, and the *exigent circumstances exception* does not apply because police had no reason to believe a shooter was hiding in the apartment or that evidence of criminal conduct would be destroyed before they had a chance to obtain a warrant. (***People v. Rubio*** (2019) 43 Cal.App.5th 342, 348-355.)

> But see the dissent (pgs. 255-357) finding sufficient facts to justify an "exigent circumstance" finding, criticizing the majority's second guessing the officers' decisions made at the scene: "(J)udges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation. With the benefit of hindsight and calm deliberation, the panel majority concluded that it was unreasonable for petitioners (i.e., the officers at the scene) to fear that violence was imminent. But we have instructed that reasonableness 'must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight' and that '[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving.'" (Quoting ***Ryburn v. Huff*** (2012) 565 U.S. 469, 477 [181 L.Ed.2nd 966; 132 S. Ct. 987].)

Neither exigent circumstances nor the alleged need to conduct a protective sweep of defendant's residence was justified under the facts of this case where defendant had pointed a shotgun at his neighbors and was already under arrest when the officer entered the house to seize the shotgun. In order to show exigent circumstances based on a "risk of danger to police officers or others on the scene," a warrantless entry into a home "must be supported by *probable cause* to believe that *a dangerous person* will be found inside." The prosecution did not argue that defendant's wife—the only occupant—was a dangerous person. (***People v. Chen*** (2020) 50 Cal.App.5th 952, 955-956; the error in admitted the shotgun into evidence held to be harmless.)

Based upon defendant's emergency 911 call, telling the dispatcher that he had been shot, and witness information upon arrival at the scene, the officers' entry into defendant's residence in response to the call for

medical aid for a shooting victim did not violate the **Fourth Amendment**. Given the fact of the shooting and the other information known to the officers at the time, the court concluded that exigent circumstances made it reasonable to enter the residence and, as a "protective sweep," look into the rooms to ensure the absence of a shooter or additional victims. Plain sight observation of at least one firearm while in the residence was lawful. Then, an officer's entry into the kitchen, and remaining there, did not unreasonably extend the duration of the protective sweep in that area. The court found that the officer in the kitchen remained there out of a concern that a witness and acquaintance of the defendant's was attempting to retrieve suspected narcotics observed in plain view on the table. Finally, the Court held that no information obtained by officers who might have "lingered" in the house during the initial entry, nor after their re-entry after the ambulance departed, aided in securing the search warrant. Instead, the Court found that in obtaining a search warrant, the officers relied on information obtained permissibly and almost immediately upon entry into defendant's residence as the basis for the search warrant. The court added that to the extent that any officer might have exceeded the permissible scope of a security sweep, any such transgression led, at most, to the discovery of evidence that inevitably would have been discovered upon execution of the valid search warrant. (***United States v. Crutchfield*** (8th Cir 2020) 979 F.3rd 614.)

The issue of the legality of an officer following defendant into his garage, after defendant failed to yield to the officer's use of his emergency lights while attempting to stop defendant after observing him honking his horn excessively (a violation of **Veh. Code § 27007**), was discussed in ***Lange v. California*** (June 23, 2021) __ U.S.__ [141 S.Ct. 2011; 219 L.Ed.2nd 486]. In ***Lange***, the Supreme Court held that whether or not an officer can make a warrantless entry into a fleeing misdemeanant's home depends upon the circumstances, rejecting the argument that an officer may do so as a "categorical" rule. The People must first show that an exigent circumstance allowed for such an entry. Per the Court: "A great many misdemeanor pursuits involve exigencies allowing warrantless entry. But whether a given one does so turns on the particular facts of the case." (***Id.***, at p. __.)

Under the exigent circumstances exception, an officer may enter a home without a warrant if he has an objectively reasonable basis to believe that entry is necessary "to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." In a case where officers responded to a reported domestic dispute, the Court held that the facts known to the officers when they decided to enter the house was reasonable, based upon the following: (1) The information from the 911 call, that the occupants were involved in a serious domestic dispute. (2) The officers' observations when they arrived, including marks on the

female's face and neck. (3) The information provided by the daughter and the female. Based on these facts, the Court concluded that it was reasonable for the officers to believe that an emergency situation existed that required their immediate attention by entering the house to either provide emergency assistance to the child who was heard crying or to prevent an imminent assault on the daughter who had reported the incident. The Court further held that exigent circumstances justified the officer's warrantless search to locate and secure the gun because: (1) "domestic disturbances are highly volatile and involve large risks;" (2) the officer had an objectively reasonable belief that a gun was inside the house based upon what the daughter had told him; and (3) the officer limited his search to areas where the gun might have been placed. (***United States v. Sanders*** (8th Cir. IA, 2021) 4 F.4th 672.)

In a case where federal agents made a warrantless entry into defendant's home to seize his computers and similar devices pending the obtaining of a warrant to search those devices, the Eighth Circuit Court of Appeals held that exigent circumstances existed that permitted the agents to enter defendant's house without a warrant and seize his electronic devices. First, by the time the agents decided to enter defendant's house, after discussing with him outside his home his possible involvement in communicating child pornography, they had probable cause to believe that he was involved in criminal activity. Specifically, the agents knew that defendant: (1) had ties to the individuals who were livestreaming sexual abuse of children; (2) had stayed with these individuals when he visited the Philippines; (3) had paid thousands of dollars to them and one of the minor victims; and (4) did not tell his wife about some of the money he sent, despite claiming that the payments were tied to his humanitarian work. Second, the court held that the agents had probable cause to believe that there would be incriminating evidence on defendant's devices, as he had admitted to the agents that he used a computer and cellphone to communicate with the abusers and had stayed in regular contact with them. The agents also knew that his Skype username was "prettyvirginfilipino" and that the profile he used was a variant of the first name of one of the minor victims. After defendant admitted that these devices were in his home, the court concluded that there was a fair probability that the agents would find "evidence of a crime" inside his home. Third, the court held that it was reasonable for the agents to believe that defendant would destroy the evidence on his devices after he went back inside his home. Defendant told the agents they could examine his devices after he "checked his email and stuff." When the agents suggested that they accompany defendant inside and look at the devices together, defendant shifted his attention to the tidiness of his house and told the agents he would need "a few minutes to clean up first." The court concluded that defendant's insistence that he have an opportunity to be alone with his devices gave the agents reason to believe that he was hiding

something. Knowing that data can be deleted "at the touch of a button," the court found that it was reasonable for the agents to enter defendant's home without a warrant and seize his devices. (***United States v. Meyer*** (8th Cir. IA 2021) 19 F.4th 1028.)

Officer Safety:

Scaling a six foot fence past a locked gate, and thus entering defendant's side yard, was lawful when necessary to retrieve a firearm observed on the ground where the officer feared for his own safety and the safety of a seven year old minor who was suspected of being in the house. (***People v. Chavez*** (2008) 161 Cal.App.4th 1493, 1503.)

The warrantless entry and search of a residence is lawful so long as there is an objectively reasonable basis for believing that someone inside *or the officer* is in serious danger, the manner of entry is reasonable, and the scope of the subsequent search is reasonable. (***United States v. Reyes-Bosque*** (9th Cir. 2010) 596 F.3rd 1017, 1029-1030.)

Police officers may make a warrantless entry into a residence whenever they have an objectively reasonable basis for believing that an occupant *or the officers* are imminently threatened with serious injury. (***Ryburn v. Huff*** (2012) 565 U.S. 469 [132 S.Ct. 987; 181 L.Ed.2nd 966]; reversing the Ninth Circuit Court of Appeal's decision that had held that unverified rumors that the plaintiffs' son had threated to "shoot up" a high school, along with the son's mother, who was generally uncooperative, running back into the house when asked about firearms in the house, was insufficient to justify an immediate entry.

Kicking open an upstairs locked bedroom door while checking for possibly wounded victims at a shooting scene, *and for officers' safety* while they conducted an investigation, when it is unknown whether the shooting suspect(s) might be in the house, was reasonable. (***People v. Troyer*** (2011) 51 Cal.4th 599, 613.)

Animal Control Cases:

The same theory apparently applies to a warrantless entry of a business by animal control officers for the purpose of checking on the welfare of animals in a pet store. The court held that exigent circumstances (the strong odor of deceased animals' flesh) justified the officers' warrantless entry into the shop and seizure of the animals pursuant to authority under **P.C. § 597.1**, finding that "the statutory language authorizing immediate seizure when an animal control officer 'has reasonable grounds to believe that very prompt action is required to protect the health or safety of others' is the equivalent of the exigent circumstances exception familiar to search

and seizure law. That exception allows entry without benefit of a warrant when a law enforcement officer confronts an emergency situation requiring swift action to save life, property, or evidence." (***Broden v. Marin Humane Society*** (1999) 70 Cal.App.4th 1212, 1220-1221.)

Defendants' motion to suppress was properly denied were exigent circumstances justified two animal control officers looking into the window of the garage on defendants' property with the knowledge that a horse that was thin and being housed in an unsafe corral had escaped from the property, where the officers knew there had been prior calls to the property in response to reported concerns about the conditions of horses and pit bull dogs on the property, and that they were reasonably concerned about whether a dog that was heard whining inside the garage was in distress and living in unhealthy conditions. Through the garage window, a "slat mill" (known to be used to train fighting dogs) could be seen. Exigent circumstances, and while looking for a resident, also justified the officers walking into and inspecting defendant's fenced backyard to check the condition of the dogs they could hear barking incessantly from there. Suspecting that the property was being used for dog fighting purposes, the later warrant obtained for the residence and property, based upon the above observations, was valid. (***People v. Williams*** (2017) 15 Cal.App.5th 111, 119-125.)

Fleeing Misdemeanant or Non-Dangerous Felon:

In ***Sims v. Stanton*** (9th Cir. 2013) 706 F.3rd 954 (certiorari granted), the Ninth Circuit Court of Appeal held that entering the curtilage of a home in pursuit of a suspect with the intent to detain him when the subject is ignoring the officer's demands to stop, at worst a misdemeanor violation of **P.C. § 148**), is illegal. The warrantless fresh or hot pursuit of a fleeing suspect into a residence (or the curtilage of a residence) is limited to felony suspects only. The United States Supreme Court, however, reversed this decision in ***Stanton v. Sims*** (2013) 571 U.S. 3 [134 S.Ct. 3; 187 L.Ed.2nd 341], without deciding the issue.

The Ninth Circuit's decision was based upon the Court's interpretation of the United States Supreme Court decision in ***Welsh v, Wisconsin*** (1984) 466 U.S. 740 [104 S.Ct. 3091; 80 L.Ed.2nd 732], and conflicts with the California Supreme Court's reasoning in ***People v. Thompson*** (2006) 38 Cal.4th 811 (see "*Warrantless entry to arrest a DUI* (i.e., "*Driving while Under the Influence*") *suspect*," above).

However, the United States Supreme Court, in interpreting its own decision on ***Welsh***, noted that they only held there that a warrantless entry into a residence for a minor offense, *not*

involving hot pursuit, was an exception to the normal rule, and that a warrant is "usually" going to be required. Per the Court, there is no rule that residential entries involving hot pursuit are limited to felony cases. (***Stanton v. Sims***, *supra*, citing ***Welsh***, at p. 750.)

The issue of the legality of an officer following defendant into his garage, after defendant failed to yield to the officer's use of his emergency lights while attempting to stop defendant after observing him honking his horn excessively (a violation of **Veh. Code § 27007**), was discussed in ***Lange v. California*** (June 23, 2021) __ U.S.__ [141 S.Ct. 2011; 201 L.Ed.2nd 486]. In ***Lange***, the Supreme Court held that whether or not an officer can make a warrantless entry into a fleeing misdemeanant's home depends upon the circumstances, rejecting the argument that an officer may do so as a "categorical" rule. The People must first show that an exigent circumstance allowed for such an entry. Per the Court: "A great many misdemeanor pursuits involve exigencies allowing warrantless entry. But whether a given one does so turns on the particular facts of the case." (***Id.***, at p. __.)

On remand from ***Lange v. California*** (June 23, 2021) __ U.S.__, __ [141 S.Ct. 2011; 219 L.Ed.2nd 486], which held that; "(i)n misdemeanor cases, flight does not always supply the exigency that this Court has demanded for a warrantless home entry," given the many other possible reasons—not necessarily involving an exigency—why a misdemeanor suspect has fled into his home, California's First District Court of Appeal (Div. 5) held that under the good faith exception to the **Fourth Amendment** exclusionary rule, it was not necessary to suppress evidence from an officer's warrantless entry into defendant's garage after the officer observed defendant blaring loud music and honking unnecessarily and defendant, rather than pulling over, drove up his driveway and into his attached garage. When the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply. (***People v. Lange*** (2021) 72 Cal.App.5th 1114.)

Emergency Exception and the Odor of Ether:

In cases where the odor of ether is apparent, coming from a particular location indicating the presence of an illicit drug lab and creating a hazardous, potentially explosive, situation, the Ninth Circuit Court of Appeal has held that although the odor by itself is *not* probable cause, it is a dangerous situation needing immediate action. Therefore, so long as (1) the police have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property, (2) their assistance is not primarily motivated by the intent to

arrest a person or seize evidence, *and* (3) there is some reasonable basis, "*approximating probable cause*," to associate the emergency with the area or place to be entered, then the "*emergency doctrine*" will allow for a warrantless entry to neutralize the emergency. (***United States v. Cervantes*** (9th Cir. 2000) 219 F.3rd 882.)

> And then, any plain sight observations made while lawfully in the house neutralizing the danger can provide the necessary probable cause to secure the house, arrest the occupants, and obtain a search warrant for the rest of the house. (***People v. Hill*** (1974) 12 Cal.3rd 731.)

State authority is in apparent agreement: The odor of ether *is* an exigent circumstance, given the potential volatility of ether, to justify an immediate warrantless entry to "*neutralize*" the dangerous situation. (***People v. Messina*** (1985) 165 Cal.App.3rd 931; ***People v. Osuna*** (1987) 187 Cal.App.3rd 845.)

See ***People v. Baird*** (1985) 168 Cal.App.3rd 237, where police officers noticed a "strong overpowering smell of ether" coming from a house and asked the fire department to investigate. (***Id.*** at p. 240.) The responding fire marshal was told the police suspected a drug lab operating on the premises and confirmed the smell of ether, which he knew to be "highly flammable and explosive," so he entered the house to determine its source. (***Id.*** at p. 241.) That entry was found to be unjustified under the exigent circumstances exception because the evidence did "not support a determination that any of the officials involved believed they were confronted with an 'emergency situation requiring swift action.'" (***Id.*** at p. 245.)

> *Note*: Once neutralized, however, the exigency is over. Any followup searches need to be conducted under the authority of a warrant. See ***People v. Duncan***, *infra*, below.

The odor of ether plus other circumstances which corroborate the suspected presence of an illicit substance *will* normally establish probable cause. (***People v. Stegman*** (1985) 164 Cal.App.3rd 936; ***People v. Patterson*** (1979) 94 Cal.App.3rd 456; ***People v. Torres*** (1981) 121 Cal.App.3rd Supp. 9.)

The California Supreme Court upheld a warrantless search of a residence where a police officer (1) had been specifically informed that an illicit drug laboratory was operating on the premises; (2) upon arrival smelled a chemical (i.e., ether) he knew to be associated with illicit drug manufacture; (3) knew that the volatile nature of the chemicals involved in the production of drugs posed a high danger of explosion; and (4)

identified the chemical odor as coming from inside the residence. (***People v. Duncan*** (1986) 42 Cal.3rd 91, 104-105.)

> Once the house was secured and the exigency neutralized, officers held back pending the obtaining of a search warrant.

See "*Odor of Ether in a Residence*," under "*Warrantless Searches and Seizures*" (Chapter 9), above.

Upon Executing an Arrest Warrant:

An arrest warrant constitutes legal authority to enter the suspect's residence and search for him. (***People v. LeBlanc*** (1997) 60 Cal.App.4th 157, 164.)

An arrest warrant based on probable cause implicitly carries with it the limited authority to enter a dwelling to execute the warrant if the officer: (1) has a reasonable belief that the location to be searched is the suspect's dwelling; and (2) that the suspect is inside the dwelling at the time of entry. (***United States v. Mastin*** (11th Cir. AL. 2020) 972 F.3rd 1230.)

Similarly, police are authorized to enter a house without a warrant where the suspect is a parolee who had no legitimate expectation of privacy against warrantless arrests. (***People v. Lewis*** (1999) 74 Cal.App.4th 662, 671; ***In re Frank S.*** (2006) 142 Cal.App.4th 145, 151.)

Surrounding a barricaded suspect in his home is in effect a warrantless arrest, justified by the exigent circumstances. The passage of time during the ensuing standoff does not dissipate that exigency to where officers are expected to seek the authorization of a judge to take the suspect into physical custody. (***Fisher v. City of San Jose*** (9th Cir. 2009) 558 F.3rd 1069; overruling its prior holding (at 509 F.3rd 952) where it was ruled that failure to obtain an arrest warrant during a 12 hour standoff resulted in an illegal arrest of the barricaded suspect.)

Entry of a residence to execute a *bench warrant*, issued by a neutral magistrate upon a defendant's failure to appear in court, is lawful despite the fact that the bench warrant was issued without a finding of probable cause. (***United States v. Gooch*** (9th Cir. 2007) 506 F.3rd 1156.)

> *But*, before a police officer may enter a home, absent consent to enter, the officer must have a *reasonable belief*, falling short of probable cause to believe, the suspect lives there *and* is present at the time. (***People v. Downey*** (2011) 198 Cal.App.4th 652, 657-662.)

But see prior decisions from the Ninth Circuit Court of Appeal finding that "*probable cause*" to believe the person who is the subject of the arrest warrant is actually inside at the time is the correct standard. (***United States v. Gorman*** (9th Cir. 2002) 314 F.3rd 1105; ***People v. Phillips*** (9th Cir. 1974) 497 F.2nd 1131; ***United States v. Diaz*** (9th Cir. 2007) 491 F.3rd 1074; ***United States v. Gooch***, *supra*, at p. 1159, fn. 2; ***Cuevas v. De Roco*** (9th Cir. 2008) 531 F.3rd 726; ***United States v. Mayer*** (9th Cir. 2008) 530 F.3rd 1099, 1103-1104.)

See "*Sufficiency of Evidence to Believe the Suspect is Inside*," below.

"Because an arrest warrant authorizes the police to deprive a person of his liberty, it necessarily also authorizes a limited invasion of that person's privacy interest when it is necessary to arrest him in his home." (***Steagald v. United States*** (1981) 451 U.S. 204, 214-215, fn. 7 [101 S.Ct. 1642; 68 L.Ed.2nd 38, 46].)

"Thus, for **Fourth Amendment** purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is *reason to believe* the suspect is within." (Italics added; ***Payton v. New York*** (1980) 445 U.S. 573, 603 [100 S.Ct. 1371; 63 L.Ed.2nd 639, 661].)

"It is not disputed that until 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, . . ." (***Maryland v. Buie*** (1990) 494 U.S. 325, 330 [110 S.Ct. 1093; 108 L.Ed.2nd 276, 283].)

If the person is in a *third party's home*, absent consent to enter, a *search warrant* for the residence must be obtained in addition to the arrest warrant. (***Steagald v. United States***, *supra*, at pp. 211-222 [101 S.Ct. 1642; 68 L.Ed.2nd at pp. 45-52]; ***People v. Codinha*** (1982) 138 Cal.App.3rd 167; see **P.C. § 1524(a)(6)**)

Failure, however, to obtain a search warrant will not benefit the subject with the outstanding arrest warrant, but serves only to protect the homeowner (i.e., the "third party") should evidence of criminal activity be discovered during the entry of his residence. The person with the outstanding arrest warrant will generally be without standing to contest the entry of the warrantless entry of the residence. (***United States v. Bohannon*** (2nd Cir. 2016) 824 F.3rd 242.)

With an arrest warrant, no search warrant is needed in order to lawfully enter a house so long as it is a dwelling in which the suspect lives, and when (1) the officers have a reasonable belief that the suspect resides at the place to be entered and (2) reason to believe that the suspect is present when the officers enter. (***United States v. Ford*** (8th Cir. IA 2018) 888 F.3rd 922.)

Sufficiency of Evidence to Believe the Suspect is Inside: The amount of evidence a law enforcement officer must have indicating that a sought-after criminal suspect is in fact presently inside his own residence in order to justify a non-consensual entry, with or without an arrest warrant, has been debated over the years:

The United States Supreme Court, in ***Payton v. New York*** (1980) 445 U.S. 573 [100 S.Ct. 1371; 63 L.Ed.2nd 639], merely states that a police officer must have a "*reason to believe*" the suspect is inside his residence, without defining the phrase.

An early California lower appellate court found that the officers needed only a "*reasonable belief*," or "*strong reason to believe*," the suspect was home. (***People v. White*** (1986) 183 Cal.App.3rd 1199, 1204-1209; rejecting the defense argument that full "*probable cause*" to believe the subject was inside is required; see also ***United States v. Magluta*** (11th Cir. 1995) 44 F.3rd 1530, 1535, using a "*reasonable belief*" standard.)

Other authority indicates that a full measure of "*probable cause*" is required. (See ***Dorman v. United States*** (D.C. Cir. 1970) 435 F.2nd 385, 393; ***United States v. Vasquez-Algarin*** (3rd Cir. 2016) [821 F.3rd 467; and ***United States v. Brinkley*** (4th Cir. 2020) 980 F.3rd 377.)

The Fourth Circuit, in ***United States v. Brinkley***, *supra*, held that in order for officers to make a warrantless entry (without consent) of a residence, looking for a subject with an outstanding arrest warrant, they must first have *probable cause* proving both of two prongs; (1) that the location is the suspect's residence, and (2) that the suspect is home when the officers enter.

See also ***People v. Phillips*** (9th Cir. 1974) 497 F.2nd 1131; a locked commercial establishment, at night; and ***United States v. Gorman*** (9th Cir. 2002) 314 F.3rd 1105; defendant in his girlfriend's house with whom he was living, both imposing a "probable cause" standard.

The California Supreme Court, interpreting the language of **Pen. Code § 844** (i.e., "*reasonable grounds for believing him to be* (*inside*)"), has found that any arrest, with or without an arrest warrant, requires *probable*

cause to believe the subject is inside in order to justify a non-consensual entry into a residence. (***People v. Jacobs*** (1987) 43 Cal.3rd 472, 478-479; *but*, see below.)

In order to conduct a **Fourth** Waiver search of a residence, an officer must have probable cause to believe that the residence to be searched is in fact the parolee's (or probationer's) residence. (***Motley v. Parks*** (9th Cir. 2005) 432 F.3rd 1072, 1080-1082; ***United States v. Franklin*** (9th Cir. 2010) 603 F.3rd 652; ***United States v. Bolivar*** (9th Cir. 2012) 670 F.3rd 1091, 1093-1095.)

> The same rule holds true for the search of a vehicle. Before officers may conduct a warrantless search of a vehicle pursuant to a supervised release condition, they must first have probable cause to believe that the defendant owns or controls the vehicle to be searched. (***United States v. Dixon*** (9th Cir. 2020) 984 F.3rd 814, 818-823.)

However, noting that five other federal circuits have ruled that something less than probable cause is required, and that the Ninth Circuit is a minority opinion, the Fourth District Court of Appeal (Div. 2) found instead that an officer executing an arrest warrant or conducting a probation or parole search may enter a dwelling if he or she has only a "*reasonable belief*," falling short of probable cause, that the suspect lives there and is present at the time. Employing that standard, the entry into defendant's apartment to conduct a probation search was lawful based on all of the information known to the officers. Accordingly, the court upheld the trial court's conclusion that the officers had objectively reasonable grounds to conclude the defendant/probationer lived at the subject apartment and was present at the time, and therefore the officers had the right to enter the apartment to conduct a warrantless probation search. (***People v. Downey*** (2011) 198 Cal.App.4th 652, 657-662.)

> Also arguing that the California Supreme Court, in ***People v. Jacobs***, *supra* (pg. 479, fn. 4), did *not* find that probable cause was required, contrary to popular belief. (***Id***., at p. 662; see above.)
>
> *Note*: The "*present at the time*" requirement apparently only applies to executing an arrest warrant. It has never been required that a person on a **Fourth** waiver be home at the time of a warrantless entry and search. (See ***People v Lilienthal*** (1978) 22 Cal.3rd 891, 900.)
>
> Without mentioning ***Downey***, the Ninth Circuit cites ***Motley v. Parks***, *supra*, with approval, continuing to hold that full probable cause to believe that the target of a **Fourth** Waiver search resides

in the place to be searched is necessary. (***United States v. Bolivar*** (9th Cir. 2012) 670 F.3rd 1091, 1093-1095; see also ***United States v. Dixon*** (9th Cir. Dec. 31, 2020) 984 F.3rd 814, 821.)

Officers knew defendant had lived at the suspect residence at one time but also had newer information that he had moved elsewhere, although there was still some indication that he was maybe visiting the prior residence or that the occupants knew where he could be located; insufficient to establish probable cause. (***Cuevas v. De Roco*** (9th Cir. 2008) 531 F.3rd 726.)

Information from a neighbors and, separately, an anonymous informant, all indicating that defendant had returned to his reported address and was selling marijuana at that residence, established probable cause to believe he was living there again. (***United States v. Mayer*** (9th Cir. 2008) 530 F.3rd 1099, 1103-1104.)

An arrest warrant based on probable cause implicitly carries with it the limited authority to enter a dwelling to execute the warrant if the officer (1) has a reasonable belief that the location to be searched is the suspect's dwelling, and (2) that the suspect is inside the dwelling at the time of entry. (***United States v. Mastin*** (11th Cir. AL. 2020) 972 F.3rd 1230.)

Third Parties Entering with Police: It is a **Fourth Amendment** violation to allow third parties (e.g.; the news media) into a constitutionally protected area, such as the defendant's home, without the occupant's permission, even when the officers themselves are entering legally (e.g.; serving a search warrant). (***Wilson v. Layne*** (1999) 526 U.S. 603 [119 S.Ct. 1692; 143 L.Ed.2nd 818]; creating federal civil liability.)

It was not error, however, to deny defendants' motions to suppress the physical evidence seized from their property where the media was present on the front yard of the defendants' compound, in that their presence did not violate the **Fourth Amendment** because the front yard was not curtilage, and there was no basis to find a reasonable expectation of privacy in the front yard. But the **Fourth Amendment** was violated by escorting certain members of the media into the backyard. Nonetheless, it was not necessary to suppress any evidence resulting from the execution of the warrant because the police conducted the search within the parameters of the warrant, and there was no suggestion that any member of the media discovered or developed any evidence seized from the property. (***United States v. Duenas*** (9th Cir. 2012) 691 F.3rd 1070, 1079-1083.)

Knock and Notice: Any time a police officer makes entry into the residence of another to arrest (**Pen. Code § 844**) or to serve a search warrant (**Pen. Code § 1531**), the officer must first comply with the statutory "*knock and notice*" rules.

The same rule applies to *entries for* "*investigative purposes*" as well, although arguably not coming within the provisions of **Pen. Code §§ 844** or **1531**. (***People v. Miller*** (1999) 69 Cal.App.4th 190, 201.)

Knock and notice requirements also apply to entries made for purposes of conducting a "***Fourth** Waiver search*." (***People v. Constancio*** (1974) 42 Cal.App.3rd 533, 542; ***People v. Lilienthal*** (1978) 22 Cal.3rd 891, 900; ***People v. Mays*** (1998) 67 Cal.App.4th 969, 973, fn. 4; ***People v. Murphy*** (2003) 112 Cal.App.4th 546, 553.)

However, recent authority has noted that violating knock and notice rules should not result in the suppression of any resulting evidence, at least absent aggravating circumstances. (***Hudson v. Michigan*** (2006) 547 U.S. 586 [126 S.Ct. 2159; 165 L.Ed.2nd 56].) This new rule applies whether executing a search warrant (i.e., ***Hudson***) or to make an arrest. (***In re Frank S.*** (2006) 142 Cal.App.4th 145.)

However, see ***United States v. Weaver*** (D.C. Cir. 2015) 808 F.3rd 26, where the D.C. Court of Appeal rejected the applicability of ***Hudson v. Michigan***, *supra*, in an arrest warrant service situation, and held that federal agents violated the knock-and-announce rule by failing to announce their purpose before entering defendant's apartment. By knocking but failing to announce their purpose, the agents gave defendant no opportunity to protect the privacy of his home. The exclusionary rule was the appropriate remedy for knock-and-announce violations in the execution of arrest warrants at a person's home.

See "*Knock and Notice*," under "*Searches With a Search Warrant*" (Chapter 10), above.

***Chapter 14*:**

New and Developing Law Enforcement Tools and Technology:

The Problem: The United States Supreme Court in ***Kyllo v. United States*** (2001) 533 U.S. 27 [121 S.Ct. 2038; 150 L.Ed.2nd 94], as well as the federal Congress and California's Legislature, has indicated a concern with developing surveillance technology which may be used to eavesdrop upon and decipher activities in constitutionally protected areas.

> "The challenge facing the courts is that technology is outpacing the law. In recognition of this reality, the United States Supreme Court recently instructed courts to adopt rules that 'take account of more sophisticated systems that are already in use or in development.' (Citation omitted) Courts have an obligation to safeguard constitutional rights and cannot permit those rights to be diminished merely due to the advancement of technology. (Citation omitted) Citizens do not contemplate waiving their civil rights when using new technology, and the Supreme Court has concluded that, to find otherwise, would leave individuals 'at the mercy of advancing technology.'" (***In re Search of a Residence in Oakland*** (N.D. Cal. 2019) 354 F.Supp.3rd 1010, citing and quoting ***Carpenter v. United States*** (June 22, 2018) 585 U.S. __ [138 S.Ct. 2206, 2214, 2218-2219; 201 L.Ed.2nd 507], and noting that: "(T)he United States Supreme Court has repeatedly sought to 'assure . . . preservation of that degree of privacy against government that existed when the **Fourth Amendment** was adopted.'")
>
> See also ***United States v. Hill*** (9th Cir. 2006) 459 F.3rd 966, 979, where it was noted that: "Technology is rapidly evolving and the concept of what is reasonable for **Fourth Amendment** purposes will likewise have to evolve."
>
> And ***People v. Michael E.*** (2014) 230 Cal.App.4th 261, 276-279, where the Court included a whole segment criticizing the current trend of referring to computers and cellphones as "*containers of information*," predicting the coming of a whole new body of law dealing with electronic devices. "'Since electronic storage is likely to contain a greater quantity and variety of information than any previous storage method, . . . '[r]elying on analogies to closed containers or file cabinets may lead courts to "oversimplify a complex area of Fourth Amendment doctrines and ignore the realities of massive modern computer storage."' [Citation.]" (Citing ***United States v. Carey*** (10th Cir. 1999) 172 F.3rd 1268, 1275.) Interestingly enough, however, most of the authority the Court cites here are container-search cases.
>
> See "*Seizures and Searches of High Tech Devices*" (Chapter 17), below.)

The United States Supreme Court agrees, at least as to cellphones, ruling that given the amount of personal information contained on the modern-day "smart phone," such a device is indeed entitled to greater protection from warrantless

searches. (See ***Riley v. California*** (2014) 573 U.S. 373, 384-385 [134 S.Ct. 2473; 189 L.Ed.2nd 430].)

The Supreme Court has pointed out that a physical trespassory intrusion (physically entering a protected area or property) is not always required to create a **Fourth Amendment** search issue. Per the Court; "(s)ituations involving merely the transmission of electronic signals without trespass would remain subject to ***Katz*** analysis" (referring to ***Katz v. United States*** (1967) 389 U.S. 347, 3612 [88 S.Ct. 507; 19 L.Ed.2nd 576, 588].); i.e., whether a "*reasonable expectation of privacy*" was violated. (***United States v. Jones*** (2012) 565 U.S. 400, 411 [132 S.Ct. 945, 953; 181 L.Ed.2nd 911].)

See also ***United States v. Cotterman*** *(9th Cir. 2013) 709 F.3rd 952, 962-968, dealing with a search of a suspect's laptop computer, and discussing* "(t)he nature of the contents of electronic devices differs from that of luggage as well. Laptop computers, iPads and the like are simultaneously offices and personal diaries. They contain the most intimate details of our lives: financial records, confidential business documents, medical records and private emails. This type of material implicates the **Fourth Amendment's** specific guarantee of the people's right to be secure in their 'papers.'"

The Fourth District Court of Appeal (Div. 1) has held that when interpreting a minor's conditions of probation, reference to defendant's "property," as "reasonably construed," does *not* include electronic data. (***In re I.V.*** (2017) 11 Cal.App.5th 249, 259-263; citing ***United States v. Lara*** (9th Cir. 2016) 815 F.3rd 605, 610-614.)

> *However*, see ***People v. Sandee*** (2017) 15 Cal.App.5th 294, at pages 302-304, where the Court noted that because the Ninth Circuit uses a balancing test, while California uses an objective test, in analyzing whether the probationer consented to the search by accepting the specific probation search conditions at issue (see pg. 303, fn. 6), ***United States v. Lara***, *supra*, is not persuasive authority and does not preclude a finding that the search of text messages contained in defendant's cellphone was lawful under defendant's **Fourth** waiver conditions allowing for the search of her "*property*" and "*personal effects*."
>
> The Court further noted at pages 304 and 305, that the events in ***Sandee*** took place before enactment of the **Electronic Communications Privacy Act**, which took effect on January 1, 2016. The **Act** provides that the government shall not "[a]ccess electronic device information by means of physical interaction or electronic communication with the electronic device" unless one of several statutory exceptions applies, including obtaining the specific consent of the authorized possessor of the device. (**P.C. § 1546.1(a)(3)** & **(c)(4)**)

It is further noted, however, that the **Act** provides an exception to the above prohibition, effective *January 1, 2017*: A government entity may physically access electronic device information "[e]xcept where prohibited by state or federal law, if the device is seized from an authorized possessor of the device who is subject to an electronic device search as a clear and unambiguous condition of probation, mandatory supervision, or pretrial release." (***Id.*, P.C. § 1546.1(c)(10)**)

See "***The California Electronic Communications Privacy Act: P.C. §§ 1546-1546.4***," under "*Seizures and Searches of High Tech Devices*" (Chapter 17), below.

Absent an exigency, in order to obtain cellphone "pinging" history, a search warrant, based upon a showing of probable cause, is required. (***Carpenter v. United States*** (June 22, 2018) 585 U.S. __ [138 S.Ct. 2206; 201 L.Ed.2nd 507]; overruling prior cases which had held that a simple court order, pursuant to **18 U.S.C. § 2703(d)** of the federal "**Stored Communications Act**," was required, and was obtainable whenever the Government could show "specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation.")

Carpenter was held *not* to apply to "business records that might incidentally reveal location information," including telephone numbers and bank records. It was also held, therefore, *not* to apply to computer IP address information as contained in the records of an Internet service provider which, in response to a grand jury subpoena, provided defendant's home address. (***United States v. Contreras*** (5th Cir. TX, 2018) 905 F.3rd 853.)

The California Supreme Court ruled that the Court of Appeal was correct in order the quashing of subpoenas for Facebook, Instagram and Twitter records to the extent if found the subpoenas unenforceable under the **Stored Communications Act** with respect to communications that are private or restricted. However, the Court of Appeal's determination was erroneous to the extent it concluded that the **Act** bars disclosure by providers of communications configured by the registered user to be public and were public at the time the subpoenas were issued. (***Facebook, Inc. v. The Superior Court*** (2018) 4 Cal.5th 1245.)

Thermal Imaging Device: The use of a "*thermal imaging device*" (also known as a "*FLIR*," for "*Forward Looking Infra Red*.") to read the amount of heat coming from a person's home, without prior judicial authorization, is an unconstitutional invasion of one's right to privacy in the home. (***Kyllo v. United States*** (2001) 533 U.S. 27 [121 S.Ct. 2038; 150 L.Ed.2nd 94].)

"To withdraw protection of this minimum expectation (of privacy in one's home) would be to permit police technology to erode the privacy guaranteed by the **Fourth Amendment**. We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' [Citation] constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the **Fourth Amendment** was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search. [footnote omitted]" (***Id.***, at p. 34 [150 L.Ed.2nd at p. 102].)

As a "*search*," a search warrant is necessary before a thermal imagining device can be used to deduce the presence and quantity of heat coming from a person's home. (***Ibid***.)

California's limited authority also holds that use of such a device is an unreasonable invasion of one's expectation of privacy, at least when used to measure heat from a person's private dwelling. (***People v. Deutsch*** (1996) 44 Cal.App.4th 1224.)

But, evidence from the use of a thermal imaging device, when lawfully obtained with judicial authorization (i.e., a search warrant), may be used as a part of the probable cause for a second search warrant. (***United States v. Huggins*** (9th Cir. 2002) 299 F.3rd 1039.)

A search warrant authorizing the use of a thermal imaging device must be supported by probable cause, or such a warrant will be held to be invalid. (***People v. Gotfried*** (2003) 107 Cal.App.4th 254.)

However, where FBI agents used "Moocherhunter software" and a specific "media access control" (or, "MAC") address, to capture the signal strength readings to locate the MAC address, it was held that ***Kyllo*** was not violated. Specifically, a Moocherhunter program was installed on a laptop computer by FBI agents and connected to a directional antenna. The Moocherhunter program was provided the known MAC address. Approximately seventeen location readings were taken in the vicinity of Apartments 242 and 243, from where via subpoena to AT&T, it was determined that a computer was transmitting child pornography via a third-party's password-protected wireless router. The readings were significantly higher when the antennae was aimed in the direction of Apartment 243. As a result, the agents concluded that Apartment 243 was from where the child pornography was being transmitted. After identifying the target apartment, the FBI waited for the computer to long on, at which time a search warrant was executed on that apartment. After being arrested for possession of child pornography, defendant challenged the legality of locating his apartment by such electronic means. The Appellate Court upheld the trial court's denial of

defendant's motion, ruling that because there was no physical intrusion into the defendant's residence to detect the signal strength of his device's media-access-control (MAC) address, district court correctly applied the ***Katz*** factors (referring to ***Katz v. United States*** (1967) 389 U.S. 347, 3612 [88 S.Ct. 507; 19 L.Ed.2nd 576, 588].) and determined that no search occurred under the **Fourth Amendment**. Also, defendant lacked a subjective expectation of privacy in the signal strength of his MAC address emanating from his unauthorized use of a third-party's password-protected wireless router. (***United States v. Norris*** (9th Cir. 2019) 938 F.3rd 1114, 1119-1122.)

ShotSpotter: ShotSpotter is a surveillance system that uses microphones to record gunshots in a specific area (e.g., a specific city; ***People v. Rubio*** (2019) 43 Cal.App.5th 342, 345.). After an individual listens to the audio file and confirms the sound as a gunshot, ShotSpotter sends an alert to the local police department. (See also ***United States v. Rickmon*** (7th Cir. 2020) 952 F.3rd 876.)

A "ShotSpotter" report of shots being fired in two separate bursts at the edge of driveway at a specific address does not provide the necessary exigent circumstance justifying an officer forcing his way into the residence. The emergency aid exception did not apply because the police had no reasonable basis to conclude there was anyone inside the apartment who was in danger or distress, and the exigent circumstances exception did not apply because police had no reason to believe a shooter was hiding in the apartment or that evidence of criminal conduct would be destroyed before they had a chance to obtain a warrant. (***People v. Rubio***, *supra*, at pp. 348-355.)

In ***Rickmon***, the Court noted that a ShotSpotter report is the equivalent of an anonymous tip, not amounting, by itself, to even a reasonable suspicion. However, with corroborating circumstances, a traffic stop and detention would be justified. In ***Rickmon***, after getting two separate ShotSpotter reports from the same area, stopping a vehicle as it was observed coming from the area of the ShotSpotter reports, and in which defendant was found (with the subsequent recovery of an illegal firearm), was upheld based upon the following; (1) the reliability of the police reports, (2) the severity of the crime, (3) the fact that the stop occurred close in time and proximity to the shots, (4) late at night in an area of light traffic, and (5) the officer's experience with gun-related calls in that area.

A trial court erred in admitting an audio recording of sounds identified by a third-party service as gunshots detected in certain areas of the city which was sent to the police department by the service because the court failed to first conduct an evidentiary hearing to assess the evidence's scientific reliability pursuant to the ***Kelly/Frye*** standard. The error was prejudicial and required reversal of defendant's conviction for assault with a semi-automatic firearm because the evidence was the only unambiguous evidence that defendant had fired seven shots and, therefore, had to have used a semi-automatic firearm rather than a revolver

which could only fire up to six shots. (***People v. Hardy*** (2021) 65 Cal.App.5th 312.)

> *Note*: The "***Kelly/Frye***" test for evidence admissibility refers to the standards for the admission into evidence of new scientific techniques, per ***People v. Kelly*** (1976) 17 Cal.3rd 24; and ***Frye v. United States*** (D.C. Cir. 1923) 293 F. 1013.)

Officers responded to the 3500 block of 13th Street Southeast in Washington D.C. based upon a spotfinder report of shots fired at that location, soon confirmed by persons calling into the Metropolitan Police Department (MPD). No injured persons were found at that location. But defendant was observed walking there, and that he was the only person on that block at the time. He was quickly detained. Found to be in the illegal possession of a firearm, defendant argued that his detention was illegal and that the gun should have been suppressed. The Court disagreed, finding that the officers had a reasonable suspicion to detain him based upon the following: (1) The ShotSpotter alert and dispatcher report from MPD indicating that shots were fired in the 3500 block of 13th Street Southeast; (2) the officers arrived at the location of the reported gunshots within a minute and a half of the MPD call; (3) officers observation of defendant being the only person on that block; (4) defendant was walking quickly away from the location of the shooting; and (5) defendant did not initially respond to an officer's repeated efforts to get his attention and continued to walk away. (***United States v. Jones*** (D.C. Cir. 2021) 1 F.3rd 50.)

A Buster: Use of a "*Buster*" on a vehicle at the Mexico/U.S. border, given the lack of any proof that the defendant was exposed to any danger from the radioactivity in the device, does *not* require any suspicion in a border search. (***United States v. Camacho*** (9th Cir. 2004) 368 F.3rd 1182.)

> A "*Buster*" is "a handheld portable density gauge. . . . It contains a tiny bead of radioactive material called barium 133 that's inside a sealed container. . . . (W)hen the actuating trigger is pushed, the container rolls to an open slot and exposes the radiation in a forward direction (providing a reading on the density of an object." A higher reading than normal indicates that something not normally there is hidden in the object being evaluated, such as in the spare tire in this case. (***Id***., at p. 1184.)

> *Note* that the Court in ***Camacho*** differentiated the *Buster* from x-rays of a person which, per the court, *does* require a "*heightened level of suspicion*" (i.e., a "*reasonable suspicion*." See ***United States v. Camacho***, *supra*, p. 1186, fn. 1) to use in a border search situation given the potential personal health issues of exposing a person's body to x-rays. (See also ***United States v. Ik*** (9th Cir. 1982) 676 F.2nd 379, 382.)

Also note that using the *Buster* on a vehicle or other container in other than a border search situation would likely require full "*probable cause*" under the theory of ***Kyllo***, *supra*, in that it is inspecting items contained within the vehicle or container itself and not just heat emanating from the vehicle or other container. However, there is no case law on this issue as of yet.

Spike Mike: The warrantless use of a "*spike mike*," which, though contact with a heating duct, was able to pick up defendant's conversations while inside his home, was held to be a **Fourth Amendment** violation. (***Silverman v. United States*** (1961) 365 U.S. 505 [81 S.Ct. 679; 5 L.Ed.2nd 734].)

Aerial Surveillance: *Overflights* over a suspect's backyard (i.e., within the "*curtilage*" of the home), so long as the observers are in the legal ("*navigable*") airspace, when naked-eye observations of illegal activity below are made, are *legal*, whether the observers are on routine patrol or are responding to a specific tip and/or otherwise purposely looking into the defendant's yard. (***California v. Ciraolo*** (1986) 476 U.S. 207 [106 S.Ct. 1809; 90 L.Ed.2nd 210].)

Note: See "*Open Fields*" (Chapter 15), below.

California's previous rule that observations of contraband within the curtilage of one's home (i.e., the yard) under such circumstances should be suppressed (see ***People v. Cook*** (1985) 41 Cal.3rd 373; ***People v. Ciraolo*** (1984) 161 Cal.App.3rd 1081.) was overruled in ***California v. Ciraolo***, *supra*. Passage of **Proposition 8** in June, 1982, dictates that California follow the federal rule.

The federal Environmental Protection Agency's use of aerial photography, flying at the legal "*navigable altitude*," was held to be within its statutory authority, as a regulatory and enforcement agency requires no explicit authorization to employ methods of observation available to the public. Additionally, the taking of photographs of petitioner's complex from navigable airspace was not a search prohibited by the **Fourth Amendment**. (***Dow Chemical Co. v. United States*** (1986) 476 U.S. 227 [106 S.Ct. 1819; 90 L.Ed.2nd 226].)

Overflights conducted by officers of a greenhouse situated 125 yards from a two-story residence did not constitute a search requiring a warrant under the **Fourth Amendment**. (***United States v. Broadhurst*** (9th Cir. 1986) 805 F.2nd 849, 849-850, 856-857.)

In April 2020, the Baltimore City Policy Department formed a contract with Persistent Surveillance Systems (PSS) for PSS to conduct an Aerial Investigation Research (AIR) pilot program in Baltimore. During the AIR pilot program, PSS plans to fly aircrafts over Baltimore for approximately twelve hours every day for six months. Once per second, the planes will collect images of approximately ninety percent of the city at a time. This surveillance system would record virtually all of the outdoor movements of all of Baltimore's 600,000 residents.

Plaintiffs filed a lawsuit in federal court under **42 U.S.C. § 1983** and **28 U.S.C. § 2201** seeking declaratory and injunctive relief, arguing that the AIR pilot program violates their constitutional rights under the **First** and **Fourth Amendments**. Specifically, they claimed that the constant surveillance infringed their reasonable expectation of privacy, resulted in indiscriminate searches, and the data analysis violated the **Fourth Amendment**. The plaintiffs also claimed that their **First Amendment** right to freedom of association was violated. The trial court held for the defendant police department (456 F. Supp. 3d 699) and plaintiff's appealed. The Fourth Circuit Court of Appeal, in a 2-to-1 decision, ruled that Baltimore's aerial surveillance plane program is in fact constitutional, finding that the plane does in fact help police combat crime without violating resident's right to privacy. Per the Court: "In addition to not infringing a reasonable expectation of privacy, the AIR program seeks to meet a serious law enforcement need without unduly burdening constitutional rights." (***Leaders of a Beautiful Struggle v. Baltimore Police Department*** (4th Cir. 2020) 979 F.3rd 219.)

Note: See "*Drones*," immediately below.

***Drones*:**

Limited Authority: As of yet, there are very limited California criminal statutes (and no reported cases) specifically dealing with the use of "*drones*," or unmanned aerial surveillance tools.

Federal Law:

14 Code of Federal Regulations, Part I & **Part 21**: Anyone who owns a small unmanned aircraft of a certain weight (between .55 and 55 pounds) must register with the Federal Aviation Administration's Unmanned Aircraft System (UAS) registry before they fly outdoors. People who previously operated their UAS must register by February 19, 2016. People who do not register could face civil and criminal penalties.

See https://registermyuas.faa.gov/.

Unmanned Aircraft weighing more than 55 pounds (25 kg) *cannot* use this registration process and must register using the Aircraft Registry process.

See **14 Code of Federal Regulations Part 107** of the Federal Aviation Regulations, effective August 29, 2016, for regulations relevant to the "non-hobbyist" drone users.

Code of Federal Regulations ("**C.F.R.**"): It is unlawful for a person to operate a drone . . . :

> **14 C.F.R § 107.23**: . . . "in a careless or reckless manner" . . . or to "allow an object to be dropped from a small unmanned aircraft in a manner that creates an undue hazard to persons or property."
>
> **14 C.F.R § 107.39**: . . . above people who have not consented to the operation.
>
> **14 C.F.R § 107.51**: . . . at an altitude higher than 400 feet above ground level.
>
> *Punishment*: Violation of the above subjects the drone operator to civil and criminal penalties pursuant to **14 C.F.R. Part 13**.

Case Law:

> The US Court of Appeals for the District of Columbia Circuit upheld the Federal Aviation Administration's (FAA) rule on drone identification. Plaintiff Tyler Brennan, a drone user, and the drone equipment retailer owned by Brennan, RaceDayQuads LLC, challenged the FAA over its **Remote Identification Rule** of April 2021. The rule requires drone manufacturers to begin producing drones with remote ID. The FAA rule requires "drones in flight to emit publically readable radio signals reflecting certain identifying information, including their serial number, location, and performance information." The FAA has compared remote ID to a "digital license plate." The Court rejected the plaintiffs' argument that the Remote ID rule amounted to "constant, warrantless governmental surveillance in violation of the **Fourth Amendment**." (***Brennan v. Dickson*** (Dist. of Columbia Cir. (2022) 45 F.4th 48.)

California Law:

> **Civ. Code § 1708.8** provides for the potential *civil liability* of a person for a physical invasion of privacy which includes when that person knowingly enters the airspace above the land of another person without permission or while committing a trespass in order to capture a visual image, sound recording, or physical impression of the plaintiff engaging in a private, personal, or familial activity, and the invasion occurs in a manner that is offensive to a reasonable person.

Gov't. Code §§ 853, **853.1**; **Civil. Code § 43.101**: *Destruction of Drones by Government Entities; Immunity From Liability*:

> A local public entity and/or a public employee of a local public entity is immune from any damage they cause to an unmanned aircraft (e.g., a drone) that is interfering with the operation or support of emergency medical services, firefighting services, or search and rescue services provided by the local public entity.

Gov't. Code § 853.5: *Drones*; *Definitions*: The following definitions shall apply to this chapter:

> **Subd. (a)**: "*Unmanned aircraft*" means an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft.
>
> **Subd. (b)**: "*Unmanned aircraft system*" means an unmanned aircraft and associated elements, including, but not limited to, communication links and the components that control the unmanned aircraft that are required for the pilot in command to operate safely and efficiently in the national airspace system.

Pen. Code § 402: *Sightseeing at the Scene of an Emergency; Drones*:

> **Subd. (a)(2)**: The misdemeanor crime of sightseeing at the scene of an emergency is expanded as of *January 1, 2017*, to include a person, regardless of his or her location, who operates or uses an unmanned aerial vehicle, remote piloted aircraft, or drone at the scene of an emergency.
>
> *Punishment*: *Misdemeanor*; 6 months in county jail and/or a fine of up to $1,000. (**P.C. § 19**)

Pen. Code § 647(j)(1): Privacy Invasion:

> As amended effective *January 1, 2020*, adding *electronic devices* and *unmanned aircraft systems* (e.g., *drones*) to the list of instrumentalities (camera, camcorders, binoculars, mobile phones, etc.) that may not be used to invade the privacy of a person in a bedroom, bathroom, changing room, or any other place where the person has a reasonable expectation of privacy.

Pen. Code § 4577: *Drone Use Over the Grounds of a State Prison, a Jail, or a Juvenile Hall, Camp, or Ranch*:

> **Subd. (a):** A person who knowingly and intentionally operates an unmanned aircraft system on or above the grounds of a state prison, a jail, or a juvenile hall, camp, or ranch is guilty of an infraction, punishable by a fine of five hundred dollars ($500).
>
> **Subd. (b)**: This section does not apply to a person employed by the prison who operates the unmanned aircraft system within the scope of his or her employment, or a person who receives prior permission from the Department of Corrections and Rehabilitation to operate the unmanned aircraft system over the prison.
>
> **Subd. (c)**: This section does not apply to a person employed by the jail who operates the unmanned aircraft system within the scope of his or her employment, or a person who receives prior permission from the county sheriff to operate the unmanned aircraft system over the jail.
>
> **Subd. (d)**: This section does not apply to a person employed by the county department that operates the juvenile hall, camp, or ranch who operates the unmanned aircraft system within the scope of his or her employment, or a person who receives prior permission from the county department that operates the juvenile hall, camp, or ranch to operate the unmanned aircraft system over the juvenile hall, camp, or ranch.
>
> **Subd. (e)**: Definitions:
>
> > **(1)** "*Unmanned aircraft*" means an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft.
> >
> > **(2)** "*Unmanned aircraft system*" means an unmanned aircraft and associated elements, including, but not limited to, communication links and the components that control the unmanned aircraft that are required for the pilot in command to operate safely and efficiently in the national airspace system.

***Facial Recognition Software and Biometric Features*:**

Facial Recognition Software: The use of software that allows the matching of one's face by matching from a photograph some 16,000 recognition points to

photographs already in law enforcement possession has not yet been tested in the courts. (But see **Pen. Code § 832.19**, below.)

Biometric Features: See the debate on the use of "*biometric features*" (e.g., such as pressing a finger or a thumb onto the screen of a digital devices, or using facial or iris recognition) as they related to passwords used to open and view the contents of electronic devices such as computers and cellphones:

> Cases holding that requiring a suspect to provide his biometric features to law enforcement is, as constituting a "*testimonial communication*," a Fifth Amendment self-incrimination violation; both federal district court decisions:
>
> > ***In re Search of a Residence in Oakland*** (N.D. Cal. 2019) 354 F.Supp.3rd 1010.
> >
> > ***In re Application for a Search Warrant*** (N.D. Ill. 2017) 236 F. Supp. 3rd 1066.
>
> Holding that biometric features are *not* a **Fifth Amendment** issue; a state Supreme Court and state intermediate Court of Appeal decisions: See ***Minnesota v. Diamond*** (2018) 905 N.W.2nd 870; and ***Commonwealth of Virginia v. Baust*** (Va. Cir. Ct. 2014) 89 Va. Cir. 267.

Pen. Code § 832.19: *Statutory Restrictions on the Use of Biometric Surveillance System Used Via an Officer Body Camera*:

> **(a)** For the purposes of this section, the following terms have the following meanings:
>
> > **(1)** "*Biometric data*" means a physiological, biological, or behavioral characteristic that can be used, singly or in combination with each other or with other information, to establish individual identity.
> >
> > **(2)** "*Biometric surveillance system*" means any computer software or application that performs facial recognition or other biometric surveillance.
> >
> > **(3)** "*Facial recognition or other biometric surveillance*" means either of the following, alone or in combination:
> >
> > > **(A)** An automated or semiautomated process that captures or analyzes biometric data of an individual to identify or assist in identifying an individual.

(B) An automated or semiautomated process that generates, or assists in generating, surveillance information about an individual based on biometric data.

(4) "*Facial recognition or other biometric surveillance*" does *not* include the use of an automated or semiautomated process for the purpose of redacting a recording for release or disclosure outside the law enforcement agency to protect the privacy of a subject depicted in the recording, if the process does not generate or result in the retention of any biometric data or surveillance information.

(5) "*Law enforcement agency*" means any police department, sheriff's department, district attorney, county probation department, transit agency police department, school district police department, highway patrol, the police department of any campus of the University of California, the California State University, or a community college, the Department of the California Highway Patrol, and the Department of Justice.

(6) "*Law enforcement officer*" means an officer, deputy, employee, or agent of a law enforcement agency.

(7) "*Officer camera*" means a body-worn camera or similar device that records or transmits images or sound and is attached to the body or clothing of, or carried by, a law enforcement officer.

(8) "*Surveillance information*" means either of the following, alone or in combination:

(A) Any information about a known or unknown individual, including, but not limited to, a person's name, date of birth, gender, or criminal background.

(B) Any information derived from biometric data, including, but not limited to, assessments about an individual's sentiment, state of mind, or level of dangerousness.

(9) "*Use*" means either of the following, alone or in combination:

(A) The direct use of a biometric surveillance system by a law enforcement officer or law enforcement agency.

(B) A request or agreement by a law enforcement officer or law enforcement agency that another law enforcement

agency or other third party use a biometric surveillance system on behalf of the requesting officer or agency.

(b) A law enforcement agency or law enforcement officer shall not install, activate, or use any biometric surveillance system in connection with an officer camera or data collected by an officer camera.

(c) In addition to any other sanctions, penalties, or remedies provided by law, a person may bring an action for equitable or declaratory relief in a court of competent jurisdiction against a law enforcement agency or law enforcement officer that violates this section.

(d) This section does not preclude a law enforcement agency or law enforcement officer from using a *mobile fingerprint scanning device* during a lawful detention to identify a person who does not have proof of identification if this use is lawful and does not generate or result in the retention of any biometric data or surveillance information.

(e) This section shall remain in effect only until *January 1, 2023*, and as of that date is repealed. (As noted here, this section has in fact been repealed.)

***Stingray* (*Kingfish*) *Device*:**

Pursuant to the California **Electronic Communications Privacy Act** (**P.C. §§ 1546-1546.4**), a search warrant must be obtained before law enforcement may use a "*Stingray*" device.

A "*Stingray*" (or "*Kingfish*") device, also known as a "cell-site simulator," is usually used to pinpoint the location of a cellphone (See ***United States v. Artis*** (9th Cir. 2019) 919 F.3rd 1123.), but can also in some cases intercept calls and text messages.

See "*The California Electronic Communications Privacy Act*: ***P.C. §§ 1546-1546.4***," under "*Searches and Seizures of High Tech Devices*" (Chapter 17), below.

See also "*The Federal* ***Electronic Communications Privacy Act*, *18 U.S.C. §§ 2701 et seq.***" under "***P.C. § 1524.2(b)***: *Records of Foreign Corporations Providing Electronic Communications or Remote Computing Services*," under "*Searches With a Search Warrant*" (Chapter 10), above.

***Automated License Plate Readers* ("*ALPR*"):**

A "*license plate recognition system*" (or "*ALPR*") is defined as "a searchable computerized database resulting from the operation of one or more mobile or fixed cameras combined with other computer algorithms to read and convert images of registration plates and the characters they contain into computer-readable data," or "automated license plate recognition (ALPR) data." Statutes in the **Civil Code** require ALPR operators to maintain reasonable security procedures and practices, including protecting ALPR information from unauthorized access, detection, use, modification, or disclosure. A use and privacy policy, establishing minimum standards, must be implemented. (**Civ. Code §§ 1798.90.5**, **1798.90.51**, **1798.90.52**, **1798.90.53**, **1798.90.54**, **1798.90.55**.)

> *Note*: ALPRs has been described as "*high-speed, computer-controlled camera systems*" that are attached to vehicles, such as police cars, or can be mounted on street poles, highway overpasses, or mobile trailers. Some models can photograph up to 1,800 license plates every minute. Every week, law enforcement agencies across the country use these cameras to collect data on millions of vehicles. The plate numbers, together with location, date, and time information, are uploaded to central servers, and made instantly available to other agencies. The location data generated by ALPRs is so precise it can place a vehicle in front of a specific home or business, . . . Law enforcement agencies may maintain their own databases of ALPR data or store their data with private companies. (Electronic Frontier Foundations: "*Courts Issue Rulings in Two Cases Challenging Law Enforcement Searches of License Plate Databases*" [referring to ***United States v. Yang*** (9th Cir. 2020) 958 F.3rd 851, and ***Commonwealth v. McCarthy*** (2020) 484 Mass. 493.]

The use of an automated license plate recognition (ALPR) system provided the necessary reasonable suspicion for a traffic stop, as required by the **Fourth Amendment**, because the LPR system merely automated what could otherwise be accomplished by checking the license-plate number against a hot sheet of numbers or using other investigative tools. (***United States v. Williams*** (8th Cir. 2015) 796 F.3rd 951.)

Where a "*high risk*" stop of a suspected stolen vehicle was made, such stop being precipitated by a misreading of the license plate by an "automated license plate reader" and where the stop was made without first making a visual verification that the license on the stopped vehicle was as interpreted by the plate reader, the lawfulness of such a stop was held to be a triable issue for a civil jury to decide. (***Green v. City & County of San Francisco*** (9th Cir. 2014) 751 F.3rd 1039, 1045-1046; discounting without discussion the possibility that the stop was based upon a reasonable mistake of fact.)

In a case in which two organizations petitioned for a writ of mandate to compel disclosure of requested automated license plate reader (ALPR) data pursuant to the **California Public Records Act**, the California Supreme Court, reversing a lower court, concluded that the ALPR scan data at issue are not subject to **Govt. Code § 6254(f)**'s exemption for records of investigations. The process of ALPR scanning does not produce records of investigations because the scans are not conducted as a part of a targeted inquiry into any particular crime or crimes. Regarding the application of the catchall exemption set forth in **Govt. Code § 6255(a)**, the Supreme Court noted the trial court appeared to have placed significant weight on speculative concerns about possible disclosure of mobile ALPR patrol patterns, without record evidence to support its conclusions. The Court held this to be error. (***American Civil Liberties Union Foundation v. Superior Court*** (2017) 3 Cal.5th 1032.)

See ***Commonwealth v. McCarthy*** (2020) 484 Mass. 493; where the Massachusetts Supreme Court held that the limited use of automatic license plate readers did not constitute a search within the meaning of either **Mass. Const. Decl. Rights art. 14** or the **Fourth Amendment** because defendant's expectation of privacy was not invaded by four cameras at fixed locations on the ends of two bridges.

Upon defendant being charged with stealing mail out of collection boxes, his motion to suppress evidence seized as a result of his rental car's license plate being located through Automatic License Plate Recognition (ALPR) technology was properly denied. Defendant had no reasonable expectation of privacy in the historical location data of the car because he had kept it six days past the return date during which he disabled its GPS locator feature. There was no evidence that the rental agency had a policy or practice of allowing lessees to keep cars beyond the rental period, and the agency had made affirmative attempts to repossess the vehicle by activating the GPS unit to locate and disable the vehicle. Further, the rental contract provided that vehicles not returned by the due date would be reported stolen. (***United States v. Yang*** (9th Cir. 2020) 958 F.3rd 851, 858-862; declining to determine whether a defendant had standing to object to a "search" of a rental vehicle's historical location information that was captured and uploaded to a database prior to the expiration of the rental agreement.)

***Electronic Tracking Devices* (*Transmitters*):**

Rule: *Electronic Tracking Devices* are lawful to use in tracking, so long as the route used is otherwise open to view and so long as the installation of the tracking device itself was not accomplished in violation of the **Fourth Amendment**. (***United States v. Knotts*** (1983) 460 U.S. 276 [103 S.Ct. 1081; 75 L.Ed.2nd 55]; but see ***United States v. Jones***. *infra*.)

But see "***Pen. Code § 637.7***: *Statutory Restrictions*," below

.

Restrictions:

However, the act of putting a tracking device (e.g., a "Global Positioning System," or "GPS" device) onto a vehicle, even the exterior or undercarriage, is a **Fourth Amendment** search. (***United States v. Jones*** (2012) 565 U.S. 400 [132 S.Ct. 945; 181 L.Ed.2nd 911]; overruling prior cases to the contrary.)

The Court in ***Jones*** did not indicate, however, whether a search warrant would be necessary, declining to rule on whether such a search, even if warrantless, was "*reasonable*" under the circumstances because that argument had been "forfeited" when not raised at the trial court level. (***United States v. Jones***, *supra*, at p. 413.)

> *Note*: The inference is that a lawful exception to the search warrant requirement might apply, depending upon the circumstances, but that otherwise, a warrant is probably required.

In ***Knotts***, *supra*, the tracking device (i.e., a "beeper") was already contained in a five-gallon drum when given to the defendant who put it in his car. There being no installation of the device onto or into defendant's car by law enforcement, there was no "search" involved.

> See ***Carpenter v. United States*** (June 22, 2018) 585 U.S. __, __ [138 S.Ct. 2206; 201 L.Ed.2nd 507].

United States v. Jones, *supra*, specifically did not rule whether the act of tracking a vehicle through the use of a GPS was a **Fourth Amendment** issue that required a search warrant (*supra*, at p. 413) although the minority opinion argued that the use of a GPS for "an extended period of time" (e.g., a month) would require a warrant. (pg. 430.)

See also ***United States v. Wahchumwah*** (9th Cir. 2013) 710 F.3rd 862, 868, refusing to extend the theory of ***Jones*** to the use of a buttonhole audio-video device in a suspect's home by an undercover agent who was in the defendant's home by invitation.

Leaving the tracking device, located in a container, turned on after it disappears into a house (at least when done without a search warrant) is an invasion of privacy, and unlawful. (***United States v. Karo*** (1984) 468 U.S. 705 [104 S.Ct. 3296; 82 L.Ed.2nd 530].)

When the transmitter is contained inside property which has been stolen, defendant's possession of the stolen property in his vehicle (***United States v. Jones*** (4th Cir. 1994) 31 F.3rd 1304, in a stolen mail bag.) or in a motel

room (***People v. Erwin*** (1997) 55 Cal.App.4th 15, in a stolen bank bag.) does *not* make the warrantless "*search*" unlawful.

> *Note*: In ***Karo***, the transmitter was followed while it was moved about inside a private residence, then to two different storage facilities, and into a second residence; a circumstance not present in the Fourth Circuit's ***Jones*** or in ***Erwin***.

In following stolen stereo speakers containing tracking devices into a home, exigent circumstances of a fresh crime and the possibility that the speakers would be destroyed if officers waited for a warrant, justified an immediate entry to secure the house. (See ***People v. Hull*** (1995) 34 Cal.App.4th 1448, 1452, 1455-1457.)

In a post-Supreme Court ***United States v. Jones*** case, the Eight Circuit Court of Appeal concluded that a police detective did not commit a trespass when he located a suspect's car in a parking lot by using the suspect's key fob to trigger the car's alarm. The court reasoned that the detective had lawfully seized the key fob and the "mere transmission of electric signals alone" through the key fob was not a trespass on the car. (***United States v. Cowan*** (8th Cir. 2012) 674 F.3rd 947, 956.)

In a case prior to the Supreme Court decision in ***United States v. Jones***, the Ninth Circuit Court of Appeal initially found that the placing of an electronic transmitter onto the undercarriage of defendant's vehicle while the vehicle is in his driveway, *within* the curtilage of the home, and without a warrant, was lawful (See ***United States v. Pineda-Moreno*** (9th Cir. 2010) 591 F.3rd 1212, certiorari granted.).

> When reconsidered in light of ***Jones***, the 9th Circuit reversed itself, finding it to be a **Fourth Amendment** violation. (***United States v. Pineda-Moreno*** (9th Cir. 2012) 688 F.3rd 1087.) The Court, however, affirmed defendant's conviction again. While noting that under ***Jones***, the attaching of a GPS onto defendant's vehicle while in parked within the curtilage of defendant's residence was indeed illegal, the officers, in good faith, were merely following existing precedent. As such, defendant was not entitled to the suppression of the resulting evidence per the U.S. Supreme Court's rule that the Exclusionary Rule does not apply under such circumstances. (***Ibid***., citing ***Davis v. United States*** (2011) 564 U.S. 229, 236-239 [131 S.Ct. 2419; 180 L.Ed.2nd 285].)

See also ***United States v. Sparks*** (1st Cir. 2013) 711 F.3rd 58; holding that the use of a GPS prior to the U.S. Supreme Court's Decision in ***United States v. Jones***, *supra,* even if done in violation of the **Fourth Amendment**, does not require the suppression of the resulting evidence

due to the officer's good faith reliance in earlier binding precedence. (Accord; ***United States v. Barraza-Maldonado*** (8th Cir. 2013) 732 F.3rd 865; noting the Ninth Circuit's original rule under ***United States v. Pineda-Moreno***, *supra,* which, at the time, had held that no warrant was necessary.)

> But see ***United States v. Katzin*** (3rd Cir. 2013) 732 F.3rd 187, ruling that "good faith" didn't save the evidence discovered after using a GPS without a warrant on defendant's vehicle in violation of ***Jones***, in that the prior cases were in conflict on this issue.
>
> *Note*: This appears to be a minority opinion.

California follows the majority rule, dictated by ***Davis v. United States***, *supra,* that because California case law allowed for the warrantless placement of a GPS device by law enforcement at the time such a device was placed on the co-defendant's car in this case (i.e., 2007), the fact that the United States Supreme Court has since held that such conduct required a warrant does not dictate exclusion of the tracking device evidence. (***People v. Mackey*** (2015) 233 Cal.App.4th 32, 93-97.)

A minor, as a condition of probation when the minor is a **W&I § 601** ward of the court for being an excessive truant, may lawfully be required to wear a GPS tracking device. (***In re A.M.*** (2013) 220 Cal. App. 4th 1494, 1498-1501.)

However, requiring a recidivist sex offender to wear a satellite-based monitor (SBM) for the rest of his life, done for the purpose of tracking the individual's movements and to "obtain information," constitutes a "search," under the **Fourth Amendment**, and under the theory of ***United States v. Jones***, *supra*. The fact that North Carolina's SBM program is civil in nature does make it any less of a **Fourth Amendment** search issue. (***Grady v. North Carolina*** (2015) 575 U.S. 306 [135 S.Ct. 1368; 191 L.Ed.2nd 459]; case remanded for the purpose of determining the reasonableness of the search under the circumstances.)

The Federal Fourth Circuit Court of Appeal held that purposely and knowingly ignoring the search warrant requirement by attaching a GPS to defendant's vehicle without a warrant, being the type of "flagrant disregard for the warrant requirement" the Exclusionary Rule was intended to prevent, required the suppression of evidence despite the fact that by the time defendant's vehicle was stopped and drugs were found a warrant had been obtained (without telling the magistrate that a GPS had already been attached). (***United States v. Terry*** (4th Cir. W. VA. 2018) 909 F.3rd 716.)

Pen. Code § 637.7: *Statutory Restrictions*: The California Legislature has chosen to legislatively restrict the use of electronic tracking devices:

Subd. (a): *Use of Electronic Tracking Devices*:

No person or entity in this state shall *use* an electronic tracking device to determine the location or movement of a person.

Subd. (b) and **(c)**: *Exceptions*:

Subd. (b): When the registered owner, lessor, or lessee of a vehicle has consented to the use of the electronic tracking device with respect to that vehicle.

Subd. (c): An otherwise lawful use of an electronic tracking device by a law enforcement agency.

Subd. (d): "*Electronic tracking device*" is defined as any device attached to a vehicle or other movable thing that reveals its location or movement by the transmission of electronic signals.

Subd. (e): A violation is a misdemeanor.

Subd. (f): A violation is also grounds for revocation of a business license.

Note: In enacting this section, effective *1/1/1999*, the Legislature noted the following: "The Legislature finds and declares that the right to privacy is fundamental in a free and civilized society and that the increasing use of electronic surveillance devices is eroding personal liberty. The Legislature declares that electronic tracking of a person's location without that person's knowledge violates that person's reasonable expectation of privacy. (**Stats 1998**, **ch. 449**, **Section 1**.)

Case Law:

Penal Code § 637.7, using an electronic tracking device to determine the location or movement of a person, is unconstitutionally vague as applied to defendant husband pending separation with his wife, who placed a magnetic tracking device on his wife's car for which both spouses were registered owners since the statute does not indicate if the consent of one owner to tracking is sufficient for exclusion under **subdivision (b)** as to the registered owner, lessor, or lessee of a vehicle who consents to the use of the device as to that vehicle. (***People v. Agnelli*** (2021) 68 Cal.App.Supp. 1.)

Note also that Indiana's State Supreme Court has held that it is not a theft for a suspect to remove a GPS from his own vehicle, invalidating a search warrant based upon the theory that defendant had stolen the GPS by removing and disabling it, and ruling that it was mere speculation to believe that defendant possessed the instrument. (***Heuring v. State of Indiana*** (2020) 140 N.E.3rd 270.)

The obtaining of tracking warrants—used to monitor defendant's travels between California and Reno, Nevada—was upheld when the probable cause for the warrants was obtained from records which themselves were obtained without a warrant during the investigation of crimes related to the dispensing of controlled substances consisting of opioids. Defendant challenged the warrantless obtaining of such records. The Court upheld defendant's conviction, noting that both Nevada law (**Nev. Rev. Stat. § 453.162**; establishing the "Prescription Monitoring Program") and federal law (**Pub. L. No. 91-513, Tit. II, 84 Stat. 1236, 1272** (1970) (codified at **21 U.S.C. § 876(a)**) upheld the warrantless obtaining of such opioid-dispensing records. "[T]he Attorney General may . . . require the production of any records . . . which the Attorney General finds relevant or material to [an] investigation [related to controlled substances]." "Both federal (and state) laws regulate controlled substances by requiring pharmacies . . . to maintain prescription drug records and keep them open for inspection by law enforcement officers without the need of a warrant." (***United States v. Motley*** (9th Cir. 2023) 89 F.4th 777, 783-787; citing ***United States Department of Justice v. Ricco Jonas*** (1st Cir. 2022) 24 F.4th 718, at 735.)

See "*Prescription Monitoring Programs*," under "*Warrantless Searches and Seizures*" (Chapter 9), above.

***"Pinging" a Cellphone*:**

Old Rule:

Historically, the courts allowed for the "pinging" of a suspect's cell phone, or the use of data collected from cellphone towers that provided a history of when a suspect's cellphone was close enough to use a particular cellphone tower (i.e., "cell-site location information (CSLI)"), without a search warrant. Per **18 U.S.C. § 2703(d)** of the federal "**Stored Communications Act**," no more than a "court order" was required, and was obtainable whenever the Government could show "specific and articulable facts showing that there are reasonable grounds to believe" that the "historical" records sought "are relevant and material to an ongoing criminal investigation." (See ***United States v. Davis*** (11th Cir. 2015) 785 F.3rd 498; ***United States v. Thompson*** (10th Cir. Kan. 2017) 866 F.3rd 1149; ***United States v. Stimler*** (3rd Cir. 2017) 864 F.3rd 253; ***United States***

v. Dorsey (Cal. 2015) 2015 U.S. Dist. LEXIS 23693; ***United States v. Rosario*** (N.D. ILL. 2017) 2017 U.S. Dist. LEXIS 73921; and ***United States v. Carpenter*** (6th Cir. 2016) 819 F.3rd 880, cert. granted.)

Note: "Cell sites usually consist of a set of radio antennas mounted on a tower, although 'they can also be found on light posts, flagpoles, church steeples, or the sides of buildings.' ***Carpenter v. United States***, 138 S.Ct. 2206, 2211, 201 L.Ed.2nd 507 (2018). 'Each time [a] phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI).' ***Id***. This CSLI data indicates the general geographic area in which the cell phone user was located when his or her phone connected to the network. Because most smartphones tap into the wireless network 'several times a minute whenever their signal is on . . . modern cell phones generate increasingly vast amounts of increasingly precise CSLI.' ***Id***. at 2211-12." (***United States v. Elmore*** (9th Cir. 2019) 917 F.3rd 1068, 1072, fn. 2.)

See also ***United States v. Wallace*** (5th Cir. Tex. 2017) 857 F.3rd 685: Even if a "Ping Order," issued under the federal pen-trap statute, **18 U.S.C. § 2703(d)** of the **Stored Communications Act**, and state law, was issued in violation of the federal pen-trap statute or state law, defendant was not entitled to suppression of the evidence as neither the pen-trap statute nor the **Texas Code of Criminal Procedure** provides for suppression of evidence as a remedy for a violation.

California was in apparent accord, allowing for the pinging of a victim's cellphone, using its GPS capabilities to track defendant who had just stolen it in a robbery, holding that it was not a **Fourth Amendment** violation to do so. (***People v. Barnes*** (2013) 216 Cal.App.4th 1508, 1517-1519; no trespassory placing of the GPS into the defendant's property (now a violation of the rule of ***United States v. Jones*** (2012) 565 U.S. 400 [132 S.Ct. 945; 181 L.Ed.2nd 911].), and no expectation of privacy violated.

See also ***People v. Zichwic*** (2001) 94 Cal.App.4th 944, which held that putting a pinging device on defendant's vehicle was lawful, and that monitoring the device was not unlawful whether or not doing so constituted a "search," despite the lack of a search warrant.

See also **Pen. Code § 1546** et seq., California's "**Electronic Communications Privacy Act**," which, by statute, greatly restricts law enforcement's access to electronic communication information from a service provider in California.

New Rule:

The Courts, however, started having some reservations over the old rule. Notably, ***United States v. Graham*** (4th Cir. 2015) 796 F.3rd 332, held, in a split 2-1 decision, that the warrantless, extended, accessing of two of defendants' cell-site data (221 days' worth of cell site location information [CSLI], which itself yielded an impressive 29,659 location data points for defendant and 28,410 for co-defendant Jordan, enough to provide a "reasonably detailed account of their movements" during the intervals covered by the disclosure orders), amounted to an unconstitutional search under the **Fourth Amendment**. Officers obtained court orders pursuant to the "**Stored Communications Act**" (**18 U.S.C. § 2703(d)**), but not search warrants. The resulting information was used against the defendants at trial. The Appellate Court refused, however, to order the suppression of the collected information because of the **Fourth Amendment's** "good faith" exception, and thus affirmed both the defendants' convictions of various charges associated with a series of armed robberies.

At least one California state court also discussed the expanding concerns with the development of high-tech methods impacting privacy rights, not offering a solution. (***People v. Barnes*** (2013) 216 Cal.App.4th 1508, 519.)

Finally, the U.S. Supreme Court, in reviewing the Sixth Circuit's ***United States v. Carpenter*** (6th Cir. 2016) 819 F.3rd 880 (cert. granted), in a split 5-to-4 decision, reversed the lower court's decision (and by implication, the other circuits, above, as well) and held that absent an exigency, in order to obtain such cellphone "pinging" history, a search warrant, based upon a showing of probable cause, is required. (***Carpenter v. United States*** (June 22, 2018) 585 U.S. __ [138 S.Ct. 2206; 201 L.Ed.2nd 507].)

> The High Court specifically held that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from (defendant's) wireless carriers was the product of a search," thus requiring a search warrant. (***Id.***, at p. __.)
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> The Court also specifically declined to apply the rules of ***Smith v. Maryland*** (1979) 442 U.S. 735 [99 S.Ct. 2577; 61 L.Ed.2nd 220], involving the warrantless obtaining of trap & trace information, or ***United States v. Miller*** (1976) 425 U.S. 435, 440 [96 S.Ct. 1619; 48 L.Ed.2nd 71], involving the obtaining of bank records without a search warrant, to the CSLI situation. (***Carpenter v. United States***, *supra*, at p. __.)

The necessity of a search warrant to obtain CSLI records is "generally" now the rule. (***United States v. Elmore*** (9th Cir. 2019) 917 F.3rd 1068, 1074.)

Note: "Cell sites usually consist of a set of radio antennas mounted on a tower, although 'they can also be found on light posts, flagpoles, church steeples, or the sides of buildings.' ***Carpenter v. United States***, 138 S.Ct. 2206, 2211, 201 L.Ed.2nd 507 (2018). 'Each time [a] phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI).' ***Id***. This CSLI data indicates the general geographic area in which the cell phone user was located when his or her phone connected to the network. Because most smartphones tap into the wireless network 'several times a minute whenever their signal is on . . . modern cell phones generate increasingly vast amounts of increasingly precise CSLI.' ***Id***. at 2211-12." (***United States v. Elmore*** (9th Cir. 2019) 917 F.3rd 1068, 1072, fn. 2.)

> *Also note* that police may also request information about every device connected to a single tower during a particular interval, potentially netting historical location information from thousands of phones. This technique is colloquially known as a *"cell tower dump*." (See John Kelly, "*Cellphone Data Spying: It's Not Just the NSA*," USA Today, August 11, 2015, https://www.usatoday.com/story/news/nation/2013/12/08/cellphone-data-spying-nsa-police/3902809/. A typical dump covers multiple towers, and wireless providers, and can net information from thousands of phones.
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> The Fourth Circuit applied the United States Supreme Court's reasoning in ***Carpenter*** to an aerial surveillance program operated by the city of Baltimore. The City of Baltimore collected both traditional surveillance data and aerial photographs. When combined, the police could effectively track someone's every movement throughout the city retroactively over a 45-day period. This integrated surveillance, the Fourth Circuit concluded, was an incursion into privacy directly comparable to the cell-site location information accessed in ***Carpenter***. (***Leaders of a Beautiful Struggle v. Baltimore Police Dept.*** (4th Cir. 2021) 2 F.4th 330.)
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> Such a cell tower dump was held to be constitutional, however, by the Delaware Supreme Court in ***Hudson v. State*** (Jan. 9, 2024) __ A.2nd __ [2024 Del. LEXIS 13]. In this case, ten search warrants were obtained for the information from five separate cell towers. The Court found that the warrants were constitutional because they were both particularized and no broader than the probable cause on

which they were based. The defendant claimed that the warrants lacked particularity and were thus unconstitutional general warrants. This is so, defendant argued, because they "sought information from all cell phone providers . . . for all cell towers located in the area of numerous locations." The Court disagreed. The United States Constitution specifies two matters that must be described with particularity in a search warrant: (1) the place to be searched; and (2) the "persons or things" to be seized. The particularity requirement is difficult in the electronic search warrant context, given the commingling of relevant and irrelevant information and the complexities of segregating responsive files after the fact. The warrants at issue described what investigating officers believed would be found in CSLI from a tower dump with as much specificity as possible under the circumstances. The warrants on their face made clear that their scope was limited to tower dumps from five cell sites in the areas around the incidents. Second, the CSLI sought from these tower dumps in the warrants was for time periods no greater than two hours at the particular towers was also specifically described and not targeted toward the content of any communications. Finally, the State established probable cause to believe that the offenses described in the cell tower warrants had been committed by providing in their respective affidavits detailed explanations of the incidents, including the area in which the incidents took place (including the locations of the apartment complexes and the surrounding banks), the timing and length of such incidents, as well as other pertinent details. Accordingly, the Court held that the Cell Tower Warrants were valid under the **Fourth Amendment**.

The following cell site location information (CSLI) cases, therefore, are still valid:

The Sixth Circuit Court of Appeal has ruled that using data emanating from a suspect's pay-as-you-go cellphone to determine its real-time location as he transported drugs along public thoroughfares was lawful. Agents located defendant at a rest stop, with a motorhome filled with marijuana, by "pinging" his phone. There was no **Fourth Amendment** violation since defendant did not have a reasonable expectation of privacy in the GPS data and location of his cellphone because authorities tracked a known number that was voluntarily used while traveling on public thoroughfares; no extreme comprehensive tracking was present in his case. (***United States v. Skinner*** (6th Cir. 2012) 690 F.3rd 772.)

Pinging a victim's cellphone, using its GPS capabilities to track defendant who had just stolen it in a robbery, was not a **Fourth**

Amendment violation. (***People v. Barnes*** (2013) 216 Cal.App.4th 1508, 1517-1519; no trespassory placing of the GPS into the defendant's property, and no expectation of privacy violated.

Exceptions:

It was noted in ***Carpenter v. United States***, *supra*, at p. __, however, that this decision "is a narrow one," and is *not* intended to apply to (1) pinging a suspect's cellphone while on the move, referred to by the court as "real-time" situations, (2) "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval), (3) the rules of ***Smith v. Maryland*** (1979) 442 U.S. 735 [99 S.Ct. 2577; 61 L.Ed.2nd 220], involving the warrantless obtaining of trap & trace information, or ***United States v. Miller*** (1976) 425 U.S. 435, 440 [96 S.Ct. 1619; 48 L.Ed.2nd 71], involving the obtaining of bank records without a search warrant, (4) other business records that might incidentally reveal location information, or (5) other collection techniques involving foreign affairs or national security.

Carpenter notably provided for the warrantless pinging of a cellphone under "exigent circumstances." "Such exigencies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence." (***Carpenter v. United States***, *supra*, at p. __.)

"*Exigent circumstances*" will excuse the pinging of a suspect's cellphone without a warrant or court order. (***United States v. Caraballo*** (2nd Cir. Vt. 2016) 831 F.3rd 95; need to locate a violent homicide suspect out of fear for the safety of informants and undercover officers.)

Defendant's motion to suppress knives seized from his backpack was properly denied where the warrantless pinging of his cell phone to locate him did not violate the **Fourth Amendment** because it was justified by *exigent circumstances*. At the time the responding officer requested that defendant's mobile service provider ping his cell phone, the information available to the officer was that less than an hour earlier the victim had been repeatedly stabbed in the neck in an unprovoked attack, all occurring within 200 yards of a preschool and near a shopping center and multiple neighborhoods. Based upon the circumstances known to the officer, he believed it was imperative that the suspect be found as soon as possible to prevent another possible unprovoked attack. (***People v. Bowen*** (2020) 52 Cal.App.5th 130, 136-139.)

The Court noted that whether or not a single ping of a suspect's cellphone is a "search" is still an undecided issue. (***Id.***, at p. 138;

declining to decide the issue because exigent circumstances already provided the justification for finding that the **Fourth Amendment** had not been violated.)

See "*Geofence Warrants*," under "*Searches with a Search Warrant*" (Chapter 10), above.

In a Fourth Circuit case after defendant, brandishing a semi-automatic handgun, assaulted his girlfriend in her home and threatened to return and kill her, her kids, her family, and law enforcement, officers submitted an "exigent form" to T-Mobile, defendant's cell phone provider. The detective's request sought immediate police access without a warrant to "pings" revealing defendant's cell phone location, and to call logs displaying the phone numbers that defendant contacted, which would enable the officers to locate him. With the resulting information, officers located defendant driving his vehicle six hour later and arrested him. In finding exigent circumstances and upholding his conviction, the 4th Circuit Court held that the officers reasonably concluded that defendant was armed and dangerous, that he posed an imminent threat to his girlfriend, to her family members, and law enforcement. In addition, the Court found that defendant's cell phone provider was "notoriously slow" in responding to law enforcement search warrants and could take several days to produce the necessary cell phone location information. The Court balanced these circumstances with the fact that the intrusion on defendant's privacy rights was reasonably confined to the exigency. For example, the officers did not attempt to enter defendant's home without a warrant or track his movements for an extended period. Instead, the officers arrested defendant in his vehicle within approximately one hour of receiving the "pings." Consequently, the court held that exigent circumstances required the officers to obtain defendant's cell phone location information from T-Mobile without delay by using the "exigent form." (***United States v. Hobbs*** (4th Cir. 2022) 24 F.4th 965.)

Note: The Court also emphasized that the exigent circumstances exception was not to be used as "a tool of convenience" by law enforcement officers in the absence of immediate danger to persons, a fleeing suspect, or the need to prevent the imminent destruction of evidence.

Carpenter was held by California's Fourth District Court of Appeal *not* to apply to street light cameras that recorded the presence of persons traversing the streets of downtown San Diego (and other areas). (See ***People v. Cartwright*** (2024) 99 Cal.App.5th 98,102-103.)

"Recordings from cameras, such as the ones that captured Cartwright's movements in the downtown urban environment in

the middle of a weekday, do not rise to the same 'unique nature of cell phone location records.' (***Carpenter***, at p. ___ [138 S.Ct. at p. 2217]," holding that "[a] person traveling . . . on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." (***Id.***, at p. 103.)

The "***Stored Communications Act***:"

With an amendment to the "**Stored Communications Act**" (**18 U.S.C. § 2703**), adding **The CLOUD Act**, effective on *March 23, 2018*, a U.S. provider of e-mail services, when subpoenaed, must disclose to the Government electronic communications within its control even if the provider stores the communications abroad. (See ***United States v. Microsoft Corp*** (2018) 584 U.S. 236 [138 S.Ct. 1186; 200 L.Ed.2nd 610]; case dismissed as moot.)

When the government views email attachments it is a "search" for **Fourth Amendment** purposes under both an expectation-of-privacy and a trespass-to-chattels theory. (***United States v. Wilson*** (9th Cir. 2021) 13 F.4th 961, 967, citing ***United States v. Ackerman*** (10th Cir. 2016) 831 F.3rd 1292, 1308.)

The Cloud Act, § 103(a)(1), provides: "A [service provider] shall comply with the obligations of this chapter to preserve, backup, or disclose the contents of a wire or electronic communication and any record or other information pertaining to a customer or subscriber within such provider's possession, custody, or control, regardless of whether such communication, record, or other information is located within or outside of the United States."

In a wife's civil action against her husband brought under the **Stored Communications Act**, **18 U.S.C.S. §§ 2701(a)(1)**, **2707(a)**, based on the husband's alleged unauthorized access into the wife's work-emails, the district court abused its discretion in excluding the declaration of an employee of the company that provided data protection services to the wife's employer because the declaration was based on the declarant's personal knowledge about the wife's e-mail storage, thus creating a dispute of material fact on the narrow issue that formed the basis of the summary judgment ruling. The district court erred in granting the husband's summary judgment motion because the declaration created a genuine dispute of material fact with respect to whether the e-mails the husband accessed were in electronic storage and, thus, entitled to protection under **18 U.S.C.S. § 2510(17)(B)**. (***Clare v. Clare*** (9th Cir. 2020) 982 F.3rd 1199.)

Officers had probable cause to believe defendant would be transporting drugs from Texas to Louisiana based upon reliable information from a confidential informant. The officers therefore obtained a state-authorized search warrant to obtain the GPS coordinates of defendant's girlfriend's cell phone from Verizon over a sixteen-hour period, thus allowing the officers to track the girlfriend's movements, and, because the two were traveling together, those of defendant as well. After having done so, defendant's vehicle was stopped and searched, resulting in the recovery of methamphetamine. The Fifth Circuit Court of Appeal held that the **Stored Communications Act** (**SCA**) authorized the government to "obtain a warrant" from a state "court of competent jurisdiction" using "state warrant procedures" upon a "showing that there are reasonable grounds to believe that the . . . information sought is relevant to an ongoing criminal investigation." The court found that the warrant in this case complied with the **SCA's** provision and therefore, properly issued by the state-court judge. (***United States v. Beaudion*** (5th Cir. 2020) 979 F.3rd1092.)

***Flashlights and Spotlights*:**

The use of flashlights to illuminate the interior of a handbag has been held to be of no constitutional significance. (***People v. Capps*** (1989) 215 Cal.App.3rd 1112, 1123.)

Officers standing in an open field, using a flashlight to look inside a barn, held to be lawful. (***United States v. Vela*** (W.D. Tex. 2005) 486 F.Supp.2nd 587, 590.)

"*Flashlighting*" or "*spotlighting*" a person, by itself, is *not* a detention. (***People v. Franklin*** (1987) 192 Cal.App.3rd 935; ***People v. Rico*** (1979) 97 Cal.App.3rd 124, 130.)

However, taking into account of the "totality of the circumstances," it was held that defendant was detained when the officer made a U-turn to pull in behind him and then trained the patrol car's spotlights on his car. (***People v. Kidd*** (2019) 36 Cal.App.5th 12, 21-22.)

But see ***People v. Tacardon*** (2022) 14 Cal.5th 235: A deputy sheriff parked 15 to 20 feet behind a lawfully parked car, shined a spotlight into the interior, and approached it on foot. When a female suddenly got out from the back seat, he ordered her to remain at the curb. At about that point the deputy smelled marijuana and observed large marijuana bags on the floorboard. Defendant, in the driver's seat, proved to be on probation. A subsequent search produced additional contraband evidencing drug sales. The Third District Court of Appeal reversed a superior court ruling that defendant had been unlawfully detained. Disagreeing with ***People v. Kidd*** (2019) 36 Cal.App.5th

12, the court held that while the use of a spotlight might cause someone to feel "scrutiny, such directed scrutiny does not amount to a detention." Although the female who had gotten out of the car was detained, "there is no evidence defendant observed the deputy's interaction with [her] . . . ." By the time the deputy addressed defendant, having smelled marijuana and having seen the large bags of marijuana, defendant was appropriately and lawfully detained. Significantly, the deputy never blocked defendant's egress, he never used emergency lights, and his approach to the car was casual.

And see ***People v. Perez*** (1989) 211 Cal.App.3rd 1492, where a police officer parked his patrol car in front of Perez's vehicle, leaving "plenty of room" for Perez to drive away, and activated both spotlights on the patrol car "to get a better look at the occupants and gauge their reactions." (***Id.*** at p. 1494.) The officer then walked over to the car, tapped on the window, and asked the driver to roll down the window. (***Ibid.***) The appellate court concluded: "[T]he conduct of the officer here did *not* manifest police authority to the degree leading a reasonable person to conclude he was not free to leave. While the use of high beams and spotlights might cause a reasonable person to feel himself [or herself] the object of official scrutiny, such directed scrutiny *does not* amount to a detention. [Citations.]" (Italics added; ***Id.*** at p. 1496, and cited with approval in ***People v. Tacardon***, *supra*, at pp. 243-244.)

See also ***People v. Bailey*** (1985) 176 Cal.App.3rd 402, where it was held that even though a vehicle is already stopped without police action, merely activating emergency lights on a police vehicle as officers contact the occupants of the vehicle is automatically a detention, and illegal if made without a reasonable suspicion.

However, when an officer shines the spotlight of his car on defendant, while stopping his patrol car, getting out, and commanding defendant to approach, defendant was in fact detailed. (***People v. Roth*** (1990) 219 Cal.App.3rd 211.)

The Juvenile Court's denial of a suppression motion was reversed for having erroneously determined that a police-defendant encounter was consensual and not a detention. Based upon a citizen's report that defendants, while parked in a vehicle in the citizen's neighborhood were "acting shady," four officers parked behind defendants' lawfully parked car, the first patrol car with its emergency lights on. The Court ruled that the officers' show of authority (i.e., turning on their emergency lights) amounted to an unlawful detention. Although noting that there is no

> "bright-line" rule that activating lights always constitutes a detention, the Court also noted that the California "Supreme Court has long recognized that activating sirens or flashing lights can amount to a show of authority" sufficient to constitute a detention. (***In re Edgerrin J.*** *(2020) 57 Cal.App.5th 752, 760, citing* ***People v. Brown*** *(2015) 61 Cal.4th 968, at p. 980.)*

A person who exposes his facial features, and/or body in general, to the public, in a public place, has no reasonable expectation of privacy in his appearance. (See ***People v. Benedict*** (1969) 2 Cal.App.3rd 400, 403-404; "The latter phenomenon (defendant's physical characteristics) was in plain sight of the officer and observed by him without any semblance of a search or seizure; his use of a flashlight to observe the pupillary reaction was not improper. The utilization of the light from a flashlight directed to that which is in plain sight ordinarily does not render observation thereof a search;" citing ***People v. Cacioppo*** (1968) 264 Cal.App.2nd 392, 397.)

However, see ***People v. Garry*** (2007) 156 Cal.App.4th 1100, where it was held to be a detention when the officer spotlighted the defendant and then walked "briskly" towards him, asking him questions as he did so.

An officer walking up to defendant as defendant crouched behind a car with the officer's flashlight trained on him was held *not* to constitute a detention. Defendant was not detained until the officer told defendant to stand and put his hands behind his head, preparatory to putting handcuffs on him as a safety measure. (***People v. Flores*** (2021) 60 Cal.App.5th 978, 988-990.)

> See dissenting opinion (at pp. 990-994), however, noting many facts and some on-point case law that were left out of the majority opinion. Among the fact ignored by the majority was that as defendant was in the process of moving around to the back side of his car, the officers drove up and parked their patrol car "a little askew to and behind" defendant's vehicle. The officers then shined their vehicle's spotlight on defendant as he bent over behind his car. The dissent also cites two cases totally ignored by the majority: ***People v. Garry*** (2007) 156 Cal.App.4th 1100, and ***People v. Roth*** (1990) 219 Cal.App.3rd 211. Both cases are spotlight cases which are nearly identical to Flores' situation, where spotlighting the suspect while (in ***Garry***) the officer "briskly" approached the suspect, and (in ***Roth***) "commanding" the suspect to approach the officer, respectively, were held to constitute detentions. Also not mentioned by the majority was the fact that while the one officer approached defendant (commanding him to stand up) from the rear of defendant's vehicle, the other officer was walking around the front of defendant's car, boxing him in between the two officers, his vehicle, and an iron spiked fence running parallel to the sidewalk, creating a situation where it is certainly arguable that defendant would have reasonably believed that with all that attention directed at him

(spotlights, flashlights, being approached from both sides, with at least one officer issuing commands to stand up), and nowhere to go, he was in fact detained before ever being told to put his hands behind his head; i.e., that he could not have reasonably felt free to just walk away.

See "'*Flashlighting*' *or* '*Spotlighting*' *a Person*," under "*Consensual Encounters*" (Chapter 3), above.

***Binoculars*:**

The use of binoculars to enhance what the officer can already see, depending upon the degree of expectation of privacy involved under the circumstances, is normally lawful. (***People v. Arno*** (1979) 90 Cal.App.3rd 505.)

Using binoculars from 50 yards away to watch defendant load boxes into his car upheld. (***United States v. Grimes*** (5th Cir. 426 F.2nd 706, 708.)

Using binoculars during surveillance of a chicken house from a pasture was lawful. (***Hodges v. United States*** (5th Cir. 1957) 243 F.2nd 281, 282.)

Similarly, observation of a marijuana patch while flying at an altitude of some 1,500 to 2,000 feet, visible to the naked eye (and then enhanced through the use of binoculars), did not violate the defendant's privacy rights. (***Burkholder v. Superior Court*** (1979) 96 Cal.App.3rd 421; see also ***People v. St Amour*** (1980) 104 Cal.App.3rd 886, observations made from 1,000 to 1,500 feet, again enhanced through the use of binoculars, held to be lawful and ***People v. Joubert*** (1981) 118 Cal.App.3rd 637.)

Night Vision Goggles:

The use of night vision goggles was held to be irrelevant when used to observe areas within the curtilage of defendants' residence. (***People v. Lieng*** (2010) 190 Cal.App.4th 1213, 1227-1228.)

***A Controlled Tire Deflation Device* ("*CTDD*")**:

The use of a "*controlled tire deflation device*" by the Border Patrol to stop a vehicle suspected of being used to smuggle controlled substances over the US/Mexico border held to be a detention only (thus requiring only a reasonable suspicion) and not excessive force under the circumstances. (***United States v. Guzman-Padilla*** (9th Cir. 2009) 573 F.3rd 865.)

Note: The "*controlled tire deflation device*," or "*CTDD*," is an accordion-like tray containing small, hollow steel tubes that puncture the tires of a passing vehicle and cause a gradual release of air, bringing the vehicle to a halt within a quarter to half a mile.

Videotaping, Tape-Recording, and Photographing:

General Rule: "Video surveillance does not in itself violate a reasonable expectation of privacy. Videotaping of suspects in public places, such as banks, does not violate the **Fourth Amendment**; the police may record what they normally may view with the naked eye. (Citation)" (***United States v. Taketa*** (9th Cir, 1991) 923 F.2nd 665, 667.)

> However, if in a place where a person has a reasonable expectation of privacy, to videotape him without a court's authorization (i.e., a search warrant) is illegal. (***Id.***, at pp. 675-677.)

Street Light Cameras:

> The City of San Diego has installed what the City refers to as its "City IQ Streetlight Camera" system. The cameras are situated so they cannot peer into businesses or residences, thus capturing only the "public right of way." They are fixed position and located throughout downtown San Diego and other parts of the city. The devices capture "environmental data, like temperature, humidity, pressure, … traffic data, like car speeds, car counts, pedestrian data, bicycle data, and even video data." The video feature creates high quality wide lens footage, but the devices do not record sound and do not act as gunshot detectors because the City did not "enable the microphones." Footage is stored on each camera's hard drive for five days; if it is not retrieved within five days, the camera records over the footage. Defendant Kevin Eugene Cartwright was convicted of first-degree murder with special circumstances, and other offense. On appeal, defendant contended that the trial court erred by denying his motion to suppress video footage from the City of San Diego's "City IQ" streetlight camera program and evidence derived from that footage. The Fourth Appellate District affirmed the trial court's decision. The court held that defendant did not have an objectively reasonable expectation of privacy when he traversed a public right of way in downtown San Diego in the middle of a business day. The court found that accessing the recordings from the City's streetlight cameras did not amount to a search within the meaning of the **Fourth Amendment** and, consequently, did not require a warrant. The court distinguished the cameras in this case from the aerial surveillance images and integrated police department systems addressed in other precedents, stating that the City's camera program stands alone and does not reveal the transit patterns of people throughout the county. The court concluded that the police did not conduct a "search" when they accessed footage from the City's streetlight cameras and, accordingly, there was no violation of the **Fourth Amendment**. (***People v. Cartwright*** (2024) 99 Cal.App.5th 98.)

Pole Cameras: Videotaping From Off the Property: Cases have gone both ways:

Upheld:

Placing a surveillance video camera on a utility pole about 200 yards from the front of defendant's rural residence/trailer and barn, monitoring the camera for about 10 weeks, was held *not* to be a **Fourth Amendment** violation in that nothing was viewed that anyone in public could not have seen. The Court also reasoned that the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) could have stationed an agent at that location around the clock and seen the same thing. The fact that it was easier to do this by means of a video camera did not make it a **Fourth Amendment** violation. (***United States v. Houston*** (6th Cir. 2016) 813 F.3rd 282.)

As a part of a drug-trafficking investigation, officers installed a camera on a telephone pole located on the public road outside of the defendant's apartment parking lot and carport. The camera, which recorded continuously for 23 days, produced video as well as still shots. The pole-camera footage captured defendant engaging in what officers suspected were drug transactions in the parking lot. On appeal from defendant's conviction, the Sixth Circuit Court of Appeal held that defendant had no reasonable expectation of privacy in the carport. Therefore, the use of the pole camera did not constitute a **Fourth Amendment** search. (***United States v. May-Shaw*** (6th Cir. 2020) 955 F.3rd 563.)

Government agents (ATF) setting up a "pole camera," which for eight months monitored the front of defendant's home 24 hours a day, seven days a week, although it did not record sound, was held to be lawful, the Court denying defendant's **Fourth Amendment** argument that due to the U.S. Supreme Court's decision in ***Carpenter v. United States*** (June 22, 2018) 585 U.S. __, __ [138 S.Ct. 2206; 201 L.Ed.2nd 507], such a monitoring violated her privacy rights. (***United States v. Moore-Bush*** (1st Cir. 2020) 963 F.3rd 29; citing its own prior precedent of ***United States v. Bucci*** (1st Cir. 2009) 582 F.3rd 108.)

Between 2013 and 2016, several law enforcement agencies investigating a large methamphetamine distribution ring installed three cameras on public property that viewed defendant's home. Officers mounted two cameras on a pole in an alley next to defendant's residence and a third on a pole one block south of the other two cameras. The first two cameras viewed the front of

defendant's home and an adjoining parking area. The third camera also viewed the outside of defendant's home but primarily captured a shed owned by another member of the ring. Together, the three cameras, operating 24 hours a day, captured almost eighteen months of footage by recording defendant's property between 2014 and 2016, accumulating over 100 instances of what officers suspected were deliveries of methamphetamine to defendant's residence, and subsequent purchases being made. The Seventh Circuit Court of Appeals held that the isolated use of pole cameras on public property, without a warrant, used to observe defendant's home, did *not* violate the **Fourth Amendment**. A person's expectation of privacy generally does not extend to what a person "knowingly exposes to the public, even in his own home." The Court further rejected defendant's argument that the prolonged and uninterrupted use of the pole cameras to conduct continuous surveillance of his house, for a period of approximately eighteen months, constituted a **Fourth Amendment** violation under the "*mosaic theory*;" i.e., that the "government can learn more from a given slice of information if it can put that information in the context of a broader pattern, a mosaic." Finally, the Court recognized that the prolonged use of pole camera surveillance has been held to be a **Fourth Amendment** violation in some jurisdictions, but held that at least in the 7th Circuit, it does not. (***United States v. Tuggle*** (7th Cir. IL 2021) 4 F.4th 505.)

Not Upheld:

See ***United States v. Vargas*** (2014) 2014 U.S. Dist. LEXIS 184672, reaching the exact opposite conclusion, where a Washington State federal trial court held that the **Fourth Amendment** requires law enforcement to first obtain a search warrant in order to continuously (six weeks, in this case) videotape the front of defendant's home and yard even though the camera, with zooming and panning capabilities, was set up on a public utility pole some 100 yards from defendant's home, well off his property.

Additional Case Law:

A warrantless videotape surveillance in the mailroom of a hospital, open to some 800 hospital employees but not of the defendant's private workspace, did not violate the defendant's expectation of privacy and was therefore lawful. (***United States v. Gonzalez*** (9th Cir. 2003) 328 F.3rd 543.)

In a homicide investigation where defendant was the primary suspect, "the police surveillance and photographing of defendant entering and exiting the drop-off point is not a subject of **Fourth Amendment** protection since defendant knowingly exposed his whereabouts in public." ***People v. Maury*** (2003) 30 Cal.4th 342, 384-385.)

The **Fourth Amendment's** protections do not extend to information that a person voluntarily exposes to a government agent, including an undercover agent. A defendant generally has no privacy interest in that which he voluntarily reveals to a government agent. Therefore, a government agent may make an audio-video recording of a suspect's statements even in the suspect's own home, and those audio-video recordings, made with the consent of the government agent, do not require a warrant. (***United States v. Wahchumwah*** (9th Cir. 2013) 710 F.3rd 862, 866-868; an investigation involving the illegal sale of eagle feathers under the **Bald and Golden Eagle Protection Act** (**16 U.S.C § 668(a)** and the **Lacey Act (16 U.S.C. §§ 2271(a)(1)** & **3373(d)(1)(B)**,)

> The Court further noted that the fact that the technology is not generally available to the public, and is more intrusive than mere audio surveillance, is irrelevant to the **Fourth Amendment** analysis. (***Id.***, at p. 868.)
>
> *However*, the warrantless installation of a hidden video camera in a suspect's home, leaving it operating after the informant leaves the premises, is a **Fourth Amendment** violation. (***United States v. Nerber*** (9th Cir. 2000) 222 F.3rd 597, 604, fn. 5; ***United States v. Wahchumwah***, *supra*., at p. 867.)

The hallway in front of defendant's apartment, when the hallway is open to anyone who might come into that area, is not part of the curtilage of defendant's residence. Placing a motion detecting camera in the hallway, showing the entrance to defendant's apartment, was held not to be a violation of the **Fourth Amendment** in that it did not violate any reasonable expectation of privacy defendant might have had in that area outside his apartment. (***United States v. Trice*** (6th Cir. 2020) 966 F.3rd 506.)

But, see ***People v. Rodriguez*** (1993) 21 Cal.App.4th 232, 239; stopping and detaining gang members *for the purpose of* photographing them is illegal without reasonable suspicion of criminal activity. Merely being a member of a gang, by itself, is not cause to detain.

> Membership in a street gang is not in and of itself a crime. (See **P.C. § 186.22**) The practice of stopping, detaining, questioning, and perhaps photographing a suspected gang member, based solely

upon the person's suspected gang membership, is illegal. (***People v. Green*** (1991) 227 Cal.App.3rd 692, 699-700.)

Note also that a police dash-cam video of an arrest is subject to release to the news media following a **California Public Records Act** (**Gov. Code, §§ 6250 et seq**.) request (and therefore likely subject to discovery by the defendant as well), in that it does *not* constitute a confidential "personnel record" under **Penal Code §§ 832.7** or **832.8**. (***City of Eureka v. Superior Court*** (2016) 1 Cal.App.5th 755, 761-765.)

Where the issue was whether in an assault trial arising from a fight between two groups of people, any error resulted from the admission of videos that had been assembled and synchronized from various businesses' surveillance systems and bystanders' cell phone footage, the Court held that neither the videos nor the expert's testimony were subject to the ***Kelly-Frye*** test because the work was a form of computer animation analogous to charts or diagrams used in other classic forms of demonstrative evidence. The expert did not alter the underlying surveillance videos except to enhance their quality and correct pixel ratios. Also, the evidence was highly probative of the circumstances that led to the victim's paralysis. The expert assistance was critical because multiple surveillance videos depicted a moving melee, at night, with at least a dozen bodies interacting on a crowded street. (***People v. Tran*** (2020) 50 Cal.App.5th 171.)

Note: "***Kelly-Frye***" refers to ***People v. Kelly*** (1976) 17 Cal.3rd 24 and ***Frye v. United States*** (D.C. Cir. 1923) 293 F. 1013, establishing the criteria for admissibility of expert testimony concerning certain scientific evidence, as commonly accepted in the scientific world.

Note that it has been held in a civil case: "The mere existence of video footage of the incident does not foreclose a genuine factual dispute as to the reasonable inferences that can be drawn from that footage." (***Vos v. City of Newport Beach*** (9th Cir. 2018) 892 F.3rd 1024, 1028; citing ***Scott v. Harris*** (2007) 550 U.S. 372, 378, 380 [127 S.Ct. 1769; 167 L.Ed.2nd 686]; see also ***Tabares v. City of Huntington Beach*** (9th Cir. 2021) 988 F.3rd 1119, 1123, fn. 4.)

Videotaping, Tape-Recording, and Photographing by Private Citizens:

A private citizen has a **First Amendment** right to videotape public officials (i.e., police officers) in a public place, and the arrest of the citizen for a Massachusetts state wiretapping violation, violated the citizen's **First** and **Fourth Amendment** rights. (***Glik v. Cunniffe*** (1st Cir. 2011) 655 F.3rd 78, 82-84.)

Police lack the authority to prohibit a citizen from recording commissioners during a town hall meeting "because [the citizen's] activities were peaceful, not performed in derogation of any law, and done in the exercise of his **First Amendment** rights[.]"). (***Iacobucci v. Boulter*** (1st Cir. 1999) 193 F.3rd 14.)

A state's eavesdropping statute that attempts to prohibit the recording of another without the consent of all parties does *not* preclude the audiovisual-recording of police officers performing their official duties in a public place, at least when the officers are speaking at a volume audible to bystanders. Such a statute has been held, under these circumstances, to violate the **First Amendment's** right to free-speech and free-press. (***ACLU v. Alvarez*** (7th Cir. 2012) 679 F.3rd 583; "The act of making an audio or audiovisual recording is necessarily included within the **First Amendment's** guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording." Pg. 595; see also ***Fordyce v. City of Seattle*** (9th Cir. 1995) 55 F.3rd 436, 439-440.)

And it has been held that; "The **First Amendment** protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest." (***Smith v. City of Cumming*** (11th Cir. 2000) 212 F.3rd 1332, 1333.)

The Ninth Circuit has also recognized, without discussing the issue, the **First Amendment's** protections for one who records bystanders who happened to be viewing public demonstrations, even without their consent. (See ***Fordyce v. City of Seattle***, *supra*, at p. 439; finding the applicability of the state's eavesdropping statute to be an undecided issue.)

Citing ***Fordyce*** in an unpublished opinion, the Ninth Circuit further recognized the **First Amendment** right to photograph the scene of a traffic accident. (***Adkins v. Limtiaco*** (9th Cir. 2013) 537 Fed. Appx. 721.)

See also ***Turner v. Driver*** (5th Cir. 2017) 848 F.3rd 678, where it was held that at least until the decision in this case, whether or not the **First Amendment** protects a person's right to record the police was an undecided issue in the Fifth Federal Circuit [Texas], providing the officers with qualified immunity when they detained him and took his video camera. However, arresting him was clearly a **Fourth Amendment** violation for which the officers were not entitled to qualified immunity.

However, there is some authority for the argument that an airport security check point constitutes a "uniquely sensitive setting" where "order and security are of obvious importance," and thus entitled to greater protection than out on the street. Whether or not law enforcement officers may

prohibit an uncooperative (i.e., refusing to provide evidence of his identity) suspect from recording TSA agents and other law enforcement officers at an airport security checkpoint is an open question, at least providing officers with qualified immunity from civil liability when they seize the suspect's camera over his objection and delete (or attempt to do so) the contents. (***Mocek v. City of Albuquerque*** (10th Cir. 2015) 813 F.3rd 912; while defendant was acquitted of all criminal charges after a jury trial, the officers were found to have qualified immunity in the resulting civil case.)

The federal Third Circuit Court of Appeal has held in two separate cases, where plaintiffs alleged that police officers illegally retaliated against them for exercising their **First Amendment** right to record public police activity, that private individuals have a **First Amendment** right to observe and record police officers engaged in the public discharge of their duties, although the defendant police officers were held to have qualified immunity in that the rule was, per the Court, not well-settled at the time. (***Fields v. City of Philadelphia*** (3rd Cir. 2017) 862 F.3rd 353.)

Also, as of January 1, 2016, California's resisting arrest statutes (i.e., **P.C. §§ 69** and **148**) specifically state that photographing, videotaping, or audio recording, is *not* an interference with the officer's performance of his duties. (**Subdivisions (b)** and **(g)**, respectively.)

In a trial for reckless driving, the **Fourth Amendment** did not require suppression of evidence obtained from defendant's dashboard camera which was seized following a collision between his vehicle and a motorcycle. The officer's belief that defendant was driving recklessly was supported by friction marks at the scene. Also, the officer's belief that defendant might seek to destroy the evidence was supported by his experience dealing with high-performance cars with dashboard cameras. The fact that defendant removed the camera and placed it in his backpack, and defendant's hesitancy to provide the camera, supported the officer's belief on that issue, justifying the immediate seizure of the camera pending the obtaining of a search warrant to search it. (***People v. Tran*** **(**2019) 42 Cal.App.5th 1.)

> On the issue of the constitutionality of the immediate seizure of defendant's dash-cam, the Court noted the following: "A seizure is 'far less intrusive than a search.' (***United States v. Payton*** (9th Cir. 2009) 573 F.3rd 859, 863.) . . . . Whereas a search implicates a person's right to keep the contents of his or her belongings private, a seizure only affects their right to possess the particular item in question. (***Segura v. United States*** (1984) 468 U.S. 796, 806, 104 S. Ct. 3380, 82 L.Ed.2nd 599) . . . . Consequently, the police generally have greater leeway in terms of conducting a warrantless

> seizure than they do in carrying out a warrantless search. The United States Supreme Court has 'frequently approved warrantless seizures of property . . . for the time necessary to secure a warrant, where a warrantless search was either held to be or likely would have been impermissible.' (***Ibid***.)" (***Id***., at p. 8.)

And the Federal Fourth Circuit Court of Appeal has held that at least as a general rule, "livestreaming" the police during an encounter with officers is similarly protected by the **First Amendment**. However, the Court also noted that law enforcement interests can easily overcome that right in some circumstances, such as when there is a concern that recipients of the livestreaming as the contact is occurring might be motivated to intervene and interfere with the officers performing their lawful duties. In so ruling, the Court also affirmed qualified immunity for the officer who tried to snatch the plaintiff's cellphone. The plaintiff had sued that officer for personal liability in his individual capacity. The court affirmed dismissal of the claims against that officer because "it was not clearly established" at the time that passengers have a right to livestream - as opposed to record - traffic stops in which they're involved. (***Sharpe v. Winterville Police Department*** (4th Cir. 2023) 59 F.4th 674.)

Tape-Recording Law Enforcement Contacts by Private Citizens:

The federal First Circuit Court of Appeal has ruled that a state statute purporting to make it illegal for a private citizen to secretly record police officers discharging their official duties in public spaces violated the **First Amendment** because the particular statute at issue (i.e., Massachusetts **General Law**, **Chapter 272**, **Section 99**, enacted in 1968, making it a crime for a person to, among other things, intercept any wire or oral communication made by another person) was "not narrowly tailored to further the government's important interest in preventing interference with police doing their jobs and thereby protecting the public." The Court found that that the civil defendants (i.e., the Commissioner of the Boston Police Department and the District Attorney for Suffolk County) presented little evidence to show how secret, nonconsensual audio recording of police officers doing their jobs in public interfered with their mission. Instead, the Court stated that "**Section 99** broadly prohibits such recording, notwithstanding the myriad circumstances in which it may play a critical role in informing the public about how the police are conducting themselves, whether by documenting their heroism, dispelling claims of their misconduct, or facilitating the public's ability to hold them to account for their wrongdoing." As such, the statute, at least as applied to these plaintiffs, was found to violate the **First Amendment**. (***Project Veritas Action Fund v. Rollins*** (1st Cir. 2020) 982 F.3rd 813.)

Pen. Code § 632: *Illegal Eavesdropping on Confidential Communications*:

> However, a hidden security video camera that takes pictures, but with no sound, is *not* a violation of **section 632**, but only because of the lack of a sound-recording capability. (***People v. Drennan*** (2000) 84 Cal.App.4th 1349; specifically disagreeing with the earlier case of ***People v. Gibbons*** (1989) 215 Cal.App.3rd 1204, which held that surreptitiously video recording acts of sexual intercourse violated **§ 632**, referring to sexual intercourse as a form of "communication.")

Metal Detectors: The use of metal detectors (or "*magnetometers*") constitute a search, but are lawful without a search warrant or individualized suspicion when:

> *On School Campuses*: Random metal detector searches of students, without any individualized suspicion, are justified by the "*special needs*" of keeping weapons off campuses. The **Fourth Amendment** is not violated by such searches where the government need is great, the intrusion on the individual is limited, and a more rigorous standard of suspicion is unworkable. (***In re Latasha W.*** (1998) 60 Cal.App.4th 1524.)
>
> *At Airports*: As an "*administrative search*," not intended to be a part of a criminal investigation to secure evidence, but to insure that dangerous weapons will not be carried onto an airplane and to deter potential hijackers from attempting to board, pre-departure screening procedures, including the use of a magnetometer, is lawful despite the lack of any particularized suspicion or a warrant. (***People v. Hyde*** (1974) 12 Cal.3rd 158.)
>
> > The legality of such searches depends upon the balancing of society's interest in safe air travel with the right of the individual passenger to be free from unnecessary government intrusions. Airport searches are reasonable when: (1) They are no more extensive or intensive than necessary, in light of current technology, to detect weapons or explosives; (2) they are confined in good faith to that purpose; and (3) passengers are given the opportunity to avoid the search by electing not to fly. (***United States v. Marquez*** (9th Cir. 2005) 410 F.3rd 612; A second, more intense, yet random screening of passengers as a part of airline boarding security procedures, held to be constitutional.)

***Cellphones, Disks, Computers and Other High Tech Devices*:**

> The current trend of referring to computers and cellphones as "*containers of information*" is being more and more criticized, with the prediction of the coming of a whole new body of law dealing with electronic devices. "'Since electronic storage is likely to contain a greater quantity and variety of information than any previous storage method, . . . '[r]elying on analogies to closed containers or file

cabinets may lead courts to "oversimplify a complex area of **Fourth Amendment** doctrines and ignore the realities of massive modern computer storage."' [Citation.]" (***People v. Michael E.*** (2014) 230 Cal.App.4th 261, 276-279; citing ***United States v. Carey*** (10th Cir. 1999) 172 F.3rd 1268, 1275.)

See "*Seizures and Searches of High Tech Devices*" (Chapter 17), below.

***Chapter 15*:**

Open Fields:

General Rule: The constitutional protections relating to homes *do not* apply to *open fields*, at least beyond the curtilage of the home. (***Oliver v. United States*** (1984) 466 U.S. 170 [104 S.Ct. 1735; 80 L.Ed.2nd 214].)

The **Fourth Amendment**, by its terms, protects only "*persons, houses, papers, and effects*." "Open fields" do not come within these four protected categories. (***United States v. Jones*** (2012) 565 U.S. 400, 404-413 [132 S.Ct. 945, 949-954; 181 L.Ed.2nd 911]; ***Florida v. Jardines*** (2013) 569 U.S. 1, 6 [133 S.Ct. 1409; 185 L.Ed.2nd 495].)

Therefore, trespassing onto defendant's open land does not implicate the Constitution, and any observations made while doing so are admissible. (***Ibid***; see also ***Hester v. United States*** (1924) 265 U.S. 57 [44 S.Ct. 445; 68 L.Ed. 898].)

Narcotics officers entered the defendant's land, past "No Trespassing" signs and barbed wire fencing. Entry into such an area, not part of the cartilage of any home, was not contested. (***United States v. Barajas-Avalos*** (9th Cir, 2004) 359 F.3rd 1204.)

Observations made into private areas from an "open field" beyond the curtilage of the home are lawful. (***United States v. Dunn*** (1987) 480 U.S. 294 [107 S.Ct. 1134; 94 L.Ed.2nd 326].)

California expressly follows the federal rule. (***People v. Channing*** (2000) 81 Cal.App.4th 985.)

Observations made from a common driveway used by other residents and the public into the curtilage of defendant's home (i.e., his garage) were lawful, and properly used in the affidavit for a search warrant. (***People v. Lieng*** (2010) 190 Cal.App.4th 1213, 1221-1227.)

Use of night vision goggles doesn't change the result. (***Id***., at pp. 1227-1228.)

Overflights:

The warrantless entry onto plaintiffs' property to seize marijuana plants, originally observed by aerial surveillance, held to be lawful under the "*open fields doctrine*." (***Littlefield v. County of Humboldt*** (2013) 218 Cal.App.4th 243, 250-254.)

> "'[T]he special protection accorded by the **Fourth Amendment** to the people in their "persons, houses, papers, and effects," is not extended to the open fields. The distinction between the latter and the house is as old as the common law.'" (***Ibid***., citing ***Oliver v. United States*** (1984) 466 U.S. 170, 176-179 [104 S.Ct. 1735; 80 L.Ed.2nd 214].)

A warrantless airplane search, acting on a tip, at altitudes of between 300 to 700 feet, resulting in observation of defendant's half-football-field-sized marijuana grow, was lawful. (***Dean v. Superior Court*** (1973) 35 Cal.App.3rd 112.)

Similarly, observation of a marijuana patch from 1,500 to 2,000 feet in the air, visible to the naked eye (and then enhanced through the use of binoculars), did not violate the defendant's privacy rights. (***Burkholder v. Superior Court*** (1979) 96 Cal.App.3rd 421; see also ***People v. St. Amour*** (1980) 104 Cal.App.3rd 886, observations made from 1,000 to 1,500 feet, again enhanced through the use of binoculars, held to be lawful; and ***People v. Joubert*** (1981) 118 Cal.App.3rd 637.)

See "Aerial Surveillance," under "*New and Developing Law Enforcement Tools and Technology*" (Chapter 14), above.

***Chapter 16*:**

***Searches of Containers*:**

General Rule*:** As a general rule, a search warrant will be required in order to search a container of any type. "The **Fourth Amendment** of the United States Constitution prohibits the government from engaging in unreasonable searches and seizures of a person's 'effects.'" (People v. Pereira*** (2007) 150 Cal.App.4th 1106, 1111; see also ***United States v. Monghur*** (9th Cir. 2009) 588 F.3rd 975.)

Also, property in the possession or under the control *of a subject who is booked* into custody is subject to search: "Once articles have lawfully fallen into the hands of the police they may examine them to see if they have been stolen, test them to see if they have been used in the commission of a crime, return them to the prisoner on his release, or preserve them for use as evidence at the time of trial. (***People v. Robertson*** 240 Cal.App.2d 99 (1966) 105-106 . . . .) During their period of police custody an arrested person's personal effects, like his person itself, are subject to reasonable inspection, examination, and test. (***People v. Chaigles*** 237 N.Y. 193 [142 N.E. 583, 32 A.L.R. 676], Cardozo, J.)" (***People v. Rogers*** (1966) 241 Cal.App.2nd 384, 389.)

As the law stands today, a search warrant will still generally be required to search a container under most circumstances. (***Smith v. Ohio*** (1990) 494 U.S. 541, 542 [110 S.Ct. 1288; 108 L.Ed.2nd 464, 467].)

See ***Robey v. Superior Court*** (2013) 56 Cal.4th 1218, 1236-1240, reiterating the general rule that "the **Fourth Amendment's** protection extends to letters and other sealed packages in shipment."

A person has an expectation of privacy in his or her private closed containers. (***United States v. Welch*** (9th Cir. 1993) 4 F.3rd 761, 764; a woman's purse.)

Cardboard boxes belonging to a homeless person, being a place where the homeless person stores his or her most private belongings, may not be searched without a warrant or consent. (***United States v. Fultz*** (9th Cir. 1998) 146 F.3rd 1102.)

While the odor of marijuana coming from a mailed package will justify the seizure of such package, it does not excuse the lack of a search warrant when law enforcement opens the package without exigent circumstances. (***Robey v. Superior Court*** (2013) 56 Cal.4th 1218, 1223-1243; overruling ***People v. McKinnon*** (1972) 7 Cal.3rd 899, 909; which had held to the contrary.

***Possible Future Change in the Rule*:**

There is some authority for the proposition that; "(t)he rationale justifying a warrantless search of an automobile that is believed to be transporting contraband arguably applies with equal force to any movable container that is believed to be carrying an illicit substance." (***United States v. Ross*** (1982) 456 U.S. 798, 809 [102 S.Ct. 2157; 72 L.Ed.2nd 572, 584.) However, the courts have not yet specifically extended this rationale to objects in containers other than when the container is in a vehicle or seized incident to a suspect's arrest. (See Justice Stevens' dissent in ***California v. Acevedo*** (1991) 500 U.S. 565, 598 [111 S.Ct. 1982; 114 L.Ed.2nd 619], predicting that this this may be the next step.)

***Exceptions to the Warrant Requirement*:** There are a number of legal theories justifying a warrantless search of containers. For instance:

Incident to Arrest: When a person is lawfully arrested, the police have a right to make a contemporaneous warrantless search (i.e., a search "*incident to arrest*") of the defendant's person (***Weeks v. United States*** (1914) 232 U.S. 383 [34 S.Ct. 341; 58 L.Ed. 652].) *and things under his immediate control*. (***Carroll v. United States*** (1925) 267 U.S. 132 [45 S.Ct. 280; 69 L.Ed.2nd 543].)

Transportation Required:

The "*Incident to Arrest*" rule, however, only applies when the defendant is to be transported somewhere. If cited and released at the scene, no search, except when there is probable cause to believe the container contains some sizable contraband or evidence, is allowed. (See "*Searches Incident to Arrest*," "*Transportation Requirement*," under "*Searches of Persons*" (Chapter 11), above. See also ***People v. Brisendine*** (1975) 13 Cal.3rd 528; and ***United States v. Robinson*** (1973) 414 U.S. 218 [94 S.Ct. 467; 38 L.Ed.2nd 427].)

However, if the arrestee has been secured (i.e., handcuffed and placed into a patrol car) in preparation to being transported, the U.S. Supreme Court has held the lunging area around him is no longer subject to being searched, at least when arrested out of the arrestee's vehicle. (***Arizona v. Gant*** (2009) 556 U.S. 332 [129 S.Ct. 1710; 173 L.Ed.2nd 485]; see "*Searches of Vehicles*" (Chapter 12), above, and "*Incident to Arrest In a Vehicle*," below.)

Although the United States Supreme Court has indicated that ***Gant*** is limited to "circumstances unique to the vehicle context" (See (***Riley v. California*** (2014) 573 U.S. 373, 400 [134 S.Ct. 2473; 189 L.Ed.2nd 430], citing ***Gant*** at p. 343), at least one California court

has applied it to the residential situation. (See ***People v. Leal*** (2009) 178 Cal.App.4th 1051; arrest in a residence.)

Booking Searches: Property in the possession of a subject who is booked into custody is subject to search:

> A person who is to be booked, and who has objects in his possession, may be subjected to an *inventory search* despite the lack of probable cause. (***Illinois v. Lafayette*** (1983) 462 U.S. 640 [103 S.Ct. 2605; 77 L.Ed.2nd 65].)
>
> The right to conduct a warrantless booking search includes the right to search containers (e.g., purse, wallet, cellphone etc.) "*immediately associated with the person of an arrestee*." (***Illinois v. Lafayette***, *supra*; ***People v. Hamilton*** (1988) 46 Cal.3rd 123, 137; see also ***People v. Diaz*** (2011) 51 Cal.4th 84; searches of containers "*immediately associated with the person*.")
>
> > ***Diaz*** involved the warrantless search of a cellphone seized incident to arrest. The United States Supreme Court impliedly overruled ***Diaz*** on this point, holding that a cellphone seized incident to arrest may not be searched without a search warrant or exigent circumstances. (***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430].)
> >
> > The California Supreme Court concluded in a warrantless cellphone search case (reversing a lower appellate court decision) that the search of defendant's cellphone would not have been proper even under its prior decision in ***People v. Diaz*** (2011) 51 Cal.4th 84 (a search incident to arrest case), and that a reasonably well-trained officer would have known this. Defendant was not under arrest when officers searched his phone. Under ***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430], which overruled ***Diaz***, even if defendant had been properly arrested, a warrant was required to search his cellphone. The search in this case violated the **Fourth Amendment**; the good faith exception to the exclusionary rule did not apply. Also, the search was not the result of negligence, nor did it result from any pressure to apply a newly enacted statutory scheme that was confusing and complex. The officers' conduct, including the search, was deliberate. Exclusion of the evidence in this case serves to deter future similar behavior. (***People v. Macabeo*** (2016) 1 Cal.5th 1206, 1212-1226.)

Cellphones are not "containers" for purposes of the vehicle exception to the search warrant requirement. (***United States v. Camou*** (9th Cir. 2014) 773 F.3rd 932, 941-943.)

See also ***United States v. Lara*** (9th Cir. 2016) 815 F.3rd 605, 610-611; declining to include defendant's cellphone under the category of a "container," in defendant's **Fourth** waiver search conditions.

However, in a questionable decision, the Tenth Circuit Court of Appeal found in ***United States v. Braxton*** (10th Cir. 2023) 61 F.4th 830, that a backpack in the defendant's possession at the time of his arrest was illegally searched under the circumstances of this case. Citing its own prior precedent in ***United States v. Knapp*** (10th Cir. 2019) 917 F.3rd 1161, the Court accepted the State's concession that search the backpack was not justifiable under the "incident to arrest" theory. The Court also rejected a "community caretaking" argument. The Court finally held that "inevitable discovery" did not apply in that impoundment of the backpack was not reasonable under these circumstances.

Note: This decision could perhaps be justified by the fact that defendant's girlfriend was present at the scene and sought to obtain items from the backpack. She also could have taken custody of the backpack, the court noting that "reasonable officers dealing with the backpack in a lawful manner would have inquired further about whether they should give the backpack to (the girlfriend)," thus eliminating the need to impound it.

Incident to Arrest In a Vehicle: When arresting an occupant of a motor vehicle, the officer may search the person arrested *and* the passenger areas of the vehicle, *and any containers within the passenger area of the vehicle*. (***New York v. Belton*** (1981) 395 U.S. 752 [101 S.Ct. 2860; 69 L.Ed.2nd 775].)

This includes containers belonging to passengers other than, and in addition to, the person arrested. (***People v. Mitchell*** (1995) 36 Cal.App.4th 672; ***People v. Prance*** (1991) 226 Cal.App.3rd 1525; see also ***Wyoming v. Houghton*** (1999) 526 U.S. 295 [119 S.Ct. 1297; 143 L.Ed.2nd 408], making containers left in a vehicle by passengers subject to search when searching a vehicle with *probable cause* to believe the vehicle contains contraband.)

If, however, the passenger takes the container (such as a purse) with him or her upon being ordered out of a vehicle, is that

container subject to search? *Probably not* (see ***United States v. Vaughan*** (9th Cir. 1983) 718 F.2nd 332.), absent some reason to believe it may contain a weapon, in which case a "*patdown*" of the container may be appropriate.

But, remember that a search incident to an arrest must be "*contemporaneous in time and place*" with the arrest. (***People v. Stoffle*** (1992) 1 Cal.App.4th 1671; ***People v. Boissard*** (1992) 5 Cal.App.4th 972.) (See "*Incident to Arrest*," under "*Searches of Persons*" (Chapter 11), above.)

Severely limiting the rule of ***Belton***, the U.S. Supreme Court decided in ***Arizona v. Gant*** (2009) 556 U.S. 332 [129 S.Ct. 1710; 173 L.Ed.2nd 485], that a warrantless search of a vehicle incident to arrest is lawful *only* when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. As an alternate theory under ***Gant***, likely to be applicable only to searches incident to arrest in a vehicle, the officer may search for evidence relevant to the charge of arrest whenever it is "*reasonable to believe*" that such evidence is present in the car.

> See "*Limitation of the **Chimel**/**Belton** 'Bright Line' Test*; *When the Arrestee Has Been Secured*," under "*Searches of Vehicles*" (Chapter 12), above.

People v. Diaz (2011) 51 Cal.4th 84, created an exception to ***Gant***, finding that containers "*immediately associated with the person*" are still subject to a search incident to arrest, even though the suspect has been arrested and secured, and even if the container, removed from the defendant's person, is not searched until later.

> In so far as ***Diaz*** refers to cellphones, this case has been impliedly overruled by the United States Supreme Court in ***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430]. (See also ***People v. Macabeo*** (2016) 1 Cal.5th 1206, 1212-1226.)
>
> Cellphones are not "containers" for purposes of the vehicle exception to the search warrant requirement. (***United States v. Camou*** (9th Cir. 2014) 773 F.3rd 932, 941-943.)
>
> See also ***United States v. Lara*** (9th Cir. 2016) 815 F.3rd 605, 610-611; declining to include defendant's cellphone under the category of a "container," in defendant's **Fourth** waiver search conditions.

See "*Incident to Arrest*," under "*Searches of Vehicles*" (Chapter 12), above.

With Probable Cause, In a Vehicle: When there is *probable cause* to search a motor vehicle encountered on the street or in public, or any specific containers in that vehicle, a warrantless search of the containers in the motor vehicle is lawful. (***United States v. Ross*** (1982) 456 U.S. 798 [102 S.Ct. 2157; 73 L.Ed.2nd 572]; ***California v. Acevedo*** (1991) 500 U.S. 565, 580 [111 S.Ct. 1982; 114 L.Ed.2nd 619]; ***People v. Schunk*** (1991) 235 Cal.App.3rd 1334, 1340-1343.)

The old rule (see ***United States v. Chadwick*** (1977) 433 U.S. 1 [97 S.Ct. 2476; 53 L.Ed.2nd 538].), that with probable cause to search a *particular container* located in a vehicle, a search warrant would be required, is no longer a valid rule. (***California v. Acevedo***, *supra*.)

And see ***Wyoming v. Houghton*** (1999) 526 U.S. 295 [119 S.Ct. 1297; 143 L.Ed.2nd 408], holding that the searching of a passenger's personal property left in a vehicle, with probable cause to believe there is sizable contraband *somewhere* in the vehicle, is lawful.

Also note that probable cause to believe there are controlled substances *somewhere* in the vehicle, even if the amount suspected is only enough for one's personal use, justifies a search of the *entire* vehicle including the trunk and engine compartment. (***People v. Hunter*** (2005) 133 Cal.App.4th 371; ***People v. Dey*** (2000) 84 Cal.App.4th 1318; finding the ***United States v. Ross***, *supra*, has, in effect, overruled prior cases to the contrary. (E.g.; see ***Wimberly v. Superior Court*** (1976) 16 Cal. 3d 557; ***People v. Gregg*** (1974) 43 Cal.App.3rd 137.)

Cellphones are not "containers" for purposes of the vehicle exception to the search warrant requirement. (***United States v. Camou*** (9th Cir. 2014) 773 F.3rd 932, 941-943; extending the prohibitions on warrantless cellphone searches seized incident to arrest.)

See also ***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430], holding that warrantless cellphone searches seized in a vehicle are illegal.

See "*With Probable Cause*," under "*Searches of Vehicles*" (Chapter 12), above.

See also ***United States v. Lara*** (9th Cir. 2016) 815 F.3rd 605, 610-611; declining to include defendant's cellphone under the category of a "container," in defendant's **Fourth** waiver search conditions.

See the extensive review of the law by the California Supreme court on searches of containers found in vehicles at ***Robey v. Superior Court*** (2013) 56 Cal.4th 1218, 1223-1243.

*When at Least One Person in a Vehicle is Subject to a **Fourth** Waiver*:

A search of the female defendant's purse left in the car when an officer is conducting a parole search of a male parolee, is illegal *absent a reasonable suspicion* to believe that the parolee had joint access, possession or control over the purse. (***People v. Baker*** (2008) 164 Cal.App.4th 1152.)

But, a warrantless search of those areas of the passenger compartment of a vehicle where an officer reasonably expects that the parolee could have stowed personal belongings or discarded items when aware of police activity, as well as a search of personal property located in those areas if the officer reasonably believes that the parolee owns those items or has the ability to exert control over them (a chip bag and a pair of woman's shoes in this case), is lawful. ***People v. Schmitz*** (2012) 55 Cal.4th 909, 916-933.)

Also, the Court noted that defendant's (vehicle driver or owner) lack of knowledge that his passenger was subject to search and seizure conditions is irrelevant to the legality of the parole search. (***Id***., at pp. 922-923.)

The factors to consider in determining what areas and items in a vehicle are subject to search include the nature of that area or item, how close and accessible the area or item is to the parolee, the privacy interests at stake, and the government's interest in conducting the search. (***Id***., at p. 923.)

Also, because "*cause*" is not required to justify such a search, an officer does not have to articulate facts demonstrating that the parolee actually placed personal items or discarded contraband in the open areas of the passenger compartment. The issue in court is going to be whether, when viewed objectively, it was reasonable for the officer to assume that any particular area or item might contain the parolee's personal property or be somewhere that he might be expected to secret items he didn't want the police to find. (***Id***., at p. 926.)

The same rule holds true as to a probationer with a **Fourth** waiver. (***People v. Cervantes*** (2017) 11 Cal.App.5th 860, 871; ruling that so long as the center console of a vehicle is not locked, secured, or otherwise closed off, a search of a center console based on a front seat passenger's probation search condition is objectively reasonable.)

See "*Common Areas; Vehicles*," *under* "*Fourth Waiver Searches*" (Chapter 19), below.

Note: Not all probationers (as opposed to parolees) are subject to a **Fourth** waiver. An officer needs to check before searching as to a probationer's **Fourth** waiver status.

With Defendant's Admission as to the Contents:

When a suspect makes "an unequivocal, contemporaneous, and voluntary disclosure (to a law enforcement officer) that a package or container contains contraband," it is arguable that he waives any reasonable expectation of privacy as to the contents of that container, eliminating the need to obtain a search warrant. (***United States v. Monghur*** (9th Cir. 2009) 588 F.3rd 975, 978-981; citing ***United States v. Cardona Rivera*** (7th Cir. 1990) 904 F.2nd 1149.)

However, a jail inmate talking over a jail telephone, where he is warned that his conversations were subject to monitoring, asking a friend to retrieve what officers understood to be a gun (although defendant only referred to it as "*the thing*") from a container (also described in vague, generic terms) in the closet of his girlfriend's home, was held *not* to have waived any expectation of privacy defendant had in the container that was later retrieved by law enforcement and illegally searched without a search warrant. (***United States v. Monghur***, *supra*.)

Abandoned Property: Any containers (or any other property) abandoned by a suspect, thus relinquishing at least an *objectively reasonable expectation of privacy*, if not also the subject's *subjective expectation of privacy*, may be seized and searched without probable cause and without a search warrant. (***In re Baraka H.*** (1992) 6 Cal.App.4th 1039.)

E.g.: A minor, who appeared to officers to be conducting narcotics transactions with passing motorists, retrieved controlled substances from a paper bag discarded on the ground some distance beyond the minor's reach. When detained, the bag was retrieved by the officers and searched and marijuana was recovered. By distancing himself from the bag, despite a lack of an intent to permanently abandon the property, the minor gave up any reasonable expectation of privacy in the bag's contents. (***In re Baraka H.***, *supra*.)

Observations of defendant retrieving contraband from a hole in the ground, covered by a piece of wood, in the common area of an apartment complex, while the observing officers are standing on adjacent private property with the permission of the property's owner, were lawful, as was the warrantless retrieval of the contraband found in the hole. (***People v. Shaw*** (2002) 97 Cal.App.4th 833.)

There is no expectation of privacy in a duffle bag left in an apartment laundry room open to anyone, even though placed out of the way on a high shelf. (***United States v. Fay*** (9th Cir. 2005) 410 F.3rd 589.)

Trashcans: There is no reasonable expectation of privacy in the trash containers one places out on the curb for pick up. (***California v. Greenwood*** (1988) 486 U.S. 35 [108 S.Ct. 1625; 100 L.Ed.2nd 30].)

> Note that this rule applies only to trashcans that were placed out on the curb for pick up, at which time the owner of the trashcan loses any expectation of privacy. A trashcan located within the curtilage of a suspect's home (e.g., at the side of the house) requires a search warrant (or consent) in order to be lawfully searched. (See ***People v. Lepere*** (2023) 91 Cal.App.5th 727, and footnote 1, citing ***Florida v. Jardines*** (2012) 569 U.S. 1, 6 [185 L.Ed.2nd 495; 133 S.Ct. 1409].)

Leaving a cellphone at the scene of a crime negates the suspect's expectation of privacy in the contents of that phone, and is therefore abandoned property despite the suspect's subjective wish to retrieve it, which he fails to act on. "Abandonment . . . is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search." (***People v. Daggs*** (2005) 133 Cal.App.4th 361.)

> Similarly, abandoning one's cellphone (apparently for the purpose of avoiding the possibility that officers might "ping" it and determined his location) during a high speed (and foot) chase negated any need for officers to obtain a search warrant before opening the cellphone and using it to call defendant's wife. (***United States v. Small*** (4th Cir. 2019) 944 F.3rd 490.)

However, the abandonment must be voluntary. Property abandoned as a result (i.e., the "*direct product*") of an unlawful detention (or unlawful arrest) may *not* be lawfully searched. (***United States v. Stephens*** (9th Cir. 2000) 206 F.3rd 914.)

Shipping a package while using a fictitious name and return address *does not* necessarily mean that the defendant has abandoned the property shipped. Abandonment is a question of fact, and depends upon the totality of the circumstances. The test is whether defendant's words or actions would cause a reasonable person in the searching officer's position to believe that the property was abandoned. Where defendant asked for a routing number and made a number of telephone inquiries concerning the

status of the package he had shipped, he was properly found to have *not* abandoned the package despite the use of a phony name and return address. (***People v. Pereira*** (2007) 150 Cal.App.4th 1106; "The appropriate test is whether defendant's words or actions would cause a reasonable person in the searching officer's position to believe that the property was abandoned." ***Id***., at p. 113.)

There is no privacy right in the mouthpiece of the PAS device, which was provided by the police and where defendant abandoned any expectation of privacy in the saliva he deposited on the device when he failed to wipe it off. Whether defendant subjectively expected that the genetic material contained in his saliva would become known to the police was irrelevant because he deposited it on a police device and thus made it accessible to the police. The officer who administered the PAS (Preliminary Alcohol Screening) test testified that used mouthpieces were normally discarded in the trash. Thus, any subjective expectation defendant may have had that his right to privacy would be preserved was unreasonable. (***People v. Thomas*** (2011) 200 Cal.App.4th 338.)

Shipping a package containing contraband, using a false name, does not indicate that the defendant intended to abandon the package, at least when he makes efforts at a later time to insure that the package has been delivered. (***People v. Pereira*** (2007) 150 Cal.App.4th 1106, 1113-1114; see also ***Robey v. Superior Court*** (2013) 56 Cal.4th 1218, 1224, where the Court held that the People had waived this argument, but cited ***Pereira*** with approval.)

The co-occupant of a vehicle, when she gets out of the car leaving her purse in the car, has *not* "abandoned" her purse. "Simply getting out of the car and leaving the purse on the floorboard does not constitute abandonment" (***People v. Baker*** (2008) 164 Cal.App.4th 1152, 1161.)

By throwing his backpack onto the roof of a house upon the approach of police officers, defendant abandoned any expectation of privacy in that backpack that he might have previously had. (***United States v. Juszczyk*** (10th Cir. Kan. 2017) 844 F.3rd 1213.)

Leaving one's backpack in a residence in which defendant had been trespassing (i.e., an unoccupied rental), precluded defendant from later claiming any expectation of privacy in that backpack. (***United States v. Sawyer*** (7th Cir. IL. 2019) 929 F.3rd 497.)

However, in ***United States v. Davis*** (4th Cir. 2021) 997 F.3rd 191, the Fourth Circuit Court of Appeal applied the theory of ***Gant*** (above) to an arrestee's backpack that he dropped on the ground upon being arrested

following a foot pursuit, and which was searched after he was arrested and handcuffed, finding the search to be illegal.

A warrantless search of abandoned property is reasonable under the **Fourth Amendment**. In the Tenth Circuit, abandonment occurs if either: (1) the owner subjectively intended to relinquish ownership of the property; or (2) the owner lacks an objectively reasonable expectation of privacy in the property. In this case, defendant disassociating himself from a large duffle bag in the overhead compartment of a Greyhound Bus by sitting away from it, on the opposite side of the bus, and telling a DEA agent that he had no luggage, left defendant without standing to contest the warrantless opening of the bag and discovery of drugs. As such, a reasonable person in the DEA agent's position would have understood that defendant had abandoned the duffle bag. (***United States v. Fernandez*** (10th Cir. 2021) 20 F.4th 1298.)

Having left a black case in a former girlfriend's apartment for an extended period of time, defendant did not have a reasonable expectation of privacy in that case. The girlfriend, therefore, lawfully provided the police with the right to open the case in which parts to an AR-15 rifle were found. The fact that defendant was arrested in the apartment was irrelevant to this issue in that defendant was a trespasser, not having legally resided there for some time. The subsequent warrantless search of defendant's vehicle, in which the rest of the firearm was found, was also upheld. (***United States v. John*** (1st Cir, 2023) 59 F.4th 44.)

During a traffic stop, the officer's observation of defendant getting out of his truck and throwing a jacket over a chain link fence onto his mother's property, did not provide the officer with cause to retrieve the jacket and search it (in which an illegal firearm was found). The Court, in so ruling, held that defendant had not abandoned the jacket in that he did not thereby manifest an intent to discard it. Per the Court: "(W)e do not think it can fairly be said that Ramirez manifested an intent to disclaim ownership in his jacket simply by placing it on the private side of his mother's fenced-in property line." (***United States v. Ramirez*** (5th Cir. Feb. 23, 2024) __ F.4th __ [2024 U.S.App. LEXIS 4347].)

With a Reasonable Suspicion to Believe a Container on Defendant's Person Might Contain a Weapon:

Upon a deputy sheriff responding to a call regarding a disturbance of the peace, defendant was stopped and questioned. During questioning and inquiries regarding his fanny pack he wore around his waist, the deputy became uneasy by defendant's responses and the contents of the fanny pack. The deputy could see what appeared to be the outline of a small gun. Defendant's refusal to take the fanny pack off and put it on the patrol

car heightened the deputy's concern. The deputy therefore placed defendant in the patrol car for his safety, and inspected the fanny pack. A gun was found and defendant was prosecuted and convicted of being a felon in the possession of a firearm despite his argument that the search was illegal. On appeal, defendant argued that he was not under arrest, none of the exceptions to the warrant requirement applied, and a warrantless search incident to arrest was inapplicable as it was limited to a patdown of a suspect's outer clothing in searching for weapons. The court affirmed defendant's conviction, holding that the search was legal in that a protective seizure and search for weapons was not limited to a person's body. Rather, a seizure required a balancing of the intrusion against the governmental interest in neutralizing the threat of physical harm to police, and the search was an objectively reasonable preventive measure. (***People v. Ritter*** (1997) 54 Cal.App. 274.)

*During a **Fourth** Waiver Search of a Residence*:

When officers find a container (backpack in this case) during a lawful **Fourth** waiver search, they only need a "*reasonable suspicion*" (as opposed to probable cause) to believe that the container belongs to or is controlled by the subject with the **Fourth** waiver in order to search it. (***United States v. Bolivar*** (9th Cir. 2012) 670 F.3rd 1091, 1093-1095.)

The search of defendant's purse, found in a room recognized by the officers to be a room where defendant was staying with her young son, when the search was based upon a **Fourth** waiver made by a probationer who owned the house, was found to be illegal absent any evidence to believe that the probationer had access to that room or to the purse itself. (***People v. Carreon*** (2016) 248 Cal.App.4th 866, 879-880.)

See "*Fourth Waiver Searches*" (Chapter 19), below.

During the Execution of a Search Warrant in a Residence:

The First Circuit Court of Appeals has held that; "any container situated within residential premises which are the subject of a validly-issued warrant may be searched if it is reasonable to believe that the container could conceal items [listed] in the warrant." In this case, the Court upheld the search of defendant's backpack found in his bedroom, finding that many of the items listed in the attachment to the warrant (related to drug possession and sales), which detailed items to be seized, were things that could reasonably be thought to be contained within a backpack. This included "[d]ocumentary or other items of personal property that tend to identify the person(s) in the residence, occupancy, control or ownership of the respective locations to be searched," and "records . . . and receipts relating to the transportation, ordering, purchase, sale or distribution of

controlled substances, and the acquisition, secreting, transfer, concealment and/or expenditure of proceeds derived from the distribution of controlled substances." The fact that defendant himself was not identified as a co-conspirator was not relevant to the question of whether his backpack, a container located in an apartment subject to a valid search warrant, was properly searched by the agents. (***United States v. Congo*** (1st Cir. 2021) 21 F.4th 29.)

Special Needs Searches:

Search of Luggage in a Subway Facility: Implemented in response to terrorist attacks on subways in other cities, a program was designed to deter terrorists from carrying concealed explosives onto the New York's subway. The city program established daily inspection checkpoints at selected subway facilities where officers searched bags that met size criteria for containing explosives. Subway riders wishing to avoid a search were required to leave the station. In a bench trial, the district court found that the program comported with the **Fourth Amendment** under the "*special needs doctrine*." On appeal, the Second Circuit Court of Appeal affirmed, finding that the program was reasonable and therefore constitutional. In particular, the court found that preventing a terrorist attack on the subway was a special need, which was weighty in light of recent terrorist attacks on subway systems in other cities. In addition, the court found that the disputed program was a reasonably effective deterrent. Although the searches intruded on a full privacy interest, the court further found that such intrusion was minimal, particularly as inspections involved only certain size containers and riders could decline inspection by leaving the station. (***MacWade v. Kelly*** (2nd Cir. 2006) 460 F.3rd 260.)

See "*Special Needs Searches and Seizures*," under "*Warrantless Searches and Seizures*" (Chapter 9), above.

Other "*Expectation of Privacy*" *Issues*:

In a Jail: A jail inmate talking over a jail telephone, where he is warned that his conversations were subject to monitoring, asking a friend to retrieve what officers understood to be a gun (although defendant only referred to it as "*the thing*") from a container (also described in vague, generic terms) in the closet of his girlfriend's home, does *not* waive any expectation of privacy defendant had in the container that was later retrieved by law enforcement and illegally searched without a search warrant. (***United States v. Monghur*** (9th Cir. 2009) 588 F.3rd 975, 978-981.)

Monghur differentiated these facts from a similar circumstance where defendant told law enforcement officers, clearly and unequivocally, that a particular container contained contraband. The Court in this case found that such a concession waived any expectation of privacy defendant might have had in the container, thus allowing for a warrantless search of that container. (***United States v. Cardona-Rivera*** (7th Cir. 1990) 904 F.2nd 1149.)

Mailed Drug Shipments: Where defendant had arranged to have delivered packages of cocaine to a friend's residence, the packages listing as the recipient the friend's deceased brother, with an address and phone number not otherwise associated with the defendant, defendant lacked the necessary expectation of privacy needed to challenge law enforcement's opening of those packages before they were delivered (in a controlled delivery) to the address listed on the packages. (***United States v. Rose*** (4th Cir. 2021) 3 F.4th 722.)

See "*Expectation of Privacy*," under "*Searches and Seizures*" (Chapter 8), above.

With Consent of a Third Person having Common Authority:

Paper bags left by defendant in an acquaintance's garage, where the acquaintance had free access to the bags, may be lawfully searched with consent from the acquaintance. By leaving the bags with the acquaintance, knowing and not objecting to the fact that she (the acquaintance) would go into the bags, defendant "*assumed the risk*" that she would allow others to look into the bags. (***People v. Schmeck*** (2005) 37 Cal.4th 240, 280-282.)

A business that owns the company's computers may consent to the search of a computer used by an employee, at least when the employee is on notice that he has no reasonable expectation of privacy in the contents of the computer he is using. (***United States v. Ziegler*** (9th Cir. 2006) 474 F.3rd 1184.)

Allowing another person unrestricted access to a mutually owned computer negates any expectation of privacy the first person might have had. A co-owner has actual authority to give consent to the police to search. And if it turns out that the person is not actually a co-owner, the doctrine of apparent authority may justify the search. (***United States v. Stanley*** (9th Cir. 2011) 653 F.3rd 946, 950-952.)

See "*Consent Searches*" (Chapter 20), below.

The "*Single Purpose Container*" *Theory*:

Where "some containers . . . by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance," a warrant is not needed to open the container and inspect its contents. In such a case, it is as if the item in the container was in "*plain sight*." (***Arkansas v. Sanders*** (1979) 442 U.S. 753, 764, fn. 13 [99 S.Ct. 2586; 61 L.Ed.2nd 235]; overruled on other grounds in ***California v. Acevedo*** (1991) 500 U.S. 565 [111 S.Ct. 1982; 114 L.Ed.2nd 619].)

""(I)f the distinctive configuration of a container proclaims its contents, the contents cannot fairly be said to have been removed from the searching officer's view," just as "if the container were transparent." (***Robbins v. California*** (1981) 453 U.S. 420, 427 [101 S.Ct. 2841; 69 L.Ed.2nd 744]; overruled on other grounds in ***United States v. Ross*** (1982) 456 U.S. 798 [102 S.Ct. 2157; 72 L.Ed.2nd 572].)

Plastic wrapped green blocks found *not* to be within this exception, in ***Robbins***.

Per the plurality, for this rule to apply; "(A) container must so clearly announce its contents, whether by its distinctive configuration, its transparency, or otherwise, that its contents are obvious to an observer." (***Robbins v. California***, *supra*, at p. 428.)

It's a question of whether a defendant has a "*reasonable expectation of privacy*" in the contents of a container. There is none if the contents are within a container that meets the requirements of this rule. (***United States v. Gust*** (9th Cir. 2005) 405 F.3rd 797; a gun case that just as easily could have contained a musical instrument.

The Ninth Circuit Court of Appeal in ***Gust*** limited the applicability of this rule by holding that the nature of the container must be evaluated in light of "the objective viewpoint of a layperson, rather than the subjective viewpoint of a trained law enforcement officer, and without sole reliance on the specific circumstances in which the containers were discovered." In other words, the officers' expertise, and the circumstances under which the container is found, must be ignored. (Citing ***United States v. Miller*** (9th Cir. 1985) 769 F.2nd 554.)

The California Supreme Court discussed the theory that a distinctive odor (of marijuana) might fit within this category of warrantless searches, but declined to decide the issue because the record was not sufficiently

developed at the trial court level. (***Robey v. Superior Court*** (2013) 56 Cal.4th 1218, 1241-1243, and concurring opinion at 1247-1254.)

The "*Private Search* (or '*Third Party*') *Doctrine*:"

Rule: *Containers First Searched by Non-Law Enforcement*: Contraband found by a civilian in a container, such as when a United Parcel Service ("UPS") or Federal Express employee opens and inspects the contents of a package being shipped through their respective businesses, is not subject to suppression. When law enforcement is subsequently notified after such an inspection, the contents of the package may be field tested by a law enforcement officer, seized, and submitted to a law enforcement lab for further testing; all without a warrant. (***People v. Warren*** (1990) 219 Cal.App.3rd 619; see also ***United States v. Jacobsen*** (1984) 466 U.S. 109 [80 L.Ed.2nd 85; 104 S. Ct. 1652]; ***United States v. Young*** (9th Cir. 1998) 153 F.3rd 1079.)

"The private search doctrine concerns circumstances in which a private party's intrusions would have constituted a search had the government conducted it and the material discovered by the private party then comes into the government's possession. Invoking the precept that when private parties provide evidence to the government 'on [their] own accord[,] ... it [i]s not incumbent on the police to . . . avert their eyes, . . .'" (***United States v. Wilson*** (9th Cir. 2021) 13 F.4th 961, 967-968, citing ***Coolidge v. New Hampshire*** (1971) 403 U.S. 443, 489 [91 S.Ct. 2022; 29 L.Ed.2nd 564]; ***Walter v. United States*** (1980) 447 U.S. 649 [100 S.Ct. 2395; 65 L.Ed.2nd 410], which produced no majority decision, and ***United States v. Jacobsen*** (1984) 466 U.S. 109 [104 S.Ct. 1652; 80 L.Ed.2nd 85], which did.)

Why? Once a private party (i.e., non-law enforcement) has made a search and revealed his findings to the police, the defendant's expectation of privacy has been intruded upon to the extent of the private search. Thus, where employees of a private freight carrier found apparent narcotics during the search of a package, then returned the substance to the package and informed narcotics agents, the agents' removal of the substance from the package did not constitute a search, because it did not exceed the scope of the earlier private search. (***United States v. Jacobsen***, *supra*, at p. 116, 119 [80 L.Ed.2nd at p. 96, 98] see also ***People v. Yackee*** (1984) 161 Cal.App.3rd 843; cocaine first found by airline agent.)

Further a "chemical test that merely discloses whether or not a particular substance (already viewed by a private person) is cocaine does not compromise any legitimate

interest in privacy," and therefore does not constitute a search. (***Jacobsen***, *supra*, at p. 123.)

As noted by the Supreme Court: "The **Fourth Amendment's** protection 'is wholly inapplicable "to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the [g]overnment or with the participation or knowledge of any governmental official."'" (***People v. Wilson*** (2020) 56 Cal.App.5th 128, 144-145; quoting ***United States v. Jacobsen***, *supra*, at pp. 113-114.)

The Government has the burden of proof on the issue of whether the Private Person Doctrine applies. (***United States v. Wilson*** (9th Cir. 2021) 13 F.4th 961, 971; citing ***Coolidge v. New Hampshire*** (1971) 403 U.S. 443, 454-455 [91 S.Ct. 2022; 29 L.Ed.2nd 564].)

General Case Law:

Searches Approved:

See ***United States v. Jacobsen*** (1984) 466 U.S. 109 [104 S.Ct. 1652; 80 L.Ed.2nd 85], above.

The **Fourth Amendment** was not implicated by a police officer's view of property found in defendant's vehicle and inventoried by a private repossessor. (***People v. Shegog*** (1986) 184 Cal.App.3rd 899, 902.)

A government agent may test suspicious substances discovered during a search by a private person without having to obtain a search warrant. (***People v. Warren*** (1990) 219 Cal.App.3rd 619, 623.)

A private citizen viewing discs taken by the citizen from the defendant's bedroom, and then showing the same discs to a police officer, is not an illegal search. Also, the fact that the officer may view images on those discs not previously seen by the citizen is irrelevant "if the police knew with substantial certainty" that the same type of images would be found. But looking at other unmarked discs not previously viewed by the private citizen, not knowing for sure what might be on them, requires a search warrant. (***People v. Wilkinson*** (2008) 163 Cal.App.4th 1554, 1569-1574.)

Note: The argument that a container, not already opened and viewed by the private citizen, can be opened by the police officer "if the police knew with substantial certainty" that it contains more of the same, comes from ***United States v. Runyan*** (5th Cir. 2001) 275 F.3rd 449, 463.)

> Another possible exception to the general rule: "(T)he police do not exceed the scope of a prior private search when they examine the same materials that were examined by the private searchers, but they examine these materials more thoroughly than did the private parties. [Citation.]" (***Id.***, at p. 464.)

See also ***United States v. Bowman*** (8th Cir. 1990) 907 F.2nd 63, where law enforcement viewing the contents of one bundle wrapped in plastic and duct tape already opened by an airport employee allowed for the opening of four identical bundles because the opened bundle "spoke volumes as to [the] contents [of the remaining bundles]—particularly to the trained eye of the officer." (pg. 65.)

Where a store employee found child pornography on defendant's computer that had been given to him by defendant to work on, and then detectives viewed the same images, suppression was not warranted under the **Fourth Amendment**. Defendant had voluntarily turned over his computer to the store with the understanding that that its employees would inspect the system in furtherance of its repair. The employee's prior viewing of the images had extinguished defendant's expectation of privacy in his computer's contents. The defectives did not exceed the scope of the employee's prior search. (***United States v. Tosti*** (9th Cir. 2013) 733 F.3rd 816, 821-823.)
In a case out of the federal Fifth Circuit, employing the "*private search doctrine*," the **Fourth Amendment** was held not to apply when the government did not conduct the search itself, but only received and utilized information discovered by a search conducted by a private party. The Supreme Court has reasoned that once a person's expectation of privacy is defeated by a private party, the government may use "the now-nonprivate information." In this case, Microsoft, a private company determined through their own software that the hash values of files uploaded by defendant corresponded to the hash values of known child

pornography. Microsoft then passed this information onto law enforcement. The court concluded that Microsoft conducted a "private search" for **Fourth Amendment** purposes. Consequently, a police detective's subsequent review of the images did not constitute an intrusion on defendant's privacy that he did not already experience as a result of the private search conducted by Microsoft. (***United States v. Reddick*** (5th Cir. TX 2018) 900 F.3rd 636.)

> See also ***People v. Wilson*** (2020) 56 Cal.App.5th 128, below, for further explanation about how the "hash value" system works.

The observation of child pornography on defendant's cellphone by a friend who had borrowed the phone, and then who showed it to a police officer, was not unlawful. The responding officer was entitled to view the same images and videos that the friend had viewed on his own initiative. The search of defendant's residence, and a later forensic search of defendant's cellphone, both under the authority of a search warrant, was upheld. (***United States v. Suellentrop*** (8th Cir. 2020) 953 F.3rd 1047.)

Defendant's wife, scrolling through his cellphone and discovering videos of him molesting their daughter, was private person search, done because of her own curiosity and not as an agent of law enforcement. Subsequently, her showing the same videos to law enforcement (on three separate occasions) was not a **Fourth Amendment** violation so long as what the officers viewed under these circumstances did not exceed the scope of what defendant's wife had already found as a private person. The Court further ruled that cellphones were not "categorically exempt" from the "private search doctrine." (***United States v. Rivera-Morales*** (1st Cir. P.R. 2020) 961 F.3rd 1.)

In a case where two packages mailed via the U.S. Postal Service by defendant were found to contain 2,222 grams of methamphetamine, the eventual searches of the packages were upheld. In this case, a postal employee observed several drug package profile characteristics, including: (1) the information on the shipping labels was handwritten; (2) the postage fees were paid in cash, allowing the sender to remain anonymous or avoid detection by law enforcement; (3) the Southern District of California is known as a source

region for controlled substances; and (4) at least one of the men mailing the packages appeared to be anxious or nervous. Finally, although the handwriting on the shipping labels for the two packages appeared identical, as though the same person filled out both shipping labels, the purported senders' names on the labels were different. Based on these factors, the court concluded the postal employee had reasonable suspicion to detain the packages. The Court also held that the delay between the detention of the packages and their search (i.e., 16 days) was reasonable. Relevant factors in determining reasonableness included investigatory diligence, the length of detention, and whether there are circumstances beyond the investigator's control. In this case, the Court noted that the reasons for the delay included having to work other cases, an intervening weekend, and the illness of the investigator. (***United States v. Martinez*** (5th Cir. 2022) 25 F.4th 303.)

Searches Disapproved:

The "*Private Search Doctrine*" was held *not* to apply, however, where a private party mistakenly received a shipment containing several individual boxes of films with labels on the outside indicating the films contained obscene content. One side of the examined boxes contained suggestive drawings while on the other side were explicit descriptions of the contents. After one of the employees unsuccessfully attempted to view the films' contents, the private party contacted the Federal Bureau of Investigation (FBI) to retrieve the shipment. The FBI agents viewed the films with a projector without obtaining a warrant. In a plurality opinion, the court held that the government's search violated the **Fourth Amendment**, explaining that "[t]he projection of the films was a *significant expansion* of the search that had been conducted previously by a private party." (***Walter v. United States*** (1980) 447 U.S. 649, 657-658 [100 S.Ct. 2395; 65 L.Ed.2nd 410].)

See ***United States v. Lichtenberger*** (6th Cir. 2015) 786 F.3rd 478: Laptop evidence and evidence obtained pursuant to a search warrant issued on the basis of its contents had to be suppressed because the police officer could not testify with a "*virtual certainty*" that she didn't view more than the defendant's girlfriend had seen in the previous private search. The search, and the resulting search warrant, therefore violated defendant's **Fourth Amendment** rights.

Downloading video files with sexually suggestive titles after viewing none-pornographic files that had been found by the owner of a computer store on defendant's computer, and then viewing the downloaded videos without a warrant, held to be beyond the scope of the private search and illegal. (***People v. Michael E.*** (2014) 230 Cal.App.4th 261, 268-279.)

The Ninth Circuit Court of Appeal declined to extend this rule to a hotel room and to a backpack in the hotel room, both of which had been looked into previously by non-law enforcement hotel employees. While the package in ***United States v. Jacobsen*** (1984) 466 U.S. 109 [104 S.Ct.1652; 80 L.Ed.2nd 85], contained nothing but contraband (i.e., cocaine), defendant's hotel room and his backpack in this case contained other items that were not illegal and to which the defendant maintained a reasonable expectation of privacy. (***United States v. Young*** (9th Cir. 2009) 573 F.3rd 711, 720-721.)

in ***United States v. Sparks*** (11th Cir. 2015) 806 F.3rd 1323, a store employee and her fiancé discovered child pornography on a lost cell phone and showed the phone to the police. The police officer ultimately viewed two videos on the cell phone, one of which the private parties "had not watched." Because the government search exposed new information, not seen by the private party, the Eleventh Circuit concluded that the government search exceeded the scope of the private search

Extension of the Rule to "Third Party Doctrine:"

When defendant rented an e-scooter, he plainly understood that the e-scooter company had to collect location data for the scooter through its smartphone applications. Having "voluntarily conveyed" his location to the operator in the ordinary course of business, the defendant could not assert a reasonable expectation of privacy. The Mobile Data Specification (i.e., MDS) location data indicated a diminished expectation of privacy, and the collection of that data by the Los Angeles Department of Transportation was not a search, and therefore not in violation of the **Fourth Amendment**. Also, **Penal Code § 1546.4(c)** did not authorize the defendant to bring an independent action to enforce its provisions. Because defendant had no reasonable expectation of privacy over the MDS location data, no additional facts could have cured the deficiency

with his constitutional claims. (***Sanchez v. Los Angeles Department of Transportation*** (9th Cir. 2022) 39 F.4th 548.)

When the Civilian is Acting as a Government Agent:

If the civilian is acting according to a governmental directive (e.g.; FAA guidelines for searching packages at an airport), the civilian *may* be held to the same standard as a law enforcement officer. (***United States v Ross*** (9th Cir. 1994) 32 F.3rd 1141; ***United States v. Young*** (9th Cir. 1998) 153 F.3rd 1079.)

However, a mere "*tacit agreement*" between a law enforcement officer and a civilian that the civilian will conduct a particular search which the officer could not lawfully perform himself, as ruled to be illegal in ***People v. North*** (1981) 29 Cal.3rd 509, is no longer enough to invalidate the search since passage of **Proposition 8**. (***People v. Wilkinson*** **(2008) 163 Cal. App. 4th 1554, 1565; noting that the rule *North* to be invalid** at least "to the extent ***North*** requires nothing more than the officer's knowledge and failure to protect the defendant's rights to attribute a private search to the government."

An airline employee who had in the past been a paid informant for the Drug Enforcement Administration ("DEA"), who opened a package after being encouraged by the DEA to do so on a routine basis, expecting a probable reward from DEA because of having received rewards for opening similar packages before, was held to be a government agent even though he had not been directed to open this particular package. (***United States v. Walther*** (9th Cir. 1981) 652 F.2nd 788.)

Note, however, it is doubtful whether merely having been informed by law enforcement of the power to open and inspect packages automatically turns a civilian into a police agent. (See ***People v. Wachter*** (1976) 58 Cal.App.3rd 311, 920-923, finding that even a police officer, when off duty and acting out of mere curiosity, may *not* be acting as a law enforcement officer in conducting a search.)

See also ***People v. Peterson*** (1972) 23 Cal.App.3rd 883, 893; off-duty police trainee searching a container in his apartment house garage out of concern for his own safety; *not* a government search.

Searches of Computers Based Upon Prior Internet Service Provider Search:

A Nebraska detective making a warrantless inspection of defendant's computerized files containing child pornography, provided to the detective by Google which had originally found them in its own inspection of those files, scanning its users' emails voluntarily out of its own private business interest to eradicate child pornography from its platform, was held to be lawful. After an individual (i.e., Google, in this case) conducts a valid private search, law enforcement officers may, in turn, perform the same search as the private party without violating the **Fourth Amendment** as long as the search does not exceed the scope of the private search. (***United States v. Ringland*** (8th Cir. 2020) 966 F.3rd 731.)

After an electronic service provider flagged certain e-mail attachments as apparent child pornography, the attachments were forwarded to a local law enforcement agency, whose officers viewed the images for the first time without a warrant. The Fifth Circuit Court of Appeal held the private search exception justified the government's warrantless search because the government agent's "visual review of the suspect images . . . was akin to the government agents' decision to conduct chemical tests on the white powder in ***Jacobsen***," insofar as "opening the file merely confirmed that the flagged file was indeed child pornography, as suspected." (***United States v. Reddick*** (5th Cir. 2018) 900 F.3rd 636, 639.)

> ***United States v. Miller*** (6th Cir. 2020) 982 F.3rd 412, 427, for a similar result under similar circumstances, accepting the district court's ruling that the hash mark system used by Google was "highly reliable."

Child pornography images that defendant sent with his g-mail account triggered an automated flag at Google (by use of a "hash" table). *Without reviewing the images*, Google reported them to a federal "tip line," which reported them to San Diego law enforcement authorities, resulting in an investigator opening and viewing a number of defendant's child pornography-related photos. The tip and the investigator's viewing of the photos resulted in a search warrant for defendant's g-mail account, which revealed defendant's multiple child molestation crimes. On appeal from his life sentence, defendant challenged the SDPD's warrantless inspection of the images which it used to justify the search warrant. The Court of Appeal rejected the challenge. "[I]f

a government search is preceded by a private search, the government search does not implicate the **Fourth Amendment** as long as it does not exceed the scope of the initial private search." (Citing ***United States v. Jacobsen*** (1984) 466 U.S. 109 [104 S.Ct. 1652; 80 L.Ed.2nd 85].) "The government did not further infringe on Wilson's privacy, but rather guarded against the risk that Google's report was wrong." (***People v. Wilson*** (2020) 56 Cal.App.5th 128, 141-152.)

> *Note*: This opinion explains what a "hash" is, how Google builds and maintains a hash table of offending images, and how Google goes about reporting violations.

In a case where AOL automatically identified one of the defendant's four email attachments as apparent child pornography, based on a hash value match, AOL then sent the text of the defendant's email and all four attachments to the National Center for Missing and Exploited Children (NCMEC) where an analyst "opened the email, viewed each of the attached images, and confirmed that all four [images] (not just the one AOL's automated filed identified) appeared to be child pornography" The Court emphasized that "AOL never opened the email itself. Only NCMEC did that." The Court, after holding that NCMEC is either a governmental entity or a government agent, concluded that "in at least this way [the government] exceeded rather than repeated AOL's private search," (***United States v. Ackerman*** (10th Cir. 2016) 831 F.3rd 1292, 1294, 1305-1306.)

Overruling the federal district court denial of defendant's motion to suppress (see ***United States v. Wilson*** (2017) 2017 U.S. Dist. LEXIS 98432.), the Ninth Circuit Court of Appeal held that a law enforcement officer's warrantless viewing of defendant's Gmail e-mail attachments, found to contain child pornography, violated the **Fourth Amendment** as an illegal search. In so holding, the Court rejected the theory that the "*private search doctrine*" applied. In this case, Google used its hash mark monitoring system to identify child pornography in four files defendant had uploaded into his computer. Google, however, never actually viewed the files, but rather identified defendant's e-mails as containing child pornography merely through its hash identification system. Passing this information onto the National Center for Missing and Exploited Children (which also did not view the files), which in turn passed it onto the San Diego Internet Crimes Against Children Task Force, where the investigator, for the first time, actually viewed defendant's pornography, the Court held that this was as

illegal search. (***United States v. Wilson*** (9th Cir. 2021) 13 F.4th 961.)

The Ninth Circuit Court of Appeal has held that federal law did not have the effect of transforming electronic communication service providers' (ESPs) private searches into governmental action because the **Stored Communications Act** and the **Protect Our Children Act of 2008** did not have the clear indices of the Government's encouragement, endorsement, and participation sufficient to implicate the **Fourth Amendment**. There was insufficient governmental involvement in the ESPs' private searches of defendant's accounts to trigger **Fourth Amendment** protection because there was no evidence law enforcement was involved in or participated in the investigations, and the ESPs investigated the accounts to further their own legitimate, independent motivations. Also, defendant did not have a legitimate expectation of privacy in the limited digital data sought in the government's subpoenas. They did not request any communication content from his accounts. (***United States v. Rosenow*** (9th Cir. 2022) 33 F.4th 529.)

Exterior of a Container:

There is no expectation of privacy in the outside of a piece of mail sent to the defendant. "(B)ecause the information is foreseeably visible to countless people in the course of a letter reaching its destination, 'an addressee or addressor generally has no expectation of privacy as to the outside of mail.'" (***People v. Reyes*** (2009) 178 Cal.App.4th 1183, 1189-1192; quoting ***United States v. Osunegbu*** (1987 5th Cir.) 822 F.2nd 472, 380, fn. 3; see also ***United States v. Jefferson*** (9th Cir. 2009) 566 F.3rd 928, 933.)

In ***Reyes***, an employee of a private postbox company spontaneously handed officers defendant's mail when the officers inquired as to whether defendant had rented a box at that facility even though the employees didn't "normally" hand over a clients' mail absent a court order. Defendant was never told that his mail would be kept private.

Customs Inspections: Similarly, the United States Supreme Court has held that evidence lawfully observed by a *customs inspector*, during a warrantless border search and resealed in its container, may later be seized from that container without a warrant by law enforcement officers after a controlled delivery to the defendant. "(O)nce a container has been found to a certainty to contain illicit drugs, the contraband becomes like objects physically within the plain view of the police, and the claim to privacy is lost. Consequently, the subsequent reopening

of the container is not a '*search*' within the intendment of the **Fourth Amendment**." (***Illinois v. Andreas*** (1983) 463 U.S. 765 [103 S.Ct. 3319; 77 L.Ed.2nd 1003].)

> The Court did note, however, that at some point after an interruption of control or surveillance of a container, such as when the defendant changes the contents of the container, the defendant may regain a legitimate privacy right. (***Id***., at p. 772 [77 L.Ed.2nd at p. 1011].)
>
> See "*Border Searches*" (Chapter 18), below.

"*Manipulating*," "*Squeezing*," *or* "*Poofing*" *Containers*: Whether or not a container can be "*manipulated*," "*squeezed*," or "*poofed*" without implicating the **Fourth Amendment** is subject to a difference of opinion, and depends upon the circumstances. For instance:

> *At an Airport*: At least where there is some need for heightened security, such as when dealing with *airline luggage*, squeezing a package and noting the odor of the expended air has been held to be lawful. (***People v. Santana*** (1998) 63 Cal.App.4th 543; ***United States v. Lovell*** (5th Cir. 1988) 849 F.2nd 910. See also ***United States v. Goldstein*** (5th Cir.) 635 F.2d 356.)
>
> > However, the Ninth Circuit Court of Appeal disagrees. Squeezing a bag checked with an airline to facilitate smelling its contents is an unconstitutional search. (***Hernandez v. United States*** (9th Cir. 1965) 353 F.2nd 624.)
>
> *At a Bus Station*: Although a federal appellate court has held that squeezing one's luggage in a bus is such a minor intrusion that it could not reasonably be considered a search for purposes of the **Fourth Amendment** (***United States v. Viera*** (5th Cir. 1981) 644 F.2nd 509.), the United States Supreme Court apparently disagrees, and has held that the squeezing of a soft-sided suitcase on a bus, thus noting the feel of a "*brick*" of contraband, *is* a search and illegal if done without probable cause. (***Bond v. United States*** (2000) 529 U.S. 334 [120 S.Ct. 1462; 146 L.Ed.2nd 365].)
>
> *During a Detention and Patdown*: If a police officer feels what *might* be a controlled substance in the pocket of a suspect during a patdown for weapons, and "*manipulates*" (***Minnesota v. Dickerson*** (1993) 508 U.S. 366, 378 [113 S.Ct. 2130; 124 L.Ed.2nd 334, 345]; ***People v. Dickey*** (1994) 21 Cal.App.4th 952, 957.) or "*shakes*" it (***United States v. Miles*** (9th Cir. 2001) 224 F.3rd 1009.) in an attempt to confirm or verify his suspicions, the manipulation or shaking of the object is *a search* for contraband, done without *probable cause*, and illegal.

But, feeling a bulge that is believed to be a weapon, and manipulating it in an attempt to verify that it is a weapon, which requires no more than a *reasonable suspicion*, is lawful. (***United States v. Mattarolo*** (9th Cir. 1999) 209 F.3rd 1153.)

See "*Frisks*," under "*Searches of Persons*" (Chapter 11), above.

Detention of a Container:

Rule: A container, with a "*reasonable and articulable suspicion*" that it may have contraband or other evidence of illegal activity inside, may be *detained* for a reasonable period of time to allow for an investigation concerning its possible contents. (***United States v. Hernandez*** (9th Cir. 2002) 313 F.3rd 1206; package mailed to the defendant detained by postal inspectors.)

"(W)e conclude that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of ***Terry*** and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope." (***United States v. Place*** (1983) 462 U.S. 696, 706 [103 S.Ct. 2637; 77 L.Ed.2nd 110].)

See ***United States v. Beale*** (9th Cir 1984) 736 F.2nd 1289, 1291-1292: "Here, we are not confronted with a case in which the detection dog conducted a sniff of a person rather than an inanimate object, or a sniff of luggage that a person was carrying at the time. The investigative technique applied to Beale's luggage caused 'virtually no annoyance and rarely even contact with the owner of the bags, unless [the test result] is positive.'"

Although the sender of a package through the U.S. mails retains little if any interest after the package is sent (***United States v. Place***, *supra*, at p. 718, fn. 5 [77 L.Ed.2nd at p. 128].), the intended recipient retains possessory and privacy rights in the package's contents. (***Walter v. United States*** (1980) 447 U.S. 649, 654 [100 S.Ct. 2395; 65 L.Ed.2nd 410. 416]; ***United States v. Gill*** (9th Cir. 2002) 280 F.3rd 923, 929.) However, the recipient of a mailed package has only a reasonable expectation that delivery will not be delayed. So long as the package is delivered on time, the **Fourth Amendment** is not implicated merely by a temporary diversion of that package. (***United States v. Demoss*** (8th Cir. 2002) 279 F.3rd

632, 639; ***United States v. England*** (9th Cir. 1992) 971 F.2nd 419, 420-421.)

An addressee has both a possessory and a privacy interest in a mailed package. (***United States v. Hernandez***, *supra*, at p. 1209; ***United States v. Hoang*** (9th Cir. 2007) 486 F.3rd 1156, 1159; *United States v. Jefferson* (9th Cir. 2009) 566 F.3rd 928, 933-935.)

The "*possessory interest*" in a mailed package, however, is "solely in the package's timely delivery. (***United States v. Hoang***, *supra*, at p. 1160, citing ***United States v. England***, *supra*, at pp. 420-421; ***United States v. Jefferson***, *supra*.)

Case Law:

A postal inspector in Alaska had sufficient reasonable suspicion to detain defendant's package when he was told that defendant was behaving suspiciously by asking about Postal Service drug detection practices, and the package listed a fictitious sender and addressee and an incomplete California return address, was shipped with delivery confirmation service, had a handwritten label, and was heavily taped. Marijuana and excessive money had also been found in defendant's home some months earlier. The court was satisfied that the length of detention between initial seizure and the development of probable cause, 22 hours, was not unreasonable, particularly given the difficulty of travel in Alaska with a drug-sniffing dog. (***United States v. Lozano*** (9th Cir. 2010) 623 F.3rd 1055.)

Seizing defendant's luggage from a common area on an Amtrak train during a drug-interdiction investigation, without any suspicion to believe that it contained contraband other than the fact that it was without tags, and then wheeling it down the aisle while asking who it belonged to and inspecting the contents after no one claimed ownership, was an illegal seizure and search, and a **Fourth Amendment** violation. (***United States v. Hill*** (10th Cir. 2015) 805 F.3rd 935.)

How long a container may be detained (i.e., a "*reasonable time*") depends upon the circumstances. (***United States v. Van Leeuwen*** (1970) 397 U.S. 249, 252 [90 S.Ct. 1029; 25 L.Ed.2nd 282, 285]; 29 hours okay.)

United States v. Hernandez (9th Cir. 2002) 313 F.3rd 1206; twenty-two hours held to be justifiable.

United States v. Dass (9th Cir. 1988) 849 F.2nd 414; packages held from seven to twenty-three days found to be excessive.

United States v. Mitchell (11th Cir. 2009) 565 F.3rd 1347; holding onto the hard drive from defendant's computer for 21 days before a warrant was obtained was an unreasonable retention of the defendant's property, violating the **Fourth Amendment**.

United States v. Aldaz (9th Cir. 1990) 921 F.2nd 227; three to five day detention found to be reasonable under the circumstances.

United States v. Gill (9th Cir. 2002) 280 F.3rd 923, 926-929; six-day delay, over a weekend, okay.

United States v. Lozano (9th Cir. 2010) 623 F.3rd 1055; 22 hours, particularly given the difficulty of travel in Alaska with a drug-sniffing dog, was held to be lawful.

United States v. Mayomi (7th Cir. 1989) 873 F.2nd 1049, 1053-1054: A two-day detention of two letters was acceptable because it was supported by probable cause.

United States v. Sullivan (9th Cir. 2015) 797 F.3rd 623, 633; 21 days between the seizure of the defendant's laptop computer and the obtaining of a search warrant held to be reasonable in that defendant was in custody for that time period and would not have been able to use his laptop anyway. Also, defendant was a parolee subject to search and seizure conditions, and then, 17 days into the detention of his laptop, he gave his consent to search it, all of which lessened his privacy interests.

See also ***United States v. Johnson*** (9th Cir. 2017) 875 F.3rd 1265, 1276; finding a 3-day delay to be reasonable, as well as a one-year delay in obtaining a search warrant for a more thorough forensic search of defendant's cellphone.

People v. Tran (2019) 42 Cal.App.5th 1, 13-14; Three days upheld as reasonable, comparing it with the 90-minutes defendant's luggage was detained at an airport as described in *United States v. Place* (1983) 462 U.S. 696 [103 S.Ct. 2637; 77 L.Ed.2nd 110], noting "(t)hat seizure did not disrupt Tran's travel plans because a dashboard camera clearly is not as integral to the necessities of travel as luggage containing clothes, toiletries, and other travel essentials."

A ten-minute delay does not significantly interfere with the timely delivery of a package in the normal course of business, and therefore does not even need a reasonable suspicion to justify. The package would have been delivered at the same time even without this delay. (***United States v. Hoang*** (9th Cir. 2007) 486 F.3rd 1156.)

But see ***United States v. Place*** (1983) 462 U.S. 696 [103 S.Ct. 2637; 77 L.Ed.2nd 110]: The detention of a suspect's luggage at an airport for exposure to a trained narcotics dog was held to exceed the bounds of a permissible investigative detention and was unreasonable under the **Fourth Amendment**. The evidence obtained from the subsequent search of the luggage was held to be inadmissible where the luggage was detained for *90 minutes* and where the officers failed to accurately inform the suspect of the place to which they were transporting his luggage, the length of time he might be dispossessed, and what arrangements would be made for the return of the luggage if the investigation dispelled the suspicion.

> A key factor in ***Place*** was that the containers (the defendant's suitcases) were seized from *his person* as opposed to the mail.

Detention of a package mailed via the United States postal service during that time period up to when delivery has been guaranteed is reasonable and therefore lawful despite the lack of any suspicion to believe it contains contraband. (*United States v. Jefferson* (9th Cir. 2009) 566 F.3rd 928, 933-935; during which time a narcotics-sniffing dog was used to alert on the package and a search warrant was obtained.)

> Holding onto the package beyond this time period, to be lawful, requires an "articulable (reasonable) suspicion that the package contains contraband or evidence of illegal activity." (***Id.***, at p. 935.)

A narcotics investigator with the United States Postal Service, rerouting a package suspected of containing a controlled substance back from Louisiana (to where it had been mailed) to Texas (where it had been mailed from) so that a drug-sniffing dog could be used and (upon a positive hit by the dog) a warrant obtained, was found not to cause an unreasonable delay despite the fact that it took five days for the package to get back to Texas. In determining whether the detention of a package was unconstitutionally long, the relevant factors to consider include: 1) investigatory diligence; 2) the length

of the detention; and 3) whether there were circumstances beyond the investigator's control. Under the circumstances of this case, where conducting the investigation in Louisiana would have been more complicated and would have taken about the same amount of time and the investigator acted diligently in retrieving the package from Texas and obtaining a search warrant, the Court held that the extended detention of the package (about seven days in total) was not unreasonable. (***United States v. Beard*** (5th Cir. 2021) 16 F.4th 1115.)

Detaining two packages mailed by defendant for sixteen days was upheld where the delay was attributable to the inspector's workload, an intervening weekend, and the illness of the inspector. (***United States v. Martinez*** (5th Cir. 2022) 25 F.4th 303.)

***Chapter 17*:**

***Seizures and Searches of High Tech Devices*:**

Issue: The legality of seizing and searching, thus retrieving information from cellphones, computer disks, thumb drives, computers, and other such high tech "containers" of information, seized from suspects or found during the search of a residence, etc., when done without a search warrant, is an issue.

Originally, it was assumed that the general law on "containers" would be applicable, and that, as a general rule, a search warrant would be required. (See ***Smith v. Ohio*** (1990) 494 U.S. 541, 542 [110 S.Ct. 1288; 108 L.Ed.2nd 464].)

Recent Trend:

See ***People v. Michael E.*** (2014) 230 Cal.App.4th 261, 276-279, where the Court included a whole segment criticizing the current trend of referring to computers and cellphones as "*containers of information*," predicting the coming of a whole new body of law dealing with electronic devices. "'Since electronic storage is likely to contain a greater quantity and variety of information than any previous storage method, . . . '[r]elying on analogies to closed containers or file cabinets may lead courts to "oversimplify a complex area of **Fourth Amendment** doctrines and ignore the realities of massive modern computer storage."' [Citation.]" (***Id***., at pp. 276-279; citing ***United States v. Carey*** (10th Cir. 1999) 172 F.3rd 1268, 1275.)

Note: Interestingly enough, however, most of the authority the ***Michael*** Court cites here are container-search cases.

Current Rules:

The U.S. Supreme Court finally recognized that cellphones are entitled to enhanced **Fourth Amendment** protections from other "containers," and found that the search of a cellphone found on a person upon his arrest is unlawful absent the obtaining of a search warrant. (***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430].)

See ***Id***., pages 393 to 397, for a detailed description of the capabilities of the modern-day "smart phone," adding to the privacy interests in such devices that outweigh the governmental interest in conducting warrantless searches upon the owner.

See ***United States v. Cano*** (9th Cir. 2019) 934 F.3rd 1002, 1011-1012, for a review of the Supreme Court's thinking behind the ***Riley*** decision.

Other courts are now following suit: (See ***United States v. Camou*** (9th Cir. 2014) 773 F.3rd 932, 941-943; holding that cellphones are not containers for purposes of the vehicle exception to the search warrant requirement.

See also ***United States v. Lara*** (9th Cir. 2016) 815 F.3rd 605, 610-611; declining to include defendant's cellphone under the category of a "container," in defendant's **Fourth** waiver search conditions.

However, a search of a cellphone "incident to arrest" (as opposed to a **Fourth** waiver search, as occurred in ***Lara***, *supra*.) was clearly lawful prior to ***Riley***, and therefore, the officer's "good faith" reliance upon that pre-***Riley*** binding precedent will save a warrantless search of defendant's cellphones found on his person when he was arrested. (***United States v. Lustig*** (9th Cir. 2016) 830 F.3rd 1075, 1977-1085.)

> The ***Lustig*** Court also upheld the more thorough search of the same cellphones four days later in that they were in continuous police custody during that time. (***Id***., at p. 1085; see ***United States v. Burnette*** (9th Cir. 1983) 698 F.2nd 1038, 1049; upholding a later search when the object searched has remained in continuous police custody after being lawfully searched once.)

Defendant's cellphone, dropped by the fleeing defendant at the scene of his attempted arrest, "*definitely required a warrant*" in order to do a forensic search of the cellphone. (***United States v. Artis*** (9th Cir. 2019) 919 F.3rd 1123, 1128.)

On appeal from the denial of defendant's motion to suppress evidence found during a search of his cellphone, seized from his rental car after a high-speed chase, the court did not need to address whether defendant had standing to challenge the search because **Fourth Amendment** standing is not jurisdictional and hence need not be addressed before addressing other aspects of the merits of a **Fourth Amendment** claim. Defendant's cellphone was lawfully seized as part of a valid inventory search because there was no showing that the search was merely used to rummage for evidence. The failure to list the phone on an inventory sheet did not invalidate the search. Probable cause thereafter supported the warrants issued to search the phone because the affiants are allowed to state conclusions based on training and experience without having to detail that experience. There was a sufficient factual basis for both magistrate judges to independently conclude that evidence might be found on the phone. (***United States v. Garay*** (9th Cir. 2019) 938 F.3rd 1108.)

However, while a search of one's cellphone is likely to require a search warrant, *seizure* of that cellphone found in plain sight (e.g.., on the center console of defendant's vehicle, left at the scene of a shooting, and where there was probable cause to believe the vehicle was associated with that shooting) was held to be lawful. (***People v. Tousant*** (2021) 64 Cal.App.5th 804, 815-817.)

Opening the cellphone before obtaining a search warrant, looking through the settings folder and viewing a few photos, obtaining the telephone number and viewing a photograph of his driver's license, was held to be unlawful (requiring that this information be excised from the warrant affidavit, noting that the U.S. Supreme Court in ***Riley v. California*** (2014) 573 U.S. 373, at p. 399 [134 S.Ct. 2473; 189 L.Ed.2nd 430], held that "officers may not engage in a warrantless search of 'those areas of the phone where an officer reasonably believes that information relevant to . . . the arrestee's identity' may be discovered." However, after deleting that information, the remaining warrant affidavit still provided sufficient probable cause to support the warrant's issuance. (***Id.***, at p. 818.)

Arguable Continued Exceptions to the Search Warrant Requirement: Arguably, exceptions to the search warrant requirement for high tech devices may still be found when the device is:

- Property seized from the suspect's person incident to his arrest (***Carroll v. United States*** (1925) 267 U.S. 132 [45 S.Ct. 280; 69 L.Ed. 543].)

  This exception, however, has been held specifically *not* to apply to cellphones in that cellphones do not pose a danger to officers and once seized, it is unlikely any evidence contained in the phone is going to be destroyed. When balanced with the large amount of personal information likely to be found in cellphones, a warrantless intrusion into the phone is not justified under the **Fourth Amendment** absent exigent circumstances. (***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430]; ***People v. Macabeo*** (2016) 1 Cal.5th 1206, 1212-1226.)

- In a vehicle for which there is already probable cause to search. (***California v. Acevedo*** (1991) 500 U.S. 565, 580 [111 S.Ct. 1982; 114 L.Ed.2nd 619].)

- In the person's possession when that person is booked into jail. (***People v. Rogers*** (1966) 241 Cal.App.2nd 384, 389.)

  But see ***United States v. Camou*** (9th Cir. 2014) 773 F.3rd 932, 941-943; extending the prohibitions on warrantless cellphone searches when the cellphone is seized incident to arrest, under ***Riley v. California***, supra, to those seized in a vehicle with probable cause.

  There may be circumstances, however, where a person loses any expectation of privacy to the contents of his cellphone, such as when he is a resident of a correctional program's residential reentry facility and he has been warned both that cellphones are prohibited and that any such cellphones found at the facility are subject to search. (See ***United States v. Jackson*** (8th Cir. Iowa 2017) 866 F.3rd 982.)

- When the container is seized under authorization of a search warrant and to inspect its contents, using "technological aids," requires further expert assistance. E.g., seizing an undeveloped roll of film, as authorized by a warrant, does not require a second warrant to develop that film. (See ***People v. Superior Court* [*Nasmeh*]** (2007) 151 Cal.App.4th 85, 98, fn. 4; citing out-of-state authority for this theory; ***State v. Petrone*** (Wis. 1991) 161 Wis.2nd 530.)

  See also ***People v. Rangel*** (2012) 206 Cal.App.4th 1310, 1317; where it was held that a cellphone having been lawfully seized pursuant to the warrant, a second warrant authoring the detective to search the cellphone is unnecessary. "(A) second warrant to search a properly seized computer (or cellphone, in this case) is not necessary where the evidence obtained in the search did not exceed the probable cause articulated in the original warrant."

  Property in the possession or under the control of a subject who is booked into custody is subject to search: "Once articles have lawfully fallen into the hands of the police they may examine them to see if they have been stolen, test them to see if they have been used in the commission of a crime, return them to the prisoner on his release, or preserve them for use as evidence at the time of trial. (***People v. Robertson*** 240 Cal.App.2nd 99, 105-106 . . . .) During their period of police custody an arrested person's personal effects, like his person itself, are subject to reasonable inspection, examination, and test. (***People v. Chaigles*** (1923) 237 N.Y. 193 [142 N.E. 583, 32 A.L.R. 676], Cardozo, J.)" (***People v. Rogers*** (1966) 241 Cal.App.2nd 384, 389.)

  See also ***United States v. Giberson*** (9th Cir. 2008) 527 F.3rd 882, where it was held that some circumstances might lead searching officers to a reasonable conclusion that documentary evidence they are seeking would be contained in computers found at the location, authorizing the search of those containers despite the failure of the warrant to list computers as things that may be searched.

    Note: It was recommended, however, that the computer merely be seized and a second warrant be obtained authorizing its search, eliminating the issue.

  But see ***United States v. Payton*** (9th Cir. 2009) 573 F.3rd 859, 861-864, where it was held that failure to include the magistrate's authorization to search defendant's computer, even though in the statement of probable cause the affiant indicated a desire to search any possible computers found in defendant's house, was a fatal omission. Searching defendant's computer, therefore, went beyond the scope of the warrant's authorization.

- *With Exigent Circumstances*:

  The search of the defendant/minor's cellphone was reasonable at its inception for purposes of the **Fourth Amendment** because a loaded firearm and its magazine cartridge had been seized from a trashcan earlier, the defendant had lingered outside the principal's office where the student (a known friend of defendant's) suspected of possessing the firearm was being detained, and where the defendant was questioned after trying to get away. While being questioned, the defendant physically resisted while fingering his cellphone in his pocket. A warrant was not necessary before school officials searched the data on the phone because school officials needed only a *reasonable suspicion* to conduct a warrantless search, and were confronted by a situation in which a loaded firearm had been discovered on school property and they were reasonably concerned that the defendant might be using his phone to communicate with other students who might possess another firearm or weapon that the officials did not yet know about. (***In re Rafael* C.** (2016) 245 Cal.App.4th 1288.)

- *The Person is Without Standing*:

  A suspect's "standing" should also be considered; i.e., is it a device in which the suspect has a reasonable expectation of privacy? (***United States v. Caymen*** (9th Cir. 2005) 404 F.3rd 1196; ***People v. Daggs*** (2005) 133 Cal.App.4th 361; cellphone abandoned at the scene of the crime deprives the defendant of standing to contest its search.)

- *The Person is Subject to a **Fourth** Waiver Search & Seizure Condition*:

  The warrantless search of a parolee's cellphone is lawful. (***United States v. Johnson*** (9th Cir. 2017) 875 F.3rd 1265, 1273-1276; ***United States v. Wood*** (7th Cir. IL 2021) 16 F.4th 529.)

  Whether or not a **Fourth** waiver probationer's cellphone is subject to warrantless search is the subject of some debate:

  > *United States* ***v.*** *Lara* (9th Cir. 2016) 815 F.3rd 605, 609-612: "*No*," at least where defendant's conditions of probation allow for a warrantless search of the probationer's "containers" or "property," only, without specifically mentioning cellphones.
  >
  > **People v. Sandee** (2017) 15 Cal.App.5th 294, 302-304: "*Yes*."

  See "***Fourth** Waiver Searches*" (Chapter 19), below.

- Border Searches:

  Border agents seized defendant's laptop at the U.S.-Mexico border in response to a Treasury Enforcement Communication System (TECS) alert that was based in part on defendant's previous conviction for child molestation. The initial search at the border turned up no incriminating material. Only after defendant's laptop was shipped almost 170 miles away and subjected to a comprehensive forensic examination were images of child pornography discovered. The court held that the forensic examination of defendant's laptop required a showing of reasonable suspicion under the **Fourth Amendment**. The court ruled that defendant's TECS alert, prior child-related conviction, frequent travels, crossing from a country known for sex tourism, and collection of electronic equipment, plus the parameters of the Operation Angel Watch program, taken collectively, gave rise to reasonable suspicion of criminal activity. When combined with the other circumstances, the fact that an agent encountered at least one password protected file on the laptop contributed to the basis for a reasonable suspicion to conduct a forensic examination. An alert regarding possession of child pornography justified obtaining additional resources to properly determine whether illegal files were present. (***United States v. Cotterman*** (9th Cir. 2013) 709 F.3rd 952, 962-970.)

  When the person's cellphone is searched at the border after drugs are found in her suitcase: In discussing the applicability of ***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430], when a cellphone is searched as a part of a border search, the court declined to adopt a general rule concerning how the government's border search authority applies to modern technology, such as cellphones or other electronic devices. Second, the officers lawfully scanned and searched defendant's suitcase, in which the methamphetamine was discovered, during a lawful border search. Third, the agents reasonably relied in good faith on this broad border-search authority to search the apps on defendant's cellphone. Fourth, while the Supreme Court in ***Riley v. California*** held that the traditional search-incident-to-arrest rationale did not apply to cellphones generally, the Court left open the possibility that "other case-specific exceptions may still justify a warrantless search of a particular phone." Consequently, in this case, the court found that "it was reasonable for the agents to continue to rely on the robust body of pre-***Riley*** case law that allowed warrantless searches of computers and cellphones." Fifth, the court recognized that no post-***Riley*** decision issued before or after the search in this case has required a warrant for a border search of an electronic device. Finally, only two of the many federal cases addressing border searches of electronic devices have ever required any level of suspicion. In those cases, the court noted that they both required only reasonable suspicion and that was for more intrusive forensic

searches. (***United States v. Molina-Isidoro*** (5th Cir. TX 2018) 884 F.3rd 287.)

See also ***United States v. Vergara*** (11th Cir. 2018) 884 F.3rd 1309; where it was held that the warrantless forensic searches of defendant's cellphones as a part of a border search required neither a warrant nor probable cause and the ***Riley*** decision did not change this rule. At most, a "reasonable suspicion" is all that is needed.

A forensic warrantless search of defendant's cellphone by United States Customs and Border Protection (CBP) officers after defendant's detention at the Washington Dulles International Airport as he attempted to board a flight to Turkey, was categorized by the Court as a "non-routine" search, and was upheld as a part of a border search. First, the border search exception applied even though the forensic search of defendant's phone occurred at an off-site location over an extended period of time. Second, the court added that defendant's arrest did not transform the examination of his phone under the border search exception into a search incident to arrest, which would have required a warrant under ***Riley v. California***. Finally, the court held that the forensic search of defendant's phone was justified because the officers had reason to believe he was attempting to export firearms illegally. The court recognized that this type of transnational offense goes to the heart of the border search exception, which is justified, in part, by the government's interest in "protecting and monitoring exports from the country." Lastly, the Court rejected defendant's argument that the privacy interest in smartphone data is so great that even under the border exception, a forensic examination of a phone is a non-routine search that requires a warrant based on probable cause. (***United States v. Kolsuz*** (4th Cir. VA 2018) 890 F.3rd 133.)

> The Court declined to find whether only a reasonable suspicion was required, ruling only that "it was reasonable for the officers who conducted the forensic search of (defendant's) phone to rely on the established and uniform body of precedent allowing warrantless border searches of digital devices that are based on at least reasonable suspicion." (***Ibid***.)
>
> The fact that the officers transported defendant's cellphone four miles from the location of the detention to where it was forensically examined was held to be irrelevant. (***Ibid***.)

When the government establishes reasonable suspicion that an individual is involved in criminal activity, the **Fourth Amendment** permits a warrantless border search of that individual's personal electronic devices, such as a laptop computer and a cellphone. (***United States v. Williams***

(10th Cir. 2019) 942 F.3rd 1187; the Court declining to rule whether even a reasonable suspicion was necessary.)

The Ninth Circuit held that a forensic search of defendant's cellphone at the Mexico/U.S. border was invalid under the border search exception to **Fourth Amendment** because forensic cellphone searches require a reasonable suspicion, meaning that officials must reasonably suspect that the cellphone contained digital contraband. While "manual cell phone searches may be conducted by border officials without reasonable suspicion . . . forensic cell phone searches require reasonable suspicion." Per the Court, border searches of a cellphone are limited to looking for such "digital contraband," at least absent a reasonable suspicion to believe the phone contains evidence of the offense for which defendant was arrested. Without such a suspicion, when the subject has been arrested for smuggling drugs, the border search exception does not justify an agent's recording of the phone numbers and text messages for further processing, nor a subsequent forensic search, because doing so has no connection to ensuring that the phone lacked "digital contraband" (i.e., child pornography.) Here, there was no evidence supporting a reasonable suspicion to believe that defendant's phone contained evidence related to other types of illegal activity, such as smuggling cocaine. (***United States v. Cano*** (9th Cir. 2019) 934 F.3rd 1002, 1010-1021: "(W)e hold that manual searches of cell phones at the border are reasonable without individualized suspicion, whereas the (more intrusive) forensic examination of a cell phone requires a showing of reasonable suspicion." ***Id***., at p. 1016.)

> Note: Subsequently, the Ninth Circuit has denied a petition for rehearing en banc (Sept. 2, 2020) 973 F.3rd 966) where a six-judge dissent argued that the original ***Cano*** decision is just dead wrong. In the ***Cano*** decision, it was held that a "forensic border search" of a cellphone is limited to those instances where there is a reasonable suspicion to believe that the suspect's phone contained "digital contraband." The term "forensic" is never defined, but is defined in the dictionary as "relating to or denoting the application of scientific methods and techniques to the investigation of crime." "Digital contraband," in turn, is defined by the ***Cano*** Court as being limited to stuff like child pornography. Searching for evidence of defendant's offense (i.e., smuggling cocaine) requires probable cause and a search warrant, says the ***Cano*** Court, despite piles of contrary case law to the effect that non-forensic border searches do not require any level of suspicion, and certainly not a search warrant. (E.g., see ***United States v. Montoya de Hernandez*** (1985) 473 U.S. 531; and ***United States v. Flores-Montano*** (2004) 541 U.S. 149.) As pointed out in the en banc denial dissent, the more intrusive forensic search of one's electronic equipment (e.g.,

computers [see ***United States v. Cotterman*** (9th Cir. 2013) 709 F.3rd at 970.] and cellphones) do in fact require a reasonable suspicion, but a warrant has never been held to be necessary, let alone probable cause. And neither suspicionless nor warrantless forensic border searches have ever been held to be limited to child pornography. The dissent here also points out that at least two other Circuits disagree with ***Cano***: ***United States v. Kolsuz*** (4th Cir. 2018) 890 F.3rd 133, and ***United States v. Williams*** (10th Cir. 2019) 942 F.3rd 1187. This makes the ***Cano*** decision ripe for review by the U.S. Supreme Court.

See "*Cellphone Searches*," under "*Border Searches*" (Chapter 18), below.

Additional Case Law:

Proof that defendant had been receiving child pornography on his computer from two traffickers in such material, despite the lack of any evidence that the defendant himself solicited such material, was held to be sufficient probable cause to justify a finding that defendant knowingly, and illegally, possessed such material, justifying the issuance of a search warrant for defendant's residence and his computer. (***United States v. Kelley*** (9th Cir. 2007) 482 F.3rd 1047.)

The same rule is applicable a "mirror port," which is similar to a pen register, but which allows the government to collect the "to" and "from" addresses of a person's e-mail messages, the IP addresses of the websites the person visits, and notes the total volume of information sent to or from the person's account. (***United States v. Forrester*** (9th Cir. 2008) 512 F.3rd 500.)

A search warrant authorizing the search for specific documents, during which a computer was found under circumstances where it was reasonable to believe that the computer was a container of those documents, allowed for the seizure of (and probably search of) the computer, even though the computer was not specifically listed in the warrant. Also, a computer is not entitled to a heightened level of proof. (***United States v. Giberson*** (9th Cir. 2008) 527 F.3rd 886-889.)

Downloading and installing onto one's computer "LimeWire," a file-sharing program which allows users to search for and share with one another various types of files, compromises a participant's expectation of privacy in the contents of the affected files, thus allowing for a warrantless search of those files via LimeWire by law enforcement. (***United States v. Ganoe*** (9th Cir. 2008) 538 F.3rd 1117.)

It is irrelevant that the defendant attempted unsuccessfully to install a program included with LimeWire that if installed properly, prevents others from accessing his files. It is also irrelevant that the investigator discovered defendant's child pornography through the use of a program unavailable to the general public.

Neither circumstance means that defendant had a reasonable expectation of privacy in his files when he used a file-sharing program such as LimeWire. (***United States v. Borowy*** (9th Cir. 2010) 595 F.3rd 1045, 1048.)

> The Court in ***Borowy*** further held that the investigator had probable cause to open up his files based upon discovering files with names that were explicitly suggestive of child pornography and that they were discovered using a search term known to be associated with child pornography, resulting with two such files being "red-flagged" by the program, indicating that they contained child pornography. (***Id***., at p. 1049.)

A properly qualified expert officer's opinion, connecting common characteristics of a child molester with known facts related to a child molest and the molester's act of hiding his computer, establishes probable cause supporting a search warrant for that computer. (***People v. Nicholls*** (2008) 159 Cal.App.4th 703.)

Customs Officers at an international border, or the "functional equivalent" of a border (e.g., an international airport) may search a person's computer without any reasonable suspicion. (***United States v. Arnold*** (9th Cir. 2008) 533 F.3rd 1003.)

> The Court further held that a high-tech container, such as a computer, does not require a higher standard of probable cause for a warrant application, even when "expressive (i.e., **First Amendment**) material" is involved. (***Id***., at p. 1010.)
>
> California is in accord with ***Arnold***, holding that, "(a) computer is entitled to no more protection than any other container." (***People v. Endacott*** (2008) 164 Cal.App.4th 1346; suspicionless search of defendant's laptop computers upon his arrival at Los Angeles International Airport from Thailand upheld.)
>
> *Note*: ***Arnold*** and ***Endacott*** are questionable authority on this issue in light of subsequent cases talking about all the personal information that is available on one's computer. (E.g., see ***People v. Michael E.*** (2014) 230 Cal.App.4th 261, 276-279, above.)
>
> > ***Endacott*** further held that the fact that the computer is further searched at some time after the initial border crossing is irrelevant. The right to do a warrantless, suspicionless search continues indefinitely. (***Id***., at p. 1350.)

The seizure of defendant's computer and all computer related items (e.g., compact disks, floppy disks, hard drives, memory cards, DVDs, videotapes, and other portable digital devices), based upon no more than the discovery of one printed-out photo of child pornography, was lawful in that it was reasonable to conclude

that the picture had come from his computer and that similar pictures were likely to be stored in it. (***United States v. Brobst*** (9th Cir. 2009) 558 F.3rd 982, 994.)

Failure to include the magistrate's authorization to search defendant's computer, even though in the statement of probable cause the affiant indicated a desire to search any possible computers found in defendant's house, was a fatal omission. Searching defendant's computer, therefore, went beyond the scope of the warrant's authorization. (***United States v. Payton*** (9th Cir. 2009) 573 F.3rd 859, 861-864.)

> The fact that the issuing magistrate testified to an intent to allow for the search of defendant's computers, and that the warrant included authorization to search for certain listed records which might be found in a computer, was held to be irrelevant. (***Id***. at pp. 862-863.)
>
> But see ***United States v. Giberson*** (9th Cir. 2008) 527 F.3rd 882, where it was held that some circumstances might lead searching officers to a reasonable conclusion that documentary evidence they are seeking would be contained in computers found at the location, authorizing the search of those containers despite the failure of the warrant to list computers as things that may be searched. It was recommended, however, that the computer be seized and a second warrant be obtained.

A city did not violate an employee's (a police officer) **Fourth Amendment** rights and right to privacy under the **Federal Stored Communications Act** (**18 U.S.C. §§ 2701 et seq.**) by obtaining and reviewing transcripts of the employee's text messages sent via a city pager where there were reasonable grounds for suspecting that the search was necessary for a non-investigatory work-related purpose because the search was done in order to determine whether the character limit on the city's contract was sufficient to meet the city's needs. Also, the city and a police department had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or on the other hand, that the city was not paying for extensive personal communications. The search was permissible in its scope because reviewing the transcripts was reasonable because it was an efficient and expedient way to determine whether the employee's overages were the result of work-related messaging or personal use. (***Ontario v. Quan*** (2010) 560 U.S.746 [130 S.Ct. 2619; 177 L.Ed.2nd 216].)

> Declining to rule on the application of an employee's privacy rights in the workplace, as they relate to the use of high-tech devices, the Court assumed for the sake of argument, without deciding, that the plaintiff/respondent had a right to privacy in the contents of text messages made via an employer-issued pager. However, the "special needs" of the workplace allow for this intrusion into plaintiff/respondent's privacy rights when conducted for a "noninvestigatory, work-related purpose." (***Id***., 130

S.Ct. at pp. 2629-2630]; i.e., to determine whether the allotted number of messages was insufficient, requiring employees to pay for office-related messages, or whether employees were using the pagers for non-work related purposes.)

See also "The Federal **Electronic Communications Privacy Act**, **18 U.S.C. §§ 2701 et seq.**" under "**P.C. § 1524.2(b)**: Records of Foreign Corporations Providing Electronic Communications or Remote Computing Services," under "Searches With a Search Warrant" (Chapter 10), above.

A single photograph of a nude minor (female child who is between 8 and 10 years old), by itself, is insufficient to establish probably cause for a search warrant. But a second such photo, under the "totality of the circumstances," is enough. (***United States v. Battershell*** (9th Cir. 2006) 457 F.3rd 1048.)

However, a single photograph of a nude minor (female of about 15 to 17 years of age), when combined with other suspicious circumstances (e.g., 15 computers in house found in complete disarray, with two minors not belonging to the defendant, where the defendant a civilian, is staying in military housing), may be enough to justify the issuance of a search warrant. (***United States v. Krupa*** (9th Cir. 2011) 658 F.3rd 1174, 1177-1179; but see dissent, pp. 1180-1185.)

The fact that the defendant may not have owned the computers that the affiant was asking to search at the time of the crime (a homicide) did not preclude the possibility that she had transferred information or records—particularly photographs—to computers owned at the time of the search. (***People v. Lazarus*** (2015) 238 Cal.App.4th 734, 767; noting that personal computers often hold "diaries, calendars, files, and correspondence.")

Allowing another person unrestricted access to a mutually owned computer negates any expectation of privacy the first person might have had. A co-owner has actual authority to give consent to the police to search. And if it turns out that the person is not actually a co-owner, the doctrine of apparent authority may justify the search. (***United States v. Stanley*** (9th Cir. 2011) 653 F.3rd 946, 950-952.)

The standard to be applied when evaluating the legality of the length of time a suspect is deprived of his property pending a search is one of "reasonableness," taking into account the "*totality of the circumstances*," and not necessarily requiring that the Government pursue the least intrusive course of action. Determining reasonableness requires a "balancing test," balancing "the nature and quality of the intrusion on the individual's **Fourth Amendment** interests against the importance of the governmental interests alleged to justify the intrusion." (Citations omitted; ***United States v. Sullivan*** (9th Cir. 2015) 797 F.3rd 623, 633; finding 21 days to be reasonable during which time the defendant's laptop was in

law enforcement custody, in that defendant was in custody at the time so he couldn't use it anyway, was subject to a **Fourth** waiver, gave consent, and where the computer had to be transferred to a different agency to conduct the necessary forensic search.)

> See also ***United States v. Johnson*** (9th Cir. 2017) 875 F.3rd 1265, 1276; finding a 3-day delay to be reasonable, as well as a one-year delay in obtaining a search warrant for a more thorough forensic search of defendant's cellphone.
>
> Fifteen-day delay between the seizure of defendant's cellphone and the eventual obtaining of a search warrant to search it was not unreasonable. (***People v. Tousant*** (2021) 64 Cal.App.5th 804, 816-817.)

A search warrant, supported by probable cause, authorized the police to search defendant's house and seize gang indicia of any sort. Such indicia could logically be found in defendant's cellphone, which had the capacity to store people's names, telephone numbers and other contact information, as well as music, photographs, artwork, and communications in the form of emails and messages. Defendant's phone was the likely container of many items that were the functional equivalent of those specifically listed in the warrant. The text messages seized during the search of defendant's phone were related to a gang-related assault that he was suspected of committing, and their suppression was thus not required under the exclusionary rule. ***(People v. Rangel*** *(2012)* 206 Cal.App.4th 1310, 1315-1317.)

The Sixth Circuit Court of Appeal has found that tracking a user's cellphone location without a warrant using GPS technology (by "pinging" it from various cell towers) is different than putting a GPS tracking device on a motorist's vehicle without a warrant. The Court upheld the drug conviction of a man found with his son near a Texas rest stop with over 1,000 pounds of marijuana in their motor home. Because he had no reasonable expectation of privacy concerning the location of his cellphone, the court ruled, there was no **Fourth Amendment** violation. (***United States v. Skinner*** (6th Cir. 2012) 690 F.3rd 772, 777-781.)

Sending a message to defendant's seized, yet open, cellphone (done for the purpose of showing the arrested defendant that the officers had evidence that he had been communicating with a person he believed to be underage) was held not to be a search, and therefore not prohibited by ***Riley***. (***United States v. Brixen*** (7th Cir. WI 2018) 908 F.3rd 276.)

Federal agents opened an investigation into the transmission of child pornography via the smartphone messaging application "Kik." Upon determining that someone with the e-mail address of "Rustyhood" was accepting and passing child pornography, a federal agent issued an Emergency Disclosure Request (EDR) pursuant to **18 U.S.C. § 2702** (the **Stored Communications Act**) to Kik

requesting subscriber information and recent internet protocol (IP) addresses associated with the "rustyhood" account. The information received in response led to defendant. Defendant argued that the IP address data that the government acquired from Kik without a search warrant was not materially different from the cell site location information (CSLI) that was at issue in ***Carpenter v. United States*** (June 22, 2018) 585 U.S. __ [138 S.Ct. 2206; 201 L.Ed.2nd 507]. The federal First Circuit Court of Appeal disagreed. First, the court noted that an Internet user generates the IP address data that the government acquired from Kik in this case only by making the affirmative decision to access a website or application. By contrast, the CSLI acquired by the government in ***Carpenter*** in many instances was generated even when the cell phone remained untouched in the suspect's pocket, as it still continued to monitor that person's movements throughout the day. Second, the court recognized that the IP address data that the government acquired from Kik did not convey any location information, a key distinction from the CSLI at issue in ***Carpenter***. Consequently, the court concluded that defendant did not have a reasonable expectation of privacy in the information the government acquired from Kik without a warrant. (***United States v. Hood*** (1st Cir. ME 2019) 920 F.3rd 87.)

In a case where a Minneapolis police officer used a program called "*RoundUp eMule*" to search for users on a peer-to-peer network who were sharing child pornography, the officer downloaded part of a file—a video that played for twenty to thirty seconds—from an IP address in or around St. Paul, Minnesota. Using the file's hash value, the officer was able to obtain the complete file and determined that it contained child pornography. After subpoenaing the relevant internet service provider, the officer learned that defendant, a sex registrant, was the person associated with the IP address. Further, a search of the Child Protection System database, which is a database that "compiles hash values of previously identified child pornography and documents hits that have occurred for certain IP addresses," revealed that defendant had advertised 92 known or suspected child pornography files near the time the officer here was investigating him. These 92 files were uncovered by programs similar to RoundUp eMule known as "G2Scanner and Nordic Mule." Based on this information, a Minnesota state court issued a search warrant for defendant's home where officers found additional digital files containing child pornography. Charged with possession of child pornography, defendant filed a motion to suppress the evidence seized during the search. The district court denied defendant's motion and upon conviction he appealed. The Eighth Circuit Court of Appeal affirmed, noting that it has been "held numerous times that a defendant has no objectively reasonable expectation of privacy in files he shares over a public peer-to-peer network, including those shared anonymously with law enforcement officers." The Court also rejected defendant's concerns about the government's "dragnet surveillance" through programs like RoundUp eMule and vast databases of known hash values that connect known or suspected child pornography to IP addresses where those files were offered for sharing. The Court noted that these programs and databases contain only information that users of peer-to-peer networks have deliberately

chosen not to keep private. Finally, the Court held that the evidence in the record established the programs used by the officer operated reliably and did not access private areas of defendant's computer. (***United States v. Shipton*** (8th Cir. MN 2021) 5 F.4th 933.)

See also "*Juveniles and Electronic Device and/or Social Media Probation Conditions*," under "*Juveniles*," under "***Fourth** Waiver Searches*" (Chapter 19), below.

Search of Unauthorized Cellphone Recovered at CDCR:

Pen. Code § 4576: CDCR (California Department of Corrections and Rehabilitation) shall *not* access data or communications that have been captured using available technology from the unauthorized use of a wireless communication device except after obtaining a search warrant.

The California Electronic Communications Privacy Act (or ***CalECPA***): **Pen. Code §§ 1546-1546.4:** Statutory restrictions on warrantless searches of cellphones and other electronic devices was enacted by the California Legislature, effective on *January 1, 2016*.

Pen. Code § 1546.1, Compelling Production of Electronic Communication Information, provides:

Subd. (a) Except as provided in this section, a government entity shall *not* do any of the following:

(1) Compel the production of or access to electronic communication information from a service provider.

(2) Compel the production of or access to electronic device information from any person or entity other than the authorized possessor of the device.

(3) Access electronic device information by means of physical interaction or electronic communication with the electronic device. This section does not prohibit the intended recipient of an electronic communication from voluntarily disclosing electronic communication information concerning that communication to a government entity.

Under this exception, it has been held that a suspect who posts information on social media does not have a reasonable expectation of privacy in the contents of what is posted, even when the defendant limits access to the posting to his "friends," and where one such "friend" who

monitors the defendant's account is an undercover police officer, and thus a "false friend." Defendant risks the possibility that one such "friend" may relay such information to law enforcement or be an undercover police officer. (***People v. Pride*** (2019) 31 Cal.App.5th 133, 141; noting also that **subd. (c)(4)**, below, states that a government entity may access electronic device information by communicating with the device with "the specific consent of the authorized possessor of the device.")

Subd. (b) A government entity may compel the production of or access to electronic communication information from a service provider, or compel the production of or access to electronic device information from any person or entity other than the authorized possessor of the device only under the following circumstances:

(1) Pursuant to a warrant issued pursuant to **Pen. Code §§ 1523 et seq.**, and subject to **subd. (d)** (see below).

(2) Pursuant to a wiretap order issued pursuant to **Pen. Code §§ 629.50 et seq.**

(3) Pursuant to an order for electronic reader records issued pursuant to **Civil Code § 1798.90**.

(4) Pursuant to a subpoena issued pursuant to existing state law, provided that the information is not sought for the purpose of investigating or prosecuting a criminal offense, and compelling the production of or access to the information via the subpoena is not otherwise prohibited by state or federal law. Nothing in this paragraph shall be construed to expand any authority under state law to compel the production of or access to electronic information.

(5) Pursuant to an order for a pen register or trap and trace device, or both, issued pursuant to **Pen. Code §§ 630 et seq.**

Subd. (c) A government entity may access electronic device information by means of physical interaction or electronic communication with the device only as follows:

(1) Pursuant to a warrant issued pursuant to **P.C. §§ 1523 et seq.**, and subject to **subd. (d)** (see below).

(2) Pursuant to a wiretap order issued pursuant to **Pen. Code §§ 629.50 et seq.**

(3) Pursuant to a tracking device search warrant issued pursuant to **Pen. Code §§ 1523(a)(12)** and **1534(b)**.

(4) With the specific consent of the authorized possessor of the device.

See ***People v. Pride***, *supra*, under **subd. (a)(3)**, above.

(5) With the specific consent of the owner of the device, only when the device has been reported as lost or stolen.

(6) If the government entity, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires access to the electronic device information.

(7) If the government entity, in good faith, believes the device to be lost, stolen, or abandoned, provided that the entity shall only access electronic device information in order to attempt to identify, verify, or contact the owner or authorized possessor of the device.

(8) Except where prohibited by state or federal law, if the device is seized from an inmate's possession or found in an area of a correctional facility under the jurisdiction of the Department of Corrections and Rehabilitation where inmates have access and the device is not in the possession of an individual and the device is not known or believed to be the possession of an authorized visitor. Nothing in this paragraph shall be construed to supersede or override **Pen. Code § 4576**.

Pen. Code § 4576: Search of Unauthorized Cellphones Recovered at CDCR; see above.

(9) Except where prohibited by state or federal law, if the device is seized from an authorized possessor of the device who is serving a term of parole under the supervision of the Department of Corrections and Rehabilitation or a term of postrelease community supervision under the supervision of county probation.

(10) Except where prohibited by state or federal law, if the device is seized from an authorized possessor of the device who is subject to an electronic device search as a clear and unambiguous condition of probation, mandatory supervision, or pretrial release.

(11) If the government entity accesses information concerning the location or the telephone number of the electronic device in order to respond to an emergency 911 call from that device.

(12) Pursuant to an order for a pen register or trap and trace device, or both, issued pursuant to **Pen. Code §§ 630 et seq.**

Subd. (d) Any warrant for electronic information shall comply with the following:

(1) The warrant shall describe with particularity the information to be seized by specifying the time periods covered and, as appropriate and reasonable, the target individuals or accounts, the applications or services covered, and the types of information sought, provided, however, that in the case of a warrant described in **subdivision (c)(1)**, the court may determine that it is not appropriate to specify time periods because of the specific circumstances of the investigation, including, but not limited to, the nature of the device to be searched.

(2) The warrant shall require that any information obtained through the execution of the warrant that is unrelated to the objective of the warrant shall be sealed and shall not be subject to further review, use, or disclosure except pursuant to a court order or to comply with discovery as required by **Pen. Code §§ 1054.1** and **1054.7**. A court shall issue such an order upon a finding that there is probable cause to believe that the information is relevant to an active investigation, or review, use, or disclosure is required by state or federal law.

(3) The warrant shall comply with all other provisions of California and federal law, including any provisions prohibiting, limiting, or imposing additional requirements on the use of search warrants. If directed to a service provider, the warrant shall be accompanied by an order requiring the service provider to verify the authenticity of electronic information that it produces by providing an affidavit that complies with the requirements set forth in **Evid. Code § 1561**. Admission of that information into evidence shall be subject to **Evid. Code § 1562**.

Subd. (e) When issuing any warrant or order for electronic information, or upon the petition from the target or recipient of the warrant or order, a court may, at its discretion, do either or both of the following:

(1) Appoint a special master, as described in **Pen. Code § 1524(d)**, charged with ensuring that only information necessary to

achieve the objective of the warrant or order is produced or accessed.

(2) Require that any information obtained through the execution of the warrant or order that is unrelated to the objective of the warrant be destroyed as soon as feasible after the termination of the current investigation and any related investigations or proceedings.

Subd. (f) A service provider may voluntarily disclose electronic communication information or subscriber information when that disclosure is not otherwise prohibited by state or federal law.

Subd. (g) If a government entity receives electronic communication information voluntarily provided pursuant to **subdivision (f)**, it shall destroy that information within 90 days unless one or more of the following circumstances apply:

(1) The entity has or obtains the specific consent of the sender or recipient of the electronic communications about which information was disclosed.

(2) The entity obtains a court order authorizing the retention of the information. A court shall issue a retention order upon a finding that the conditions justifying the initial voluntary disclosure persist, in which case the court shall authorize the retention of the information only for so long as those conditions persist, or there is probable cause to believe that the information constitutes evidence that a crime has been committed.

(3) The entity reasonably believes that the information relates to child pornography and the information is retained as part of a multiagency database used in the investigation of child pornography and related crimes.

(4) The service provider or subscriber is, or discloses the information to, a federal, state, or local prison, jail, or juvenile detention facility, and all participants to the electronic communication were informed, prior to the communication, that the service provider may disclose the information to the government entity.

Subd. (h) If a government entity obtains electronic information pursuant to an emergency involving danger of death or serious physical injury to a person, that requires access to the electronic information without delay, the government entity shall, within *three court days* after obtaining the electronic information, file with the appropriate court an application for a

warrant or order authorizing obtaining the electronic information or a motion seeking approval of the emergency disclosures that shall set forth the facts giving rise to the emergency, and if applicable, a request supported by a sworn affidavit for an order delaying notification under **Pen. Code § 1546.2(b)(1)**. The court shall promptly rule on the application or motion and shall order the immediate destruction of all information obtained, and immediate notification pursuant to **Pen. Code § 1546.2(a)(1)** if that notice has not already been given, upon a finding that the facts did not give rise to an emergency or upon rejecting the warrant or order application on any other ground. This subdivision does not apply if the government entity obtains information concerning the location or the telephone number of the electronic device in order to respond to an emergency 911 call from that device.

> **Subd. (a)(2)** of **§ 1546.2** specifically provides that "(n)otwithstanding **paragraph (1)**, notice is not required if the government entity accesses information concerning the location or the telephone number of an electronic device in order to respond to an emergency 911 call from that device."
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> > Defendant's motion to suppress knives seized from his backpack was properly denied where the warrantless pinging of his cell phone to locate him did not violate the **Fourth Amendment** because it was justified by exigent circumstances. At the time the responding officer requested that defendant's mobile service provider ping his cell phone, the information available to the officer was that less than an hour earlier the victim had been repeatedly stabbed in the neck in an unprovoked attack, all occurring within 200 yards of a preschool and near a shopping center and multiple neighborhoods. Based upon the circumstances known to the officer, he believed it was imperative that the suspect be found as soon as possible to prevent another possible unprovoked attack. (***People v. Bowen*** (2020) 52 Cal.App.5th 130, 136-139.)
> >
> > > The Court noted that whether or not a single ping of a suspect's cellphone is a "search" is still an undecided issue. (***Id***., at p. 138; declining to decide the issue because exigent circumstances already provided the justification for finding that the **Fourth Amendment** had not been violated.)

Subd. (i) This section does not limit the authority of a government entity to use an administrative, grand jury, trial, or civil discovery subpoena to do any of the following:

(1) Require an originator, addressee, or intended recipient of an electronic communication to disclose any electronic communication information associated with that communication.

(2) Require an entity that provides electronic communications services to its officers, directors, employees, or agents for the purpose of carrying out their duties, to disclose electronic communication information associated with an electronic communication to or from an officer, director, employee, or agent of the entity.

(3) Require a service provider to provide subscriber information.

Subd. (j) This section does not limit the authority of the Public Utilities Commission or the State Energy Resources Conservation and Development Commission to obtain energy or water supply and consumption information pursuant to the powers granted to them under the **Public Utilities Code** or the **Public Resources Code** and other applicable state laws.

Note: In other words, a search warrant is not necessary for the collection of data related to "smart meters."

Subd. (k) This chapter shall not be construed to alter the authority of a government entity that owns an electronic device to compel an employee who is authorized to possess the device to return the device to the government entity's possession.

Pen. Code § 1546 provides the relevant definitions.

Subd. (a) An "*adverse result*" means any of the following:

(1) Danger to the life or physical safety of an individual.
(2) Flight from prosecution.
(3) Destruction of or tampering with evidence.
(4) Intimidation of potential witnesses.
(5) Serious jeopardy to an investigation or undue delay of a trial.

Subd. (b) "*Authorized possessor*" means the possessor of an electronic device when that person is the owner of the device or has been authorized to possess the device by the owner of the device.

Subd. (c) "*Electronic communication*" means the transfer of signs, signals, writings, images, sounds, data, or intelligence of any nature in whole or in part by a wire, radio, electromagnetic, photoelectric, or photo-optical system.

Subd. (d) "*Electronic communication information*" means any information about an electronic communication or the use of an electronic communication service, including, but not limited to, the contents, sender, recipients, format, or location of the sender or recipients at any point during the communication, the time or date the communication was created, sent, or received, or any information pertaining to any individual or device participating in the communication, including, but not limited to, an IP address. Electronic communication information does not include subscriber information as defined in this chapter.

Subd. (e) "*Electronic communication service*" means a service that provides to its subscribers or users the ability to send or receive electronic communications, including any service that acts as an intermediary in the transmission of electronic communications, or stores electronic communication information.

Subd. (f) "*Electronic device*" means a device that stores, generates, or transmits information in electronic form. An electronic device does not include the magnetic strip on a driver's license or an identification card

Subd. (g) "*Electronic device information*" means any information stored on or generated through the operation of an electronic device, including the current and prior locations of the device.

Subd. (h) "*Electronic information*" means electronic communication information or electronic device information.

Subd. (i) "*Government entity*" means a department or agency of the state or a political subdivision thereof, or an individual acting for or on behalf of the state or a political subdivision thereof.

Subd. (j) "*Service provider*" means a person or entity offering an electronic communication service.

Subd. (k) "*Specific consent*" means consent provided directly to the government entity seeking information, including, but not limited to, when the government entity is the addressee or intended recipient or a member of the intended audience of an electronic communication. Specific consent does not require that the originator of the communication have actual knowledge that an addressee, intended recipient, or member of the specific audience is a government entity.

> *Query*: How does this requirement affect a person's pre-search waiver of his **Fourth Amendment** rights as a condition of probation or parole?

> **Subd. (l)** "*Subscriber information*" means the name, street address, telephone number, email address, or similar contact information provided by the subscriber to the provider to establish or maintain an account or communication channel, a subscriber or account number or identifier, the length of service, and the types of services used by a user of or subscriber to a service provider.

Pen. Code § 1546.2 deals with the procedures for obtaining a warrant as a followup to an emergency situation, and is a part of the **California Electronic Communications Privacy Act** (**CalECPA**). Pursuant to **CalECPA's** provisions, within 10 days after use of a tracking device has ended, the officer must notify the person about the nature of the government investigation and provide a copy of the warrant. In addition, the provisions of **Pen. Code 1546.2(b)** now apply to permit a delay in notification of the target if the court determines that there is reason to believe that notification may have an adverse result.

> **Pen. Code § 1546.2(a)(2)** provides that "(n)otwithstanding **paragraph (1)**, notice is not required if the government entity accesses information concerning the location or the telephone number of an electronic device in order to respond to an emergency 911 call from that device."

Pen. Code § 1546.4 describes the suppression provisions and other remedies when information is obtained illegally.

> **Subd. (a)**: "Any person in a trial, hearing, or proceeding may move to suppress any electronic information obtained or retained in violation of the **Fourth Amendment** to the United States Constitution or of this chapter. The motion shall be made, determined, and be subject to review in accordance with the procedures set forth in subdivisions **(b)** to **(q)**, inclusive, of **Section 1538.5**." (Italics added)
>
> **Subd. (c)**: "An individual whose information is targeted by a warrant, order, or other legal process that is inconsistent with this chapter, or the California Constitution or the United States Constitution, or a service provider or any other recipient of the warrant, order, or other legal process may petition the issuing court to void or modify the warrant, order, or process, or to order the destruction of any information obtained in violation of this chapter, or the **California Constitution**, or the **United States Constitution**." (Italics added)
>
> *Query*: Does this give a defendant vicarious standing to challenge a search or seizure despite not otherwise having his own expectation of privacy violated? E.g., a car thief?

Geofence Warrants: The Courts have uniformly rejected the argument that the **CalECPA** provisions make illegal geofence warrants:

> ***People v. Meza*** (2023) 90 Cal.App.5th 520, 545-546: The Court rejected defendants' arguments to the effect that a geofence warrant violates the **CalECPA**. Specifically, the Court held that (1) it is not necessary under **CalECPA** to specifically target specific individuals or accounts. Rather, **CalECPA** requires only that a warrant must describe with particularity the information to be seized as is "appropriate and reasonable" to the case at issue. (**P.C. § 1546.1(d)(1)**) The warrant in this case described the target individuals and accounts with the greatest degree of particularity available to investigators; i.e., individuals whose devices were located within the search boundaries at certain times. There is no requirement in the statute that a suspect's name or other identifying information be included in the warrant to ensure its validity. (2) The Court further held that the warrant was not defective merely because it failed to specify the "applications and services covered" by the warrant. (See **Pen. Code § 1524.3(b)**) In a geofence warrant, the government is not seeking data or content related to a particular application or service. Rather, what is sought is the service provider's (i.e., Google's) record of all electronic contacts with that device, regardless of which applications or services originated the contact. Accordingly, the failure to name a particular application or service in this instance did not result in a violation of ***CalECPA***. (3) Lastly, the Court rejected the defendants' argument to the effect that any constitutional infirmities in the warrant create an independent violation of **CalECPA**. In so ruling, the Court noted simply that, "(t)here is nothing in the cited language that, without more, converts a **Fourth Amendment** violation into a statutory violation." (pgs. 545-546.)
>
> See ***Price v. Superior Court*** (2023) 93 Cal.App.5th 13, 51-55:

Additional Case Law:

> No violation of the **Fourth Amendment** resulted when a gang police detective portrayed himself as a friend to gain access to defendant's social media account and viewed and saved a copy of a video that defendant posted and that was later admitted into evidence, in which defendant wore and discussed a chain resembling one taken in a robbery. Although defendant chose a social media platform where posts disappeared after a period of time, he assumed the risk that the account for one of his "friends" could be an undercover profile for a police detective or that any other "friend" could save and share the information with government officials. California's **Electronic Communications Privacy Act** (**CalECPA**) had no application because defendant voluntarily granted access to his social media account to a "friend" and voluntarily then

posted a video of himself with incriminating evidence. (***People v. Pride*** (2019) 31 Cal.App.5th 133, 137-141.)

Because California's **Electronic Communications Privacy Act** (**ECPA**) was not in effect at the time of the search of defendant's cellphone, a reasonable, objective person at the time of the search would not have understood the **ECPA** to restrict the scope of the search permitted by defendant's probation orders. Moreover, because the proper inquiry focused on a reasonable person's understanding at the time of the search, not at the time of the hearing on a motion to suppress, it was not relevant that the **ECPA** was in effect at the time of defendant's suppression hearing. While it is reasonable after California's **Electronic Communications Privacy Act** to interpret a general search condition in a probation order to exclude a search of the probationer's electronic data unless the search condition specifically states otherwise, a reasonable, objective person would not reach such a conclusion prior to the **Act**. (***People v. Sandee*** (2017) 15 Cal.App.5th 294.)

In a case in which defendant pleaded guilty to a felony sex offense pursuant to a negotiated disposition, the trial court had jurisdiction to modify a probation condition to explicitly authorize warrantless searches of defendant's electronic devices. The enactment of the **California Electronic Communications Privacy Act** necessitated a modification to clarify that defendant's warrantless search condition included searches of his electronic storage devices. (***People v. Guzman*** (2018) 23 Cal.App.5th 53.)

The **California Electronic Communications Privacy Act** was not violated by an electronic search condition of probation because, in accepting probation, defendant expressly consented to subject the electronic storage devices under his control to search by any law enforcement or probation officer. It did not matter that the terms of his probation do not identify any agency to which he was giving consent. (***People v. Wright*** (2019) 37 Cal.App.5th 120.)

Particularity requirements were met in a warrant to search defendant's computers, despite the phrase "including, but not limited to" in describing the items to be seized, because the warrant conveyed the limited objective to recover material depicting or relating to child pornography, identify victims of sexual abuse or exploitation, and access files and other material referring to or relating to planned or actual sexual encounters with minors. Given the nature of the evidence sought, the time periods covered were not important. Sixty-day time limit of **Pen. Code § 1510** (time limits for motion to dismiss or suppress) applies to motions brought under **Pen. Code § 1546.4**. Information from third parties supported the warrant to search defendant's computers, even though one report related to files seen

as much as three years before issuance of the warrant, because the trial court also relied on observations as recent as two months before the warrant issued, relating to files on defendant's computer containing images of young girls performing sex acts with adults.(***Klugman v. Superior Court*** (2019) 39 Cal.App.5th 1080; Ordered not published.)

A geofence warrant application is not in violation of ***The California Electronic Communications Privacy Act*** in that the **CalECPA** does not require that a suspect's name or other identifying information be included in the warrant to ensure its validity. Also, "(t)here is nothing in the cited language that, without more, converts a **Fourth Amendment** violation into a statutory violation. (***People v. Meza*** (2023) 90 Cal.App.5th 520, 545-546.)

Although the government did not properly notify defendant of its acquisition of electronic information evidence pursuant to the **California Electronic Communications Privacy Act** (**CalECPA**), suppression of the electronic information evidence at defendant's murder trial was unwarranted. When the government has properly obtained relevant evidence, and its only failure is timely notification under **CalECPA**, the consequence should not be categorical exclusion unless the legislature is exceedingly clear on the point. (***People v. Campos*** (2024) 98 Cal.App.5th1281, 1284, 1296-1297.)

Gov't. Code § 53166, *Cellular Communications Interception Technology*, also effective *January 1, 2016*, provides that:

Subd. (a).

(1) "*Cellular communications interception technology*" means any device that intercepts mobile telephony calling information or content, including an international mobile subscriber identity catcher or other virtual base transceiver station that masquerades as a cellular station and logs mobile telephony calling information.

(2) "*Local agency*" means any city, county, city and county, special district, authority, or other political subdivision of the state, and includes every county sheriff and city police department.

Subd. (b): Every local agency that operates cellular communications interception technology shall do both of the following:

(1) Maintain reasonable security procedures and practices, including operational, administrative, technical, and physical safeguards, to protect information gathered through the use of cellular communications

interception technology from unauthorized access, destruction, use, modification, or disclosure.

(2) Implement a usage and privacy policy to ensure that the collection, use, maintenance, sharing, and dissemination of information gathered through the use of cellular communications interception technology complies with all applicable law and is consistent with respect for an individual's privacy and civil liberties. This usage and privacy policy shall be available in writing to the public, and, if the local agency has an Internet Web site, the usage and privacy policy shall be posted conspicuously on that Internet Web site. The usage and privacy policy shall, at a minimum, include all of the following:

(A) The authorized purposes for using cellular communications interception technology and for collecting information using that technology.

(B) A description of the job title or other designation of the employees who are authorized to use, or access information collected through the use of, cellular communications interception technology. The policy shall identify the training requirements necessary for those authorized employees.

(C) A description of how the local agency will monitor its own use of cellular communications interception technology to ensure the accuracy of the information collected and compliance with all applicable laws, including laws providing for process and time period system audits.

(D) The existence of a memorandum of understanding or other agreement with another local agency or any other party for the shared use of cellular communications interception technology or the sharing of information collected through its use, including the identity of signatory parties.

(E) The purpose of, process for, and restrictions on, the sharing of information gathered through the use of cellular communications interception technology with other local agencies and persons.

(F) The length of time information gathered through the use of cellular communications interception technology will be retained, and the process the local agency will utilize to determine if and when to destroy retained information.

Subd. (c):

(1) Except as provided in **para. (2)**, a local agency shall not acquire cellular communications interception technology unless approved by its legislative body by adoption, at a regularly scheduled public meeting held pursuant to the **Ralph M. Brown Act** (**Gov't. Code §§ 54950 et seq**.), of a resolution or ordinance authorizing that acquisition and the usage and privacy policy required by this section.

(2) Notwithstanding **para. (1)**, the county sheriff shall not acquire cellular communications interception technology unless the sheriff provides public notice of the acquisition, which shall be posted conspicuously on his or her department's Internet Web site, and his or her department has a usage and privacy policy required by this section.

Subd. (d) Describes civil remedies for violating this section.

See also "*The Federal **Electronic Communications Privacy Act**, **18 U.S.C. §§ 2701 et seq.**" under "**P.C. § 1524.2(b)**: Records of Foreign Corporations Providing Electronic Communications or Remote Computing Services*," under "*Searches With a Search Warrant*" (Chapter 10), above.

Chapter 18:

***<u>Border Searches</u>*:**

General Rule: The United States has a governmental interest in keeping drugs and undocumented aliens, etc., out of the country. Therefore, the search and seizure standards are relaxed a bit at the International Borders. (***Carroll v. United States*** (1925) 267 U.S. 132, 154 [45 S.Ct. 280; 69 L.Ed. 543, 551-552].)

***Case Law*:**

"'[B]order searches constitute a "historically recognized exception to the **Fourth Amendment's** general principle that a warrant be obtained."'" (***United States v. Cano*** (9th Cir. 2019) 934 F.3rd 1002, 1012; quoting ***United States v. Cotterman*** *(9th Cir. 2013) 709 F.3rd 952, 957*.)

Two principal purposes to allowing warrantless border searches:

First, to identify "[t]ravelers . . . entitled to come in," *and*,

Second, to verify their "belongings as effects which may be lawfully brought in."

(***United States v. Cano***, *supra*, at p. 1013; quoting ***Carroll v. United States*** (1925) 267 U.S. 132, 154 [45 S.Ct. 280; 69 L.Ed. 543].)

Border searches are not limited to physical contraband, but may include contraband contained in one's cellphone (e.g., child pornography). (***United States v. Cano***, *supra*, at p. 1014.)

"(B)order searches ...[are] considered to be '*reasonable*' by the single fact that the person or item in question has entered into our country from outside." (***United States v. Ramsey*** (1977) 431 U.S. 606, 619 [97 S.Ct. 1972; 52 L.Ed.2nd 617, 628].)

"(A)t least with respect to the **Fourth Amendment's** suspicion requirements, a routine border search 'is by its very nature reasonable.'" (***United States v. Guzman-Padilla*** (9th Cir. 2009) 573 F.3rd 865, 877; quoting ***United States v. Dobson*** (9th Cir. 1986) 781 F.2nd 1374, 1376.)

"'The task of guarding our country's border is one laden with immense responsibility.' ***United States v. Bravo***, 295 F.3rd 1002, 1005 (9th Cir. 2002). Border agents serve as our first line of defense in preventing people intent on violating our laws from coming into our country." (***United States v. Hernandez*** (9th Cir. 2002) 314 F.3rd 430, 433-434.)

However, while Border Patrol agents may conduct routine searches "without any articulable level of suspicion," they still need "*probable cause*" to make a warrantless arrest. (***Id.***, at p. 434.)

"The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border." (***United States v. Flores-Montano*** (2004) 541 U.S. 149, 152 [124 S.Ct. 1582; 158 L.Ed.2nd 311]; see also ***United States v. Cotterman*** *(9th Cir. 2013) 709 F.3rd 952, 960.)*

"The government has more latitude to detain people in a border-crossing context [Citation], but such detentions are acceptable only during the time of extended border searches [Citations]." (***United States v. Juvenile* [*RRA-A*]** (9th Cir. 2000) 229 F.3rd 737, 743.)

The authority to conduct warrant border searches may include subjects who, mistakenly at the border, are turned around without ever having entered a foreign country (Canada, in this case). Routine searches at the border do not require a warrant or any level of suspicion, regardless of whether the motorist intends to cross the border or has mistakenly arrived at the border. Second, that defendant subjectively did not intend to cross the border is irrelevant as well. There is no reliable way for the Customs and Border Protection officers to tell the difference between a motorist who has just crossed the border and a "turnaround" motorist who is at the border area by mistake. (***D.E. v. Doe*** (6th Cir. Mich. 2016) 834 F.3rd 723.)

***Search Statutory Authority*:**

8 U.S.C. § 1357(a): The statutory arrest and search authority for officers and employees of the Immigration and Nationalization Service (i.e., Border Patrol) is contained in **8 U.S.C. § 1357(a)**: "*Powers Without a Warrant*.

Rule: Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without a warrant:"

- To interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States. (**Subd. (1)**)

- To arrest aliens entering, or who have already entered, the United States illegally. (**Subd. (2)**)

- To conduct warrantless searches of private lands within 25 miles of the border. (**Subd. (3)**.)

  However, private dwellings within this 25-mile area are excluded under the terms of this statute from those areas subject to a

warrantless search. Although not specifically stated in the statute, *the curtilage* of a home (which would typically include the back and side yards of a residence), by case law, is included within this exclusion. (***United States v. Romero-Bustamente*** (9th Cir. 2003) 337 F.3rd 1104.)

- To arrest for felony violations of the immigration laws. (**Subd. (4)**)

- To arrest for **(A)** any offense against the United States, committed in the officer's or employee's presence; *or* **(B)** any federal felony. (**Subd. (5)**)

8 U.S.C. § 1357(c) provides for the power to search the person and personal effects in the possession of any person seeking admission to the United States, with "*reasonable cause*" to suspect that grounds for denial of admission would be disclosed by such search.

The authorizing statute limits the persons who may legally conduct a "border search" to "persons authorized to board or search vessels. (***United States v. Soto-Soto*** (9th Cir. 1979) 598 F.2nd 545, 549; citing **19 U.S.C. § 482**). This includes customs and immigration officials, but not general law enforcement officers such as FBI agents. (***United States v. Cano*** (9th Cir. 2019) 934 F.3rd 1002, 1012.)

See ***United States v. Diamond*** (9th Cir. 1973) 471 F.2nd 771, 773; noting that "customs agents are not general guardians of the public peace."

Also, a border search must be conducted "in enforcement of customs laws." A border search must be conducted to "enforce importation laws," and not for "general law enforcement purposes." (***United States v. Soto-Soto***, *supra*.)

19 U.S.C. § 1581(a): *Boats & Vehicles*: Because the United States has many miles of shoreline, the Government must also have authority to stop and search boats off the coast in order to effectively guard our borders:

19 U.S.C. § 1581(a): *Vehicle Searches***:** The statutory authority for Customs Agents to conduct boat and vehicle searches is contained in **19 U.S.C. § 1581(a)**: "Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States . . . or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers, and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may

hail and stop such vessel or vehicle, and use all necessary force to compel compliance."

> It has been stated that this statute "reflects the 'impressive historical pedigree' of the Government's power and interest, [citation]. It is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity." (***United States v. Flores-Montano*** (2004) 541 U.S. 149, 153 [124 S.Ct. 1582; 158 L.Ed.2nd 311, 317].)

14 U.S.C. § 89(a): *Vessel Searches*: The statutory authority for the Coast Guard to search vessels is contained in **14 U.S.C. § 89(a)**: "The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized."

> See also **19 U.S.C. § 482(a)**: "Any of the officers or persons authorized to board or search vessels may stop, search, and examine . . . any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law . . . . [and may] seize and secure the same for trial."
>
> Note: See **Har. & Nav. Code § 523** for the authority for local law enforcement (as defined in **Har. & Nav. Code § 663**) to impound vessels from "public waterways."

31 U.S.C. § 5317: ***Interdiction Authority*:** Customs officials have the lawful authority to conduct interdiction inspections:

Subd. (b): "(A) customs officer may stop and search, at the border and without a search warrant, any vehicle, vessel, aircraft, or other conveyance, any envelope or

other container, and any person entering or departing from the United States." (See ***United States v. Seljan*** (9th Cir 2008) 547 F.3rd 993, 1001; a currency interdiction inspection, resulting in the recovery of evidence that defendant was traveling to the Philippines to have sex with underage minors; no suspicion required.)

Case Law:

> "(S)earches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." (***United States v. Flores-Montano*** (2004) 541 U.S. 149, 152-153 [124 S.Ct. 1582; 158 L.Ed.2nd 311].)
>
> Customs Officers at an international border, or the "*functional equivalent*" of a border (e.g., an international airport), may search a person's computer without any reasonable suspicion. (***United States v. Arnold*** (9th Cir. 2008) 533 F.3rd 1003.)
>
> > The Court further held that a high-tech container, such as a computer, *does not* require a higher standard of probable cause for a warrant application, even when "expressive (i.e., **First Amendment**) material" is involved. (***Id***., at p. 1010.)
>
> California is in accord with ***Arnold***. (***People v. Endacott*** (2008) 164 Cal.App.4th 1346.)
>
> > ***Endacott*** also held that the fact that the computer is further searched at some time after the initial border crossing is irrelevant. The right to do a warrantless, suspicionless search continues indefinitely. (***Id***., at p. 1350.)
> >
> > ***Endacott*** also agrees with ***United States v. Arnold***, *supra*, in holding that, "(a) computer is entitled to no more protection than any other container." (***Ibid***.)
>
> But see ***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430], where the U.S. Supreme Court, recognized that cellphones are entitled to enhanced **Fourth Amendment** protections from other "containers," ruling that the search of a cellphone found on a person upon his arrest is unlawful absent the obtaining of a search warrant. The same reasoning likely applies to computers.
>
> > See ***People v. Michael E.*** (2014) 230 Cal.App.4th 261, 276-279, where the Court included a whole segment criticizing the current trend of referring to computers and cellphones as "*containers of*

information," predicting the coming of a whole new body of law dealing with electronic devices. "'Since electronic storage is likely to contain a greater quantity and variety of information than any previous storage method, . . . '[r]elying on analogies to closed containers or file cabinets may lead courts to "oversimplify a complex area of **Fourth Amendment** doctrines and ignore the realities of massive modern computer storage."' [Citation.]" (Citing ***United States v. Carey*** (10th Cir. 1999) 172 F.3rd 1268, 1275.)

However, note ***United States v. Molina-Isidoro*** (5th Cir. TX 2018) 884 F.3rd 287. Where the person's cellphone was searched at the border after drugs were found in her suitcase. In discussing the applicability of ***Riley*** when the cellphone is searched as a part of a border, search, the Court declined to adopt a general rule concerning how the government's border search authority applies to modern technology, such as cellphones or other electronic devices. Second, the officers lawfully scanned and searched defendant's suitcase, in which the methamphetamine was discovered, during a lawful border search. Third, the agents reasonably relied in good faith on this broad border-search authority to search the apps on defendant's cellphone. Fourth, while the Supreme Court in ***Riley v. California*** held that the traditional search-incident-to-arrest rationale did not apply to cellphones generally, the Court left open the possibility that "other case-specific exceptions may still justify a warrantless search of a particular phone." Consequently, in this case, the court found that "it was reasonable for the agents to continue to rely on the robust body of pre-***Riley*** case law that allowed warrantless searches of computers and cellphones." Fifth, the court recognized that no post-***Riley*** decision issued before or after the search in this case has required a warrant for a border search of an electronic device. Finally, only two of the many federal cases addressing border searches of electronic devices have ever required any level of suspicion. In those cases, the court noted that they both required only reasonable suspicion and that was for more intrusive forensic searches.

See also ***United States v. Vergara*** (11th Cir. 2018) 884 F.3rd 1309; where it was held that the warrantless forensic searches of defendant's cellphones as a part of a border search required neither a warrant nor probable cause and the ***Riley*** decision did not change this rule.

See also ***United States v. Touset*** (11th Cir. 2018) 890 F.3rd 1227, 1234, continuing to rule that no suspicion is required at the border to search a cellphone.

The Ninth Circuit held that a forensic search of defendant's cellphone at the Mexico/U.S. border was invalid under the border search exception to **Fourth Amendment** because forensic cellphone searches require a *reasonable suspicion*, meaning that officials must reasonably suspect that the cellphone contained digital contraband. While "manual cell phone searches may be conducted by border officials without reasonable suspicion . . . forensic cell phone searches require reasonable suspicion." Per the Court, border searches of a cellphone are limited to looking for such "digital contraband," at least absent a reasonable suspicion to believe the phone contains evidence of the offense for which defendant was arrested. Without such a suspicion, when the subject has been arrested for smuggling drugs, the border search exception does *not* justify an agent's recording of the phone numbers and text messages for further processing, nor a subsequent forensic search, because doing so has no connection to ensuring that the phone lacked "digital contraband" (i.e., child pornography.) Here, there was no evidence supporting a reasonable suspicion to believe that defendant's phone contained evidence related to other types of illegal activity, such as smuggling cocaine. (***United States v. Cano*** (9th Cir. 2019) 934 F.3rd 1002, 1010-1021: "(W)e hold that manual searches of cell phones at the border are reasonable without individualized suspicion, whereas the (more intrusive) forensic examination of a cell phone requires a showing of reasonable suspicion." ***Id***., at p. 1016.)

> *Note*: Subsequently, the Ninth Circuit has denied a petition for rehearing en banc (Sept. 2, 2020) 973 F.3rd 966) where a six-judge dissent argued that the original ***Cano*** decision is just dead wrong. In the ***Cano*** decision, it was held that a "forensic border search" of a cellphone is limited to those instances where there is a reasonable suspicion to believe that the suspect's phone contained "digital contraband." The term "*forensic*" is never defined, but is defined in the dictionary as "relating to or denoting the application of scientific methods and techniques to the investigation of crime." "*Digital contraband*," in turn, *is* defined by the ***Cano*** Court as being limited to stuff like child pornography. Searching for evidence of defendant's offense (i.e., smuggling cocaine) requires probable cause and a search warrant, says the ***Cano*** Court, despite piles of

contrary case law to the effect that non-forensic border searches *do not* require any level of suspicion, and certainly not a search warrant. (E.g., see ***United States v. Montoya de Hernandez*** (1985) 473 U.S. 531; and ***United States v. Flores-Montano*** (2004) 541 U.S. 149.) As pointed out in the en banc denial dissent, the more intrusive forensic search of one's electronic equipment (e.g., computers [see ***United States v. Cotterman*** (9th Cir. 2013) 709 F.3rd at 970.] and cellphones) do in fact require a reasonable suspicion, but a warrant has never been held to be necessary, let alone probable cause. And neither suspicionless nor warrantless forensic border searches have ever been held to be limited to child pornography. The dissent here also points out that at least two other Circuits disagree with ***Cano***: ***United States v. Kolsuz*** (4th Cir. 2018) 890 F.3rd 133, and ***United States v. Williams*** (10th Cir. 2019) 942 F.3rd 1187. This makes the ***Cano*** decision ripe for review by the U.S. Supreme Court.

See "*Cellphone Searches*," below.

Authority to conduct warrantless, suspicionless searches of containers crossing the international border extends to packages both entering, *and leaving*, the mainland by crossing the custom's border. (***United States v. Baxter*** (3rd Cir. 2020) 951 F.3rd 128; upholding the search of defendant's packaged mailed from the United States to the Virgin Islands.)

The Seventh Circuit has held that ***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430], requiring probable cause and a search warrant, does not apply to border searches nor to computers or thumb drives, both of which only require a reasonable suspicion to do a warrantless search. (***United States v. Skaggs*** (7th Cir. 2022) 25 F.4th 494; defendant suspected of engaging in the importation of child pornography.)

Routine vs. Non-Routine Searches: In determining what level of suspicion of criminal activity is required to justify any particular search, courts, at one time, would break down the searches into "*routine*" and "*non-routine*," which in turn would be determined by the "*level of intrusiveness*" involved. (***United States v. Flores-Montano*** (2004) 541 U.S. 149 [124 S.Ct. 1582; 158 L.Ed.2nd 311].)

Routine Searches may be performed with *no specific particularized suspicion*, under authority of **19 U.S.C. § 1581(a)**, as described above. Such searches have been held to include searches of *handbags, luggage, shoes, pockets* and the *passenger compartments of cars*. (***United States v. Montoya De Hernandez*** (1985) 473 U.S. 531 [105 S.Ct. 3304; 87 L.Ed.2nd 381]; ***United States v. Ramos-Saenz*** (9th Cir. 1994) 36 F.3rd 59; ***United States v. Sandoval Vargas*** (9th Cir.

1988) 854 F.2nd 1132; ***United States v. Palmer*** (9th Cir. 1978) 575 F.2nd 721; ***United States v. Cano*** (9th Cir. 2019) 934 F.3rd 1002, 1012.)

See also ***United States v. Flores-Montano*** (9th Cir. 2005) 424 F.3rd 1044, applying **section 1581(a)**, rejecting the defendant's argument that **19 U.S.C. § 482** (which does talk in terms of a necessary reasonable suspicion) applied to the border searches of vehicles.

In-coming international mail, including packages, are included within this category. "Border searches of international mail are per se '*reasonable*' under the **Fourth Amendment**, without any need to show probable cause." (***People v. Blardony*** (1998) 66 Cal.App.4th 791, 794-795; citing ***United States v. Ramsey*** (1977) 431 U.S 606, 619-622 [97 S.Ct. 1972; 52 L.Ed.2nd 617, 628-630]; and ***United States v. Ani*** (9th Cir. 1998) 138 F.3rd 390, 392.)

> The requirement under **19 U.S.C. § 1582** that there be a "*reasonable suspicion*" justifying the search of in-coming mail is not constitutionally required, and a violation of this requirement will not result in suppression of any evidence. (***People v. Blardony***, *supra*, at p. 794; ***United States v. Ani***, *supra*.)

X-ray examination of luggage, bags, and other containers at a border is *routine* and requires neither a warrant nor individualized suspicion. (***United States v. Okafor*** (9th Cir. 2002) 285 F.3rd 842.)

Taking a gas tank out of a vehicle to inspect its contents, given the minimal intrusiveness of such an act, is considered by the United States Supreme Court to be a "*routine*" search, *not* requiring any articulable suspicion to justify. (***United States v. Flores-Montano*** (2004) 541 U.S. 149 [124 S.Ct. 1582; 158 L.Ed.2nd 311]; overruling the Ninth Circuit's conclusion to the contrary in ***United States v. Molina-Tarazon*** (2002) 279 F.3rd 709.)

Use of a "*Buster*" on a vehicle, given the lack of any proof that the defendant was exposed to any danger from the radioactivity in the device, does not require any suspicion in a search at the border. (***United States v. Camacho*** (9th Cir. 2004) 368 F.3rd 1182.)

> A "*Buster*" is "a handheld portable density gauge. . . . It contains a tiny bead of radioactive material called barium 133 that's inside a sealed container. . . . (W)hen the actuating trigger is pushed, the container rolls to an open slot and exposes the radiation in a forward direction (providing a reading on the density of an object)." A higher reading than normal indicates that something

not normally there is hidden in the object being evaluated, such as the spare tire in this case. (***Ibid***.)

The search of a passenger's cabin on a cruise ship, upon returning from a foreign port, is a "routine border search" and does not require any suspicion. (***People v. Laborde*** (2008) 163 Cal.App.4th 870.)

Non-Routine Searches require a "*reasonable suspicion*" the person or thing to be searched contains something illegal, and have been held to include *body cavity searches*, *strip searches*, *patdowns* and *involuntary x-ray searches*. (***United States v. Montoya De Hernandez*** (1985) 473 U.S. 531 [87 L.Ed.2nd 381]; ***United States v. Vance*** (9th Cir. 1995) 62 F.3rd 1152.)

Reasonable Suspicion: The United States Supreme Court in ***United States v. Montoya De Hernandez***, *supra*, at pp. 540-541, criticized the use of the phrase "*heightened level of suspicion*," preferring to use the standard "*reasonable suspicion*" requirement.

In ***United States v. Montoya De Hernandez***, defendant was subject to a rectal examination and held for four days at a hospital where she passed 88 balloons containing cocaine, the Court holding that a more intrusive, nonroutine search must be supported by "*reasonable suspicion*." (***Ibid***.)

Factors: The Ninth Circuit Court of Appeal, in ***United States v. Molina-Tarazon***, *supra*, found three factors which, when present, warrant the finding that a particular search is non-routine; i.e., (1) the use of force, (2) danger, and (3) fear. The Court, perhaps stretching its credibility a bit, found evidence of each in the removal of a vehicle's gas tank.

The United States Supreme Court overruled ***Molina-Tarazon***, so far as it related to the intrusiveness of taking a gas tank out of a vehicle, finding instead that to do so *does not* require any articulable suspicion. (***United States v. Flores-Montano*** (2004) 541 U.S. 149 [124 S.Ct. 1582; 158 L.Ed.2nd 311].)

See also ***United States v. Cedano-Arellano*** (9th Cir. 2003) 332 F.3rd 568; a certified detection dog's alert on defendant's gas tank, plus defendant's nervousness, evasiveness and suspicious responses, sufficient "*reasonable suspicion*" to justify the removal of his gas tank.

X-Rays of the Person: An x-ray search requires a "*heightened level*" of suspicion because it is potentially harmful to the health of the suspect. (***United States v. Ek*** (9th Cir. 1982) 672 F.2nd 379, 382.)

The United States Supreme Court in ***United States v. Montoya De Hernandez***, *supra*, at pp. 540-541, criticized the use of the phrase "*heightened level of suspicion*," preferring to use the standard "*reasonable suspicion*" requirement.

> In ***United States v. Montoya De Hernandez***, defendant was subject to a rectal examination and held for four days at a hospital where she passed 88 balloons containing cocaine, the Court holding that a more intrusive, nonroutine search must be supported by "*reasonable suspicion*." (*Ibid*.)

Use of a "*Buster*," however, on a vehicle, given the lack of any proof that the defendant was exposed to any danger from the radioactivity in the device, does not require any suspicion in a search at the border. (***United States v. Camacho*** (9th Cir. 2004) 368 F.3rd 1182.)

Extended Detentions at the border, and all *stops* or *detentions away from the border*, are also non-routine. (***United States v. Montoya De Hernandez***, *supra*, and ***People v. Superior Court*** (1973) 33 Cal.App.3rd 523.)

Cutting Open Luggage, if permanent damage is caused, is likely to be held to be a non-routine search, depending upon the extent of the damage. (***United States v. Okafor*** (9th Cir. 2002) 285 F.3rd 842.)

Cellphone and Other Electronic Device Searches:

> When the person's cellphone is searched at the border after drugs are found in her suitcase: In discussing the applicability of ***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430], when a cellphone is searched as a part of a border search, the court declined to adopt a general rule concerning how the government's border search authority applies to modern technology, such as cellphones or other electronic devices. *Second*, the officers lawfully scanned and searched defendant's suitcase, in which the methamphetamine was discovered, during a lawful border search. *Third*, the agents reasonably relied in good faith on this broad border-search authority to search the apps on defendant's cellphone. *Fourth*, while the Supreme Court in ***Riley v. California*** held that the traditional search-incident-to-arrest rationale did not apply to cellphones generally, the Court left open the possibility that "other case-specific exceptions may still justify a warrantless search of a particular phone." Consequently, in this case, the court found that "it was reasonable for the agents to continue to rely on the robust body of pre-***Riley*** case law that

allowed warrantless searches of computers and cellphones." *Fifth*, the court recognized that no post-***Riley*** decision issued before or after the search in this case has required a warrant for a border search of an electronic device. *Finally*, only two of the many federal cases addressing border searches of electronic devices have ever required any level of suspicion. In those cases, the court noted that they both required only reasonable suspicion and that was for more intrusive forensic searches. (***United States v. Molina-Isidoro*** (5th Cir. TX 2018) 884 F.3rd 287.)

A forensic warrantless search of defendant's cellphone by United States Customs and Border Protection (CBP) officers after defendant's detention at the Washington Dulles International Airport as he attempted to board a flight to Turkey, was categorized by the Court as a "non-routine" search, and was upheld as a part of a border search. *First*, the border search exception applied even though the forensic search of defendant's phone occurred at an off-site location over an extended period of time. *Second*, the court added that defendant's arrest did not transform the examination of his phone under the border search exception into a search incident to arrest, which would have required a warrant under ***Riley v. California*** (2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430]. *Finally*, the court held that the forensic search of defendant's phone was justified because the officers had reason to believe he was attempting to export firearms illegally. The court recognized that this type of transnational offense goes to the heart of the border search exception, which is justified, in part, by the government's interest in "protecting and monitoring exports from the country." Lastly, the Court rejected defendant's argument that the privacy interest in smartphone data is so great that even under the border exception, a forensic examination of a phone is a non-routine search that requires a warrant based on probable cause. (***United States v. Kolsuz*** (4th Cir. VA 2018) 890 F.3rd 133.)

> The Court declined to find whether only a reasonable suspicion was required, ruling only that "it was reasonable for the officers who conducted the forensic search of (defendant's) phone to rely on the established and uniform body of precedent allowing warrantless border searches of digital devices that are based on at least reasonable suspicion." (***Ibid***.)
>
> The fact that the officers transported defendant's cellphone four miles from the location of the detention to where it was forensically examined was held to be irrelevant. (***Ibid***.)

See also ***United States v. Vergara*** (11th Cir. 2018) 884 F.3rd 1309; where it was held that the warrantless forensic searches of defendant's cellphones as a part of a border search (returning from a cruise) where defendant was suspected of having child pornography on his cellphones, required neither a warrant nor probable cause and the ***Riley*** decision did not change this rule. The Court further noted that at most, border searches require reasonable suspicion, but defendant did not argue that the agents lacked reasonable suspicion to conduct a forensic search of his phones.

When the government establishes reasonable suspicion that an individual is involved in criminal activity, the **Fourth Amendment** permits a warrantless border search of that individual's personal electronic devices, such as a laptop computer and a cellphone. (***United States v. Williams*** (10th Cir. 2019) 942 F.3rd 1187; the Court declining to rule whether even a reasonable suspicion was necessary.)

The Ninth Circuit held that a forensic search of defendant's cellphone at the Mexico/U.S. border was invalid under the border search exception to **Fourth Amendment** because forensic cellphone searches require a *reasonable suspicion*, meaning that officials must reasonably suspect that the cellphone contained digital contraband. While "manual cell phone searches may be conducted by border officials without reasonable suspicion . . . forensic cell phone searches require reasonable suspicion." Per the Court, border searches of a cellphone are limited to looking for such "digital contraband," at least absent a reasonable suspicion to believe the phone contains evidence of the offense for which defendant was arrested. Without such a suspicion, when the subject has been arrested for smuggling drugs, the border search exception does *not* justify an agent's recording of the phone numbers and text messages for further processing, nor a subsequent forensic search, because doing so has no connection to ensuring that the phone lacked "digital contraband" (i.e., child pornography.) Here, there was no evidence supporting a reasonable suspicion to believe that defendant's phone contained evidence related to other types of illegal activity, such as smuggling cocaine. (***United States v. Cano*** (9th Cir. 2019) 934 F.3rd 1002, 1010-1021: "(W)e hold that manual searches of cell phones at the border are reasonable without individualized suspicion, whereas the (more intrusive) forensic examination of a cell phone requires a showing of reasonable suspicion." ***Id***., at p. 1016.)

Note: Subsequently, the Ninth Circuit has denied a petition for rehearing en banc (Sept. 2, 2020) 973 F.3rd 966) where a six-judge dissent argued that the original ***Cano*** decision is just dead wrong. In the ***Cano*** decision, it was held that a "forensic border search" of a cellphone is limited to those instances where there is a reasonable suspicion to believe that the suspect's phone contained "digital contraband." The term "*forensic*" is never defined, but is defined in the dictionary as "relating to or denoting the application of scientific methods and techniques to the investigation of crime." "*Digital contraband*," in turn, *is* defined by the ***Cano*** Court as being limited to stuff like child pornography. Searching for evidence of defendant's offense (i.e., smuggling cocaine) requires probable cause and a search warrant, says the ***Cano*** Court, despite piles of contrary case law to the effect that non-forensic border searches *do not* require any level of suspicion, and certainly not a search warrant. (E.g., see ***United States v. Montoya de Hernandez*** (1985) 473 U.S. 531; and ***United States v. Flores-Montano*** (2004) 541 U.S. 149.) As pointed out in the en banc denial dissent, the more intrusive forensic search of one's electronic equipment (e.g., computers [see ***United States v. Cotterman*** (9th Cir. 2013) 709 F.3rd at 970.] and cellphones) do in fact require a reasonable suspicion, but a warrant has never been held to be necessary, let alone probable cause. And neither suspicionless nor warrantless forensic border searches have ever been held to be limited to child pornography. The dissent here also points out that at least two other Circuits disagree with ***Cano***: i.e.; ***United States v. Kolsuz*** (4th Cir. 2018) 890 F.3rd 133, and ***United States v. Williams*** (10th Cir. 2019) 942 F.3rd 1187. This makes the ***Cano*** decision ripe for review by the U.S. Supreme Court.

Defendant, a citizen of the People's Republic of China and a long-time resident of the United States, conditionally pled guilty to conspiracy to commit economic espionage. He appealed the conviction and sentence. The principal issue is whether the district court erred in denying defendant's motion to suppress evidence obtained by a warrantless seizure and forensic search of his digital devices as he was leaving Chicago's O'Hare International Airport, with Shanghai, China, his final destination. The Eighth Circuit affirmed. The court explained that it agreed with the district court's conclusion that U.S. Customs and Border Protection ("CBP") officers had reasonable suspicion to conduct non-routine forensic

searches of defendant's electronic devices and acted reasonably in doing so. The court explained that no Circuit has held that the government must obtain a warrant to conduct a routine border search of electronic devices. Further, the court held that the officers and agents had background information, much of it corroborated, that provided a basis for assessing defendant's actions in May and June 2017. Their experience and training in international economic espionage and theft of trade secrets gave them reasonable suspicion for an extended border search that included a forensic search of electronic devices. Ultimately, the court held that the search was not constitutionally unreasonable. (***United States v. Haitao Xiang*** (8th Cir. 2023) 67 F.4th 895.)

Destructiveness of the Search:

In ***Cortez-Rocha*** (9th Cir. 2005) 394 F.3rd 1115, the Ninth Circuit Court of Appeal, in a split, two-to-one decision, held that cutting open a spare tire of a vehicle is not so destructive as to require a finding of a reasonable suspicion in order to justify.

Removal of a gas tank is not so destructive as to require a reasonable suspicion to justify. (***United States v. Flores-Montano*** (2004) 541 U.S. 149 [124 S.Ct. 1582; 158 L.Ed.2nd 311], overruling the Ninth Circuit Court's opinion to the contrary.

Drilling a 5/16-inch hole into the bed of a pickup truck, the damage being minimal and not affecting the security and safety of its passengers, does not require a reasonable suspicion to justify. (***United States v. Chaudhry*** (9th Cir. 2005) 424 F.2nd 1051.)

Unscrewing and pulling apart the inside door panels to a vehicle, where the panels could be reinstalled without any damage to the vehicle, does not require a reasonable suspicion. (***United States v. Hernandez*** (9th Cir. 2005) 424 F.3rd 1056.)

Reasonableness of the Search:

Even a border search which may be conducted with no suspicion must be reasonable in its manner and scope. (***United States v. Seljan*** (9th Cir. 2007) 497 F.3rd 1037, 1042-1045; a currency interdiction search, as authorized by **31 U.S.C. § 5317(b)**, of an out-bound envelope resulting in discovery of evidence that defendant traveled to the Philippines for illicit purposes, where letters were initially merely scanned and not read.)

Border agents seized defendant's laptop at the U.S.-Mexico border in response to a Treasury Enforcement Communication System (TECS) alert

that was based in part on defendant's previous conviction for child molestation. The initial search at the border turned up no incriminating material. Only after defendant's laptop was shipped almost 170 miles away and subjected to a comprehensive forensic examination were images of child pornography discovered. The court held that although the initial warrantless search of defendant's computer at the border was lawful, with or without any articulable suspicion, the later forensic examination of defendant's laptop required a showing of reasonable suspicion under the **Fourth Amendment**. The court ruled that defendant's TECS alert, prior child-related conviction, frequent travels, crossing from a country known for sex tourism, and collection of electronic equipment, plus the parameters of the Operation Angel Watch program, taken collectively, gave rise to reasonable suspicion of criminal activity. When combined with the other circumstances, the fact that an agent encountered at least one password protected file on the laptop contributed to the basis for a reasonable suspicion to conduct a forensic examination. An alert regarding possession of child pornography justified obtaining additional resources to properly determine whether illegal files were present. (***United States v. Cotterman*** (9th Cir. 2013) 709 F.3rd 952, 962-970.)

"*Reasonable suspicion*" necessary for such an intrusive search is defined as; "*a particularized and objective basis for suspecting the particular person stopped of criminal activity*." (***Id***., at p. 968.)

Scope of the Search:

Even a border search which may be conducted with no suspicion must be reasonable in its manner and scope. (***United States v. Seljan*** (9th Cir. 2007) 497 F.3rd 1037, 1042-1045; a currency interdiction search, as authorized by **31 U.S.C. § 5317(b)**, of an out-bound envelope resulting in discovery of evidence that defendant traveled to the Philippines for illicit purposes, where letters were initially merely scanned and not read.)

The Ninth Circuit is of the opinion (not agreed to by all courts; e.g., see ***United States v. Kolsuz*** (4th Cir. VA 2018) 890 F.3rd 133, 139-143.) that while warrantless/suspicionless searches at an international border for the purpose of discovering contraband being smuggled at that time, it is "beyond the scope" of a border search to be looking for evidence of past or future criminal violations; i.e., looking for "evidence that would aid in prosecuting past and preventing future border-related crimes." (***United States v. Cano*** (9th Cir. 2019) 934 F.3rd 1002, 1016-1018.)

The "Functional Equivalent of a Border:" "Border searches need not occur at an actual border, but may take place at the '*functional equivalent*' of a border, or at an '*extended border* (see below).'" (***United States v. Guzman-Padilla*** (9th Cir. 2009) 573 F.3rd 865, 877; citing ***United States v. Cardona*** (9th Cir. 1985) 769 F.2nd 625, 628.)

An International Airport, receiving flights from a foreign country, is the "*functional equivalent of a border*." Opening luggage therefore requires no suspicion, while cutting open the luggage, damaging it, requires a *reasonable suspicion*, to be lawful. (***United States v. Okafor*** (9th Cir. 2002) 285 F.3rd 842.)

The first port where a vessel docks on arrival from a foreign country is the functional equivalent of an international border. (***People v. Laborde*** (2008) 163 Cal.App.4th 870, 874.)

Similarly, *a regional sorting hub* for express consignment services, like those offered by UPS, is the "*functional equivalent of a border*" and not an "*extended border*." (See below). The test for determining the difference is whether the facility (at Louisville, Kentucky, in this case) is where packages are searched "at the last practicable opportunity before its passage over the international border." (***United States v. Abbouchi*** (9th Cir. 2007) 502 F.3rd 850.)

> See also ***United States v. Seljan*** (9th Cir. 2008) 547 F.3rd 993, where the Court held the same for a FedEx regional sorting facility in Oakland, California, where defendant's mail, bound for the Philippines, was lawfully subjected to warrantless inspections by U.S. Customs Service inspectors.

The "Extended Border Search Doctrine:"

The "*Reasonable Cause to Suspect*" *Rule*: While a search at the International border or the "*functional equivalent of a border*" (see above), done under authority of **19 U.S.C. § 1582**, does not require any suspicion to justify, a search under the "*extended border search doctrine*," done upon containers that have already been imported and are searched "*wherever found*," are authorized by **19 U.S.C. § 482**, and require the presence of a "*reasonable cause to suspect*" (i.e., a "*reasonable suspicion*"), to be lawful. (***United States v. Ramsey*** (1977) 431 U.S. 606, 612-613 [97 S.Ct. 1972; 52 L.Ed.2nd 617]; ***United States v. Taghizadeh*** (9th Cir. 1994) 41 F.3rd 1263, 1265; ***United States v. Cardona*** (9th Cir. 1985) 769 F.2nd 625, 627; ***United States v. Sahanaja*** (9th Cir. 2005) 430 F.3rd 1049.)

> Extended border searches based upon less than probable cause are lawful so long as:
>
> (1) The totality of the circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, convince the fact finder with *reasonable certainty* that any contraband in or on the vehicle at the time of search was aboard the vehicle at the time of entry into the United States; *and*

(2) The government agents conducing the search have a *reasonable suspicion* that the search may uncover contraband or evidence of criminal activity.

(***United States v. Villasenor*** (9th Cir. 2010) 608 F.3rd 467, 471-472.)

Case Law:

This rule applies to packages that are being sent *from* the United States to a foreign country, even though it has not yet left the country, at least where it has been put into the hands of the mail service and is "*all but certain*" that it will be leaving the country. (***Alexander v. United States*** (9th Cir. 1966) 362 F.2nd 379, 382.)

An extended border search, which occurs after the actual entry into the United States has been made, tend to intrude more on an individual's normal expectation of privacy. It must therefore be justified by a "*reasonable suspicion*" that the subject of the search was involved in criminal activity. (***United States v. Guzman-Padilla*** (9th Cir. 2009) 573 F.3rd 865, 877.")

> An extended border search requires that law enforcement possess a "*reasonable certainty*" that a border has been crossed, either by the vehicle in question or by contraband suspected to be within the vehicle. (***Id.***, at p. 878, 879-881.)

A Border Patrol Agent observed defendant's pickup truck some 70 miles north of the U.S.–Mexico border on Interstate 70, with Baja California license plates, traveling at 90 miles-per-hour while the other vehicles were driving between 70 and 80 mph. Also, defendant was weaving in and out of traffic and did not make eye contact with the agent after he pulled his marked vehicle alongside the passenger side of his truck. The agent affected a traffic stop. Defendant consented to a search of his truck resulting in eight kilograms of cocaine being recovered. The stop was held by an en banc panel of the Ninth Circuit Court of Appeal to have been supported by a reasonable suspicion based upon the fact that the location was the last checkpoint on that interstate, the truck had Mexican plates, and the erratic driving that the agent recognized as common among smugglers. (***United States v. Valdes-Vega*** (9th Cir. 2013) 738 F.3rd 1074, 1076-1081.)

Use of a "*Controlled Tire Deflation Device*" (or "CTDD") by Border Patrol agents to stop a vehicle for which there was a reasonable suspicion that it was involved in smuggling people or contraband across the border

was held to be lawful and, under the circumstances, not an excessive use of force. (***United States v. Guzman-Padilla*** (9th Cir. 2009) 573 F.3rd 865.)

> See "*A Controlled Tire Deflation Device* ("*CTDD*")," under "*New and Developing Law Enforcement Tools and Technology*" (Chapter 14), above.

Following defendant after seeing his car on the United States side but near the border, after which a municipal police officer was told to stop defendant, and where a drug sniffing dog alerted on defendant's vehicle, was a valid extended border search supported by a reasonable suspicion, based upon informant information and defendant's unusual behavior after crossing the border. (***United States v. Villasenor*** (9th Cir. 2010) 608 F.3rd 467.)

> The search was upheld in ***Villasenor*** despite a 45 minute detention while awaiting the arrival of a drug-sniffing dog, after a 20 minute surveillance, and where defendant was not seen crossing the border but where it was apparent that he'd just come from Mexico.

A forensic search of the defendant's laptop computer, conducted some 170 miles away from the border and over five days after the laptop was seized at the border, held *not* to come within the "extended border search" doctrine. Defendant's computer never cleared customs, so it cannot be said that it ever entered the United States. (***United States v. Cotterman*** (9th Cir. 2013) 709 F.3rd 952. 961-962; "A border search of a computer is not transformed into an extended border search simply because the device is transported and examined beyond the border.")

Immigration Checkpoints Away from the Border:

Established checkpoints located away from the border, such as at San Clemente, on Interstate 5, and Fallbrook, on Interstate 15, were, at one time, considered to be the "*functional equivalent*" of a border, and therefore subject to the same rules, even though these two points are miles from the U.S./Mexican border. (See ***United States v. Martinez-Fuerte*** (1976) 428 U.S. 543 [96 S.Ct. 3074; 49 L.Ed.2nd 1116].)

> At the time, a checkpoint was thought to be the "*functional equivalent of the border*" only when the government has proven to a "reasonable certainty that the traffic passing through the checkpoint is international in character. [Citation] In practical terms, this test means that border equivalent checkpoints intercept no more than a negligible number of domestic travelers." (***United States v. Jackson*** (5th Cir. 1987) 825 F.2nd 853, 860.)

Actual "*border checkpoints*" implicate the broader powers of the federal government to conduct searches and seizures of persons for *immigration, drug interdiction,* or *other purposes* at the border or its functional equivalent. (See ***United States v. Montoya de Hernandez*** (1985) 473 U.S. 531, 541-542 [105 S.Ct. 3304; 87 L.Ed.2nd 381, 391-392]; ***United States v. Ramsey*** (1977) 431 U.S. 606, 616 [97 S.Ct. 1972; 52 L.Ed.2nd 617, 626].)

More recent authority, however, recognizes that such checkpoints are merely "*immigration checkpoints*," and not the equivalent of an international border. (***United States v. Franzenberg*** (S.D.Cal. 1990) 937 F.Supp. 1414; ***United States v. Machuca-Barrera*** (5th Cir. 2001) 261 F.3rd 425, 432, fn. 15.)

Therefore, it has been held that stops at such points for immigration purposes is lawful despite the lack of "*reasonable suspicion*," requiring only that such stops be "*selective*." (***United States v. Martinez-Fuerte***, *supra*.)

But the search of a vehicle at an immigration checkpoint, away from the border, may require "*probable cause*" to justify. (***United States v. Ortiz*** (1975) 422 U.S. 891 [95 S.Ct. 2585; 45 L.Ed.2nd 623].)

Although argued that such checkpoints are for the purpose of enforcing immigration rules, their use in also preventing drug trafficking has recently been challenged in ***United States v. Soto-Zuniga*** (9th Cir. 2016), 837 F.3rd 992, where the Ninth Circuit Court of Appeal remanded the case back to the trial court to allow defense discovery into the records of the San Clemente checkpoint in order to properly litigate the legitimacy of such a use.

Roving Patrols: Border Patrol vehicle stops, away from the border, are held to the same **Fourth Amendment** standards as any other domestic law enforcement agency. (***Almeida-Sanchez v. United States*** (1973) 413 U.S. 266 [93 S.Ct. 2535; 37 L.Ed.2nd 596]; ***United States v. Brignoni-Ponce*** (1975) 422 U.S. 873 [95 S.Ct. 2574; 45 L.Ed.2nd 607]; ***Delaware v. Prouse*** (1979) 440 U.S. 648 [99 S.Ct. 1391; 59 L.Ed.2nd 660].)

An investigatory stop of a vehicle may be based upon a reasonable suspicion that criminal activity is afoot, based upon an evaluation of the "*totality of the circumstances*." The fact that the circumstances, taken individually and in isolation, may all have some reasonable, non-criminal explanation, does not mean that a border patrol agent does not have legal cause to stop and investigate a possible drug smuggler. (***United States v. Arvizu*** (2002) 534 U.S 266 [122 S.Ct. 744; 151 L.Ed.2nd 740].)

"(T)here was a 'crucial distinction' between the sort of 'roving-patrol stop' or 'spot check' at issue in ***Prouse*** and the fixed checkpoint in ***Martinez-Fuerte***." (***Demarest v. City of Vallejo*** (9th Cir. 2022) 44 F.4th 1209, 1217, citing ***Delaware v. Prouse***, *supra*, at pp. 656-657.)

> "(U)nlike the checkpoint in ***Martinez-Fuerte***, the sort of roving-patrol stop in ***Prouse*** involved an exercise of 'standardless and unconstrained discretion.'" (***Id.***, at 1217, quoting ***Delaware v. Prouse***, *supra*, at p 661.)

The non-exclusive list of factors a court may use in determining whether a stop and detention is lawful include:

- The characteristics of the area in which a vehicle is encountered.
- Proximity to the border.
- Recent illegal border crossings in the area.
- Erratic or evasive driving behavior.
- Aspects of the vehicle.
- The behavior or appearance of the driver.

(***United States v. Brignoni-Ponce***, *supra*, at pp. 884-885 [45 L.Ed.2nd at pp. 618-619]; see also ***United States v. Nelson*** (5th Cir. 2021) 990 F.3rd 947.)

See also ***United States v. Berber-Tinoco*** (9th Cir. 2007) 510 F.3rd 1083, adding:

- Usual patterns of smuggling in the area;
- Previous alien or drug smuggling in the area;
- Behavior of the driver, including "obvious attempts to evade officers;"
- Appearance or behavior of passengers;
- Model and appearance of the vehicle; *and*
- Officer experience.

See ***United States v. Diaz-Juarez*** (9th Cir. 2002) 299 F.3rd 1138; Driving late at night in a high crime area, near the International Border, apparently looking for something, in a vehicle from another area and with a modified suspension, held in this case sufficient to justify a stop and detention.

Also, state (including local) law enforcement officers have limited statutory authority to detain and question individuals regarding their immigration status if:

- The person is illegally present in the United States;

- The person has previously been convicted of a felony in the United States and since left the country or was deported;

- The state or local law enforcement official obtains "*appropriate confirmation*" from the INS of the immigration status of the individual;

- The state or local law enforcement official only detains the individual for as long as is reasonably required for the INS to assume federal custody of the individual for the purposes of deportation or removal.

(**8 U.S.C. § 1252c(a)**; ***United States v. Vasquez-Alvarez*** (10th Cir. 1999) 176 F.3rd 1294, 1296.)

Note the Ninth Circuit's unsupported conclusion that absent "a *particularized reasonable suspicion* that an individual is not a citizen," it is a **Fourth Amendment** violation to ask him or her about the subject's citizenship (see ***Mena v. City of Semi Valley*** (9th Cir. 2003) 332 F.3rd 1255, 1264-1265.) was reversed by the United States Supreme Court (Certiorari granted, 2004)

> The U.S. Supreme Court rejected this reasoning in the ***Mena*** case, reversing ***Mena*** while holding that it is *not* an unconstitutional expansion of the original reasons for the detention merely to make inquiry as to a person's citizenship status. ***Muehler v. Mena*** (2005) 544 U.S. 93 [125 S.Ct. 1465; 161 L.Ed.2nd 299]; specifically reversing the Ninth Circuit on this issue.)

A roving Border Patrol agent may stop a vehicle if he has reasonable suspicion to believe the vehicle is involved in illegal activity. Here, the agent was an experienced officer who had been patrolling Highway 77 near Raymondville, Texas, for almost one year, forty-five miles north of the border, well south of the Sarita checkpoint. The agent saw defendant and his passengers acting as if they were very nervous when they saw him. Finally, defendant was driving a type of vehicle known to be popular among smugglers, on a highway and on a day of the week popular among them. Based on these factors, the court held that the agent had reasonable suspicion to stop defendant. (***United States v. Ramirez*** (5th Cir. 2016) 839 F.3rd 437.)

A Border Patrol agent's knowledge of the area and his observations of suspicious circumstances constituted sufficient reasonable suspicion to stop a vehicle observed in the area of frequent drug and illegal alien trafficking (***United States v. Robles-Avalos*** (5th Cir. TX 2018) 895 F.3rd 405.)

The district court was held to have properly denied defendant's motion to suppress narcotics that Border Patrol agents found in defendant's vehicle because the agents, who had a particularized and objective basis for suspecting defendant was engaged in criminal activity, had sufficient reasonable suspicion to stop defendant's vehicle. (***United States v. Raygoza-Garcia*** (9th Cir. 2018) 902 F.3rd 994, 999-1001.)

Note: Evidence of "unproductive stops" by Border Patrol agents in the same area, or stops from which no federal prosecutions arose, did not constitute facts that were "not subject to reasonable dispute," and thus (under **Fed. R. Evid. 201(b)**) were not the proper subject for a trial court to take "*judicial notice*." (***Id.***, at pp. 1001-1002.)

But see concurring opinion, at pp. 1002-1004, criticizing what the justices consider to be putting too much emphasis on otherwise innocent behavior in establishing a reasonable suspicion of criminal activity.

"Border Patrol Agents on roving border patrols may conduct 'brief investigatory stops' without violating the **Fourth Amendment** if the stop is supported by reasonable suspicion to believe that criminal activity may be afoot. (Citing ***United States v. Valdes-Vega*** (9th Cir. 2013) 738 F.3rd 1074, 1078.). 'Reasonable suspicion is defined as a particularized and objective basis for suspecting the particular person stopped of criminal activity.' ***Id.*** (internal quotations and citation omitted). The standard 'is not a particularly high threshold to reach,' and '[a]lthough . . . a mere hunch is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.' (***Id***.)" (***United States v. Raygoza-Garcia*** (9th Cir. 2018) 902 F.3rd 994, 999-1000.)

A Court must look at the "*totality of the circumstances*:" "When evaluating law enforcement stops of vehicles near the border, 'the totality of the circumstances may include characteristics of the area, proximity to the border, usual patterns of traffic and time of day, previous alien or drug smuggling in the area, behavior of the driver, appearance or behavior of passengers, and the model and appearance of the vehicle.' (Citing ***United States v. Valdes-Vega***, *supra*, at 1079; and ***United States v. Brignoni-Ponce*** (1975) 422 U.S. 873, 884-885 [95 S. Ct. 2574; 45 L.Ed. 2nd 607].). The facts in a given case must be seen through the lens of the agents' training and experience." (***United States v. Raygoza-Garcia***, *supra*, at pp. 1000-1001; taking into consideration the vehicle's recent crossing history, the change in drivers on the same day, the distracted driving, and the proximity of the vehicle to the border.)

But see concurring opinion, at pp. 1002-1004, criticizing what the justices consider to be putting too much emphasis on otherwise innocent behavior in establishing a reasonable suspicion of criminal activity.

The **Fourth Amendment** was held to require suppression of drug evidence where a U.S. Customs and Border Protection agent did not have sufficient reasonable suspicion for a traffic stop based on the facts that defendant was driving in a known drug trafficking corridor in a vehicle that had crossed the U.S.-Mexico border a week earlier and that she slowed and moved over behind the agent after

he pulled alongside her vehicle in an unmarked car. "(W)hen the agent pulled alongside defendant, it was his conduct that looked suspicious, not hers." It was also noted that the Customs and Border Protection agent's instinct, even though based on training in "behavior analysis" and experience, was not enough to justify stopping a vehicle and searching it. (***People v. Mendoza*** (2020) 44 Cal.App.5th 1044.)

In a license suspension case under **Veh. Code, § 13353**, based on defendant's refusal to submit to a blood or breath test, the underlying investigative stop was held to be valid because an experienced border patrol officer reasonably suspected that defendant's minivan was involved with illegal smuggling after it fled the officer from a restricted area near the border at a high rate of speed. (***Elmore v. Gordon*** (2021) 73 Cal.App.5th 520, 521-522.)

***Search of a Residence*:**

Search of a residence, away from the border, after following a suspected illegal alien to the residence, requires full probable cause and a search warrant, absent an exigency or consent. Although police officers are allowed to approach a home to contact individuals inside and conduct a "knock and talk," in this case, the evidence did not support the Border Patrol Agents' argument that they entered defendant's property to initiate a consensual encounter with him. The court concluded that it was not objectively reasonable, as part of a knock-and-talk, for the agent to bypass the front door, which the agent had seen defendant open in response to a knock by a suspected illegal alien moments earlier, and intrude into an area of the curtilage where an uninvited visitor would not be expected to appear (i.e., carport attached to the side of the house). By trespassing onto the curtilage and detaining defendant, the agent violated defendant's **Fourth Amendment** rights. (***United States v. Perea-Rey*** (9th Cir. 2012) 680 F.3rd 1179, 1183-1189.)

The San Ysidro Port of Entry, in San Diego, is state land and not federal, although the attached facilities belong to the federal government. A federal Immigration and Naturalization Agent at that location may therefore lawfully make a citizen's arrest for a state criminal violation (e.g., driving while under the influence) and turn him over to state and local law enforcement officers. (***People v. Crusilla*** (1999) 77 Cal.App.4th 141.)

***Chapter 19*:**

Fourth Waiver Searches:

"*Prior Consents*:" *Search & Seizure* ("*Fourth Waiver*") *Conditions*:

General Rule: All *parolees*, and some *probationers*, and in some cases, pre-trial defendants, are subject to what is commonly referred to as a "***Fourth** Waiver*;" i.e., where the subject has agreed, prior to the fact, to waive any objections to being subjected to searches and seizures without the necessity of the law enforcement officer (or a parole or probation officer) having to meet the standard **Fourth Amendment** requirements of *probable cause* and a *search warrant*. (See ***Vandenberg v. Superior Court*** (1970) 8 Cal.App.3rd 1048, 1053; ***People v. Bravo*** (1987) 43 Cal.3rd 600, 610; ***In re York*** (1995) 9 Cal.4th 1133, 1150.)

Probation: "In California, a person may validly consent in advance to warrantless searches and seizures in exchange for the opportunity to avoid serving a state prison term. [Citations.] Warrantless searches are justified in the probation context because they aid in deterring further offenses by the probationer and in monitoring compliance with the terms of probation. [Citations.] By allowing close supervision of probationers, probation search conditions serve to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers. [Citation.]" (***People v. Cruz*** (2019) 34 Cal.App.5th 764, 770; DUI probationary search condition to submit to a blood or breath test, quoting ***People v. Robles*** (2000) 23 Cal.4th 789, 795 . . . .)

E.g.: A vehicle search based on a passenger's probation status may extend beyond the probationer's person and the seat he or she occupies, but is confined to those areas of the passenger compartment where the officer reasonably expects that the probationer could have stowed personal belongings or discarded items when aware of police activity. (***People v. Cervantes*** (2017) 11 Cal.App.5th 860, 866-872.)

Parole: Searches of a parolee and his property are reasonable, so long as the parolee's status is known to the officer and the search is not arbitrary, capricious, or harassing. (***People v. Schmitz*** (2012) 55 Cal.4th 909, 916-933; discussing the search of a non-parolee's vehicle and its contents when the parolee is a passenger in the car.)

A warrantless search of those areas of the passenger compartment of a vehicle where an officer reasonably expects that the parolee could have stowed personal belongings or discarded items when aware of police activity, as well as a search of personal property located in those areas if the officer reasonably believes that the

parolee owns those items or has the ability to exert control over them, is lawful. (***Ibid***.)

However, defendant's locked glovebox (defendant being the driver and owner of the car) was held *not* to be searchable merely because a parolee (subject to search and seizure conditions) was in the back seat, absent evidence tending to show that the parolee was capable of accessing the glovebox and in the absence of any observations by the police suggesting that the occupants of the car were maneuvering to get the gun from the back seat passenger into the glove box and lock it. (***Claypool v. Superior Court*** (2022) 85 Cal.App.5th 1092.)

Post-Release Community Supervision Act of 2011 ("***PRCS***"):

The same rules apply to what are referred to as "*probation searches*" under the "**Post-Release Community Supervision Act of 2011**," i.e., **Pen. Code §§ 3450 et seq.** (***People v. Douglas*** (2015) 240 Cal.App.4th 855, 863-873.)

The search of an individual's hotel room, when the individual was subject to the "mandatory supervision" provisions of **PRCS**, was held *not* to be an "arbitrary, capricious, or harassing" search when the officer had not had any prior contact with the defendant, there was no indication that the search had been conducted for an improper purpose, and it appeared to have been conducted solely for legitimate law-enforcement purposes. Also, the search was not conducted at an unreasonable time or in an unreasonable manner. (***United States v. Cervantes*** (9th Cir. 2017) 859 F.3rd 1175.)

See "***Post-Release Community Supervision Act of 2011***," below.

Parole v. Probation: *Prior Consent*:

Although imposed as a condition of the subject's parole or probation, such a waiver, albeit coerced at least to some extent (in so far it is imposed in lieu of incarceration where the subject is to be placed on probation), is often considered by some courts to be a form of "*prior consent*." (***In re Tyrell J.*** (1994) 8 Cal.4th 68, 79-80, overruled on other grounds.)

Note: ***In re Tyrell J.***, *supra*, has been specifically overruled by the California Supreme Court in ***In re Jaime P.*** (2006) 40 Cal.4th 128, on the issue of whether an officer had to know of the probation condition prior to the search. ***Tyrell J.*** is cited in this outline for its other still-valid legal points.

See "*Searching While In Ignorance of a Search Condition*," below.

The California Supreme Court has noted that while probationers consent to the imposition of search and seizure conditions, typically to avoid further incarceration, similar search and seizure conditions are imposed on parolees upon their release on parole without their consent since the parole statutes (e.g., **P.C. § 3067**) were amended to eliminate the a need for parolee's actual consent (**Stats. 2012, ch. 43, § 49**). A parolee's lack of consent is therefore irrelevant. (***People v. Schmitz*** (2012) 55 Cal.4th 909, 919-921, and fn. 9.)

The amendment to **P.C. § 3067**, eliminating the requirement that the inmate agree in writing to search and seizure conditions, was effective as of *6/27/2012*.

Parole: A condition of *all paroles*, after the parolee has been released from prison, is that the parolee submit to searches by his or her parole officer, or "*other peace officer at any time of the day or night, with or without a search warrant and with or without cause*." (**Cal. Code of Regs**, **Title 15**, **§ 2511**; **P.C. § 3067(a)**; ***People v. Hernandez*** (1964) 229 Cal.App.2nd 143; ***People v. Perkins*** (2016) 5 Cal.App.5th 454, 472; ***People v. Cervantes*** (2017) 11 Cal.App.5th 860, 869, fn. 9; ***Sharp v. County of Orange*** (9th Cir. 2017) 871 F.3rd 901, 905-906.)

Statutory Authorization: **P.C. § 3000(a)(1)** provides that; "The Legislature finds and declares that the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. It is in the interest surveillance of parolees . . ."

"A search of a parolee that complies with the terms of a valid search condition will usually be deemed reasonable under the **Fourth Amendment**." (***United States v. Korte*** (9th Cir. 2019) 918 F.3rd 750, 754; quoting ***United States v. Cervantes*** (9th Cir. 2017) 859 F.3rd 1175, 1183.)

Constitutionality: California's statutory warrantless, suspicionless, search condition for parolees (i.e., **P.C. § 3067(b)(3)**) has been held to be constitutional by the United State Supreme Court. (***Samson v. California*** (2006) 547 U.S. 843 [126 S.Ct. 2193; 165 L.Ed.2nd 250].)

"The State of California imposes expansive search conditions on its parolees. Pursuant to **Cal. Penal Code § 3067(b)(3)**, every parolee under the state's supervision 'is subject to search or seizure . . . at any time of the day or night, with or without a search warrant or with or without cause.' In ***Samson v. California***, the

Supreme Court held that this broad provision satisfies the mandates of the **Fourth Amendment**, as the state's interests in public safety and reintegration outweigh the privacy interests of its parolees. 547 U.S. 843, 857, . . ." (***United States v. Estrella*** (9th Cir. 2023) 69 F.4th 958, 964.)

Areas Subject to Search: Property is subject to a parolee's search conditions when the parolee "exhibit(s) a sufficiently strong connection to (the property in question) to demonstrate 'control' over it." (***United States v. Korte*** (9th Cir. 2019) 918 F.3rd 750, 754; quoting ***United States v. Grandberry*** (9th Cir. 2013) 730 F.3rd 968, 980.)

The California Supreme Court has noted that a parolee controls property based on "the nexus between the parolee and the area or items searched," which includes a consideration of the "nature of that area or item" and "how close and accessible the area or item is to the parolee." (***United States v. Korte***, *supra*, at pp. 754-755; citing ***People v. Schmitz*** (2012) 55 Cal. 4th 909.)

In ***Korte***, the trunk of defendant's rented car was held to be subject to his parolee search and seizure conditions.

There was no **Fourth Amendment** violation from a warrantless parole search of defendant's cellphone, as permitted by **Pen. Code § 3067**, because any expectation of privacy that defendant may have had in the contents of his cellphone did not outweigh the government's interest. The officers knew that defendant was on parole and had specific reasons for suspecting that defendant was involved in a residential burglary because of video surveillance evidence they had showing that a burglary involved defendant's truck and two individuals, one of whom bore a very close resemblance to defendant. (***People v. DelRio*** (2020) 54 Cal.App.5th 47.)

Pen. Code § 3067(c) *vs.* ***Cal. Code of Regs, Title 15, § 2511***:

Pen. Code § 3067 applies, by its terms (**subd. (c)**), to any parolee whose offense for which he or she is paroled occurred *on or after* January 1, 1997, as well as prison inmates released on what is known as "*postrelease community supervision*." Otherwise, the language of **Cal. Code of Regs, Title 15, § 2511** controls.

For parolees whose offense for which he or she is on parole *occurred before 1/1/1997*: "You and your residence and any property under your control may be searched without a warrant at

any time by any agent of the Department of Corrections or any law enforcement officer." (**Cal. Code of Regs, Title 15 § 2511**)

> The language in this parole condition that allows for a search of property "under (the parolee's) control," when the place to be searched is a residence, does not allow for the search of a third-party's residence even though the parolee is a frequent visitor and even though there is evidence that he is dealing drugs out of that third-party's residence. (***United States v. Grandberry*** (9th Cir. 2013) 730 F.3rd 968, 980-982,)
>
> However, the trunk of a suspect's rented car is property under his control, and is subject to a warrantless search under the terms of the defendant's parole conditions. (***United States v. Korte*** (9th Cir. 2019) 918 F.3rd 750, 754-755; noting that where the search of a vehicle is allowed, this includes the trunk to that vehicle.)

For parolees whose offense for which he or she is on parole *occurred on or after 1/1/1997* and prison inmates released on "*postrelease community supervision*." Any inmate released on parole or postrelease community supervision must agree in writing "to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." (**Pen. Code § 3067(a)**)

Note: "*Parole*," pursuant to **Pen. Code § 3067**, is to be differentiated from what is colloquially known as "Sheriff's Parole," which, pursuant to **Pen. Code § 3081(b)**, permits county boards of parole commissioners to release on parole prisoners sentenced within their counties "upon those conditions and under those rules and regulations as may seem fit and proper for his or her rehabilitation." (See ***People v. Taggart*** (2019) 31 Cal.App.5th 607; holding that leaving the jurisdiction in violation of her conditions as imposed by the county board of parole while on "sheriff's parole" was *not* an escape, pursuant to **Pen. Code § 4532(b)(1)**.) Such a parole may not include search and seizure conditions. And no known case discusses the enforceability of such conditions if they are in fact imposed by a county board of parole.

Officer's Prior Knowledge: Note ***United States v. Caseres*** (9th Cir. 2008) 533 F.3rd 1064, at pp. 1075-1076, which *erroneously* held that an officer conducting a parole search must have been aware prior to the search that **Pen. Code § 3067(a)** was applicable to the defendant, i.e., that the prior

conviction leading to his parole status occurred on or after January 1, 1997.

Note: While an officer's prior knowledge that a suspect is subject to *some* search and seizure condition is necessary (See "*Searching While In Ignorance of a Search Condition*," below), there's no basis in that law for the argument that the officer know that it was a parole, verses a probation, search condition, or that **Pen. Code § 3067(a)** was applicable as opposed to some other legal authority for the search.

California case law appears to disagree with the Ninth Circuit's ***United States v. Caseres*** decision. (See ***People v. Solorzano*** (2007) 153 Cal.App.4th 1026, 1030-1032; citing ***People v. Middleton*** (2005) 131 Cal.App.4th 732; it is not necessary that the searching officer was aware of the existence of a signed parole search agreement, as required by **Pen. Code § 3067**, so long as he knew that the subject was on parole. See also ***People v. Douglas*** (2015) 240 Cal.App.4th 855, 868-869.)

Note: In that the language of **Pen. Code § 3067(a)** is substantially similar to that of **Cal. Code of Regs, Title 15 § 2511**, the arresting officers' knowledge of the date of the prior conviction *should* be irrelevant on the issue of the legality of a parolee's **Fourth** waiver search.

The warrantless searches of defendant's person and truck were not justified under the **Fourth Amendment**, as probation searches, even though the officers had been told by dispatch that defendant was on probation but did not convey any information indicating that defendant was subject to search terms as a condition of his probation. Application of the good faith exception to the exclusionary rule was not supported by either an officer's subjective belief that all probationers were subject to search terms or by the trial court's factually unsupported assertion that 99.9 percent of probationers were subject to search terms. (***People v. Rosas*** (2020) 50 Cal.App.5th 17.)

However, see "*Searching While In Ignorance of a Search Condition*," below.

Use of a Global Positioning System; GPS:

The warrantless placing of a GPS device on defendant's vehicle, when defendant was on parole pursuant to the terms of **Pen. Code § 3067(a)**, where he was "subject to search or seizure by a parole

officer or other peace officer any time of the day or night, with or without a search warrant or with or without cause, (of) (y)ou, your residence, and any property under your control," was held to be lawful. ***United States v. Korte*** (9th Cir. 2019) 918 F.3rd 750, 755-757; citing ***People v. Zichwic*** (2001) 94 Cal.App.4th 944, a "pinging" case, as in accord.)

Note: The legality of obtaining of defendant's resulting "CSLI" (cell site location information) via a court order, pursuant to the "**Stored Communications Act**" (**18 U.S.C. § 2703(d)**), instead of a search warrant (now required pursuant to ***Carpenter v. United States*** (June 22, 2018) 585 U.S. __, __ [138 S.Ct. 2206; 201 L.Ed.2nd 507], was not decided, upholding the use of the court order instead of a search warrant under the good faith exception, relying on prior authority for using a federal court order only. (***Id***., at pp. 757-759.)

***Post-Release Community Supervision Act of 2011*:**

Supervision by County Probation: Felons released from custody who were sentenced under the "**Post-Release Community Supervision Act of 2011**," are subject to "post-release community supervision" ("**PRCS**") instead of state parole. They will be supervised by a county agency designated by the board of supervisors. In most, if not all, counties, this will be the county's probation department. (See the "**Post-Release Community Supervision Act of 2011**," **Pen. Code §§ 3450 et seq.**)

The federal Ninth Circuit Court of Appeals has held that "the State's interest in supervising offenders placed on (**PRCS**) mandatory supervision is comparable to its interest in supervising parolees." (***United States v. Cervantes*** (9th Cir. 2017) 859 F.3rd 1175; ***United States v. Johnson*** (9th Cir. 2017) 875 F.3rd 1265, 1273, fn. 4.)

See **Pen. Code § 3067**: Inmates released from prison on "postrelease community supervision" are added to those inmates (i.e., those released on parole) who are subject to search and seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant, and with or without cause.

"**The Realignment Act**" provides that a defendant sentenced to state prison is "subject to a mandatory period of supervision following release, either parole supervision by the state (**§ 3000 et seq.**), or postrelease community supervision by a county probation

department. (**§ 3450 et seq.**)" (***People v. Douglas*** (2015) 240 Cal.App.4th 855, 863-873.)

"During the period of mandatory supervision, the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence imposed by the court." (**Pen. Code § 1170(h)(5)(B)**)

Pen. Code § 3453: *A Postrelease Community Supervision Agreement* includes the following among its conditions:

(f): The person, and his or her residence and possessions, shall be subject to search at any time of the day or night, with or without a warrant, by an agent of the supervising county agency or by a peace officer.

This also allows for the warrantless withdrawal of a blood sample from a person subject to postrelease community supervision, in a DUI case, despite the lack of consent or exigent circumstances. (***People v. Jones*** (2014) 231 Cal.App.4th 1257, 1265-1269.)

"A **PRCS** search condition, like a parole search condition, is imposed on all individuals subject to **PRCS**. (**§ 3465**.)" (***People v. Douglas*** (2015) 240 Cal.App.4th 855, 864; see also ***People v. Young*** (2016) 247 Cal.App.4th 972, 979.)

"If a police officer knows an individual is on **PRCS**, he may lawfully detain that person for the purpose of searching him or her, so long as the detention and search are not arbitrary, capricious or harassing." (***People v. Douglas***, *supra,* at p. 863.)

"(A)n officer's knowledge that the individual is on **PRCS** is equivalent to knowledge that he or she is subject to a search condition." (***Id***., at p. 865.)

Also, "An officer 'knows' a subject is on **PRCS** if his belief is objectively reasonable." (***Id***., at p. 865.)

Lastly: "(W)e conclude that an individual who has been released from custody under **PRCS** is subject to search (and detention incident thereto) so long as the officer knows the individual is on **PRCS**."

An order revoking defendant's postrelease community supervision (**PRCS**) did not violate his due process rights because a "***Morrissey***-complaint" (***Morrissey v. Brewer*** (1972) 408 U.S. 471 [92 S.Ct. 2593; 33 L.Ed.2nd 484].) informal hearing before the supervising agency had been held. The record did not suggest that the probation officer who conducted the probable cause hearing was involved in defendant's arrest. The order also did not violate defendant's equal protection rights on the ground that the procedure used to revoke his **PRCS** differed from that applied to a parole revocation, under ***Morrissey***, because he had not shown that he was similarly situated to a state prison parolee. (***People v. Gutierrez*** (2016) 245 Cal.App.4th 393, 399-404.)

Given the similarities between California's mandatory supervision and parole, and the State's comparably weighty interest in supervising offenders placed on both forms of supervision, the **Fourth Amendment** analysis in defendant's case was held to be governed by the line of precedent applicable to parolees. Because defendant was subject to mandatory supervision per **Pen. Code § 1170(h)(5)**, enacted as part of California's **Criminal Justice Realignment Act of 2011**, the suspicionless search condition to which he was subject rendered the warrantless, suspicionless search of his hotel room reasonable under the **Fourth Amendment**. The hotel room could be deemed a "premises" under defendant's control (differentiating it from a "residence"). Also, the district court, in sentencing defendant on the parole violation, did not abuse its discretion by imposing a supervised release condition requiring defendant to be subject to suspicionless searches. (***United States v. Cervantes*** (9th Cir. 2017) 859 F.3rd 1175.)

Probation: A condition of *some* (but not all) *probationary* terms is that the probationer submit to searches by a probation officer or any law enforcement officer without probable cause or a warrant. (***People v. Mason*** (1971) 5 Cal.3rd 759, 763-764.)

General Rules:

"'Inherent in the very nature of probation is that probationers 'do not enjoy "the absolute liberty to which every citizen is entitled. [Citation.]" (***United States v. Knights*** ((2001) 534 U.S. 112) at 119 ([122 S.Ct. 587; 151 L.Ed.2nd 497, 505],) 'Probation is not a right, but a privilege.' (***People v. Bravo*** 43 Cal.3rd (600) at p. 608.) '[A] probationer who has been granted the privilege of probation on condition that he submit at any time to a warrantless search may have no reasonable expectation of traditional **Fourth**

Amendment protection." [Citation.] Therefore, "when [a] defendant in order to obtain probation specifically agree[s] to permit at any time a warrantless search of his person, car and house, he voluntarily waive[s] whatever claim of privacy he might otherwise have had.' [Citations.]" (***People v. Ramos*** (2004) 34 Cal.4th 494, 506 . . . ; see ***United States v. Knights***, supra, 534 U.S. at pp. 119–120.) "If the defendant finds the conditions of probation more onerous than the sentence he would otherwise face, he may refuse probation" [citation] and simply "choose to serve the sentence" [citation].' (***People v. Moran*** (2016) 1 Cal.5th 398, 403 . . . , fn. omitted.) 'A probationer's waiver of his **Fourth Amendment** rights is no less voluntary than the waiver of rights by a defendant who pleads guilty to gain the benefits of a plea bargain. [Citations.]' (***People v. Bravo***, supra, 43 Cal.3rd at p. 609.)" (***People v. Cruz*** (2019) 34 Cal.App.5th 764, 770.)

Government Interests: Probationary searches advance at least two related government interests;

- Combating recidivism; *and*
- Helping probationers integrate back into the community.

(***United States v. Lara*** (9th Cir. 2016) 815 F.3rd 605, 612; citing ***Samson v. California*** (2006) 547 U.S. 843, 849 [126 S.Ct. 2193; 165 L.Ed.2nd 250], and ***United States v. Knights*** (2001) 534 U.S. 112, 120-121 [122 S.Ct. 587; 151 L.Ed.2nd 497].)

General Principles: There are four general principles that relate to probationary **Fourth** waiver searches:

(1) Whether a search is reasonable must be determined based upon the circumstances known to the officer when the search is conducted.

(2) The rationale for warrantless probation searches is consent based.

(3) Because probation searches are undertaken to deter further offenses by the probationer and to ascertain whether he is complying with the terms of his probation, the scope of permitted search must be reasonably related to the purposes of probation.

(4) Whether the purpose of the search is to monitor the probationer or to serve some other law enforcement purpose, or both, the

search in any case remains limited in scope to the terms articulated in the search clause.

(***People v. Romeo*** (2015) 240 Cal.App.4th 931, 449-450.)

Degree of Suspicion Required:

The Ninth Circuit Court of Appeal has indicated that for a probationer, there must be at least a *reasonable suspicion* of renewed criminal activity in order for a warrantless probation search to be lawful. (***Smith v. City of Santa Clara*** (9th Cir. 2017) 876 F.3rd 987, at page 993.) But in a footnote, the Court acknowledges that no suspicion at all may be okay, at least in a case where the probationer's original offense is for a serious or violent felony. (Fn. 6.)

California does not agree with the reasonable suspicion requirement, finding suspicionless searches to be lawful. (***People v. Bravo*** (1987) 43 Cal.3rd 600; ***People v. Brown*** (1987) 191 Cal.App.3rd 761; see also ***People v. Reyes*** (1998) 19 Cal.4th 743, 748-749, commenting on ***Bravo***.)

The Second Circuit Court of Appeal has held that a federal parolee's home was subject to a warrantless search despite the lack of a reasonable suspicion, and despite a local written policy directive specifically requiring a reasonable suspicion before conducting such a search. In this case, the federal probation (i.e., parole) officers received an anonymous tip that defendant illegally possessed firearms. Anonymous information is not enough, by itself, to constitute a reasonable suspicion. However, searching defendant's residence based upon an anonymous tip constituted "a search of a parolee . . . (that) is reasonably related to the parole officer's duties," which is all that is required. (***United States v. Braggs*** (2nd Cir. 2021) 5 F.4th 183.)

See "*Standard of Proof Required*," below.

Statutory Authorization: **Pen. Code § 1203.1(j):** A court may impose any "reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, . . . (and) for the reformation and rehabilitation of the probationer."

"(A) court when granting probation may impose 'reasonable conditions as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for breach of the law, for any injury done to any person resulting from

that breach, and generally and specifically for the reformation and rehabilitation of the probationer.'" (***People v. Leon*** (2010) 181 Cal.App.4th 943, 948-949; see also ***People v. Douglas*** (2015) 240 Cal.App.4th 855, 863-873.)

"(A)dult probationers, in preference to incarceration, validly may consent to limitations upon their constitutional rights." (***People v. Olguin*** (2008) 45 Cal.4th 375, 384.)

However; "(a) probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (***In re Sheena K.*** (2007) 40 Cal.4th 875, 890.)

Although defendant had met a false imprisonment victim through social media several months before the crime, a probation condition upon conviction that allows law enforcement unrestricted computer searches for material prohibited by law was overbroad under the **Fourth Amendment**. Such a condition allows for searches of vast amounts of personal information unrelated to defendant's criminal conduct or his potential future criminality. A narrower means might include either requiring defendant o provide his social media account and passwords to his probation officer for monitoring, or restricting his use of, or access to, social media websites and applications without the prior approval of his probation officer. A condition requiring defendant not to delete his browser history was held to be valid, assuming a properly narrowed condition monitoring his use of social media can be fashioned. (***People v. Appleton*** (2016) 245 Cal.App.4th 717, 721-728.)

*Validity of a **Fourth** Waiver Condition*: A **Fourth** Waiver condition of probation will be upheld *unless*:

- The waiver has no relationship to the crime for which the offender was convicted; *and*
- The waiver relates to conduct that is not in itself criminal; *and*
- The waiver is not reasonably related to preventing future criminality.

(See ***People v. Shimek*** (1988) 205 Cal.App.3rd 340, 342; ***People v. Lent*** (1975) 15 Cal.3rd 481, 486; ***In re Frank V.*** (1991) 233

Cal.App.3rd 12232, 1242; ***People v. Moret*** (2009) 180 Cal.App.4th 839, 845; ***People v. Olguin*** (2008) 45 Cal.4th 375, 379-380.)

> *Note*: The Supreme Court, in ***People v. Mason*** (1971) 5 Cal.3rd 759, erroneously listed these criteria in the *disjunctive*, when in fact they are to be considered in the *conjunctive*. (***People v. Lent***, *supra*, at p. 486, fn. 1.)

Federally, at least in the Ninth Circuit, it is required that "[w]here a condition of supervised release is not on the list of mandatory or discretionary conditions in the sentencing guidelines, notice is required before it is imposed." (***United States v. Wise*** (9th Cir. 2004) 391 F.3rd 1027.)

> Under this theory, defendant's case was remanded for resentencing following a plea of guilty for unlawful importation of methamphetamine and heroin. The Ninth Circuit held that the district court erred by failing to give notice that it was contemplating imposing its broad search condition, requiring defendant to submit to suspicionless searches by any law enforcement officer, prior to imposing that condition in its oral pronouncement of sentence. (***United States v. Reyes*** (9th Cir. 2021) 18 F.4th 1130.)

When the probationer is a juvenile, because the purpose of juvenile law is to rehabilitate (See **W&I § 202(b)**), the *third* of the above factors is perhaps the most important. (***In re Tyrell J.*** (1994) 8 Cal.4th 68, 87, overruled on other grounds; see also ***In re Bonnie P.*** (1992) 10 Cal.App.4th 1079, 1089.)

> See "*Juveniles*," below.

A probation condition that requires the defendant to obtain the probation officer's approval of his residence has been held to be unconstitutionally overbroad. The condition was evidently intended to prevent the defendant from residing with his overprotective parents. Per the court: "The condition is all the more disturbing because it impinges on constitutional entitlements—the right to travel and freedom of association. Rather than being narrowly tailored to interfere as little as possible with these important rights, the restriction is extremely broad. The condition gives the probation officer the discretionary power . . . to banish [the defendant]. It has frequently been held that a sentencing court does not have this power. [Citations.]" (***People v. Bauer*** (1989) 211 Cal.App.3rd 937.)

Unconstitutionally vague probation conditions may be cured by amending the conditions so that the probationer will know a particular association, place, or item is within a prohibited category. (***People v. Gaines*** (2015) 242 Cal.App.4th 1035].) "Even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality." (***People v. Olguin*** (2008) 45 Cal.4th 375, 379-380; upholding a probation condition requiring defendant, convicted of DUI-related charges, to notify the probation officer of the presence of any pets in his home.)

Probation conditions may require a gang member to provide his passwords to electronic devices and social media websites to allow warrantless searches. (***People v. Ebertowski*** (2014) 228 Cal.App.4th 1170, 1174-1177.)

But it violates the **Fifth Amendment** self-incrimination privilege to require a probationer to waive his self-incrimination rights even if related to a sex-offender management program as mandated by **P.C. § 1203.067**. However, when a mandatory waiver of the defendant's psychotherapist-patient privilege is construed as requiring waiver only insofar as necessary to enable communication between the probation officer and the psychotherapist, such a condition was held to *not* be overbroad or in violation of defendant's constitutional right to privacy. (***People v. Rebulloza*** (2015) 234 Cal.App.4th 1065.)

> *Note*: Review was granted, depublishing this case, on June 10, 2015, and is therefore not citable pending a decision by the California Supreme Court. (188 Cal. Rptr.3rd 372.) On May 10, 2017, the case was transferred to the Court of Appeal for the Sixth Appellate District for reconsideration in light of the decision in ***People v. Garcia*** (2017) 2 Cal.5th 792, below.

In ***People v. Garcia*** (2017) 2 Cal.5th 792, at pp. 800-814, a probation condition under **Pen. Code §1203.067(b)(3)**, requiring waiver of the privilege against self-incrimination and participation in polygraph examinations, was held by the California Supreme Court *not* to violate the **Fifth Amendment** and is not overbroad, as interpreted to require that probationers answer all questions fully and truthfully, knowing that compelled responses cannot be used against them in a subsequent criminal proceeding. A probationer must be advised, before treatment begins, that no compelled

statement (or the fruits thereof), elicited in the course of the mandatory sex offender management program, may be used against the probationer in a criminal prosecution. Also, mandating that sex offenders waive any psychotherapist-patient privilege does not violate the right to privacy as construed to intrude on the privilege only to the limited extent specified in the condition itself.

So long as a federal district court makes a factual finding establishing some nexus between defendant's computer use and one of the statutory goals articulated in the federal probation condition statutes (i.e., **18 U.S.C. § 3553(a)(2)(B)**, **(C)** or **(D)**), it is not an abuse of discretion to impose a condition of supervised release permitting the search of defendant's personal computers. The nexus was held to be sufficient in this case. (***United States v. Bare*** (9th Cir. 2015) 806 F.3rd 1011, 1017-1019.)

Although defendant had met a false imprisonment victim through social media several months before the crime, a probation condition upon conviction that allows law enforcement unrestricted computer searches for material prohibited by law was overbroad under the **Fourth Amendment**. Such a condition allows for searches of vast amounts of personal information unrelated to defendant's criminal conduct or his potential future criminality. A narrower means might include either requiring defendant o provide his social media account and passwords to his probation officer for monitoring, or restricting his use of, or access to, social media websites and applications without the prior approval of his probation officer. A condition requiring defendant not to delete his browser history was held to be valid, assuming a properly narrowed condition monitoring his use of social media can be fashioned. (***People v. Appleton*** (2016) 245 Cal.App.4th 717, 721-728.)

A search condition for a person on probation for burglary such as: "You are not to possess tools used for the express purpose of facilitating a burglary or theft such as pry bars, screw drivers, pick lock devices, universal keys or implements or other such devices without the express permission of your supervising probation officer," is too vague to be lawful. However, it will be upheld if rewritten to contain either an "express knowledge" element (e.g.: "(D)o not possess a tool that you know or reasonably should know is used to facilitate a burglary or theft."), or an express intent element (e.g.: "(D)o not possess a specified tool with the intent to commit a burglary or theft" or "do not possess a specified tool with the purpose of committing a burglary or theft.") (***People v. Carreon*** (2016) 248 Cal.App.4th 866, 881-883.)

Upon conviction for attempted robbery and assault by means of force likely to cause great bodily injury, the trial court did not abuse its discretion under **Pen. Code § 1203.1(j)** in concluding that an electronics-search probation condition was reasonable under ***Lent*** because, given defendant's unique family and personal history (e.g., suicides, drug use, gang affiliation, economic stress), it would allow the probation department to effectively supervise defendant. The probation condition satisfied constitutional standards because infringement on defendant's privacy rights was outweighed by the State's strong need to closely monitor his conduct and protect public safety. Also, there were no facts showing defendant's electronics contained the type of private information meriting heightened protection or that a search of those devices would be more intrusive than a warrantless search of his home, to which defendant had not objected. The record did not support the argument that the probation condition was unnecessarily broad or would result in an unjustified invasion of defendant's privacy rights. (***People v. Trujillo*** (2017) 15 Cal.App.5th 574, 582-589.)

Following his conviction for domestic abuse, defendant was placed on probation with a condition authorizing the search of "*electronic storage devices*" such as cellular phones and computers, under his control. Defendant appealed and challenged the validity of the condition on the grounds that (1) the condition was unreasonable under ***People v. Lent*** (1975) 15 Cal.3rd 481, because it bore no relationship to his current offense or potential future criminality; (2) the condition was unconstitutional under the **Fourth** and **Fifth Amendments** because his privacy and privilege against self-incrimination far outweigh the State's interests, and also infringes on the privacy interests of third parties; and (3) the condition was unconstitutionally overbroad because its potential impact on his **Fourth Amendment** rights exceeds what is reasonably necessary to serve the government's legitimate interest in ensuring that he complies with the terms of his probation. The Court rejected defendant's first two claims but agreed that the condition was nonetheless unconstitutionally overbroad. Per the Court, even though the electronic storage device search condition was reasonable under ***Lent*** because it served to help ensure that defendant obeys all laws, the condition was not sufficiently narrowly tailored to pass constitutional muster. The condition's broad language "permitted unprecedented intrusion into his private affairs—and it does so on a record that demonstrates little likelihood, or even possibility, that evidence of illegal activity will be found in the devices the condition subjects to a warrantless

search." There was no evidence in the record that electronic devices played any role in defendant's crime. "Under these circumstances, there appear[ed] to be no substantial reason for believing that evidence of future criminal activity by defendant is likely to be found on electronic storage devices under his control." Thus, the Court concluded that on the record in this case the electronic storage device search condition was unconstitutionally overbroad because its potential impact on defendant's **Fourth Amendment** rights exceeds what is reasonably necessary to serve the government's legitimate interest in ensuring that he complied with the terms of his probation. (***People v. Valdivia*** (2017) 16 Cal.App.5th 1130.)

After pleading guilty to felony vandalism with gang enhancements, defendant was placed on probation with a number of conditions including that he "[s]ubmit person, vehicle, residence, property, personal effects, *computers and recordable media . . .* to search at any time with or without a warrant, and with or without reasonable cause, when required by P.O. [i.e., a probation officer] or law enforcement officer." Defendant challenged the electronics condition (in italics, above). The court upheld the validity of this condition in that it "related to preventing future criminality." (***People v. Acosta*** (2018) 20 Cal.App.5th 225, 228-237.)

A warrantless seizure of a blood sample against defendant's wishes did not violate **U.S. Const.**, **4th Amendment**, because as a condition of probation in a prior driving under the influence case, defendant had expressly agreed that if he were arrested for drunk driving, he would not refuse to submit to a chemical test of his blood. When he did refuse, the officer was legally justified in having blood drawn anyway, so long as the procedure was performed in a reasonable manner. (***People v. Cruz*** (2019) 34 Cal.App.5th 764; noting (at p. 772) that the right to take a blood sample was based upon more than merely California's implied consent law or a general **Fourth Amendment** waiver of his search and seizure rights to his "person, vehicle, place of residence, and belongings.")

> The Court cites the California Supreme Court decision of ***People v. Simon*** (2016) 1 Cal.5th 98, at p. 120, where it was noted that it has yet to be determined whether a general probationary search and seizure condition of defendant's "person," by itself, was sufficient to allow for a warrantless blood draw.

However, see ***People v. Jones*** (2014) 231 Cal.App.4th 1257, at p. 1266, where it was held that the defendant, being subject to general search and seizure conditions under his "post-release community supervision" (**PRCS**) terms, eliminated the need for a search warrant to extract a blood sample in a DUI case. With probable cause to believe that he was driving while under the influence of alcohol when he had a traffic accident, his mandatory **PRCS** search and seizure conditions, authorizing the blood draw without the necessity of a search warrant, was not in violation of the **Fourth Amendment**.

After pleading guilty to a charge of identity theft (**Pen. Code § 530.5(c)(3)**), defendant appealed from the imposition of a probation condition allowing warrantless searches of his electronic devices and accounts. The Court affirmed, despite the instant crime not involving the use of electronics or digital accounts. The court noted that a probation search condition is valid if it helps deter further offenses or helps ascertain probation compliance. "While nothing in the record indicates that defendant used an electronic device to (commit identity theft), the trial court's finding that electronic devices can facilitate the commission of identity theft crimes is not outside the bounds of reason." The Court also rejected claims that the conditions violated the defendant's expectations of privacy, his privilege against self-incrimination, and **California Electronic Communications Privacy Act** (**Pen. Code §§ 1546 et seq.**) (***People v. Wright*** (2019) 37 Cal.App.5th 120: It is also noted that the People submitted a declaration by a financial crimes detective, who averred a synergy between identity theft and digital technology.)

Defendant committed a string of burglaries, later claiming that he was under the influence of marijuana and not "think[ing] clearly." His probation included drug terms and an electronics search term limited to whether or not he was "boasting" online about marijuana. Applying ***People v. Lent***, *supra*, the California Supreme Court found the electronics search term improper because it was not "reasonably related to future criminality." The court noted that the minor did not use electronics to commit crimes, nor had he boasted online about drugs. "[T]he burden it imposes on Ricardo's privacy is substantially disproportionate to the condition's goal of monitoring and deterring drug use." "In virtually every case, one could hypothesize that monitoring a probationer's electronic devices and social media might deter or prevent future criminal conduct." A dissenting opinion took issue with an "unduly exacting proportionality assessment," which will tend to

undermine the juvenile court's quasi-parental oversight responsibilities. (***In re Ricardo P.*** (2019) 7 Cal.5th 1113.)

> See "*Juveniles and Electronic Device and/or Social Media Probation Conditions*," below.

Where defendant pled guilty to grand theft of personal property under **Pen. Code § 487(a)**, after stealing cellphones and other electronic devices, the Appellate Court held that an electronics search condition was reasonable because there is a relationship between the theft of electronic devices and the imposition of an electronic device search condition. Also, defendant forfeited an unconstitutional overbreadth challenge because he failed to raise it below and it was an as-applied challenge. (***People v. Patton*** (2019) 41 Cal.App.5th 934.)

Under the ***Lent*** test, a condition of mandatory supervision imposed under **Pen. Code § 1170**, requiring defendant—who was convicted of possessing a firearm—to submit to searches of his text messages, emails, and photographs on any cellular phone or other electronic device in his possession or residence, was invalid because it imposed a significant burden on his privacy interest and there was no information connecting it with preventing future criminality. There was no evidence that defendant used any electronic device to promote gang activity or to suggest that his phone must be monitored for drug sales. (***People v. Bryant*** (2019) 42 Cal.App.5th 839.)

Conditions of defendant's supervised release requiring that he support his dependents and meet other family responsibilities, that he work regularly at a lawful occupation, and that he notify third parties of risks that may be occasioned by his criminal record or personal history or characteristics were unconstitutionally vague. (***United States v. Ped*** (9th Cir. 2019) 943 F.3rd 427, 432-434.)

A probation condition compelling defendant to submit electronic devices for search at any time was overly burdensome. Mere convenience in monitoring a parolee's conduct, coupled with generic descriptions of how some people use cellphones, were held to *not* be sufficient to render this burden on defendant's privacy interests reasonable. (***People v. Cota*** (2020) 45 Cal.App.5th 786, 789-791.)

Upon being convicted of making harassing electronic communications (**Pen. Code § 653m(b)**), the trial court placed defendant on three years' probation with conditions (1) prohibiting

him from using or accessing social media Web sites and (2) allowing warrantless searches of his communication devices. The condition of probation prohibiting access to social media Web sites and applications was held to be sufficiently tailored to the state's legitimate interest in reformation and rehabilitation of defendant who was convicted for making harassing electronic communications, because defendant used social media to perpetrate the crime. He gathered information on the victim and had inappropriate contacts with the victim's friends through social media, and continued to use social media to discuss the case even after conviction. However, the electronic search condition was held to be illegal in that it impinged on defendant's **Fourth Amendment** rights because it could potentially expose a large volume of data that had nothing to do with illegal activity. The state's interests in preventing communication with the victim and fostering rehabilitation could be served through narrower means. (***People v. Prowell*** (2020) 48 Cal.App.5th 1094.)

It was conceded on appeal that a condition of probation to "[c]onsult with the Probation Officer without hesitation when you are in need of advice" is unconstitutionally vague and unenforceable. (***In re Anthony L.*** **(**2019) 43 Cal.App.5th 438, 455-456.)

Defendant, convicted of illegally distributing drugs, contested a probation condition requiring him to provide access to his cell phones or electronic devices and all passwords to any social media accounts and applications. On appeal, the search condition was *not* to be overbroad or vague because the relationship between drug distribution under **Health & Safety Code § 11352**, and the use of cell phones was more than abstract or hypothetical, given that police found three cell phones in the car and defendant admitted that two were his. The condition did not require defendant to open applications for the probation officer, and it limited searches to cell phones and electronic devices. The conditions were held to be sufficiently precise for defendant to know what is required of him and for the court to determine whether he had violated the condition. (***People v. Castellanos*** (2020) 51 Cal.App.5th 267.)
In a capital case, defendant contended that the trial court erred by denying his motion to suppress evidence seized during a warrantless **Fourth** waiver probation search of his home, arguing that his wavier was invalid because it was not furnished to him in writing and there was no direct evidence presented at the suppression hearing—whether through the sentencing transcript or witness testimony—that he knowingly, freely, and voluntarily consented to warrantless searches when agreed to be placed on

probation. The Court rejected defendant's argument, finding substantial evidence (via the clerk's minutes) supporting the trial court's determination that when defendant was placed on probation, he freely, voluntarily, and knowingly waived his **Fourth Amendment** rights as a condition of probation. Per the Court: "In addition to the clerk's minutes indicating the court advised defendant of the consequences of his plea, defendant told officers he was subject to a probation search condition when they entered his home. His acknowledgment of the condition to officers suggested he understood the advisals applied. The clerk's minutes and defendant's acknowledgment belie his assertion that he was not furnished with or did not sign the disposition/minute order. Defendant was also invited to present evidence that ordinary advisements were not provided, and he declined to do so." Based upon this evidence, defendant's motion to suppress was properly denied. (***People v. Vargas*** (2020) 9 Cal.5th 793, 813-816.)
The defendant's casual use of marijuana, having no substantiated relationship to the theft of a car, under ***People v. Lent*** (1975) 15 Cal.3rd 481, the Appellate Court invalidated the trial court imposed marijuana-related conditions of probation. "What is missing is some indication that [defendant] is predisposed or more likely to commit crimes when under the influence of marijuana." (***People v. Cruz*** (2020) 54 Cal.App.5th 707.)

Conditions of mandatory supervision imposed following a jail sentence as part of a post-realignment split sentence (**Pen. Code § 1170(h)(5)**) are evaluated under the ***Lent*** test for reasonableness applicable to probation conditions, rather than tests applicable to parole conditions, in that the mandatory supervision scheme is similar to a probation scheme when it comes to conditions as both involve individualized discretion as to each particular case. Here, after being convicted of concealing a firearm in a vehicle, and over defendant's objection, the trial court imposed the following electronic-related condition: "Defendant is to submit to search of any electronic device either in his possession[,] including cell phone[,] and/or any device in his place of residence. Any search by probation is limited to defendant[']s text messages, emails, and photos on such devices." The Court of Appeal's rejection of this electronics-related search condition was affirmed. However, the California Supreme Court emphasized that "this case-specific outcome should not be read to 'categorically invalidate electronics search conditions. In certain cases, the [defendant's] offense or personal history may provide the . . . court with a sufficient factual basis from which it can determine that an electronics search condition is a proportional means of deterring the [defendant] from future criminality.' [Citation.]" The Chief Justice concurred,

noting: (1) This case didn't overrule prior cases holding that some conditions are reasonable under ***Lent*** based solely on the offense of conviction with no further case-specific balancing of benefits and burdens; (2) a condition that fails as a probation condition under ***Lent*** may not necessarily fail as a condition of mandatory supervision given the differences in the schemes; and (3) the burdensome nature of a sweeping electronics search condition, like the one here, may be addressed by tailoring conditions to specific data or devices. (***People v. Bryant*** (2021) 11 Cal.5th 976.)

The language of the specific ***Fourth Waiver*** *condition* must be considered. There being no statutorily-required standard language, a court is free to limit the search and seizure conditions as it deems to be appropriate under the circumstances. A judge who wishes to impose some unusual restrictions on law enforcement officers' powers to conduct **Fourth** Waiver searches has the legal authority to do so. (***People v. Bravo*** (1987) 43 Cal.3rd 600, 607, fn. 6.)

> "Where a probation search is challenged, an officer's knowledge that the defendant was on probation and subject to search alone may be insufficient to determine the search was reasonable because 'probation search clauses are not worded uniformly' and 'judges may limit the scope of the defendant's consent to searches for particular contraband, such as drugs or stolen property, or place spatial limits on where searches may take place.'" (***People v. Thomas*** (2018) 29 Cal.App.5th 1107, 1114; quoting ***People v. Romeo*** (2015) 240 Cal.App.4th 931, 951.)
>
> Any limitations in the conditions are binding on the searching officers. For instance, a search and seizure condition specifically limited to narcotics cannot be used to justify a search for stolen property. (***People v. Howard*** (1984) 162 Cal.App.3rd 8.)
>
> However, so long as the area being searched could contain items allowed to be searched for under the terms of the **Fourth** Waiver, the officer's subjective intent (e.g., searching for stolen property where only a search for narcotics was authorized) is irrelevant, and the search will be upheld. (***People v. Gomez*** (2005) 130 Cal.App.4th 1008.)
>
> Some **Fourth** Waivers include language authorizing a warrantless search only "*upon request*," "*as requested*," or "*whenever requested*." Even though ordinarily the defendant need not be present during the search (***People v Lilienthal*** (1978) 22 Cal.3rd 891, 900.), courts have interpreted the above language to mean that the probationer must either be present, or at least be notified

beforehand about an impending search. If he is not, the resulting evidence will be suppressed. (See ***People v. Mason*** (1971) 5 Cal.3rd 759, 763; ***People v. Superior Court* [*Stevens*]** (1974) 12 Cal.3rd 858, 861.)

See ***People v. Romeo*** (2015) 240 Cal.App.4th 931, 946-949, where the prosecution's failure to offer evidence of the scope of two residents' probation conditions resulted in an incomplete record as to what could be searched, resulting in suppression of all evidence found in the residence.

Fourth waiver probation conditions, such as; to "submit [his] person and property, including any residence, premises, container or vehicle under [his] control to search and seizure," held *not* to reasonably include defendant's cellphone. (***United States v. Lara*** (9th Cir. 2016) 815 F.3rd 605, 609-612: "Just as it makes no sense to call a cell phone a 'container' for purposes of a search incident to arrest (***Riley [v. California*** (2014) 573 U.S. 373, 393-394 [134 S.Ct. 2473; 189 L.Ed.2nd 430].]) or search of an automobile (***Camou*** [(9th Cir. 2014) 773 F.3rd 932.]), it makes no sense to call a cell phone a '*container*' for purposes of a probation search." [Italics added])

> A cellphone also held *not* to come within the category of "*property*." (***United States v. Lara***, *supra*, at p. 609.)

The Fourth District Court of Appeal (Div. 1) has held that when interpreting a minor's conditions of probation, reference to defendant's "property," as "reasonably construed, does *not* include "electronic data." (***In re I.V.*** (2017) 11 Cal.App.5th 249, 259-263; citing ***United States v. Lara***, *supra*.)

However, see ***People v. Sandee*** (2017) 15 Cal.App.5th 294, at pages 302-304, where the Court noted that because the Ninth Circuit uses a balancing test, while California uses an objective test, in analyzing whether the probationer consented to the search by accepting the specific probation search conditions at issue (see pg. 303, fn. 6), ***United States v. Lara***, *supra*, is not persuasive authority and does not preclude a finding that the search of text messages contained in defendant's cellphone was lawful under defendant's **Fourth** waiver conditions allowing for the search of her "*property*" and "*personal effects*."

> The Court further noted at pages 304 and 305, that the events in ***Sandee*** took place before enactment of the **Electronic Communications Privacy Act**, which took effect on January 1, 2016. The **Act** provides that the

> government shall not "[a]ccess electronic device information by means of physical interaction or electronic communication with the electronic device" unless one of several statutory exceptions applies, including obtaining the specific consent of the authorized possessor of the device. (**Pen. Code § 1546.1(a)(3)** & **(c)(4)**)
>
> It is further noted, however, that the **Act** provides an exception to the above prohibition, effective January 1, 2017: A government entity may physically access electronic device information "[e]xcept where prohibited by state or federal law, if the device is seized from an authorized possessor of the device who is subject to an electronic device search as a clear and unambiguous condition of probation, mandatory supervision, or pretrial release." (***Id.***, **Pen. Code § 1546.1(c)(10)**)

Recognizing that "the government's interest in supervising parolees is 'substantial,'" more so than with probationers, the Ninth Circuit differentiated its decision in *Lara* (as well as *Riley*) and held that a parolee's cellphone was subject to a warrantless search. The fact that the warrantless search of defendant's phone was delayed by three days after his arrest was held not to be unreasonable. (***United States v. Johnson*** (9th Cir. 2017) 875 F.3rd 1265, 1273-1276.)

> The Court also noted that while the severity of the crimes for which an arrestee is on parole should probably be a consideration, it is not practical for officers to be held to a requirement that they check a parolee's criminal history before conducting a warrantless search of his cellphone. Therefore, defendant's status as a parolee by itself was held to be sufficient to justify a warrantless search of his cellphone. (***Id.***, at p. 1275.)
>
> The Court further noted that this defendant's search and seizure conditions, imposed by statute under **P.C. § 3067** where he was subject to search "at any time of the day or night, with or without a search warrant or with or without cause, . . . sweeps more broadly than the probation search condition at issue in ***Lara***, . . ." (referring to ***United States v. Lara*** (9th Cir. 2016) 815 F.3rd 605, where "containers" and "property" where held *not* to include cellphones.)

There was no **Fourth Amendment** violation from a warrantless parole search of defendant's cellphone, as permitted by **Pen. Code § 3067**, because any expectation of privacy that defendant may have had in the contents of his cellphone did not outweigh the government's interest. The officers knew that defendant was on

parole and had specific reasons for suspecting that defendant was involved in a residential burglary because of video surveillance evidence they had showing that a burglary involved defendant's truck and two individuals, one of whom bore a very close resemblance to defendant. (***People v. DelRio*** (2020) 54 Cal.App.5th 47: It was not argued that "*to any property under your control*" did not include defendant's cellphone.

See also ***United States v. Wood*** (7th Cir. IL 2021) 16 F.4th 529, following the weight of authority, holding that a parolee's cellphone was subject to a warrantless search, at least where (under Illinois statutes) there was a reasonable suspicion that the parolee was violating the law and subject to revocation.

In a case in which defendant challenged the trial court imposition of probation conditions, the appellate court concluded the imposition of a condition requiring defendant's consent to searches of his electronic devices was not an abuse of discretion, as the condition was tailored with sufficient specificity to avoid unconstitutionally intruding on defendant's **Fourth Amendment** rights. A probation condition prohibiting defendant from entering or posting to social media sites also was not an abuse of discretion. However, a portion of the conditions restricting defendant's use of the Internet was unconstitutionally overbroad in violation of defendant's **First Amendment** rights. The general restriction against Internet access swept far more broadly than necessary to serve the purposes of the condition; i.e., preventing or deterring contact with minors for sexual purposes. (***People v. Salvador*** (2022) 83 Cal.App.5th 57.)

Juvenile Probationers: *Juvenile probationers* may also be subjected to a ***Fourth*** *Waiver* requirement. (***In re Tyrell J.*** (1994) 8 Cal.4th 68, 87, overruled on other grounds.)

General Rules:

> "'The state, when it asserts jurisdiction over a minor, stands in the shoes of the parents' [citation], thereby occupying a 'unique role . . . in caring for the minor's well-being.' [Citation.] . . . [¶]The permissible scope of discretion in formulating terms of juvenile probation is even greater than that allowed for adults. '[E]ven where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . ."' [Citation.] This is because juveniles are deemed to be 'more in need of guidance and supervision than adults, and because a minor's

constitutional rights are more circumscribed.' [Citation.] Thus, '"'a condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court.'"' [Citations.]" (***In re Erica R.*** (2015) 240 Cal.App.4th 907, 911-912; quoting *In re Victor L.* (2010) 182 Cal.App.4th 902, 909-910.) The "*special needs*" of the juvenile probation system, with its "goal of rehabilitating youngsters who have transgressed the law, a goal that is arguably stronger than in the adult context," allows for stricter controls. (***In re Tyrell J.***, *supra*, overruled on other grounds.)

So long as the conditions imposed are tailored specifically to meet the needs of the juvenile concerned, taking into account not only the circumstances of the crime but the juvenile's entire social history, probationary conditions, even which otherwise infringe upon the constitutional rights of the juvenile, will be upheld. (***In re Binh L.*** (1992) 5 Cal.App.4th 194, 203-205.)

But the Juvenile Court's discretion is not unlimited. A probation condition is invalid if it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. (***In re Malik J.*** (2015) 240 Cal.App.4th 896, 901; quoting ***People v. Lent*** (1975) 15 Cal.3rd 481, 486.)

Statutory Authority:

Wel. & Insti. Code § 727 provides that "[i]f a minor is adjudged a ward of the court on the ground that he or she is a person described by **Section 601** or **602**, the court may make any reasonable orders for the care, supervision, custody, *conduct*, maintenance, and support of the minor, including medical treatment, subject to further order of the court." (**Subd. (a)(1)**) **Subd. (a)(2)** authorizes the court, in its discretion, to place a ward on probation without the supervision of the probation officer, and to impose "reasonable conditions of behavior as may be appropriate under this disposition." In all other cases, however, "the court shall order the care, custody, and control of the minor to be under the supervision of the probation officer . . . ." (**Subd. (a)(3)**)

Wel. & Insti. Code § 730(b): "The court may impose and require any and all reasonable conditions that it may determine are fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (See ***In re Malik J.*** (2015) 240 Cal.App.4th 896, 900.)

Wel. & Insti. Code §§ 790 et seq., which provides for a post-plea diversion program, mandates a **Fourth Amendment** waiver as a condition in every grant of deferred entry of judgment (**W&I § 794**).

Diversion in a pre-plea situation pursuant to **W&I §§ 654** and **654.2**, however, placing a juvenile on informal probation, does not provide for the imposition of a **Fourth** waiver. Absent statutory authority to do so, a court, therefore, is prohibited from imposing a **Fourth** waiver on a juvenile under such circumstances. (***Derick B. v. Superior Court* [*People*]** (2009) 180 Cal.App.4th 295.)

Juveniles and Electronic Device and/or Social Media Probation Conditions:

First District: The First District Court of Appeal's various divisions have issued a series of published decisions in rapid succession discussing the legality of imposing conditions of probation that include the warrantless searches of a minor's electronic devices and the requirement that the minor provide a probation officer with the minor's passwords to those devices.

In re Erica R. (First Dist. Div. 2, 2015) 240 Cal.App.4th 907: Defendant juvenile admitted to the misdemeanor possession of ecstasy after a school counselor found a baggie of pills in her purse, the trial court imposed as a condition of probation that she be required to submit to a search of her electronic devices and to provide her passwords to her probation officer. Defendant challenged these conditions as unreasonable under ***People v. Lent*** (1975) 15 Cal.3rd 481, 486. The court concluded that because there was no evidence connecting her electronic device or social media usage to her offense or to a risk of future criminal conduct, the

conditions were unreasonable. (***In re Erica R.***, at pp. 911-915.)

> Under ***Lent***, which applies to both juvenile and adult probationers, a condition is *invalid* if it; (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. (***Id***, at p. 912.)

In re Malik J. (First Dist. Div. 3, 2015) 240 Cal.App.4th 896: The Court upheld probation conditions to the extent that they required defendant to permit searches of electronic devices in his possession, but found those conditions requiring family members to comply, and also the portion requiring defendant to provide passwords to social media accounts, to be overbroad. With respect to the passwords to social media sites, the court noted that officers do not have the unfettered right to retrieve any information accessible from electronic devices in a probationer's possession, information stored in a remote location cannot be considered in the probationer's possession nor entirely within his or her control, and access to remotely stored information may also implicate privacy interests of third persons. In examining such devices, officers must first disable the device from any Internet or cellular connection in order to limit the search to information stored on the device, in the probationer's possession, and subject to his or her control. (***Id***, at pp. 900-906.)

> Note ***People v. Sandee*** (2017) 15 Cal.App.5th 294, 299, fn. 3, where the court's approval of a detective using a **Fourth** waiver condition as the grounds for viewing defendant's text messages was limited to just the text messages. Foreshadowing the possible suppression of more obscure information from a cellphone, the Court warned: "(T)his case does not present the issue of whether a probation search condition permits law enforcement to

use a cell phone to access other type of data that may raise third party privacy concerns, such as using the cell phone connection to access a shared databases or social networking site with restricted access."

In re Patrick F. (First Dist. Div. 5, 2015) 242 Cal.App.4th 104: Where the juvenile was determined to be a ward of the court for having committed a second degree burglary, but told his probation officer that he used marijuana frequently and had committed the burglary to get money to buy his marijuana, the conditions of his probation reasonably included a search term requiring the juvenile to submit any electronic devices and passwords under his control to search by a probation officer or a peace officer with or without a search warrant as such a condition was reasonably related to monitoring his future criminality. However, the condition was overbroad as drafted in that it did not limit the types of data (whether on the phone or accessible through the phone) that could be searched. While the juvenile's privacy interest in the information contained in his electronic devices was trumped by the State's interest in effectively monitoring his probation, that interest was trumped only to the extent the information was reasonably likely to yield evidence of drug use and other criminal activity or noncompliance with his probation conditions. The Court further held that the juvenile lacked standing to raise the privacy interest of third parties who might be affected by his search conditions.

In re J.B. (First Dist. Div. 3, 2015) 242 Cal.App.4th 749, 753-759: Where defendant admitted to the crime of petty theft, the juvenile court imposed a condition of probation that required him to permit searches of, and disclose all passwords to, his electronic devices and social media sites. The Court of Appeal found such a condition, under the circumstances, and according to the criteria set out in ***People v. Lent*** (1975) 15 Cal.3rd 481, to be unreasonable. In this case, the challenged electronic search condition had no relationship to the crime of petty theft or to the specific offense

that minor admitted committing. There was no evidence in the record that the minor used e-mail, texting or social networking websites to facilitate his offense. The court's suggestion that the minor may have used "the Internet to arrange to meet in a certain place with the idea of stealing items" **was pure** speculation. (***Id***., at p. 754.)

In re Alejandro R. (First Dist. Div. 1, 2015) 243 Cal.App.4th 556, 561-570: An electronics search condition imposed under **W&I Code § 730(b)** against defendant juvenile who admitted to being an accessory to illegal drug sales was valid under ***Lent***, *supra*, in that it was imposed with the goal of preventing defendant from selling and consuming illegal drugs. However, the condition was overbroad as imposed in that it permitted officers to review all sorts of private information that was highly unlikely to shed any light on whether defendant was complying with the other conditions of his probation, drug-related or otherwise. To satisfy the juvenile court's concern that defendant might use a cellphone and social media to communicate about drug use and sales, the scope of the condition must be limited to programs used for interpersonal communication (e.g., such as text messages, voicemail messages, photographs, e-mail accounts, and social media accounts.). The Court also upheld a condition that defendant must attend school, finding it to be neither vague nor overbroad.

In re Mark C. (First Dist. Div. 2, 2016) 244 Cal.App.4th 520, 526-535: A probation condition requiring a juvenile to submit to warrantless searches of his electronics, including passwords, was held to be invalid under ***Lent*** in that there was no relationship between the condition and the underlying offense of possessing a prohibited knife on school grounds. Using electronic devices is not in itself criminal. Nor is using password-protected services such as social media criminal, nor is it reasonably related to any future criminality by the juvenile.

In re A.S. (First Dist. Div. 5, 2016) 245 Cal.App.4th 758: As part of probation, defendant juvenile was

ordered to submit her electronics, including passwords, to warrantless searches by law enforcement. The Court of Appeal noted this condition imposed by the same judge had been reversed or modified in a number of other cases. But, under the circumstances of this case, the condition was reasonable. "[T]he electronic search condition is reasonably related to deterring future criminality because it facilitates the type and level of supervision of (defendant) which is absolutely necessary for her to succeed on probation."

In re P.O. (First Dist. Div. 1, 2016) 246 Cal.App.4th 288: Defendant was granted probation with a condition that he provide his electronic passwords to his probation officer. Defendant appealed arguing that the condition was unreasonable and unconstitutionally overbroad. Noting the various cases with inconsistent holdings and referencing various cases on this issue pending in the Supreme Court, the Court here held the condition in this case was not unreasonable because it was reasonably related to future criminality. However, it was still overbroad because it was not narrowly tailored to further defendant's rehabilitation. The court modified that condition and also struck conditions requiring "good behavior" and "good citizenship" as unconstitutionally vague.

In re Juan R. (First Dist. Div. 5, 2018) 22 Cal.App.5th 1083: Defendant/minor was declared a ward of the juvenile court and placed on supervised probation with specified terms and conditions. One of those conditions was as follows: "Submit to search of electronic devices at any time of the day or night by any law enforcement officer, probation officer, or mandatory supervision officer with or without a warrant, probable cause or reasonable suspicion including cell phones over which the minor has control over or access to for electronic communication content information likely to reveal evidence that the minor is continuing his criminal activities and is continuing his association via text or social media with co-companions. This search should be confined to areas of the electronic devices including social media accounts, applications,

websites where such evidence of criminality [or] probation violation may be found. . . . The minor must provide access/passwords to those electronic devices, accounts, applications, websites to any law enforcement officer, probation officer or mandatory supervision officer." Minor attacked the constitutionality of this condition as being overbroad. The Court of Appeal rejected this claim and upheld the condition.

In re L.O. (First Dist. Div. 4, 2018) 27 Cal.App.5th 706: A probation condition prohibiting the minor from gaining access to, or using any social networking site was modified because while there doubtless were circumstances in which it was appropriate to restrict a probationer's access to social media, an absolute prohibition that admitted to no exception was held to be unconstitutionally overbroad on its face.

In re Amber K. (First Dist. Div. 2, 2020) 45 Cal.App.5th 559: The record did not show a relationship between defendant minor's use of electronic devices and the offending conduct sufficient to justify an electronic search condition. An assault that defendant had committed was filmed by fellow students and distributed on social media. However, there was no evidence that defendant arranged for the filming or distribution. Also, although there was evidence that the victim used electronic devices and social media to communicate about defendant, the only information in the record concerning defendant's use of social media was the district attorney's statement that defendant posted about the fight after it took place. The electronic search condition burdened defendant's privacy in a manner substantially disproportionate to the legitimate interest in monitoring her compliance with a no-contact order.

In re David C. (First Dist. Div. 3, 2020) 47 Cal.App.5th 657, 661-665: In an indecent exposure case under **Pen. Code, § 314**, an electronics search condition should not have been included in a probation condition requiring that the minor participate in sex offender counseling if

recommended by a treatment provider because it was not reasonably related to future criminality, given that the charge did not involve electronics. The condition was not meaningfully narrowed by confining it to areas of devices where evidence likely to reveal probation violations might be found. However, a polygraph condition was proper because it was adequately limited. The scope of any examination directed by minor's treatment provider would be for purposes of psychological assessment as part of minor's treatment and counseling.

In re Cesar G. (First Dist. Div. 2, Feb. 10, 2022) 74 Cal.App.5th 1039: The juvenile court did not abuse its discretion under **Welf. & Inst. Code § 730, subd. (b)**, by imposing a search condition on a minor who pleaded no contest to alcohol-related reckless driving and was adjudged a ward of the court and placed on probation because the burdens imposed on the minor were not unreasonable or disproportionate in light of legitimate interests in the minor's rehabilitation preventing future criminal behavior. Also, although nothing prevented the minor's parents from requiring the minor to reimburse them for costs they incurred, which they did, and the Juvenile Court could support such efforts by the parents, the Juvenile Court erred in not ordering the probation department to pay the fees for the minor to attend sobriety programs because there was no authority under **Welf. & Inst. Code § 903**, or any other statute, to order the minor to pay.

Second District:

In a delinquency proceeding arising from the minor's use of a racial slur against a teacher who tried to stop a fight, it was reasonable under **W&I Code § 730** to require, as a condition of probation, that the minor's electronic devices be subject to search because that condition would allow law enforcement to monitor the minor's compliance with the other conditions, specifically, that he refrain from using drugs, threatening others with violence, and visiting school grounds without prior approval. The condition was not overbroad because

it was limited to digital communication in the form of text messages, voice mail messages, social media accounts, call logs, photographs, e-mail accounts and internet browsing history. That limitation reduced the likelihood that law enforcement would access medical records, financial information or other data unrelated to criminal activity. (***In re J.G.*** (2nd Dist. Div. 6, 2019) 33 Cal.App.5th 1084.)

Note: On October 23, 2019, this case was transferred back to the Court of Appeal, Second Appellate District, Division Six, with directions to vacate its decision and reconsider the cause in light of ***In re Ricardo P.*** (2019) 7 Cal.5th 1113, below: See "*Validity of a **Fourth** Waiver Condition*," above.

Fourth District:

Conditions of probation restricting defendant minor's use of electronics or requiring the submission of those electronics to search were held to be reasonably related to his supervision, under valid under ***Lent***, and were constitutional. The contested conditions reasonably related to the probation department's supervision of defendant in that compliance with these conditions provided the probation department with the practical information necessary to enforce the uncontested conditions. The sentencing court could reasonably infer an increased risk that defendant, who demonstrated a sexual attraction to children, would seek to possess child pornography or contact potential victims via the Internet as the result of the attraction he demonstrated. The conditions the Juvenile Court imposed on defendant would deter him from reoffending. (***In re George F.*** (Fourth Dist., Div. 1, 2016) 248 Cal.App.4th 734.)

A condition of probation allowing searches of a minor's electronic devices was not a facially overbroad restriction of constitutional rights because certain probationers might require more intensive supervision and monitoring based on the specific facts of the case. A condition limiting the

minor's use of computers, the Internet, and social networking Web sites was also not facially overbroad because, in certain circumstances, a complete prohibition on the use of a probationer's access to social networking Web sites during the term of probation could be a close fit. (***In re J.S.*** (Fourth Dist., Div. 1, 2019) 37 Cal.App.5th 402.)

> *Note*: On October 23, 2019, this case was transferred back to the Court of Appeal, Fourth Appellate District, Division One, with directions to vacate its decision and reconsider the cause in light of ***In re Ricardo P.*** (2019) 7 Cal.5th 1113, below: See "*Validity of a **Fourth** Waiver Condition*," above.

A minor's failure to object in the trial court to a probation condition under **Welf. & Inst. Code, § 730**, was held to have forfeited a challenge on appeal on the basis that it was vague to require him to submit searches of his property, in that the phrase "any property" might encompass electronic devices. Under the facts of the case, including that one of the offenses was striking an elderly man to steal his cell phone, the question should have been asked of the juvenile court. It was not unconstitutionally vague to require that, when traveling with other minors, the minor be accompanied by "a parent or legal guardian, a responsible adult." It was sufficiently clear that a "responsible adult" was an adult with a supervisory role, given that the minor had committed a violent robbery when accompanied by a juvenile friend. (***In re R.S.*** (Fourth District, Div. 1, 2017) 11 Cal.App.5th 239.)

> *Note*: On October 16, 2019, this case was transferred back to the Court of Appeal, Fourth Appellate District, Division One, with directions to vacate its decision and reconsider the cause in light of ***In re Ricardo P.*** (2019) 7 Cal.5th 1113, below: See "*Validity of a **Fourth** Waiver Condition*," above.

Sixth District:

> After admitting to felony possession of child pornography, **Pen. Code, § 311.11, subd. (a)**, and extortion, **Pen. Code, §§ 518, 520**, a minor was properly required, as a condition of probation, to submit to electronic searches and to provide passwords because there was a direct relationship between his use of an electronic device his offenses, which arose from recording photographs and video on his cellular phone of sexual activity between himself and another minor and later extorting money from the other minor by threatening to disclose the recordings to other students at their high school. (***In re Q.R.*** (Sixth District, 2020) 44 Cal.App.5th 696.)

The California Supreme Court finally resolved some of the issues raised in the above cases:

> Defendant committed a string of burglaries, later claiming that he was under the influence of marijuana and not "think[ing] clearly." His probation included drug terms and an electronics search term limited to whether or not he was "boasting" online about marijuana. Applying ***People v. Lent***, *supra*, the California Supreme Court found the electronics search term improper because it was not "reasonably related to future criminality." The court noted that the minor did not use electronics to commit crimes, nor had he boasted online about drugs. "[T]he burden it imposes on Ricardo's privacy is substantially disproportionate to the condition's goal of monitoring and deterring drug use." "In virtually every case, one could hypothesize that monitoring a probationer's electronic devices and social media might deter or prevent future criminal conduct." A dissenting opinion took issue with an "unduly exacting proportionality assessment," which will tend to undermine the juvenile court's quasi-parental oversight responsibilities. (***In re Ricardo P.*** (2019) 7 Cal.5th 1113.)

First Amendment Issues:

> A court may restrict a minor's use of social media, such as by prohibiting him from using it to talk about his offense, in a narrowly tailored probation condition affecting this **First Amendment** freedom of expression rights. (***In re A.A.*** (Second Dist., Div. 6, 2018) 30 Cal.App.5th 596.)
>
> > In ***A.A.***, The Court held that no **First Amendment** violation arose from prohibiting a minor, as a condition of probation, from discussing on social media his adjudication for battery with serious bodily injury. The restriction, which allowed the minor to use other speech forums, was precise, narrow, and reasonably tailored to address posting conduct and rehabilitation. Also, it was not rendered overbroad by prohibiting use of social media to express remorse, to praise the juvenile justice system, or to inform friends and family about the progress of the case.

Differences Between Parole and Probation: Although there is some authority for the argument that the rules are the same, whether discussing the issue of a parole search or a probation search, when a **Fourth** Waiver is the issue (see ***People v. Hoeninghaus*** (2004) 120 Cal.App.4th 1180, 1192-1198.), the United States Supreme Court has indicated that parolees have a lesser expectation of privacy than probationers, hinting that they (i.e., parolees) therefore may be subjected to stricter controls. (***Samson v. California*** (2006) 547 U.S. 843, 850 [126 S.Ct. 2193; 165 L.Ed.2nd 250].)

> The state "has an overwhelming interest in supervising parolees because parolees . . . are more likely to commit future criminal offenses." (***Id.***, at p. 853. See also ***United States v. Sullivan*** (9th Cir. 2015) 797 F.3rd 623, 634; and ***People v. Perkins*** (2016) 5 Cal.App.5th 454, 473, citing ***Pennsylvania Board of Probation and Parole v. Scott*** (1998) 524 U.S. 357, 365 [118 S.Ct. 2014; 141 L.Ed.2nd 344]; see also ***United States v. Cervantes*** (9th Cir. June 19, 2017) 859 F.3rd 1175; and ***United States v. Johnson*** (9th Cir. 2017) 875 F.3rd 1265, 1275.)
>
> Recognizing this, the Ninth Circuit Court of Appeal has overruled any of its prior decisions that have held to the contrary. (***United States v. King*** (9th Cir. 2013) 736 F.3rd 805.)
>
> > See also ***United States v. Lara*** (9th Cir. 2016) 815 F.3rd 605, 610; "(A) probationer's privacy interest is greater than a parolee's;" citing ***Samson v. California***, *supra*, at p. 850; see also ***United***

States v. Job (9th Cir. 2017) 871 F.3rd 852, 859-860; and ***United States v. Korte*** (9th Cir. 2019) 918 F.3rd 750, 754.)

Given the similarities between California's mandatory supervision and parole, and the State's comparably weighty interest in supervising offenders placed on both forms of supervision, the **Fourth Amendment** analysis in defendant's case was held to be governed by the line of precedent applicable to parolees. Because defendant was subject to mandatory supervision per **Pen. Code § 1170(h)(5)**, enacted as part of California's **Criminal Justice Realignment Act of 2011**, the suspicionless search condition to which he was subject rendered the warrantless, suspicionless search of his hotel room reasonable under the **Fourth Amendment**. The hotel room could be deemed a "premises" under defendant's control. Also, the district court, in sentencing defendant on the parole violation, did not abuse its discretion by imposing a supervised release condition requiring defendant to be subject to suspicionless searches. (***United States v. Cervantes*** (9th Cir. 2017) 859 F.3rd 1175.)

California courts are in accord, holding that a split sentence under **Pen. Code § 1170(h)(5)** is "akin to a state prison commitment," and that mandatory supervision is therefore "more similar to parole than probation." (See ***People v. Martinez*** (2014) 226 Cal.App.4th 759, 763; quoting ***People v. Fandinola*** (2013) 221 Cal.App.4th 1415, 1422-1423.)

"Parolees, 'have severely diminished expectations of privacy by virtue of their status,' ***Samson v. California***, 547 U.S. 843, 852, 126 S.Ct. 2193, 165 L. Ed. 2d 250 (2006), and they may be subject to warrantless searches of their homes without a warrant or suspicion of wrongdoing." (***United States v. Ped*** (9th Cir. 2019) 943 F.3rd 427, 430.)

A "*Special Needs*" *Search*: In either case (i.e., parole or probation), such a condition of parole or probation, commonly referred to as a "***Fourth*** *Waiver*," is an important variance from the normal search and seizure rules.

"(T)he government may dispense with the warrant requirement in situations when '"special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable."'" (***In re Tyrell J.*** (1994) 8 Cal.4th 68, 77, overruled on other grounds, citing ***Griffin v. Wisconsin*** (1987) 483 U.S. 868, 873 [107 S.Ct. 3164; 97 L.Ed.2nd 709, 717].)

A "***Fourth*** *Waiver*," at least when applied to an adult probationer, is in effect a *prior consent* given by the probationer to submit his or her person, home, vehicle and other possessions to search or seizure by any probation

officer or other law enforcement officer, any time, day or night, without requiring the searching probation officer or police officer to obtain a search warrant, or to demonstrate the existence of probable cause. It is a waiver of the subject's **Fourth Amendment** rights against unreasonable searches and seizures. (See ***In re Tyrell J.***, *supra*, at pp. 79-80, overruled on other grounds; ***Vandenberg v. Superior Court*** (1970) 8 Cal.App.3rd 1048, 1053; ***People v. Bravo*** (1987) 43 Cal.3rd 600, 608-610; ***In re York*** (1995) 9 Cal.4th 1133, 1149; ***People v. Hernandez*** (1964) 229 Cal.App.2nd 143.)

As a result, considering the important governmental interest in operating probation or parole systems, as well as the need to protect the public, when balanced with the diminished expectation of privacy enjoyed by probationers and parolees, ***Fourth** Waiver* searches are now commonly classified as "*Special Needs*" searches which may be reasonable despite the lack, in some instances, of *any* particularized suspicion justifying the search. (***Griffin v. Wisconsin*** (1987) 483 U.S. 868, 875 [107 S.Ct. 3164; 97 L.Ed.2nd 709, 718]; ***In re Tyrell J.***, *supra*, at pp. 76-77, overruled on other grounds; ***People v. Reyes***, *supra*, at pp. 748, 751-752.)

> *Note*: While a *probationer* is given a choice whether to accept the probation conditions (the alternative being incarceration), parolees and juveniles typically are not. The "*prior consent*" theory, therefore may be hard to justify with parolees and juveniles. Therefore, in such cases, the theory that one who has validly waived his or her **Fourth Amendment** rights has a *diminished expectation of privacy* as a result, as a "*special needs*" search, is perhaps a stronger justification. (***In re Tyrell J.***, *supra*, at p. 86, overruled on other grounds; ***People v. Reyes*** (1998) 19 Cal.4th 743, 749-750.)

The United States Supreme Court, in ***Griffin v. Wisconsin***, *supra*, at p. 876 [97 L.Ed.2nd at p. 719], found three reasons supporting the conclusion that the operation of a probation system presented such "*special needs*:"

- A warrant requirement would interfere to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close the supervision the probationer requires.

- The delay inherent in obtaining a warrant would make it more difficult for probation officials to respond quickly to evidence of misconduct.

- A warrant and probable cause requirement would reduce the deterrent effect that the possibility of expeditious searches would otherwise create.

See also the concurring opinion in ***United States v. Crawford*** (9th Cir. 2004) 372 F.3rd 1048, at pages 1066-1072, describing a parole **Fourth** Waiver search as a "*special needs*" search.

However, the United States Supreme Court, in ***Samson v. California*** (2006) 547 U.S. 843, 852, fn. 3 [126 S.Ct. 2193; 165 L.Ed.2nd 250], declined to decide whether a parole **Fourth** Waiver involved a "*special need*."

Diversion in a pre-plea situation pursuant to **W&I §§ 654** and **654.2**, however, placing a juvenile on informal probation, does not provide for the imposition of a **Fourth** waiver. Absent statutory authority to do so, a court, therefore, is prohibited from imposing a **Fourth** waiver on a juvenile under such circumstances. (***Derick B. v. Superior Court* [*People*]** (2009) 180 Cal.App.4th 295.)

See ***Smith v. City of Santa Clara*** (9th Cir. 2017) 876 F.3rd 987, at pages 991-994; differentiating pure "consent" searches (e.g., ***Georgia v. Randolph*** (2006) 547 U.S. 103 [126 S.Ct. 1515; 164 L.Ed.2nd 208].) from **Fourth** waiver "special needs" searches.

The warrantless search of a parolee may be classified under both a "special needs" search and a search based upon the parolee's lessened expectation of privacy. (See ***United States v. Sweeney*** (6th Cir. OH 2018) 891 F.3rd 232.)

See "*Special Needs Searches*," under "*Warrantless Searches and Seizures*" (Chapter 9), above.

Veh. Code § 23154: *Person on Probation for a Prior Driving Under the Influence* (*DUI*) *Conviction*:

(a) It is unlawful for a person who is on probation for a violation of **Section 23152** or **23153** to operate a motor vehicle at any time with a blood-alcohol concentration of *0.01 percent or greater*, as measured by a preliminary alcohol screening test or other chemical test.

(b) A person may be found to be in violation of **subdivision (a)** if the person was, at the time of driving, on probation for a violation of **Section 23152** or **23153**, and the trier of fact finds that the person had consumed an alcoholic beverage and was driving a vehicle with a blood-alcohol

concentration of 0.01 percent or greater, as measured by a preliminary alcohol screening test or other chemical test.

(c)

(1) A person who is on probation for a violation of **Section 23152** or **23153** who drives a motor vehicle *is deemed to have given his or her consent to a preliminary alcohol screening* (*i.e., a "PAS"*) *test* or other chemical test for the purpose of determining the presence of alcohol in the person, if lawfully detained for an alleged violation of **subdivision (a)**.

(2) The testing shall be incidental to a lawful detention and administered at the direction of a peace officer having reasonable cause to believe the person is driving a motor vehicle in violation of **subdivision (a)**.

(3) The person shall be told that his or her failure to submit to, or the failure to complete, a preliminary alcohol screening test or other chemical test as requested will result in the *suspension or revocation of the person's privilege to operate a motor vehicle* for a period of *one year to three years,* as provided in **Section 13353.1**.

Pre-Trial Fourth Waiver:

Similar ***Fourth*** *Waivers* may also be imposed as a condition of an "*O.R.*" (i.e., "*Own Recognizance*") release pending trial, and have been held to be lawful if reasonably related under the circumstances of a particular case to the prevention and detection of further crime and to the safety of the public. (***In re York*** (1995) 9 Cal.4th 1133.)

The Ninth Circuit disagrees, holding that a ***Fourth*** *Waiver* cannot be imposed on a pretrial defendant as a condition of release. (***United States v. Scott*** (9th Cir. 2005) 450 F.3rd 863.)

However, a trial court lacks inherent authority to impose conditions of bail once a defendant posts the scheduled bail amount. The court distinguished such a situation from releasing a defendant on his or her own recognizance (OR), because OR release does permit a court to impose reasonable conditions of bail. In this case, the court struck the **Fourth** waiver as a condition of bail. A concurring justice believed that trial courts do have inherent authority to impose conditions of bail, even when the scheduled amount is posted. (***In re Webb*** (2018) 20 Cal.App.5th 44, 51-56.)

Warrantless Blood-Draws of a DUI Probationer/Parolee Suspect:

> Where defendant's blood was taken over his objection and without a warrant and without exigent circumstances, ***Missouri v. McNeely*** (2013) 569 U.S. 141 [133 S.Ct. 1552; 185 L.Ed.2nd 696], held that a blood draw is illegal. However, where defendant is subject to search and seizure conditions under his "post-release community supervision" (**PRCS**) terms, there is no need for a search warrant. With probable cause to believe that he was driving while under the influence of alcohol when he had a traffic accident, his mandatory **PRCS** search and seizure conditions, authorizing the blood draw without the necessity of a search warrant, is not in violation of the **Fourth Amendment**. (***People v. Jones*** (2014) 231 Cal.App.4th 1257, 1262-1269.)

Taking a DNA Sample:

> Where defendant, who was on searchable parole, is arrested on rape charges, and officers extracted a DNA sample without a search warrant, defendant's later motion to suppress the results of the DNA test was properly denied by the trial court. The undisputed evidence showed that that search was "not arbitrary, capricious, or harassing." The prosecution bore the burden of establishing the search was reasonable, and it met that burden in this case beyond a reasonable doubt. (***People v. Perkins*** (2016) 5 Cal.App.5th 454, 471-474.)

Constitutionality: The advanced waiver of **Fourth Amendment** rights, imposed as a condition of accepting probation or parole, has been held to be constitutional. (***Zap v. United States*** (1946) 328 U.S. 624 [66 S.Ct. 1277; 90 L.Ed. 1477]; ***People v. Mason*** (1971) 5 Cal.3rd 759, 764-765.)

Expectation of Privacy:

> While a number of legal theories, including "*prior consent*" and "*special needs*" (see above), have justified the upholding the legality of **Fourth** Waiver searches over the years, another theory espoused by some courts is that persons subject to a **Fourth** Waiver have a *reduced expectation of privacy*, depriving them of any "*standing*" to object to the search. (***People v. Valasquez*** (1993) 21 Cal.App.4th 555, 558; ***People v. Viers*** (1991) 1 Cal.App.4th 990, 993; ***People v. Biddinger*** (1996) 41 Cal.App.4th 1219; ***People v. Ramos*** (2004) 34 Cal.4th 494, 504-506; ***Samson v. California*** (2006) 547 U.S. 843 [126 S.Ct. 2193; 165 L.Ed.2nd 260]; ***People v. Smith*** (2009) 172 Cal.App.4th 1354, 1360-1361.)
>
> However, the Ninth Circuit Court of Appeal has taken it a step further and specifically held that a probationer (which has a higher expectation of privacy than does a parolee) who's probationary offense was for anything

other than a violent felony, cannot be searched based upon a **Fourth** waiver alone. (***United States v. Job*** (9th Cir. 2017) 871 F.3rd 852, 859-865.)

Note: This conclusion is not supported by any other case law. While there is no California state case to the contrary, there are many cases where a **Fourth** waiver suspect was on probation for a non-violent offense—even misdemeanors—where the lawfulness of a suspicionless search was upheld without debate. (See "*Standard of Proof Required*," immediately below.)

Standard of Proof Required:

Probation: A probation search with no *warrant*, *probable cause*, or even a *reasonable suspicion*, so long as it does not exceed the scope of the consent given, and is not done for purposes of harassment or some arbitrary or capricious reason, meets, in the opinion of the California Supreme Court, both federal (**Fourth Amendment**) and state (**Art. 1, § 13**) constitutional requirements. (***People v. Bravo*** (1987) 43 Cal.3rd 600; ***People v. Brown*** (1987) 191 Cal.App.3rd 761; see also ***People v. Reyes*** (1998) 19 Cal.4th 743, 748-749, commenting on ***Bravo***.)

This includes juvenile probation. (***In re Tyrell J.*** (1994) 8 Cal.4th 68, overruled on other grounds.)

The Ninth Circuit Court of Appeal has, as a rule, assumed that, at the very least, a "*reasonable suspicion*" of renewed criminal activity is required for both parole and probation **Fourth** Waivers. (See ***United States v. Stokes*** (9th Cir. 2002) 292 F.3rd 964; "*reasonable suspicion*" found, so the issue not discussed.)

However, most recently, the Ninth Circuit has conceded that the issue of whether a **Fourth** waiver search may be conducted where there is less than a reasonable suspicion is really not yet settled, at least sufficiently to hold an officer civilly liable. (***Motley v. Parks*** (9th Cir. 2005) 432 F.3rd 1072, 1083-1088; officers entitled to qualified immunity on this issue. See below.)

The U.S. Supreme Court has specifically left open the question whether or not a probationer on a **Fourth** Waiver may be searched on less than a reasonable suspicion. (***United States v. Knights*** (2001) 534 U.S. 112, 120, fn. 6. [122 S.Ct. 587; 151 L.Ed.2nd 497]; see also ***United States v. King*** (9th Cir. 2013) 736 F.3rd 805, 808; and ***Smith v. City of Santa Clara*** (9th Cir. 2017) 876 F.3rd 987, 993, fn. 6.)

Until the U.S. Supreme Court does rule on this issue, it is acknowledged that the California rule is that no suspicion is needed to conduct a **Fourth**

waiver search on a probationer. (***People v. Medina*** (2007) 158 Cal.App.4th 1571; probationers having "*consented*" to warrantless, suspicionless searches.)

But in ***Samson v. California*** (2006) 547 U.S. 843 [126 S.Ct. 2193; 165 L.Ed.2nd 260], the Supreme Court hinted strongly that although a suspicionless search of a parolee is constitutional, probationers probably have more rights than parolees and may require a higher (i.e., a "*reasonable suspicion*") standard.

> See also ***United States v. Lara*** (9th Cir. 2016) 815 F.3rd 605, 610; "(A) probationer's privacy interest is greater than a parolee's," citing *Samson*, *supra*, at p. 850.)

Where a probation order clearly expressed a suspicionless search condition, defendant was unambiguously informed of it, and he accepted it, a suspicionless search of his residence was held to be lawful. Defendant's acceptance of the search condition significantly diminished his reasonable expectation of privacy. The search conducted in the present case intruded on defendant's legitimate expectation of privacy only slightly and the governmental interests at stake were substantial. (***United States v. King*** (9th Cir. 2013) 736 F.3rd 805, 808-810.)

> The ***King*** court ruled that because California courts have interpreted the following as not requiring any suspicion, citing ***People v. Bravo*** (1987) 43 Cal. 3rd 600, and ***People v. Woods*** (1999) 21 Cal. 4th 668, and because suspicionless searches are constitutional, that when a probationer agrees to such a condition as a part of his probation, a suspicionless search of his person, property, premises and vehicle is therefore lawful: "Defendant is subject to a warrantless search condition, as to defendant's person, property, premises and vehicle, any time of the day or night, with or without probable cause, by any peace, parole or probation officer." (***Ibid***.)
>
> The term "suspicionless search" refers to a search for which the police have less than reasonable suspicion. The term covers both a search as to which there is some (but not enough) suspicion and a search that is, for example, conducted randomly with no individualized suspicion. (***Id***., at p. 806, fn. 1)
>
> However, the Ninth Circuit also is of the opinion that a probationer convicted of a non-violent offense, such as simple drug possession, has a "reasonable expectation of privacy (that) is greater than that of probationers such as King because he (defendant in the drug case) was not convicted of a particularly 'serious and intimate'

offense." (***United States v. Lara*** (9th Cir. 2016) 815 F.3rd 605, 609-612.)

The Ninth Circuit Court of Appeal has taken it a step further and specifically held that a probationer (which has a higher expectation of privacy than does a parolee) who's probationary offense was for anything other than a violent felony, cannot be searched based upon a **Fourth** waiver alone. (***United States v. Job*** (9th Cir. 2017) 871 F.3rd 852, 860.)

Parole: Older California case authority to the effect that a police officer needs a "*reasonable suspicion*" of renewed criminal activity before conducting a parole **Fourth** Waiver search (See ***People v. Burgener*** (1986) 41 Cal.3rd 505, 534-535.) was overruled in ***People v. Reyes*** (1998) 19 Cal.4th 743.

In ***Reyes***, the California Supreme Court adopted the reasoning of ***In re Tyrell J.*** (1994) 8 Cal.4th 68 (overruled on other grounds), and, overruling ***Burgener***, determined that as with juvenile probationers, parolees do not retain a reasonable expectation of privacy, and may therefore be searched even without even a "*reasonable suspicion*" of renewed criminal activity or other parole violation. (***People v. Reyes***, *supra*, at p. 754, citing ***New Jersey v. T.L.O.*** (1985) 469 U.S. 325, 338 [105 S.Ct. 733; 83 L.Ed.2nd 720].)

The Ninth Circuit Court of Appeal avoided deciding the issue in a number of recent cases. (See ***United States v. Crawford*** (2004) 372 F.3rd 1048; ***Moreno v. Baca*** (9th Cir. 2005) 431 F.3rd 633; and ***Motley v. Parks*** (9th Cir. 2005) 432 F.3rd 1072, 1083-1088.)

The United States Supreme Court has now unequivocally settled the rule, agreeing with California's analysis of this issue, at least as it relates to parolees. (***Samson v. California*** (2006) 547 U.S. 843 [126 S.Ct. 2193; 165 L.Ed.2nd 260]; search of a parolee's person.)

See also ***United States v. Lopez*** (9th Cir. 2007) 474 F.3rd 1208, 1212-1214, where the Ninth Circuit Court of Appeal followed ***Samson*** in finding that a suspicionless parole **Fourth** Waiver search of a parolee's residence was valid.

The Second Circuit Court of Appeal has held that a federal parolee's home was subject to a warrantless search despite the lack of a reasonable suspicion, and despite a local written policy directive specifically requiring a reasonable suspicion before conducting such a search. In this case, the federal probation (i.e., parole) officers received an anonymous tip that defendant illegally possessed firearms. Anonymous information is not enough, by itself, to constitute a reasonable suspicion. However,

searching defendant's residence based upon an anonymous tip constituted "a search of a parolee . . . (that) is reasonably related to the parole officer's duties," which is all that is required. (***United States v. Braggs*** (2nd Cir. 2021) 5 F.4th 183.)

"(L)aw enforcement officers do not possess unfettered discretion to detain and search suspected parolees. Two principles constrain an officer's authority to conduct a suspicionless parole search or seizure pursuant to **Cal. Penal Code § 3067(b)(3)**. *See* ***United States v. Korte***, 918 F.3rd 750, 754 n.1 (9th Cir. 2019); ***United States v. Grandberry***, 730 F.3rd 968, 975 (9th Cir. 2013). First, law enforcement must know that the subject is on active parole before initiating a search or seizure pursuant to a parole condition. ***Moreno* (*v. Baca* (9th Cir. 2005))** 431 F.3rd (633) at 641. Second, the encounter must not violate California's statutory prohibition on 'arbitrary, capricious or harassing' searches. ***Korte***, 918 F.3rd at 754 n.1; *see* **Cal. Penal Code § 3067(d)** ('It is not the intent of the Legislature to authorize law enforcement officers to conduct searches for the sole purpose of harassment.')." (***United States v. Estrella*** (9th Cir. 2023) 69 F.4th 958, 965.)

Limitation*: *Searches Conducted for Purposes of Harassment:

Rule: A probationer (or parolee) subject to a search condition retains the right to be free from a search that is *arbitrary*, *capricious* or *harassing*. A search is arbitrary "when the motivation for the search is unrelated to rehabilitative, reformative or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee." A search is a form of harassment when its motivation is a mere "*whim or caprice*." (***People v. Reyes*** (1998) 19 Cal.4th 743, 754; ***People v. Medina*** (2007) 158 Cal.App.4th 1571, 1577.)

"Under California law, a search constitutes harassment if it is 'unrelated to rehabilitative, reformative or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee.'" (***United States v. Estrella*** (9th Cir. 2023) 69 F.4th 958, 972; quoting ***People v. Reyes*** (1998) 19 Cal.4th 743, 754; quoting in turn ***In re Anthony S.*** (1992) 4 Cal.App.4th 1000, 1004.)

Statutory Law, Referencing Parolees: **Pen. Code § 3067(d)**: "It is not the intent of the Legislature to authorize law enforcement officers to conduct searches for the sole purpose of harassment."

Case Law:

"It is only when the motivation for the search is wholly arbitrary, when it is based merely on a whim or caprice or when there is no reasonable claim

of a legitimate law enforcement purpose, e.g., an officer decides on a whim to stop the next red car he or she sees, that a search based on a probation search condition is unlawful." (***People v. Cervantes*** (2002) 103 Cal.App.4th 1404, 1408.)

"Nor do we condone searches that are conducted for illegitimate reasons, such as harassment." (***United States v. King*** (9th Cir. 2013) 736 F.3rd 805, 810.)

The search of an individual's hotel room, when the individual was subject to the "mandatory supervision" provisions of "**Post-Release Community Supervision Act of 2011**," was held not to be an "arbitrary, capricious, or harassing" search when the officer had not had any prior contact with the defendant, there was no indication that the search had been conducted for an improper purpose, and it appeared to have been conducted solely for legitimate law-enforcement purposes. Also, the search was not conducted at an unreasonable time or in an unreasonable manner. (***United States v. Cervantes*** (9th Cir. 2017) 859 F.3rd 1175.)

"(L)aw enforcement officers do not possess unfettered discretion to detain and search suspected parolees. Two principles constrain an officer's authority to conduct a suspicionless parole search or seizure pursuant to **Cal. Penal Code § 3067(b)(3)**. *See* ***United States v. Korte***, 918 F.3d 750, 754 n.1 (9th Cir. 2019); ***United States v. Grandberry***, 730 F.3d 968, 975 (9th Cir. 2013). First, law enforcement must know that the subject is on active parole before initiating a search or seizure pursuant to a parole condition. *Moreno* (***v. Baca*** (9th Cir. 2005) 431 F.3d (633) at 641. Second, the encounter must not violate California's statutory prohibition on 'arbitrary, capricious or harassing' searches. (***United States v.***) ***Korte*** ((9th Cir. 2019) 918 F.3d (750) at 754 n.1; *see* **Cal. Penal Code § 3067(d)** ('It is not the intent of the Legislature to authorize law enforcement officers to conduct searches for the sole purpose of harassment.')." (***United States v. Estrella*** (9th Cir. 2023) 69 F.4th 958, 965.)

The United States Supreme Court found California's restrictions on arbitrary, capricious or harassing searches as an important ingredient in upholding the constitutionality of a suspicionless **Fourth** Waiver search of a parolee. (***Samson v. California*** (2006) 547 U.S. 843 [126 S.Ct. 2193; 165 L.Ed.2nd 260].)

> The fact that a particular officer searched defendant twice within a 24-hour period, did not establish by itself that he was harassing him. The legitimate law enforcement purpose of the second search (after having found nothing illegal on defendant or in his car, less than 24 hours earlier) was substantiated by the fact that the officer knew defendant was on parole for a narcotics violation, that he

associated with drug users, and because he was observed at the time of the second search in a high-narcotics area some 3½ to 4 miles from his home without any real reason for being there. (***People v. Sardinas*** (2009) 170 Cal.App.4th 488.)

"This prohibition is decidedly narrow: 'It is only when the motivation for the search is wholly arbitrary, when it is based merely on a whim or caprice or when there is no reasonable claim of a legitimate law enforcement purpose . . . that a search based on a probation search condition is unlawful.'" (***United States v. Estrella*** (9th Cir. 2023) 69 F.4th 958, 972; quoting ***People v. Cervantes*** (2002) 103 Cal.App.4th 1404, 1408.)

Examples of "Unreasonable" Searches:

Fourth *Waiver* searches have been held to be *unreasonable* if conducted *too often*, at an *unreasonable time*, when it is *unreasonably prolonged*, or for any other reasons establishing *arbitrary or oppressive conduct* by the searching officers. A search is arbitrary or oppressive when the motivation for the search is *unrelated to a rehabilitative, reformative or legitimate law enforcement purpose*, or when the search is *motivated by personal animosity* toward the parolee or probationer. (***People v. Reyes***, *supra*, at pp. 753-754; see also ***People v. Clower*** (1993) 16 Cal.App.4th 1737, 1741; ***United States v. Follette*** (S.D.N.Y. 1968) 282 F.Supp. 10, 13; and ***In re Anthony S.*** (1992) 4 Cal.App.4th 1000, 1004.)

A public strip search of a probationer or parolee may in fact be *unreasonable*, and grounds for suppression of the resulting evidence. However, where the parolee is moved to a location where he cannot be seen by members of the general public (behind the patrol car, with police officers blocking anyone's view), his pants lowered and the band on his underwear pulled back only to the extent necessary to see into his crotch area, such is not a strip search conducted in public. Under the circumstances, such a search was considered to be reasonable. (***People v. Smith*** (2009) 172 Cal.App.4th 1354.)

***Who May Conduct a Fourth Waiver Search*:**

California Rule: California law is clear, as indicated by the terms of the standard ***Fourth*** *Waiver* conditions, probation and parole searches are *not* limited to probation and parole officers. *Any law enforcement officer* is typically authorized to conduct such searches. (***People v. Mason*** (1971) 5 Cal.3rd 759, 766 [probation]; ***People v. Reyes*** (1998) 19 Cal.4th 743 [parole].)

A state probation officer confronted with an uncooperative, irate individual who was present in the house of a juvenile probationer during a

Fourth waiver search, when the detained visitor appeared to be a gang member and who was overly dressed for the weather, and who attempted to turn away and cover his stomach when ordered not to do so, lawfully patted down the suspect for weapons. (***People v. Rios*** (2011) 193 Cal.App.4th 584, 598-600.)

The Court further determined that a probation officer has the legal authority to detain and patdown a non-probationer pursuant to **P.C. § 830.5(a)(4)** (i.e.; enforcing "violations of any penal provisions of law which are discovered while performing the usual or authorized duties of his or her employment.") (***Id***., at p. 600.)

Federal Rule: The Ninth Circuit Court of Appeal's theory that ***Fourth*** *Waiver* searches are a rehabilitative tool for use by *probation officers only*, with local law enforcement's attempt to use a ***Fourth*** *Waiver* to justify a warrantless search as being no more than a "*ruse*" for conducting a new criminal investigation and a violation of the **Fourth Amendment** (e.g., see ***United States v. Ooley*** (9th Cir. 1997) 116 F.3rd 370; see also ***United States v. Stokes*** (9th Cir. 2002) 292 F.3rd 964; and ***United States v. Jarrad*** (9th Cir. 1985) 754 F.2nd 1451.), was overruled by the United States Supreme Court in ***United States v. Knights*** (2001) 534 U.S 112 [122 S.Ct. 587; 151 L.Ed.2nd 497], where the High Court approved California's broader rule of ***People v. Woods*** (1999) 21 Cal.4th 668, at p. 681; "whether the purpose of the search is to monitor the probationer or to serve some other law enforcement purpose."

Knights further approved probation searches by "by any probation officer or law enforcement officer." (***Ibid***.)

Need to Seek Permission from the Probation or Parole Officer:

Probation: It has long been the rule, at least in probation searches, that a local law enforcement officer need *not* seek the permission of a probation officer before conducting a probation **Fourth** Waiver search. (See ***People v. Mason*** (1971) 5 Cal.3rd 759.)

Note federal law is to the contrary, based on the terms of the **Federal Probation Act**, which is *not* applicable to state cases. (See ***United States v. Consuelo-Gonzalez*** (9th Cir. 1975) 521 F.2nd 259.)

Parole: Prior California authority to the effect that in a parole situation a local law enforcement officer must first receive authorization from the parole officer. (E.g., see ***People v. Coffman*** (1969) 2 Cal.App.3rd 681, 688-689; ***People v. Natale*** (1978) 77 Cal.App.3rd 568, 574.) This rule has arguably been overruled by ***People v. Reyes*** (1998) 19 Cal.4th 743, which finds the standards for probation and parole searches to be the same.

Even prior to ***Reyes***, *supra*, there was some California authority that at least where seeking the prior approval of the parole officer would be a "*meaningless formality*," such as when "any parole officer who refused to authorize a search given an articulable reasonable suspicion of criminal activity 'would have been derelict in his duties,'" calling the parole officer is unnecessary. (***People v. Brown*** (1989) Cal.App.3rd 187, 192.)

> *Note*: Despite the lack, under California law, of any legal requirement to contact the appropriate parole officer or office before undertaking a parole search, the California Department of Correction requests and recommends, in instances involving the search of a parolee's *residence* or *business*, that you do so anyway, for operational reasons as well for reasons of safety and cooperation.

The "Stalking Horse" Theory:

At least from the Ninth Circuit Court of Appeal, and at least as of 1985, still holds onto the theory that parole is a tool for parole authorities for controlling parolees, and not something that local law enforcement is entitled to use. (See ***United States v. Jarrad*** (9th Cir. 1985) 754 F.2nd 1451, 1453-1454; referring to a parole officer who authorizes a search at the request of the police as the police officers' agent, or "*stalking horse*;" see also ***Latta v. Fitzharris*** (9th Cir. 1975) 521 F.2nd 246, 247, and ***United States v. Hallman*** (3rd Cir. 1966) 365 F.2nd 289.)

> The U.S. Supreme Court's holding in ***United States v. Knights*** (2001) 534 U.S 112 [122 S.Ct. 587; 151 L.Ed.2nd 497], while not specifically addressing the issue, seems to disagree, approving a probation search by any law enforcement officer.

"Because a state's operation of its probation system presents 'special needs' beyond normal law enforcement which render impracticable the **Fourth Amendment's** usual warrant and probable cause requirements, probation searches conducted pursuant to state law satisfy the **Fourth Amendment's** reasonableness requirement. ***Griffin v. Wisconsin***, 483 U.S. 868, 872-80, 97 L. Ed. 2nd 709, 107 S. Ct. 3164 (1987). However, a probation search may not be used as a subterfuge for a criminal investigation. *See* ***Latta v. Fitzharris***, 521 F.2nd 246, 249 (9th Cir.). . . . (Defendant) Watts argues that the district court should have suppressed the fruits of the probation search because Demmel (his probation officer) was acting as a 'stalking horse' for police when he authorized the search. We review for clear error the district court's factual determination that Demmel was not acting as a stalking horse. *See* ***United States v. Butcher***, 926 F.2nd 811, 815 (9th Cir.). . . ; ***United States v. Jarrad***, 754 F.2nd 1451, 1454 (9th Cir.). . . . (¶) A probation officer acts as

a stalking horse if he conducts a probation search on prior request of and in concert with law enforcement officers. ***United States v. Richardson***, 949 F.2nd 439, 441 (9th Cir.). . . . However, collaboration between a probation officer and police does not in itself render a probation search unlawful. *See* ***United States v. Harper***, 928 F.2d 894, 897 (9th Cir. 1991) (parole officer was not a stalking horse simply because police helped him locate parolee); ***Jarrad***, 754 F.2nd at 1454 (fact that police investigation preceded parole search does not render the search a subterfuge); ***United States v. Gordon***, 540 F.2nd 452, 453 (9th Cir. 1976) (finding a lawful probation search even though Narcotics Task Force agents accompanied the probation officer to expedite the search). The appropriate inquiry is whether the probation officer used the probation search to help police evade the **Fourth Amendment's** usual warrant and probable cause requirements or whether the probation officer enlisted the police to assist his own legitimate objectives. ***Harper***, 928 F.2nd at 897. A probation officer does not act as a stalking horse if he initiates the search in the performance of his duties as a probation officer. ***Butcher***, 926 F.2nd at 815; ***Jarrad***, 754 F.2d at 1454." (***United States v. Watts*** (9th Cir. 1995) 67 F.3rd 790, 793-795.)

The Seventh Circuit Court of Appeal rejected the continuing validity of the "*stalking horse*" theory in ***United States v. Price*** (7th Cir. 2022) 28 F.4th 739, at least in this case and as a general rule. In ***Price***, where defendant, as a convicted felon and while on parole, was attempting to buy ammunition and a magazine for a pistol he illegally possessed, the Court held:

> Evidence seized during the warrantless searches of defendant's vehicle and home were lawful, rejecting defendant's argument that it should have been suppressed under the "*stalking horse*" theory. As noted by the Court, a search under the stalking horse theory occurs when a parole or probationary search is conducted as "a subterfuge for a criminal investigation," evading the **Fourth Amendment's** warrant and probable cause requirements, In this case, defendant claimed that Special Agent Clancy, of the Indiana Department of Correction, violated the **Fourth Amendment** by using parole officers as pawns to conduct a search by calling them to the scene of the arrest and prompting them to conduct a warrantless search under the parole agreement that SA Clancy was not himself authorized to conduct. In ***Griffin v. Wisconsin*** (1987) 483 U.S. 868 [107 S.Ct. 3164; 97 L.Ed.2nd 709], decided in 1987, the U.S. Supreme Court upheld the warrantless search of a probationer's residence after probation officers established reasonable grounds to believe the probationer was unlawfully in possession of firearms. The Court held that supervision of probationers is a "special need" of the State. Therefore, it was

reasonable under the **Fourth Amendment** for the State to "depart from the usual warrant and probable cause requirements." Under ***Griffin***, warrantless searches of probationers seemingly needed to be justified by the "*special needs*" of the state's probation system as opposed to police officers using a parole officer as a "*stalking horse*" to assist in an unrelated investigation. However, in ***United States v. Knights*** (2001) 534 U.S. 112 [122 S.Ct. 587; 151 L.Ed.2nd 497], decided in 2001, and ***Samson v. California*** (2006) 547 U.S. 843 [126 S.Ct. 2193; 165 L.Ed.2nd 250], decided in 2006, the Supreme Court held that warrantless probation and parole searches need not be based on "*special needs*," but can also be evaluated under the **Fourth Amendment's** reasonableness inquiry by considering the totality of the circumstances. Significantly, the Court noted that defendant Price did not point to a single federal appellate decision in which a search was invalidated under the stalking horse theory since the Court's rulings in ***Knights*** and ***Samson***. In addition, the Court found that every other circuit court that has examined the stalking horse theory since ***Knights*** has either rejected it or limited its applicability to circumstances where the government relies solely on the "*special needs*" of a state's probationary or parole system as the basis for a search. In this case, because the government did not rely on the "*special needs*" of Indiana's parole system to justify the searches of defendant's property and residence, it was irrelevant whether parole officers initiated their searches of defendant's vehicle and residence of their own volition or at SA Clancy's request.

Searching While In Ignorance of a Search Condition: Whether a police officer must personally know of a probation or parole search and seizure condition (i.e., a "***Fourth Waiver***") *before* conducting a search in order for the search to be later declared "*lawful*" has been the subject of some debate.

Issue: When a police officer conducts a warrantless *search of a person* or that person's *property* or *residence*, which, as it turns out, is *not* supported by probable cause and/or exigent circumstances, and then *belatedly* discovers that the person being searched is subject to a *probation* or *parole*-imposed **Fourth** Waiver, *may* the search still be upheld?

Earlier Case Law tended to lean towards finding such searches to be lawful, at least if based upon a *probation* **Fourth** Waiver. (***In re Tyrell J.*** (1994) 8 Cal.4th 68, 85; ***People v. Valasquez*** (1993) 21 Cal.App.4th 555.)

When dealing with a "*parole search and seizure condition*," the courts were not so prone to excusing the officer's failure to know of the existence of a **Fourth** Waiver. (See ***In re Martinez*** (1970) 1 Cal.3rd 641.)

Also, there was authority that an *illegal arrest* of someone subject to probationary search and seizure conditions does not result in suppression of any evidence recovered incident to the arrest, in that the subject has waived any right to seek suppression of the evidence seized. (***People v. Valasquez***, *supra*, at p. 559.)

Juvenile probationers have been held to the same standards as are adults (***In re Marcellus L.*** (1991) 229 Cal.App.3rd 134 144-146; ***In re Tyrell J.***, *supra*, overruled on other grounds.), although, perhaps, for different reasons.

See ***People v. Lewis*** (1999) 74 Cal.App.4th 662, at pages 668-669, using ***In re Tyrell J.*** to uphold the warrantless entry into a residence and arrest of a parolee-at-large/robbery suspect in his home, holding that the arresting officer's lack of knowledge of the arrestee's probation **Fourth** Waiver was irrelevant.

Present State of the Rule:

The California Supreme Court ruled as recently as 1994 that a juvenile probationer, on the street, may be lawfully searched even though the officer does not discover until after the fact that he was on probation and subject to search and seizure conditions. (***In re Tyrell J.*** (1994) 8 Cal.4th 68.)

However, the California Supreme Court refused to extend the rule of ***In re Tyrell J.*** to the search of a residence when it was belatedly discovered that the suspect's brother (and co-occupant) was subject to a **Fourth** Waiver, attaching more value to the privacy rights of a co-tenant who is not subject to search conditions. (***People v. Robles*** (2000) 23 Cal.4th 789.)

Finally, recognizing that they might have gone too far in ***In re Tyrell J.***, *supra*, a majority of the Supreme Court invalidated the search of a residence as to both the co-tenant (who was *not* on a **Fourth** Waiver), and the suspect who was discovered, after the fact, to be on parole, and thus subject to search and seizure conditions. (***People v. Sanders*** (2003) 31 Cal.4th 318.)

> While refusing to specifically overrule ***In re Tyrell J.***, the Court noted the "*chilly reception*" the decision has received, and, at the very least, limited it to its facts; i.e., the search of a juvenile's person, as opposed to the search of a residence in an adult case.

The First District Court of Appeal, in ***People v. Bowers*** (2004) 117 Cal.App.4th 1261, read ***Sanders*** as limiting the rule of ***In re Tyrell J.*** to juvenile cases, given the unique "*special needs*" of the juvenile court

probation system. In an adult prosecution, whether of a parolee or a probationer, and irrespective of whether it is the subject's home or person (or, presumably, his vehicle or other personal possessions) that is being searched, not knowing of a **Fourth Amendment** search and seizure condition will preclude the use of such a waiver to save an otherwise illegal search. (***People v. Bowers***, *supra*, at pp. 1268-1269.)

> ***Myers v. Superior Court*** (2004) 124 Cal.App.4th 1247, is in accord, noting the ***Tyrell J.*** is limited to probation searches of a juvenile.

But the Fifth District Court of Appeal finally went all the way and took it upon itself, in effect (without specifically stating so), to overrule ***Tyrell J.*** and hold that a juvenile probationer, searched illegally, is protected by the rule of ***Sanders***: An officer cannot rely upon a **Fourth** Waiver that he didn't know about at the time of the search whether the target of the search is an adult or a juvenile. (***In re Joshua J.*** (2005) 129 Cal.App.4th 359.)

Since ***Sanders***, courts have consistently ruled against the legality of searches done when the prosecution attempts to validate the search under the theory that the officer belatedly discovered that the defendant was subject to either probation or parole search and seizure conditions; i.e.:

> Searching law enforcement officers must be aware of a juvenile's waiver of his or her probationary search and seizure rights when searched after being stopped in a motor vehicle. (***People v. Hester*** (2004) 119 Cal.App.4th 376, 392-405.)
>
> An otherwise illegal search of a residence is *not* saved by a belatedly discovered probation **Fourth** Waiver search and seizure condition. (***People v. Bowers*** (2004) 117 Cal.App.4th 1261; see also ***People v. Lazalde*** (2004) 120 Cal.App.4th 858; a decision out of the Sixth Appellate District, involving an adult probationer and a motel room.)
>
> The illegal search of an adult on the street, where it was belatedly discovered that he was on a probation **Fourth** waiver, is not made retroactively valid. (***People v. Hoeninghaus*** (2004) 120 Cal.App.4th 1180.)
>
> > It is irrelevant whether the **Fourth** Waiver is based upon a probationary, or a parole, search and seizure condition. The rule is the same. (***Id***., at pp. 1192-1198.)
> >
> > See also ***People v. Thomas*** (2018) 29 Cal.App.5th 1107, 1114-1115; "(T)he exception is inapplicable if police are

> unaware of the probation search condition at the time of a warrantless search."

The same rule has been held to apply to the person of a parolee who is found in public. (***People v. Jordan*** (2004) 121 Cal.App.4th 544, 552-553; see also ***People v. Bowers***, *supra*.)

Where the issue of the officer's knowledge, or lack thereof, of a search and seizure condition was not resolved in the trial court (***Sanders*** being decided after the hearing), a remand to the lower court for further evidence on this issue, and not reversal of the judgment, is the proper remedy for an appellate court. (***People v. Moore*** (2006) 39 Cal.4th 168.)

If, however, the trial court record shows the officer's lack of prior information about the defendant's **Fourth** Waiver status, there is no need for a remand to the trial court for further hearings. (***People v. Miller*** (2007) 146 Cal.App.4th 545.)

However, the taint of an illegal traffic stop *may* be attenuated by the existence of an outstanding arrest warrant (***People v. Brendlin*** (2008) 45 Cal.4th 262; ***People v. Carter*** (2010) 182 Cal.App.4th 522, 529-530.) or a **Fourth** waiver (***People v. Bates*** (2013) 222 Cal.App.4th 60, 65-71.), depending upon the circumstances.

> The Court in ***Brendlin*** held that in assessing whether an outstanding arrest warrant, discovered after the fact, was sufficient to attenuate the taint of an illegal traffic stop, the Court must look at what it referred to as the "***Brown factors***;" i.e., "the temporal proximity of the **Fourth Amendment** violation to the procurement of the challenged evidence, the presence of intervening circumstances, and the flagrancy of the official misconduct." (Id, at p. 269, citing ***Brown v. Illinois*** (1975) 422 U.S. 590, 604 [95 S.Ct. 2254; 45 L.Ed.2nd 41].)

The Ninth Circuit Court of Appeal is in accord, noting that ***Whren v. United States*** (1996) 517 U.S. 806 [116 S.Ct. 1769; 135 L.Ed.2nd 89], upholding "*pretext stops*," cannot be used to justify a detention or search based upon a belatedly discovered search condition. Per the Ninth Circuit, the theory of ***Whren*** is limited to those circumstances where a police officer is aware of facts that would support an arrest. "(A)lthough ***Whren*** stands for the proposition that a pretextual seizure based on the illegitimate subjective intentions of an officer may be permissible, it does not alter the fact that the pretext itself must be a constitutionally sufficient

basis for the seizure and the facts supporting it must be known at the time it is conducted." (***Moreno v. Baca*** (9th Cir. 2005) 431 F.3rd 633, 640.)

> "Police officers must know about a probationer's **Fourth Amendment** search waiver before they conduct a search in order for the waiver to serve as a justification for the search." (***United States v. Job*** (9th Cir. 2017) 871 F.3rd 852, 859-860.)
>
> See also ***United States v. Estrella*** (9th Cir. 2023) 69 F.4th 958, at p. 961: "As a threshold requirement, we have held that 'an officer must know of a detainee's parole status before that person can be detained and searched pursuant to a parole condition.'" (Quoting ***Moreno v. Baca***, *supra*, at p. 641.)
>
> > The issue in ***Estrella*** was how precise that prior knowledge must be. See "*The Prior Knowledge Requirement*," below.

Finally, recognizing that the case law and legal commentary was uniformly in opposition to the rule of ***In re Tyrell J.***, the California Supreme Court reversed itself and held that a detention and search of a minor on probation with search and seizure conditions could not be justified by the belatedly discovered **Fourth** waiver. (***In re Jaime P.*** (2006) 40 Cal.4th 128.)

A detective's "vague recollection" of having seen defendant's name on a postrelease community supervision (**PRCS**) list within the last two months, while remembering that he had arrested defendant on a weapons-related offense in 2011, was held to be sufficient prior knowledge of defendant's status as being subject to a **Fourth** waiver. The warrantless, suspicionless search of defendant, during which an illegal firearm was discovered, was therefore held to be a lawful **Fourth** waiver search based upon the officer's "objectively reasonable belief" defendant was still on **PRCS** in that that belief proved to be accurate. (***People v. Douglas*** (2015) 240 Cal.App.4th 855, 868-869.)

> See also ***United States v. Torres*** (U.S Dist. 2021) 2021 U.S. Dist. LEXIS 96229; noting that there is no authority that an officer must verify the existence of a warrant in the moments before effectuating a traffic stop pursuant to that warrant where the officer testifies that he knew defendant was subject to search conditions from his prior contacts with him. Nor has the degree of certainty necessary as to the continuing existence of a defendant's **Fourth** waiver conditions been established by prior case law.

The prosecution was properly permitted to rely on hearsay evidence, specifically, an officer's testimony about information obtained from a

computer database, corroborated by his prior knowledge of the two owners of the searched residence, to prove the state-of-mind exception under **Evid. Code § 1250(a)(1)** that the officer had advance knowledge of the probationary status of the owners of the home. (***People v. Romeo*** (2015) 240 Cal.App.4th 931, 946-949.)

The warrantless searches of defendant's person and truck were *not* justified under the **Fourth Amendment**, as probation searches, even though the officers had been told by dispatch that defendant was on probation but did not convey any information indicating that defendant was subject to search terms as a condition of his probation. Application of the good faith exception to the exclusionary rule was not supported by either an officer's subjective (mistaken) belief that *all* probationers were subject to search terms or by the trial court's factually unsupported assertion that 99.9 percent of probationers were subject to search terms. (***People v. Rosas*** (2020) 50 Cal.App.5th 17.)

> *Note*: As it turned out, defendant was not on probation, the information from dispatch having been wrong. The interesting issue, not decided here, is what the Court's ruling would have been had he actually been on probation *and* subject to search and seizure conditions (i.e., a "**Fourth** waiver), but with the officers unaware whether or not he was subject to a **Fourth** waiver; an issue that must await a later decision.

The Prior Knowledge Requirement:

It is not necessary that the searching officer was aware of the existence of a signed parole search agreement, as required by **P.C. § 3067**, so long as he knew that the subject was on parole. (***People v. Solorzano*** (2007) 153 Cal.App.4th 1026, 1030-1032; citing ***People v. Middleton*** (2005) 131 Cal.App.4th 732; see also ***People v. Douglas*** (2015) 240 Cal.App.4th 855, 868-869.)

> *But note* ***United States v. Caseres*** (9th Cir. 2008) 533 F.3rd 1064, at pp. 1075-1076, which (arguably) erroneously held that an officer conducting a parole search must have been aware prior to the search that **P.C. § 3067(a)** was applicable to the defendant, i.e., that the prior conviction leading to his parole status occurred on or after January 1, 1997.

Determining that a person is on parole is enough information to justify a police officer's assumption that he or she is subject to a **Fourth** waiver in that *all* parolees are subject to a **Fourth** waiver. (***People v. Middleton*** (2005) 131 Cal.App.4th 732.)

Where an officer is erroneously told that the defendant is on parole, only to find out later that he was subject to a probationary **Fourth** waiver instead, the search will still be upheld. It is not relevant what type of **Fourth** waiver applies to the defendant. (***People v. Hill*** (2004) 118 Cal.App.4th 1344.)

A suspect subject to search and seizure conditions is estopped from complaining about being searched by an officer who was unaware of the search conditions when the officer's failure to know of the conditions was because defendant misidentified himself. (***People v. Watkins*** (2009) 170 Cal.App.4th 1403, warrantless search of a vehicle; ***People v. Mathews*** (2018) 21 Cal.App.5th 130, warrantless search of defendant's cellphone.)

> Failure to raise the issue of "equitable estoppel" at the trial court level (i.e., that defendant, by denying he was on searchable probation, cannot later claim that the officers could not use his probation status as legal justification for a search of his person) waived the issue. (***People v. Thomas*** (2018) 29 Cal.App.5th 1107, 1113-1114.)

A detective's "vague recollection" of having seen defendant's name on a postrelease community supervision (**PRCS**) list within the last two months, while remembering that he had arrested defendant on a weapons-related offense in 2011, was held to be sufficient prior knowledge of defendant's status as being subject to a **Fourth** waiver. The warrantless, suspicionless search of defendant, during which an illegal firearm was discovered, was therefore held to be a lawful **Fourth** waiver search based upon the officer's "objectively reasonable belief" defendant was still on **PRCS** in that that belief proved to be accurate. (***People v. Douglas*** (2015) 240 Cal.App.4th 855, 868-869.)

The prosecution was properly permitted to rely on hearsay evidence, specifically, an officer's testimony about information obtained from a computer database, corroborated by his prior knowledge of the two owners of the searched residence, to prove the state-of-mind exception under **E.C. § 1250(a)(1)** that the officer had advance knowledge of the probationary status of the owners of the home. (***People v. Romeo*** (2015) 240 Cal.App.4th 931, 946-949.)

While prior knowledge of a search condition is necessary in order to justify a warrantless, suspicionless parole search, the Ninth Circuit Court in ***United States v. Estrella***, ***infra***, noted that no case had yet decided "how precise that knowledge must be." Resolving this issue, the ***Estrella*** Court determined that a law enforcement officer must only have *probable cause* to believe that a person is then on active parole before that person

may be detained and searched pursuant to a parole search condition. (***United States v. Estrella*** (9th Cir. 2023) 69 F.4th 958, 961, 964-972.)

> In ***Estrella***, the officer (who was his department's "gang specialist") had spoken with defendant (a known gang member) several times, had spoken with his parole officer, knew roughly (but not precisely) when defendant's parole had begun, and was familiar with the terms and conditions of defendant's parole. Although he did not know the precise start and end dates of defendant's parole term, he knew that California parole ordinarily lasts three to four years. He also had good reason to believe that defendant's term was not over in that he had only been released from prison about one year prior, and had violated a parole condition in April 2019, only four months prior. So although the officer was not aware of the precise date defendant's parole would lapse, the **Fourth Amendment** requires only that there be a "reasonable certainty" as to the defendant's patrol status. "(T)he **Fourth Amendment**, which calls for reasonable determinations, and does not demand certainty." (***Id.***, pgs. 968, 972.)
>
> "'Determining the reasonableness of a particular search involves balancing the degree to which the search intrudes upon an individual's privacy against the degree to which the search is needed to further legitimate governmental interests.'" (***Id.***, pg. 970; quoting ***Ioane v. Hodges*** (9th Cir. 2018) 939 F.3rd 945, 953); *accord* ***Bell v. Wolfish*** (1979) 441 U.S. 520, 559 [99 S.Ct. 1861; 60 L.Ed.2nd 447].)

Detaining an individual (even though the officers unsuccessfully attempted to conduct a "consensual encounter") before discovering the fact that the subject was on parole, and thus subject to a warrantless/suspicionless search, without sufficient cause to otherwise detain him, poisons the subsequent parole search. (***People v. Paul*** (2024) 99 Cal.App.5th 832, 837-841.)

Arresting and Searching While in Ignorance of an Existing Warrant of Arrest:

The same theory may be used to find unlawful a search based upon a de facto arrest on less than probable cause when trying to justify the arrest (or a detention) by a belatedly-discovered existing arrest warrant. (***Moreno v. Baca*** (9th Cir. 2005) 431 F.3rd 633.)

> However, it has been held in California that the taint of an illegal traffic stop *may* be attenuated by the existence of an outstanding arrest warrant (***People v. Brendlin*** (2008) 45 Cal.4th 262; ***People v. Carter*** (2010) 182

Cal.App.4th 522, 529-530.) or a **Fourth** waiver (***People v. Bates*** (2013) 222 Cal.App.4th 60, 65-71.), depending upon the circumstances.

The Court in ***Brendlin*** held that in assessing whether an outstanding arrest warrant, discovered after the fact, was sufficient to attenuate the taint of an illegal traffic stop, the Court must look at what it referred to as the "***Brown*** *factors*;" i.e., "the temporal proximity of the **Fourth Amendment** violation to the procurement of the challenged evidence, the presence of intervening circumstances, and the flagrancy of the official misconduct." (***Id***, at p. 269, citing ***Brown v. Illinois*** (1975) 422 U.S. 590, 604 [95 S.Ct. 2254; 45 L.Ed.2nd 41].)

Discovery of a Search Condition as the Product of an Illegal Detention**:**

It has been held that a suspect's **Fourth** waiver (subjecting him to warrantless search and seizures) attenuated the taint of an illegal traffic stop. (***People v. Durant*** (2012) 205 Cal.App.4th 57.)

But see ***People v. Bates*** (2013) 222 Cal.App.4th 60, 69-71, and ***People v. Kidd*** (2019) 36 Cal.App.5th 12, 23, both ruling to the contrary.

The ***Bates*** Court both declined to adopt the ***Durant*** Court's reasoning, and differentiated the cases on their respective facts. (***Ibid***.)

Parole and Probation Revocation Hearings:

Parole Hearings: Evidence recovered in an illegal parole search *is* admissible in a parole revocation proceeding. (***Pennsylvania Board of Probation and Parole v. Scott*** (1998) 524 U.S. 357 [118 S.Ct. 2014; 141 L.Ed.2nd 344].)

The need to use illegally seized evidence, from both **Fourth** and **Fifth Amendment** violations, in parole revocation hearings, outweighs the policy considerations underlying the Exclusionary Rule (i.e., deterring illegal police conduct.), and therefore is admissible in such circumstances. (***In re Martinez*** (1970) 1 Cal.3rd 641, 648-650.)

Probation Hearings: The same theory used in ***Martinez*** has been used to allow the admission of illegally seized evidence in probation revocation hearings. (***People v. Hayko*** (1970) 7 Cal.App.3rd 604.)

Entering a Residence**;** ***Probable Cause or Reasonable Suspicion*****?**

The Ninth Circuit Court of Appeal has consistently ruled that in order to conduct a **Fourth** Waiver search of a residence, an officer must have "*probable cause*" to believe that the residence to be searched is in fact the parolee's (or probationer's) residence. (***Motley v. Parks*** (9th Cir. 2005) 432 F.3rd 1072, 1080-1082; ***United***

States v. Howard (9th Cir. 2006) 447 F.3rd 1257, 1262-1268; ***United States v. Franklin*** (9th Cir. 2010) 603 F.3rd 652; ***United States v. Bolivar*** (9th Cir. 2012) 670 F.3rd 1091, 1093-1095; ***United States v. Grandberry*** (9th Cir. 2013) 730 F.3rd 968, 973; ***Smith v. City of Santa Clara*** (9th Cir. 2017) 876 F.3rd 987, 994, fn. 7, 995; ***United States v. Ped*** (9th Cir. 2019) 943 F.3rd 427, 430-431; ***United States v Dixon*** (9th Cir. 2020) 984 F.3rd 814, 821-822.)

> This hasn't always been the case. Earlier Ninth Circuit case law has been ambivalent on this issue. In *United States v. Watts* (9th Cir. 1995) 67 F.3rd 790, at pg. 795, for instance, the Ninth Circuit, without deciding the issue, at least discussed it: "There is some tension among our cases regarding whether a probation search must be supported by probable cause to believe that the probationer resides on the premises or whether a 'reasonable' belief will suffice. In ***Harper*** (***United States v. Harper*** (9th Cir 1991) 928 F.2nd 894.), we characterized the requisite level of suspicion as probable cause. Our principal holding in that case was that, under the Supreme Court's decision in ***Griffin*** (***Griffin v. Wisconsin*** (1987) 483 U.S. 868, 873 [107 S.Ct. 3164; 97 L.Ed.2nd 709, 717].), police could search a parolee's home to execute an arrest warrant issued by a parole board. ***Harper***, 928 F.2d at 896. We also held that police could conduct such a search only if they had 'probable cause' to believe that the arrestee actually lived at the place to be searched. ***Id.*** (⁋) However, before *Harper* we held in ***Dally*** (***United States v. Dally*** (9th Cir. 1979) 606 F.2nd 861.), that a parole search was lawful because the parole officer had a 'reasonable basis' and 'reasonable belief' that the parolee had moved to the searched residence. ***Dally***, 606 F.2nd at 863. Moreover, despite our mention in ***Harper*** of a probable cause requirement, we cited with approval in that case the 'reasonable belief' standard employed in ***Dally***. *See* ***Harper***, 928 F.2nd at 986 (citing ***Dally***, 606 F.2nd 861). Our decision in ***United States v. Davis***, 932 F.2nd 752 (9th Cir. 1991), is also relevant. In ***Davis***, decided shortly after ***Harper***, we held that an item such as a closed container falls within the scope of a probation search as long as there is 'reasonable suspicion' to believe that the item is within the ownership, possession, or control of the probationer. ***Davis***, 932 F.2nd at 758-60. In doing so, we stated broadly that 'the permissible bounds of a probation search are governed by a reasonable suspicion standard.' ***Id.*** at 758."

Noting that five other federal circuits have ruled that something less than probable cause is required, and that the Ninth Circuit is a minority opinion (see ***United States v. Gorman*** (9th Cir. 2002) 314 F.3rd 1105.), California's Fourth District Court of Appeal (Div. 2) has found that an officer executing an arrest warrant or conducting a probation or parole search may enter a dwelling if he or she has only "*a reasonable belief*," falling short of probable cause to believe, the suspect lives there and is present at the time. Employing that standard, the entry into defendant's apartment to conduct a probation search was lawful based on all of

the information known to the officers. Accordingly, the court upheld the trial court's conclusion that the officers had objectively reasonable grounds to conclude the defendant/probationer lived at the subject apartment and was present at the time, and therefore the officers had the right to enter the apartment to conduct a warrantless probation search. (***People v. Downey*** (2011) 198 Cal.App.4th 652, 657-662.)

> The ***Downey*** Court also noted that the California Supreme Court, in ***People v. Jacobs*** (1987) 43 Cal.3rd 472, 479, fn. 4, did *not* find that probable cause was required, but rather only a "*reasonable belief*" that defendant was home, despite the comments in footnote 4 to the effect that the officers, to lawfully enter the residence may have needed some "extra increment of probable cause when executing the arrest warrant, namely, *grounds to believe that the suspect is within* the dwelling." (***People v. Downey***, *supra*, at p. 662, Italics in original.)
>
> *Note*: The "*present at the time*" requirement apparently only applies to executing an arrest warrant, despite language in the ***Downey*** decision saying that it applies to both **Fourth** Waiver searches and executing arrest warrants. It has never been required that a person on a **Fourth** waiver be home at the time of a warrantless entry and search. (See ***People v Lilienthal*** (1978) 22 Cal.3rd 891, 900.)
>
> Without mentioning ***Downey***, the Ninth Circuit has since cited ***Motley v. Parks***, *supra*, with approval, for the proposition that full probable cause to believe that the target of a **Fourth** Waiver search resides in the place to be searched is necessary. (***United States v. Bolivar*** (9th Cir. 2012) 670 F.3rd 1091, 1093-1095.)

Searching without a warrant a residence defendant was observed entering and exiting, but with insufficient information to believe that the parolee/defendant lived at that residence (i.e., all available information indicated that his home address was elsewhere), held to be illegal. (***United States v. Grandberry*** (9th Cir. 2013) 730 F.3rd 968, 975-980.)

> The fact that the apartment that was searched might have been "under defendant's control" was held to be irrelevant. The issue is whether there is probable cause to believe defendant actually lived there. (***Id.***, at pp. 980-982: "(W)e conclude that the 'property under your control' provision cannot refer to a place where someone else, but not the parolee, lives.")
>
> However, the trunk of a suspect's rented car is property *under his control*, and is subject to a warrantless search under the terms of the defendant's parole conditions. (***United States v. Korte*** (9th Cir. 2019) 918 F.3rd 750, 754-755.)

Defendant's motion to suppress firearms found in a search of his home was properly denied because officers had "*probable cause*" to believe that defendant's brother, a parolee, lived at his house (although he had since moved out, unbeknownst to the officers), given a list the probation officer provided to the police which stated that the parolee had reported living at defendant's address plus two prior contacts at that residence. The evidence did not come close to satisfying defendant's burden of showing that the officers conducted the search for an improper purpose, such as a desire to harass him or out of personal animosity toward him. (***United States v. Ped*** (9th Cir. 2019) 943 F.3rd 427, 430-432; using language indicating that the officers must be "*reasonably sure*" that they have the right house (citing ***Motley v. Parks*** (9th Cir. 2005) 432 F.3rd 1072, at p. 1079.), but then noting that "*probable cause*" is the correct legal standard, without a discussion of the issue. Pg. 430-431.)

Also note, by the way, while the Court held here that three-month-old information to the effect that the parolee subject to search and seizure conditions still lived at the residence to be searched is still considered reliable: "We do not question that at a certain point, a reported address would become so old that it would no longer be reasonable for officers to rely on it." (Pg. 431.) The Court gives no hint when that line might be crossed.

***Searching a Container*; *Probable Cause or Reasonable Suspicion*?**

When officers find a container (backpack in this case) during a lawful **Fourth** waiver search, they only need a "*reasonable suspicion*," as opposed to probable cause, to believe that the container belongs to, or is controlled by, the subject with the **Fourth** waiver in order to search it. (***United States v. Bolivar*** (9th Cir. 2012) 670 F.3rd 1091, 1093-1095.)

See "*Searches of Containers*" (Chapter 16), above.

***Duration of a Fourth Waiver*:**

Parole:

A parole **Fourth** Waiver continues until he has had his formal parole hearing where he has the opportunity to contest the proposed revocation and parole is formally revoked. Being arrested and incarcerated on a parole hold pending a revocation hearing does not, in itself, negate a **Fourth** Waiver. (***People v. Hunter*** (2006) 140 Cal.App.4th 1147.)

A parolee's arrest seven years after her parole suspension was held to be reasonable for **Fourth Amendment** purposes where she had taken no action after being evicted from her residence to ensure that the parole officer could maintain contact with her, her parole was lawfully

suspended, a retake warrant was properly issued, and the arresting officer had arrested her pursuant to that warrant. The arrest did not violate due process where the parolee failed to fulfill her parole obligation to provide the parole office with correct and up-to-date contact information, and thus, she was largely responsible for the delay. An intentional infliction of emotional distress claim failed because the seven-year delay was not outrageous. (***Cornel v. State of Hawaii*** (9th Cir. 2022) 37 F.4th 527.)

The Ninth Circuit Court of Appeal affirmed the district court's judgment on the third revocation of defendant's supervised release. Applying the rationale of ***United States v. Castro-Verdugo*** (9th Cir. 2014) 750 F.3rd 1065, which involved the same issue in the context of probation revocation, the panel held that because defendant was serving a term of supervised release when he committed the instant violation, the district court had jurisdiction to revoke his supervised release and impose an additional term of imprisonment, regardless of any error in the sentence imposed on the second revocation. The Court declined to reach defendant's argument that the term of supervised release imposed on his second revocation exceeded the statutory maximum. Consistent with ***Castro-Verdugo*** and earlier precedent, the Court held that an appeal challenging a supervised release revocation is not the proper avenue through which to attack the validity of the underlying sentence. (***United States v. Estrada*** (9th Cir. 2023) 81 F.4th 859.)

> In ***Castro-Verdugo***, the district court imposed a sentence on an illegal reentry conviction that included both probation and a stayed custodial sentence. (At pg. 1067.) This exceeded the court's statutory authority under **18 U.S.C. § 3561(a)(3)** (stating that a defendant may not be sentenced to probation in conjunction with a term of imprisonment), but the defendant did not move to correct this sentence. On appeal from a subsequent probation revocation, the defendant argued that the district court lacked jurisdiction to revoke his probation because he was not serving a valid probation term at the time of his revocation. (At p. 1068.) Explaining that the "the *only* criteria necessary to create jurisdiction over probation revocation proceedings are: (1) that the defendant still be serving a term of probation and (2) that the defendant violate its conditions," the Court concluded that the district court had jurisdiction because, regardless of the error in the underlying sentence, the defendant was serving a term of probation at the time of his violation. (At p. 1069.)
>
> The Court also reaffirmed its prior precedent holding that a defendant cannot challenge the validity of an underlying sentence in a subsequent probation revocation proceeding. "[A]n underlying sentence may not always be valid, but . . . a court

tasked with conducting or reviewing probation revocation proceedings may not investigate the validity of the original sentence." (*See also* ***United States v. Gerace*** (9th Cir. 1992) 997 F.2nd 1293, 1295: "An appeal challenging a probation revocation proceeding is not the proper avenue through which to attack the validity of the original sentence." ***United States v. Simmons*** (9th Cir. 1987) 812 F.2nd 561, 563: "[A]n appeal from a probation revocation is not the proper avenue for a collateral attack on the underlying conviction."). This type of collateral attack should be brought in a **28 U.S.C. § 2255** motion, because to hold otherwise "would circumvent the statutorily defined procedure" provided in **§ 2255**. (***Castro-Verdugo***, at 1069-1071.)

Probation:

A probationer on a **Fourth** Waiver is also subject to warrantless searches and seizures until he has been accorded the right to a probation revocation hearing, even if in custody while awaiting that hearing, and even though, pending his hearing, a court has "summarily revoked" his probation. (***People v. Barkins*** (1978) 81 Cal.App.3rd 30.)

However, where a defendant's probation has been formally revoked, but not reinstated, he is no longer subject to the terms and conditions of his probation. A trial court does not have jurisdiction, therefore, to find defendant violated probation based on him exposing himself to a jail nurse where his probation had been formally revoked and not reinstated, terminating probation. Defendant was no longer on probation once the trial court formally revoked his probation and ordered that probation not be reinstated. Because defendant was not on probation when he committed the felony conduct alleged to have been a probation violation under the third petition to revoke probation, the trial court erred in overruling defendant's demurrer to the third petition to revoke probation. The trial court did not have discretion, therefore, to impose a six-year prison term because defendant had agreed to a three-year term when he admitted the probation violation associated with the second petition to revoke probation. (***People v. Belche*** (2020) 53 Cal.App.5th 956.)

"It is now well established that summary revocation of probation is appropriate and preserves a court's jurisdiction over a probationer, 'even if the evidentiary hearing, formal revocation and sentencing all occur after the period of probation would otherwise have been completed.'" (***Kuhnel v. Superior Court (People)*** (2022) 75 Cal.App.5th 726, 734); quoting ***People v. Journey*** (1976) 58 Cal.App.3rd 24, 27; accord, ***People v. Medeiros*** (1994) 25 Cal.App.4th 1260, 1267; and see **P.C. § 1203.2(a)**.)

See also ***People v. Zuniga*** (2022) 79 Cal.App.5th 870, where it was held that In a felony hit and run case that the trial court had jurisdiction to set the amount of victim restitution after defendant's probation expired as a result of **Assembly Bill No. 1950**, amending **Pen. Code § 1203.1**, shortening probation to two years, because the original probation order contemplated restitution and the victim's economic losses could not be determined at the time of sentencing. The Legislature did not intend to interfere with a crime victim's right to restitution under preexisting law when it shortened the maximum term of felony probation to two years.

Enactment of **AB 1950** (2019-2020 Reg. Sess.) shortened felony probation from three to two years in most cases, pursuant **Pen. Code § 1203.1(a)**. This provision applied retroactively to reduce the maximum term of probation to two years in cases not yet final when the legislation became effective on *January 1, 2021*. Defendant in this case had served significantly more than two years of probation on the date when the trial court attempted to find him in violation of his terms of probation. However, defendant's probation terminated as a matter of law and the trial court thereafter lacked jurisdiction to order summary revocation in defendant's human trafficking. However, the trial court retained jurisdiction to adjudicate a violation of probation in defendant's robbery case because robbery was a violent felony listed in **Pen. Code § 667.5(c)**, and, as such, was an offense excepted from the two-year probation limitation pursuant to **§ 1203.1(m)**. (***People v. Arreguin*** (2022) 79 Cal.App.5th 787.)

Postrelease Supervision:

Pen. Code § 3456 provides for the termination of postrelease supervision as follows:

> **(a)** The county agency responsible for postrelease supervision . . . shall maintain postrelease supervision over a person . . . until one of the following events occurs:
>
> > **(1)** The person has been subject to postrelease supervision pursuant to this title for three years at which time the offender shall be immediately discharged from postrelease supervision.
> >
> > **(2)** Any person on postrelease supervision for six consecutive months with no violations of his or her conditions of postrelease supervision that result in a custodial sanction may be considered for immediate discharge by the supervising county.

(3) The person who has been on postrelease supervision continuously for one year with no violations of his or her conditions of postrelease supervision that result in a custodial sanction shall be discharged from supervision within *30 days*.

Case Law:

Defendant was released from prison and placed on postrelease supervision for one year. The terms of supervision included a **Fourth** waiver. One year and one day after defendant's release, his probation officer conducted a search of defendant's home and discovered child pornography. Defendant filed a motion to suppress arguing that his postrelease supervision was complete at the time of the search. The trial court disagreed and denied the motion. The Court of Appeal upheld the denial, holding that **Pen. Code § 3456**, which states that a person shall be discharged within 30 days of completing postrelease supervision, means there is a 30-day window of continuing supervision following completion. (***People v. Young*** (2016) 247 Cal.App.4th 972.)

See also ***People v. Leiva*** (2013) 56 Cal.4th 498, where it was held that a possible probation violation occurring after the expiration of a defendant's probationary period is not punishable despite an earlier summary revocation of probation which is imposed by a court prior to the expiration of the probationary period. **Pen. Code § 1203.2(a)'s** "*tolling*" provisions only allow for a court to retain jurisdiction beyond the probationary period in order to punish for probation violations that are alleged to have occurred *prior* to the expiration of that probationary period.

Pen. Code § 1203.2(a) vests a court with the authority to preside over revocation hearings when a supervised person violates a term or condition of his or her supervision. The statute does not explicitly define "*supervision*" but uses the word throughout the statute to refer to the different types of supervision—such as probation or parole—available to individuals released from custody. **Section 1203.2**, **subd. (a)**, which provides that a supervised person may be rearrested for violations of any term or condition of the person's supervision, lists the following types of supervision covered by the statute: (1) probation; (2) mandatory supervision; (3) postrelease community supervision (PCRS; see **P.C. §§ 3450 et seq.**); and (4) parole. The trial court erred in terminating defendant's parole supervision and in ordering that he not be supervised for the remainder of his parole term where it appeared to have interpreted the term "terminate supervision"

in **Pen. Code § 1203.2(b)(1)** to mean that "supervision" was a condition of parole that could be struck. The Court held that that interpretation was not supported by the statutory language, and it thus had no authority to terminate defendant's parole supervision. (***People v. Johnson*** (2020) 58 Cal.App.5th 363.)

Good Faith Belief in the Existence of Probable Cause to Arrest: The United States Supreme Court recently ruled (in a 5-to-4 decision) that an officer's good faith reliance on erroneous information will not invalidate an arrest even when that information comes from a law enforcement source, so long as the error was based upon non-reoccurring negligence only. However, deliberate illegal acts, or a reckless disregard for constitutional requirements, or reoccurring or systematic negligence, will *not* excuse the resulting unlawful arrest. (***Herring v. United States*** (2009) 555 U.S. 135 [129 S.Ct. 695; 172 L.Ed.2nd 496].)

Note: Under this theory, it is arguable that an officer's good faith belief that a **Fourth** waiver exists, and then conducting a search based upon that belief, would preclude the suppression of any resulting evidence. No case, however, has yet so held.

Search and Seizure Conditions Discovered After the Fact: It is quite clear now that when the search and seizure conditions of one co-tenant are belatedly discovered (i.e., after an otherwise illegal, warrantless search), given the importance of the non-waiver subject's privacy rights in a residence, any evidence found as a result will *not* be admissible against that person. (***People v. Robles*** (2000) 23 Cal.4th 789; ***People v. Sanders*** (2003) 31 Cal.4th 318; ***In re Jaime P.*** (2006) 40 Cal.4th 128.)

***Miscellaneous*:**

Burden of Proof:

The prosecution has the burden of proving that defendant was subject to searchable probation or parole conditions. (***People v. Williams*** (1999) 20 Cal.4th 119, 130; see also ***People v. Pearl*** (2009) 172 Cal.App.4th 1280.)

Once the prosecution has offered a justification for a warrantless search or seizure, the defendant must then present any arguments as to why that justification is inadequate. This specificity requirement does not place the burden of proof on defendants; "the burden of raising an issue is distinct from the burden of proof." (***People v. Perkins*** (2016) 5 Cal.App.5th 454, 474, quoting ***People v. Williams***, *supra*.)

Failure to raise the issue of "equitable estoppel" at the trial court level (i.e., that defendant, by denying he was on searchable probation, cannot later claim that the officers could not use his probation status as legal

justification for a search of his person) waived the issue. (***People v. Thomas*** (2018) 29 Cal.App.5th 1107, 1113-1114.)

Rights of Third Persons not subject to the ***Fourth*** *Waiver*, but who happen to live with a person who is subject to *search and seizure* conditions:

Rule: A warrantless search of a residence based upon a probationer's (or parolee's) search and seizure conditions, when the probationer is a co-occupant of the residence, is lawful as a matter of law, even over the objection of another co-tenant (the probationer's mother who also lived there, in this case). The principles behind ***Georgia v. Randolph*** (2006) 547 U.S. 103 [126 S.Ct. 1515; 164 L.Ed.2nd 208], ***Randolph*** being a consensual search issue unrelated to a **Fourth** waiver search, are inapplicable. (***Smith v. City of Santa Clara*** (9th Cir. 2017) 876 F.3rd 987, 991-995; rejecting defendant's argument that ***Randolph*** created an exception to the probationary search rule.)

See also ***Sharp v. County of Orange*** (9th Cir. 2017) 871 F.3rd 901, 918, fn. 10.)

"Parolees, 'have severely diminished expectations of privacy by virtue of their status,' ***Samson v. California***, 547 U.S. 843, 852, 126 S.Ct. 2193, 165 L.Ed.2nd 250 (2006), and they may be subject to warrantless searches of their homes without a warrant or suspicion of wrongdoing. ***Cuevas v. De Roco***, 531 F.3rd 726, 732 (9th Cir. 2008) (per curiam). *That is true even if other people also live there*. (Italics added) ***United States v. Bolivar***, 670 F.3rd 1091, 1092-93, 1096 (9th Cir. 2012); *see also* ***Samson*** (***v. California***) (2006) 547 U.S. at 856-57." (***United States v. Ped*** (9th Cir. 2019) 943 F.3rd 427, 430.)

See "*Co-Occupants* (*Roommates, Husband and Wife, or Parent and Child*)," under "*Consent Searches*" (Chapter 18), below, discussing the principles of ***Georgia v. Randolph***.

Common Areas; Residences:

Even over the objection of the person who is *not* subject to a **Fourth** Waiver, the police may search the **Fourth** Waiver subject's private areas and all common areas. Only the non-**Fourth** Waiver subject's private areas are protected from being searched. (***Russi v. Superior Court*** (1973) 33 Cal.App.3rd 160, 168-171.)

In extending the rule of ***Whren v. United States*** (1996) 517 U.S. 806 [116 S.Ct. 1769; 135 L.Ed.2nd 89] (i.e., that the officer's

subjective intent is irrelevant) to the **Fourth** Waiver situation, the California Supreme Court upheld the search of the common areas of a residence, looking for evidence against Suspect A, while using Suspect B's **Fourth** Waiver as the legal justification, eventually resulting in recovery of evidence tending to incriminate Suspect C (i.e., defendant Woods). (***People v. Woods*** (1999) 21 Cal.4th 668.)

> "It long has been settled that a consent-based search is valid when consent is given by one person with common or superior authority over the area to be searched; the consent of other interested parties is unnecessary. (***People v. Boyer*** (1989) 48 Cal.3rd 247, 276 . . . ; ***People v. Haskett*** (1982) 30 Cal.3rd 841, 856 . . . ***People v. Viega*** (1989) 214 Cal.App.3rd 817, 828 . . . see ***People v. Clark*** (1993) 5 Cal.4th 950, 979 . . . [search of a car].) Warrantless consent searches of residences have been upheld even where the unmistakable purpose of the search was to obtain evidence against a non-consenting cohabitant. (E.g., ***United States v. Matlock*** (1974) 415 U.S. 164 [170 94 S.Ct. 988; 39 L.Ed.2nd 242] [roommate's consent, obtained after defendant was arrested and removed from the scene, sufficient]; ***People v Haskett*** , *supra,* 30 Cal.3rd at pp. 856-857.)" (***People v. Woods***, *supra,* at pp. 675-676.)
>
> It was noted in *Woods,* however, that there are limitations. A probation search, for instance, cannot "exceed the scope of the particular clause relied upon," cannot "be undertaken in a harassing or unreasonable manner," and cannot extend beyond "those portions of the residence they reasonably believe the probationer has complete or joint control over." (***Id.***, at p. 682; see also ***People v. Maxwell*** (2020) 58 Cal.App.5th 546, 554.)

But, see the limitations put on such searches when the attempted use of another's search and seizure conditions was not discovered until *after* the search for evidence against a co-habitant who was *not* on a **Fourth** Waiver. (***People v. Robles*** (2000) 23 Cal.4th 789; ***People v. Sanders*** (2003) 31 Cal.4th 318; ***In re Jaime P.*** (2006) 40 Cal.4th 128; see above.)

"(A) warrantless search, justified by a probation search condition, may extend to common areas, shared by non-probationers, over which the probationer has '*common authority*.' (***United States v. Matlock*** (1974) 415 U.S. 164, 171 [94 S.Ct. 988; 39 L.Ed.2nd 242, 250].) The '*common authority*' theory of consent rests 'on mutual use of the property by persons generally having joint access or

control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.' (***Id.***, at p. 171, fn. 7 [39 L.Ed.2nd, at p. 250)" (***People v. Smith*** (2002) 95 Cal.App.4th 912, 916.)

The fact that a parolee or probationer lives with a third person who is not subject to search and seizure conditions cannot be used to immunize the one who *is* subject to a **Fourth** Waiver from government scrutiny. (***People v. Kanos*** (1971) 14 Cal.App.3rd 642, 650-651; ***Russi v. Superior Court*** (1973) 33 Cal.App.3rd 160,166-167.)

However, per the Ninth Circuit, the language in this parole condition that allows for a search of property "*under (the parolee's) control*," when the place to be searched is a residence, does not allow for the search of a third-party's residence even though the parolee is a frequent visitor and even though there is evidence that he is dealing drugs out of that third-party's residence. (***United States v. Grandberry*** (9th Cir. 2013) 730 F.3rd 968, 980-982.)

But, there must be at least "*probable cause*" to believe that the person subject to the **Fourth** Waiver does in fact live there, as opposed to merely staying with the resident on an occasional basis. (***United States v. Howard*** (9th Cir. 2006) 447 F.3rd 1257; see also ***Motley v. Parks*** (9th Cir. 2005) 432 F.3rd 1072, 1080-1082; ***United States v. Bolivar*** (9th Cir. 2012) 670 F.3rd 1091, 1093-1095; ***United States v. Grandberry***, *supra*, at p. 973-980; ***Smith v. City of Santa Clara*** (9th Cir. 2017) 876 F.3rd 987, 995-996.)

> But see ***People v. Downey*** (2011) 198 Cal.App.4th 652, 657-662, above, where it was held that only a "*reason to believe*," (interpreted to mean a "reasonable suspicion") being a standard less than probable cause, that the subject lives there is necessary.

Any evidence lawfully seized during a parole or probation search may be used in court against whomever the circumstances tend to connect it to. That may turn out to be the cotenant who was not on probation or parole. (***Russi v. Superior Court*** (1973) 33 Cal.App.3rd 160, 167-168; ***People v. Woods*** (1999) 21 Cal.4th 668.)

> This rule is *not* conditioned upon the third person's knowledge of the existence of the **Fourth** Waiver to which

his or her cotenant was subject. (***Russi v. Superior Court***, *supra*, at p. 170.)

Also, it matters not whether the cotenant is the parolee or probationer's wife, live-in "significant other," or just some "drinking buddy." (***People v. Triche*** (1957) 148 Cal.App.2nd 198, 203.)

Common Areas; Vehicles:

The California Supreme Court has differentiated **Fourth** waiver searches of residences from those of vehicles. Given the higher expectation of privacy involved in a residence, it has been held that officers generally may only search those portions of the residence over which they reasonably believe the **Fourth** waiver suspect has complete or joint control. Those areas that are exclusively possessed or controlled by others are off limits. Common areas are subject to being searched. In the case of a vehicle, with its lower expectation of privacy, a warrantless search of those areas of the passenger compartment where an officer reasonably expects that the parolee could have stowed personal belongings or discarded items when aware of police activity, as well as a search of personal property located in those areas if the officer reasonably believes that the parolee owns those items or has the ability to exert control over them, is lawful. (***People v. Schmitz*** (2012) 55 Cal.4th 909, 916-933.)

The same rule holds true for a *probationer* who is subject to a **Fourth** waiver. (***People v. Cervantes*** (2017) 11 Cal.App.5th 860, 866-872; ruling that so long as the center console of a vehicle is not locked, secured, or otherwise closed off, a search of a center console based on a front seat passenger's probation search condition is objectively reasonable. See also ***People v. Maxwell*** (2020) 58 Cal.App.5th 546, 553-557, *infra*.)

The trunk of a suspect's rented car is property under his control, and is subject to a warrantless search under the terms of the defendant's parole conditions. (***United States v. Korte*** (9th Cir. 2019) 918 F.3rd 750, 754-755.)

Agreeing with the ruling in ***People v. Cervantes*** (2017) 11 Cal.App.5th 860 (see above), the Third District Court of Appeal held that the rule of ***Schmitz*** (search of defendant's vehicle using a parolee-passenger's **Fourth** wavier as the legal reason; see above) allowed for the search of defendant's car (or at least, "those areas

of the passenger compartment where the officer reasonably expects that the [probationer] could have stowed personal belongings or discarded items when aware of police activity." Quoting ***Schmitz***, at p. 913.) when his passenger was on searchable probation. (***People v. Maxwell*** (2020) 58 Cal.App.5th 546, 553-557.)

In ***Maxwell***, it was further noted that the fact that the probationer had left defendant's vehicle when contacted was irrelevant, at least when she was still so close to defendant's car that she still had access to it. (***Id.***, at p. 557.)

Private Areas:

A **Fourth** Waiver imposed on one cotenant does *not* justify the search of areas or property *exclusive* to a third person. (***People v. Veronica*** (1980) 107 Cal.App.3rd 906.)

"Neither reason nor authority support the proposition that police may conduct a general search of the private belongings of one who lives with a probationer." To justify searching the property exclusive to a non-probationer or non-parolee, the officers will need "*some cause*" to believe the person subject to search and seizure conditions has secreted contraband in the property of a third person. (Italics added; ***People v. Alders*** (1978) 87 Cal.App.3rd 313, 317-318.)

The searching officers need only entertain a "*reasonable suspicion*," based upon an evaluation of all the surrounding circumstances, that the item to be searched was either owned, or (at least jointly) controlled, by the person subject to the **Fourth** Waiver. (***People v. Boyd*** (1990) 224 Cal.App.3rd 736, 745-346, 749-750.)

While some older cases have required that an officer have full "*probable cause*" to believe that a place or item to be searched is owned, controlled, or jointly possessed by the **Fourth** waiver suspect (e.g., see ***People v. Montoya*** (1981) 114 Cal.App.3rd 556, 562.), the more recent cases, and the weight of authority, have held that so long as the searching officers have a "*reasonable suspicion*," the resulting search will be upheld. (***People v. Palmquist*** (1981) 123 Cal.App.3rd 1, 12; ***People v. Boyd***, *supra*, at p. 750.)

See ***People v. Smith*** (2002) 95 Cal.App.4th 912; search of defendant, non-probationer's purse, under the theory that

the person subject to the search and seizure conditions (a male) had joint authority over her purse, was upheld.

A search of the female defendant's purse left in the car when an officer is conducting a parole search of a male parolee, is illegal absent a reasonable suspicion to believe that the parolee had joint ownership, possession, or control over the purse. (***People v. Baker*** (2008) 164 Cal.App.4th 1152.)

A warrantless search of those areas of the passenger compartment of a vehicle where an officer reasonably expects that the parolee could have stowed personal belongings or discarded items when aware of police activity, as well as a search of personal property located in those areas if the officer reasonably believes that the parolee owns those items or has the ability to exert control over them, is lawful. (***People v. Schmitz*** (2012) 55 Cal.4th 909, 916-933.)

The Court further noted that **Fourth** waiver for probationers is a matter of choice, such a person agreeing to the giving up his or her **Fourth Amendment** search and seizure protections in exchange for avoiding a jail sentence. Parolees, on the other hand, at least since the applicable statute (i.e., **Pen. Code § 3067**) was amended (effective 6/27/12), aren't given a choice. **Fourth** waiver conditions are involuntarily imposed upon them. As a result, "parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." Therefore, the fact that defendant's passenger was a parolee, as opposed to a probationer, is a "salient circumstance" in setting out the rule of this case. But the Court never indicates that the general rule is any different between cases involving probationers and parolees. (***Id.***, at pp. 921-922.)

Also, the Court noted that defendant's (vehicle driver or owner) lack of knowledge that his passenger was subject to search and seizure conditions is irrelevant to the legality of the parole search. (***Id.***, at pp. 922-923.)

The factors to consider in determining what areas and items in a vehicle are subject to search include the nature of that area or item, how close and accessible the area or item is to the parolee, the privacy interests at stake, and the government's interest in conducting the search. (***Id.***, at p. 923.)

> Also, because "cause" is not required to justify such a search, an officer does not have to articulate facts demonstrating that the parolee actually placed personal items or discarded contraband in the open areas of the passenger compartment. The issue in court is going to be whether, when viewed objectively, it was reasonable for the officer to assume that any particular area or item might contain the parolee's personal property or be somewhere that he might be expected to secret items he didn't want the police to find. (***Id***., at p. 926.)

The search of a non-probationer's purse, when found in the middle of a jointly occupied bedroom, was upheld. The fact that the probationer was a male and the non-probationer defendant was a female, is not dispositive. "To rule otherwise would enable a probationer to flout a probation search condition by hiding drugs in a cohabitant's purse or any other hiding place associated with the opposite gender." (***People v. Ermi*** (2013) 216 Cal.App.4th 277, 280-282.)

A warrantless search of the garage in which defendant was living was not justified under the **Fourth Amendment** where there was nothing in the record to aid an objective evaluation of the scope of the home owner's advance consent. No evidence was produced as to what were the terms of the specific search and seizure conditions applicable to the residents of house and garage that was searched. Guests (the defendant here being a non-probationer who was living in the probationers' garage) are entitled to demand adherence to the proper scope of their host's search conditions, despite the usual rule prohibiting the assertion of someone else's **Fourth Amendment** rights in search and seizure cases. (***People v. Romeo*** (2015) 240 Cal.App.4th 931, 949-955.)

> That problem could have been resolved had the prosecution introduced into evidence (under **Evid. Code § 1280**) the public records exception to the hearsay rule, a copy of the residents' search and seizure conditions as ordered by the court, or the searching officer's own testimony as to what he knew those conditions to be. (***Id***., at p. 955.)

When it is Unknown Who Owns the Property About to be Searched:

Rule: Where the officers do not know who owns or possesses a place or item to be searched, and such information can be easily ascertained, it *may*, depending upon the circumstances, be

incumbent upon them to attempt to determine ownership in order to protect the privacy interests of the third persons involved. (See below)

Case Law:

> "(I)n the case of probation searches, the officer must have some knowledge not just of the fact someone is on probation, but of the existence of a search clause broad enough to justify the search at issue." ***People v. Douglas*** (2015) 240 Cal.App.4th 855, 863; citing ***People v. Bravo*** (1987) 43 Cal. 3rd 600, 605-606, 608.)
>
> "If it is *objectively unreasonable* for officers to believe that the residence or item falls within the scope of a search condition, any evidence seized will be deemed the product of a warrantless search absent other considerations." (Italics added; ***People v. Tidalgo*** (1981) 123 Cal.App.3rd 301, 306-307.)

Additional Rule: However, the officers may still act upon appearances, so long as they act reasonably.

Additional Case Law:

> While some courts argue that officers may have a duty to inquire as to the ownership or control of certain items (see ***People v. Montoya*** (1981) 114 Cal.App.3rd 556, 562-563.), other more reasoned court decisions recognize that "an officer could hardly expect that a parolee (or probationer) would claim ownership of an item which he knew contained contraband." (***People v. Britton*** (1984) 156 Cal.App.3rd 689, 701.)
>
> If an officer reasonably believes he will not receive an honest answer, there appears to be no legal reason why he or she must either inquire, or accept the answer as true if inquiry is in fact made. (***People v. Boyd*** (1990) 224 Cal.App.34d 736, 746-750; see also ***United States v. Davis*** (9th Cir. 1991) 932 F.2nd 752, 760.)
>
> Searching without a warrant a residence defendant was observed entering and exiting, but with insufficient information to believe that the parolee/defendant lived at that residence (i.e., all available information indicated that his home address was elsewhere), held to be illegal.

(***United States v. Grandberry*** (9th Cir. 2013) 730 F.3rd 968, 975-980.)

> The fact that the apartment that was searched might have been "under defendant's control" held to be irrelevant. The issue is whether there is probable cause to believe defendant lived there. (***Id***., at pp. 980-982: "(W)e conclude that the 'property under your control' provision cannot refer to a place where someone else, but not the parolee, lives.")

However, the trunk of a suspect's rented car is property under his control, and is subject to a warrantless search under the terms of the defendant's parole conditions. (***United States v. Korte*** (9th Cir. 2019) 918 F.3rd 750, 754-755.)

A female resident's probation search condition did not allow for the search of a purse and drawers found in the residences' separate living unit (i.e., the garage) where there was no evidence of the probationer's actual access to, or control over, the contents of the purse or drawers, and no evidence of a family relationship or equivalent familiarity between the probationer and the defendant. The searching officers did not have an "objectively reasonable belief" that the probationer had authority over the contents of either the drawers or the purse found in the defendant's separate living quarters. (***People v. Carreon*** (2016) 248 Cal.App.4th 866, 877-881.)

In a Vehicle:

An existing search and seizure condition justifies a detention without a reasonable suspicion of criminal activity, including while in a vehicle, and a search of the car under the terms of the defendant's **Fourth** waiver. (See ***People v. Viers*** (1991) 1 Cal.App.4th 990, 992-994; defendant stopped in his vehicle.)

> *Note*: ***Viers*** further held that it was irrelevant that the officers were unaware of defendant's probation status when the search was conducted; a conclusion that has since been abrogated by ***People v. Sanders*** (2003) 31 Cal.4th 318. (See ***Myers v. Superior Court*** (124 Cal.App.4th 1247.)
>
> See "*Searching While In Ignorance of a Search Condition*," above.

A warrantless search of those areas of the passenger compartment of a vehicle where an officer reasonably expects that the parolee could have stowed personal belongings or discarded items when aware of police activity, as well as a search of personal property located in those areas if the officer reasonably believes that the parolee owns those items or has the ability to exert control over them, is lawful. (***People v. Schmitz*** (2012) 55 Cal.4th 909, 916-933.)

> The Court further noted that a **Fourth** waiver for probationers is a matter of choice, such a person agreeing to the giving up his or her **Fourth Amendment** search and seizure protections in exchange for avoiding a jail sentence. Parolees, on the other hand, at least since the applicable statute (i.e., **Pen. Code § 3067**) was amended (effective 6/27/12), aren't given a choice. **Fourth** waiver conditions are involuntarily imposed upon them. As a result, "parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." Therefore, the fact that defendant's passenger was a parolee, as opposed to a probationer, is a "salient circumstance" in setting out the rule of this case. But the Court never indicates that the general rule is any different between cases involving probationers and parolees. (***Id***., at pp. 921-922.)
>
> > Also, the Court noted that defendant's (vehicle driver or owner) lack of knowledge that his passenger was subject to search and seizure conditions is irrelevant to the legality of the parole search. (***Id***., at pp. 922-923.)
> >
> > See also ***United States v. Johnson*** (9th Cir. 2017) 875 F.3rd 1273-1274.
>
> The factors to consider in determining what areas and items in a vehicle are subject to search include the nature of that area or item, how close and accessible the area or item is to the parolee, the privacy interests at stake, and the government's interest in conducting the search. (***Id***., at p. 923.)
>
> Also, because "*cause*" is not required to justify such a search, an officer does not have to articulate facts demonstrating that the parolee actually placed personal

> items or discarded contraband in the open areas of the passenger compartment. The issue in court is going to be whether, when viewed objectively, it was reasonable for the officer to assume that any particular area or item might contain the parolee's personal property or be somewhere that he might be expected to secret items he didn't want the police to find. (***Id***., at p. 926.)

See also ***People v. Maxwell*** (2020) 58 Cal.App.5th 546, where defendant's passenger in his vehicle was on searchable probation. "We thus conclude an officer may search 'those areas of the passenger compartment where the officer reasonably expects that the parolee could have stowed personal belongings or discarded items when aware of police activity.'" (Pg. 556.)

> Defendant's motion to suppress evidence obtained from a search of his car based on the searchable probation status of his passenger was properly denied because an officer may search those areas of a car's passenger compartment where the officer reasonably expects the probationer could have stowed or discarded items after noticing police activity, and that searchable area includes those parts of the passenger compartment the probationer still had access to. (***Id***. at pp. 552-557.)

> The Court further held that the trial court also properly denied defendant's motion to suppress evidence obtained from searches of his person, car, and home, which were premised on a bail condition that was later found to be invalid, where the good-faith exception to the exclusionary rule applied, as the officer who conducted the search acted in good-faith reliance on defendant's then-extant bail terms, and that reliance was objectively reasonable. (***Id***., at pp. 558-560.)

Detention of Third Persons:

Police may lawfully detain visitors to a probationer's home while executing a "***Fourth*** *Waiver*" *search* for purposes of identifying the visitors (as possible felons) and for the officers' safety. (***People v. Matelski*** (2000) 82 Cal.App.4th 837; ***People v. Rios*** (2011) 193 Cal.App.4th 584, 593-595.)

Third party occupants of a home searched under the conditions of a **Fourth** waiver may lawfully be detained during the search. The justifications for such a detention include:

- The need to prevent flight in the event incriminating evidence is found;
- Minimizing the risk of harm to the officers, *and*
- Facilitating the orderly completion of the search while avoiding the use of force.
(***Sanchez v. Canales*** (9th Cir. 2009) 574 F.3rd 1169, citing ***Muehler v. Mena*** (2005) 544 U.S. 93 [125 S.Ct. 1465; 161 L.Ed.2nd 299]; a search warrant case.)

See *"Detentions, Patdowns, and Arrests*," below.

Knock and Notice:

The "*knock and notice*" provisions of **Penal Code §§ 844** and **1531** apply to searches conducted pursuant to a probation or parole condition. (See **P.C. § 3061**; ***People v. Rosales*** (1968) 68 Cal.2nd 299, 303-304; ***People v. Kanos*** (1971) 14 Cal.App.3rd 642, 651-652; ***People v. Constancio*** (1974) 42 Cal.App.3rd 533, 542; ***People v. Lilienthal*** (1978) 22 Cal.3rd 891, 900; ***People v. Mays*** (1998) 67 Cal.App.4th 969, 973, fn. 4; ***People v. Urziceanu*** (2005) 132 Cal.App.4th 747, 789-792; ***People v. Murphy*** (2005) 37 Cal.4th 490.)

See "*Knock and Notice*," under "*Searches With a Search Warrant*" (Chapter 7), above.

This includes the doctrine of "*substantial compliance*," where forced entry may be made so long as the "*policies and purposes*" (i.e., respecting the right to privacy within the home and avoiding violent confrontations) of the knock-notice rules have been satisfied. (***People v. Montenegro*** (1985) 173 Cal.App.3rd 983, 988-989.)

However, a court *may not* impose a waiver of the knock and notice requirements as a condition of probation. (***People v. Freund*** (1975) 48 Cal.App.3rd 49, 56-58.)

Detentions, Patdowns, and Arrests:

Detentions: A search and seizure condition justifies a detention without a reasonable suspicion of criminal activity. (***People v. Viers*** (1991) 1 Cal.App.4th 990, 992-994.)

Viers further held that it was irrelevant that the officers were unaware of defendant's probation status when the search was conducted; a conclusion that has since been abrogated by ***People v.***

Sanders (2003) 31 Cal.4th 318. (See ***Myers v. Superior Court*** (124 Cal.App.4th 1247.)

See "***Searching While In Ignorance of a Search Condition***," above.

"If a police officer knows an individual is on **PRCS**, he may lawfully detain that person for the purpose of searching him or her, so long as the detention and search are not arbitrary, capricious or harassing." (***People v. Douglas*** (2015) 240 Cal.App.4th 855, 863.)

Patdowns:

Old Rule: When the rule was that a parole search required at least a "*reasonable suspicion*" of renewed criminal activity, a police officer could not justify a patdown (frisk) search of a detained suspect for weapons based upon the detainee's status as a parolee alone, in the absence of other suspicious circumstances furnishing grounds to believe he may be armed, unless, perhaps, it was known that his prior offense involved the use of weapons. (***People v. Williams*** (1992) 3 Cal.App.4th 1100, 1105, 1108; ***People v. Montenegro*** (1985) 173 Cal.App.3rd 983.)

New Rule: Because under the present state of the law, a parolee or probationer may be searched without any cause (See ***People v. Reyes*** (1998) 19 Cal.4th 743.), this rule (requiring a reasonable suspicion) is *probably* no longer valid, at least pending review of the necessary standards by the United States Supreme Court. (See "*Standard of Proof Required*," above.)

Arrests: The fact that a person is a parolee-at-large, and subject to search or seizure without a warrant or probable cause, justifies a warrantless entry into the subject's house for the purpose of arresting him. (***People v. Lewis*** (1999) 74 Cal.App.4th 662.)

There is no authority, however, allowing for a non-consensual transportation of a parolee or probationer to his house, absent probable cause to arrest the subject. In that a non-consensual transportation of a subject is generally considered to be an arrest (***Dunaway v. New York*** (1979) 442 U.S. 200, 206-216 [99 S.Ct. 2248; 60 L.Ed.2nd 824, 832-838]; see "*Detentions*." above), and thus illegal absent probable cause to arrest the subject, it is likely that the use of a **Fourth** Waiver condition as an excuse to transport the subject from a remote location back to his house, absent probable cause to arrest him, would *not* be upheld.

Out-of-State Probationer or Parolee: The validity of a search of a probationer or parolee from another state, supervision for whom has been transferred to California pursuant to **Penal Code §§ 11175 et seq**. (**Uniform Act for Out-of-State Parolee (and Probationer) Supervision**), is to be determined by California Law. (***People v. Reed*** (1994) 23 Cal.App.4th 135.)

AIDS & HIV; *Required Notifications*: A parole or probation officer seeking the assistance of law enforcement to apprehend or take into custody a parolee or probationer who has a record of assault on a peace officer, *must*, by statute, inform the officers of the suspect's infliction with AIDS or HIV. (**Pen. Code § 7521**)

Pen. Code § 290.024: *Sex Offender Internet Identifier Registration Requirements*:

> *Requirement*: Sex offenders convicted of a felony on or after *January 1, 2017*, are required to register Internet identifiers if a court at sentencing finds that any one of the following applies:
>
> > **(1)** The defendant used the Internet to collect any private information to identify the victim of the crime;
> >
> > **(2)** The defendant was convicted of human trafficking pursuant to **Pen. Code § 236.1(b)** (sex trafficking) or **Pen. Code § 236.1(c)** (sex trafficking involving minors) and used the Internet to traffic the victim; *or*
> >
> > **(3)** The defendant was convicted of a felony involving obscene matter (**Pen. Code §§ 311** through **311.12**) and used the Internet to prepare, publish, distribute, send, exchange, or download the obscene matter or matter depicting a minor engaging in sexual conduct.
>
> "*Internet identifier*" is defined as "any electronic mail address or user name used for instant messaging or social networking that is actually used for direct communication between users on the Internet in a manner that makes the communication not accessible to the general public." An Internet identifier does *not* include passwords, date of births, social security numbers, or PIN numbers.
>
> > Note that the U.S. Supreme Court has held unconstitutional a statute that made it a felony for registered sex offenders to access commercial social networking websites even though the sex offender knew the site allowed minor children to become members or to create or maintain a personal web page because it impermissibly restricted lawful speech in violation of the **First Amendment's** Free Speech Clause, which was applicable to North Carolina under the Due Process Clause of the **Fourteenth**

Amendment. (***Packingham v. North Carolina*** (2017) 582 U.S. 98 [137 S.Ct. 1730; 198 L.Ed.2nd 273].)

However, see ***In re A.A.*** (2018) 30 Cal.App.5th 596, where it was held that a court may restrict a minor's use of social media, such as by prohibiting him from using it to talk about his offense, in a "narrowly tailored probation condition" even though it affected the minor's **First Amendment** freedom of expression rights.

Pen. Code § 290.45: *Non-Disclosure of Internet Identifiers to the Public*:

Law enforcement is prohibited from disclosing an offender's Internet identifiers to a non-law enforcement entity or person, except by court order (as an exception to the right of law enforcement to disclose information about a sex offender when necessary to ensure public safety).

A law enforcement agency may use an Internet identifier submitted with a sex offender's registration or to release it to another law enforcement agency *only* for the purpose of investigating a sex-related crime, a kidnapping, or human trafficking.

***Chapter 20*:**

Consent Searches:

Rule*:** A valid *consent* is a lawful substitute for both a search warrant and probable cause. (United States v. Matlock*** (1974) 415 U.S. 164, 165-166 [94 S.Ct. 988; 39 L.Ed.2nd 242]; ***Vandenberg v. Superior Court*** (1970) 8 Cal.App.3rd 1048, 1053; ***United States v. Russell*** (9th Cir. 2012) 664 F.3rd 1279, 1281; (***Fernandez v. California*** (2014) 571 U.S. 292, 298-307 [134 S.Ct. 1126; 1132-1137; 188 L.Ed.2nd 25]; ***People v. Arredondo*** (2016) 245 Cal.App.4th 186, 193-194.)

Note: Petition for Review was dismissed and the case remanded in light of the decision in ***Mitchell v. Wisconsin*** (June 27, 2019) __ U.S.__, __ [139 S.Ct. 2525; 204 L.Ed.2nd 1040], where the U.S. Supreme Court held that when a DUI arrestee is unconscious, this fact alone will "almost always" constitute an exigency, allowing for a warrantless blood draw.

"It is well settled that a search conducted pursuant to a valid consent is constitutionally permissible." (Citation omitted; ***United States v. Soriano*** (9th Cir 2004) 361 F.3rd 494, 501; ***Schneckloth v. Bustamonte*** (1973) 412 U.S. 218, 222 [93 S.Ct. 2041; 36 L.Ed.2nd 854, 860]; ***People v. Harris*** (2015) 234 Cal.App.4th 671, 685.)

"'Consent searches are part of the standard investigatory techniques of law enforcement agencies' and are 'a constitutionally permissible and wholly legitimate aspect of effective police activity.'" (***Fernandez v. California***, *supra*, at p. 298, quoting ***Schneckloth v. Bustamonte***, *supra*, at pp. 231-232 [93 S.Ct. 2041; 36 L.Ed.2nd 854].).

"Consent, much like a warrant, changes an officer's duties. It turns an unlawful act into one that is lawful." (***Mendez v. County of Los Angeles*** (9th Cir. 2018) 897 F.3rd 1067, 1075.)

This includes searches of one's home: "Though the **Fourth Amendment** generally prohibits warrantless entry into a person's home, an exception applies to consent-based searches. ***Schneckloth v. Bustamonte***, 412 U.S. 218, 228, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). The government bears the burden to demonstrate that an exception to the warrant requirement applies. ***United States v. Lundin***, 817 F.3d 1151, 1157 (9th Cir. 2016)." (***United States v. Parkins*** (9th Cir. Feb. 14, 2024) 92 F.4th 882, __ [2024 U.S.App. LEXIS 3427].)

***Why do people consent*?** Would a person who has something to hide really consent to being searched? *Yes!*

Some persons are more concerned with what they perceive to be the *appearance of guilt*, and feel they must consent to avoid such an appearance, hoping the law

enforcement officer will either lose interest or fail to find whatever it is the person hopes to keep concealed. Consent under these circumstances, however, if the person reasonably should have felt like he or she had the option of refusing, is still a valid consent. (See ***People v. James*** (1977) 19 Cal.3rd 99, 114.)

Limitation*:** A consent, to be lawful, must be "*freely and voluntarily*" given. (Bumper v. North Carolina*** (1969) 391 U.S. 543, 548 [88 S.Ct. 1788; 20 L.Ed.2nd 797]; ***People v. Smith*** (2010) 190 Cal.App.4th 572, 576-577; ***United States v. Russell*** (9th Cir. 2012) 664 F.3rd 1279, 1281; ***People v. Ling*** (2017) 15 Cal.App.5th Supp. 1, 7; see also ***People v. Superior Court* [*Corbett*]** (2017) 8 Cal.App.5th 670, 680-681; a signed consent held to be involuntary in that the interrogating officers ignored defendant's prior repeated refusals to consent.)

General Rule: "'To be effective, consent must be voluntary. [Citations.]' (***People v. Ledesma*** (1987) 43 Cal.3rd 171, 233 . . .) '[W]here the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority. [Citations.]' (***Florida v. Royer*** (1983) 460 U.S. 491, 497 [103 S.Ct. 1319; 75 L.Ed.2nd 229, 103 S.Ct. 1319].) 'The voluntariness of consent is a question of fact to be determined from the totality of circumstances. [Citations.] If the validity of a consent is challenged, the prosecution must prove it was freely and voluntarily given—i.e., "that it was [not] coerced by threats or force, or granted only in submission to a claim of lawful authority.' [Citations.]'" (***People v. Boyer*** (2006) 38 Cal.4th 412, 445-446 . . .)" (***People v. Gutierrez*** (2019) 33 Cal.App.5th Supp. 11, 17.)

> "'[W]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given.' [Citations.]" (***Schneckloth* (*v. Bustamonte*** (1973) 412 U.S. 218) at p. 222 ([36 L.Ed.2nd 854]).) He or she must also prove the warrantless search was within the scope of the consent given. (***People v. Cantor*** (2007) 149 Cal.App.4th 961, 965 . . . .) "'Whether the search remained within the boundaries of the consent is a question of fact to be determined from the totality of [the] circumstances. [Citation.].'" (***People v. Cruz*** (2019) 34 Cal.App.5th 764, 769.)

"*Submission to Authority*" *Issue*: Mere "acquiescence to a claim of lawful authority" will likely "vitiate" any consent given. (***People v. Meza*** (2018) 23 Cal.App.5th 604, 611, fn. 2, citing ***Bumper v. North Carolina*** (1968) 391 U.S. 543, 548-549 [20 L.Ed.2nd 797; 88 S.Ct. 1788]; ***People v. Ling*** (2017) 15 Cal.App.5th Supp. 1, 8; ***People v. Mason*** (2016) 8 Cal.App.5th Supp. 11, 31-33; see also ***People v. Vannesse*** (2018) 23 Cal.App.5th 440, 445.)

> "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist

the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." (***Bumper v. North Carolina***, *supra*, at p. 549; falsely telling defendant's grandmother that the officers had a search warrant which precipitated what the prosecution argued was a consent search.)

"'Coercion is not limited to physical abuse; it may involve 'more subtle forms of psychological persuasion,'" including "'deception or communication of false information.'" (***Boitez v. Superior Court of Yolo County*** (2023) 96 Cal.App.5th 1213, 1224-1225; quoting ***People v. Miranda-Guerrero*** (2022) 14 Cal.5th 1, 20.)

However, where four uniformed officers went to the defendant's house, asked him to step outside, arrested and handcuffed him, and then asked to search the house. the court held that, "[T]he arresting officer neither held defendant at gunpoint, nor unduly detained or interrogated him; the officer did not claim the right to search without permission, nor act as if he intended to enter regardless of defendant's answer." Defendant's consent to search his house was upheld. (***People v. James*** (1977) 19 Cal.3rd 99, 106-113.)

Also, a police officer merely telling a DUI (drugs) arrestee that she must submit to a blood test falls short of the coerciveness necessary to vitiate her consent. To have a valid argument that the arrestee was merely submitting to the officer's authority requires "far more coercive circumstances or additional facts such as an illegal arrest or a false claim of authority to search." The arrestee's actual knowledge of her right to refuse is but one fact to consider in determining whether she validly consented to providing a blood test. (***People v. Lopez*** (2019) 8 Cal.5th 353, 330-331.)

False Claim of Exigent Circumstances: Use of a ruse, however, implying exigent circumstances, will likely negate any consent given. For instance, telling defendant that his computer is sending out viruses and promising that they can fix his computer and/or supply him with a free one in exchange, where in reality the agents were looking for child pornography, vitiates any consent given to do a warrantless inspection of his computer. (***Pagán-González v. Moreno*** (1st Cir. P.R. 2019) 919 F.3rd 582.)

The trial court's refusal to grant defendant's suppression motion was reversed by the Ninth Circuit Court of Appeal in a 2-to-1 decision where FBI agents' use of deceit to seize and search defendant and his vehicle violated the **Fourth Amendment**. The FBI agents, with a warrant to search defendant's home, posed as police officers and played on defendant's trust and reliance on their story that his home had been burglarized to trick him into coming home, bringing his car and his person

within the ambit of the warrant when it was not otherwise within its ambit. The FBI agents' use of a ruse to seize and search the defendant was held to have violated the **Fourth Amendment**. Balancing the Government's justification for its actions against the intrusion into the defendant's **Fourth Amendment** interests, the Ninth Circuit concluded that the Government's conduct was clearly unreasonable. The Court rejected the Government's arguments that the agents never seized the defendant, holding that the seizures of the defendant's person and the electronic devices in his car were the direct result of the FBI agents' unreasonable ruse. The Court further held that the Government failed to carry its burden to show that the defendant's incriminating statements, made after an agent revealed the true purpose of the investigation and asked to speak with him, were not obtained through exploitation of an illegality rather than by means sufficiently distinguishable to be purged of the primary taint. (***United States v. Ramirez*** (9th Cir. 2020) 976 F.3rd 946.)

Burden of Proof: The prosecution bears the burden of showing that the defendant's consent to search is voluntary and unaffected by coercion. (***Schneckloth v. Bustamonte*** (1973) 412 U.S. 218 [93 S.Ct. 2041; 36 L.Ed.2nd 854]; ***Estes v. Rowland*** (1993) 14 Cal.App.4th 508, 527; ***United States v. Bautista*** (9th Cir. 2004) 362 F.3rd 584; ***United States v. Johnson*** (9th Cir. 2017) 875 F.3rd 1265, 1276; ***Boitez v. Superior Court of Yolo County*** (2023) 96 Cal.App.5th 1213, 1217, 1224.)

"This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." (***Bumper v. North Carolina*** (1968) 391 U.S. 543, 548-549 [20 L.Ed.2nd 797; 88 S.Ct. 1788]; ***People v. Ling*** (2017) 15 Cal.App.5th Supp. 1, 8.)

"Whether consent to search was voluntarily given is 'to be determined from the *totality of all the circumstances*.'" (Italics added; ***United States v. Soriano*** (9th Cir. 2003) 361 F.3rd 494, 501; citing ***Schneckloth v. Bustamonte***, *supra*; see also ***Pavao v. Pagay*** (9th Cir. 2002) 307 F.3rd 915, 919; ***United States v. Crapser*** (9th Cir. 2007) 472 F.3rd 1141, 1149; ***People v. Espino*** (2016) 247 Cal.App.4th 746, 762.)

"(T)he government's burden to show voluntariness cannot be discharged by showing no more than acquiescence to a claim of lawful authority." (***United States v. Perez-Lopez*** (9th Cir. 2003) 348 F.3rd 839, 846; see also ***United States v. Bautista*** (9th Cir. 2004) 362 F.3rd 584, 589.)

"(T)he analysis naturally involves distinguishing consent from assent. "'Consent, in law, means a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice, to do something proposed by another … . [Assent] means mere

passivity or submission, which does not include consent.""" (***People v. Ling*** (2017) 15 Cal.App.5th Supp. 1, 8; quoting ***People v. Fields*** (1979) 95 Cal.App.3rd 972, 977.)

"On appeal, evidence regarding the question of consent must be viewed in the light most favorable to the fact-finder's decision." (***United States v. Kaplan*** (9th Cir. 1990) 895 F.2nd 618, 622.)

"'The voluntariness of the consent is in every case 'a question of fact to be determined in the light of all the circumstances.' (***People v. James*** ((1977)) 19 Cal.3rd (99) at p. 106.) As part of the calculus in determining whether a defendant's consent to search was voluntarily given, courts must consider any evidence that a police officer made a misrepresentation that prompted the defendant's acquiescence to the search." (***Boitez v. Superior Court of Yolo County*** (2023) 96 Cal.App.5th 1213, 1217, an "offer of leniency" case; quoting ***United States v. Vazquez*** (1st Cir. 2013) 724 F.3d 15, 19.)

The ***Boiltiz*** Court further noted (at pgs. 1217-1218, and 1223) that "the question of voluntary consent cannot be based on the subjective good faith of an officer in making a representation that induced the consent to search." (Citing ***Beck v. Ohio*** (1964) 379 U.S. 89, 97 [13 L Ed.2nd 142; 85 S.Ct. 223].) "Thus, 'whether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of [a defendant's] election to abandon his[, her, or their] rights.'" (Quoting ***Moran v. Burbine*** (1986) 475 U.S. 412, 423 [89 L.Ed.2nd 410; 106 S.Ct. 1135].)

Factors: As described in ***People v. Ramirez*** (1997) 59 Cal.App.4th 1548, at page 1558, the following are among the factors that will be taken into consideration in determining the validity of a consent to search, although none of these factors are necessarily dispositive in and of itself:

- Whether the person consenting was in custody.
- Whether the arresting officers had their guns drawn.
- Whether ***Miranda*** warnings had been given. (*But*, see ***Miranda***, below.)
- Whether the person consenting was told that he or she had a right not to consent.
- Whether the person consenting was told that a search warrant could be obtained.

(See also ***United States v. Soriano*** (9th Cir. 2003) 361 F.3rd 494, 968-969; ***United States v. Rodriguez-Preciado*** (9th Cir. 2005) 399 F.3rd 1118, 1126; ***United States v. Crapser*** (9th Cir. 2007) 472 F.3rd 1141, 149; ***United States v. Brown*** (9th Cir. 2009) 563 F.3rd 410,

415; ***United States v. Vongxay*** (9th Cir. 2010) 594 F.3rd 1111, 1119-1120; (***Liberal v. Estrada*** (9th Cir. 2011) 632 F.3rd 1064, 1082-1083; ***United States v. Russell*** (9th Cir. 2012) 664 F.3rd 1279, 1281; ***United States v. Johnson*** (9th Cir. 2017) 875 F.3rd 1265, 1276-1277; ***United States v. Mora-Alcaraz*** (9th Cir. 2021) 986 F.3rd 1151, 1156, 1157.)

- Whether consent was obtained while the person was confronted by many officers;

- Whether the consenting person experienced a significant interruption of his, her, or their liberty; *and*

- Whether the officer(s) used deceptive practices to obtain consent.

(***Boitez v. Superior Court of Yolo County*** (2023) 96 Cal.App.5th 1213, 1224; citing ***United States v. Cormier*** (9th Cir. 2000) 220 F.3rd 1103, 1112; ***People v. Ledesma*** (1987) 43 Cal.3rd 171, 233–234; ***People v. Avalos*** (1996) 47 Cal.App.4th 1569, 1578.)

Circumstances Affecting Voluntariness:

Under Arrest:

The fact alone that the suspect is *under arrest* is not enough to demonstrate coercion. (***United States v. Watson*** (1976) 423 U.S. 411 [96 S.Ct. 820; 46 L.Ed.2nd 598]; ***People v. Llamas*** (1991) 235 Cal.App.3rd 441, 447.)

A "person's in-custody status, even when he is handcuffed, does not automatically vitiate his consent; this is '"but one of the factors, but not the only one, to be considered by the trial judge who sees and hears the witnesses and is best able to pass upon the matter."'" (***People v. Byers*** (2016) 6 Cal.App.5th 856, 864; quoting ***People v. Llamas***, *supra*.)

> Being detained outside an apartment, ordered to the ground by an officer with a drawn gun, arrested, handcuffed, placed in the back of a van, and surrounded by several officers, held to be insufficient to vitiate the suspect's consent to enter his apartment and search his room. (***People v. Byers***, *supra*, at pp. 864-865.)

But if he is unlawfully under arrest (i.e., without probable cause), then any resulting consent obtained at that time will be invalid. (***People v. Espino*** (2016) 247 Cal.App.4th 746, 762-765.)

Display of Firearms: Attempting to obtain a consent from a suspect while *firearms* are being displayed will inevitably result in a finding that the consent was coerced. (***People v. McKelvy*** (1972) 23 Cal.App.3rd 1027, 1034: "(N)o matter how politely the officer may have phrased his request for the object, it is apparent that defendant's compliance was in fact under compulsion of a direct command by the officer. . . . The evidence established 'no more than acquiescence to a claim of lawful authority.'")

> In ***McKelvy***, the defendant was standing in a police spotlight, surrounded by four police officers, all of whom were armed with either a shotgun or a carbine. Handing over contraband to the officers under these circumstances was held *not* to be a consensual act.
>
> Even an *implied assertion of authority* by the police officer may be enough to invalidate a consent to search. (***People v. Fields*** (1979) 95 Cal.App.3rd 972, 976; ***Amos v. United States*** (1921) 255 U.S. 313, 317 [100 S.Ct. 2570; 65 L.Ed.2nd 654, 656].)

Threatening to Obtain a Search Warrant: While telling a suspect that officers will obtain a warrant invalidates a consensual search under circumstances where the officers *do not* actually have the necessary probable cause to obtain a warrant, threatening to get a warrant when the officers *do* have the necessary probable cause is lawful and will not, by itself, invalidate a resulting consent. (***People v. Robinson*** (1957) 149 Cal.App.2nd 282, 286; ***People v. Goldberg*** (1984) 161 Cal.App.3rd 170, 188; ***Bumper v. North Carolina*** (1968) 391 U.S. 543 [88 S.Ct. 1788; 20 L.Ed.2nd 797] ***United States v. Soriano*** (9th Cir. 2003) 361 F.3rd 494, 971; ***People v. Williams*** (2007) 156 Cal.App.4th 949, 961.)

> With officers approaching and asking defendant at the airport if they could search him, while also telling him that he had the right to refuse but that he would be detained until a search warrant could be obtained although it was uncertain whether one could be obtained, after which defendant responded, "You may as well search me now," resulted in a voluntary search. Defendant's search was not obtained as the result of threats or coercion. (***United States v. Pariseau*** (9th Cir. 2012) 685 F.3rd 1129.)
>
> However, falsely claiming to have a search warrant will invalidate any subsequent consent to search. (***Bumper v. North Carolina*** (1968) 391 U.S. 543, 548-549 [20 L.Ed.2nd 797; 88 S.Ct. 1788]; see "*Submission to Authority*," above.

Threatening to obtain a search warrant to search defendant's briefcase when there was no probable cause sufficient to justify the issuance of a search warrant, negated defendant consent to search the briefcase. (***United States v. Ocheltree*** (9th Cir. 1980) 622 F.2nd 992.)

An Offer of Leniency:

A false promise of leniency by a police officer to a person consenting to a search is, however, an important piece in ascertaining the voluntariness of the consent. (See ***United States v. Molt*** (3rd Cir. 1978) 589 F.2nd 1247, 1251–1252; when a defendant's consent "stems directly from misrepresentations by government agents, however innocently made, we deem the consent even more questionable.")

During a routine traffic stop, the officer making a deal with defendant not to tow his vehicle if, in exchange, defendant would agree to allow the officer to search it, did not constitute free and voluntary consent. The false promise of leniency not to tow the car was a material and inextricable part of the agreement inducing defendant's consent to the search, and thus, under the totality of the circumstances, defendant's consent was not voluntarily given. (***Boitez v. Superior Court of Yolo County*** (2023) 96 Cal.App.5th 1213; noting (at pg. 1217) that "the question of voluntary consent cannot be based on the subjective good faith of an officer in making a representation that induced the consent to search.")

"'The offer or promise of such benefit need not be expressed, but may be implied from equivocal language not otherwise made clear.'" **(*Id.*,** at p. 1225; Quoting ***People v. Hill*** (1967) 66 Cal.2nd 536, 549.)

Threatening to Use a Drug-Sniffing Dog: Threatening to use a drug-sniffing dog, when such use does not require the suspect's consent and is otherwise lawful, will not invalidate the resulting consent to search. (***United States v. Todhunter*** (9th Cir. 2002) 297 F.3rd 886, 891.)

Threatening the Suspension of One's Driver's License and Other Consequences for Refusing a Blood Test after a DUI Arrest:

"A motorist's submission to a chemical test, if freely and voluntarily given, is actual consent under the **Fourth Amendment**. That the motorist is forced to choose between submitting to the chemical test and facing serious consequences for refusing to submit, pursuant to the implied consent law, does not in itself

render the motorist's submission to be coerced or otherwise invalid for purposes of the **Fourth Amendment**." (***People v. Harris*** (2015) 234 Cal.App.4th 671, 689.)

> I.e.: ". . . that he did not have the right to talk to a lawyer when deciding whether to submit to a chemical test, that his driver's license would be suspended if he refused to submit to a chemical test, and that his refusal could be used against him in court." (***Id***., at p. 690.)

The results of defendant's warrantless blood draw was improperly suppressed by the trial court where the arresting officer told defendant that the test was required by law, that comment being an accurate statement of the implied consent law. The fact that the officer did not inform defendant of the consequences of refusing was also not enough, by itself, to require suppression of the blood test results. Although providing an admonition about the consequences of withdrawing consent is to be considered in the totality of the circumstances surrounding the consent to a warrantless blood draw, the **Fourth Amendment** does not require the admonition in order to find a voluntary consent. (***People v. Agnew*** (2015) 242 Cal.App.4th Supp. 1, 4-20; a decision of appellate division of the Santa Clara County Superior Court.)

However, in another prosecution for driving under the influence of alcohol, a different panel of the same appellate division of the Santa Clara County Superior Court disagreed with ***Agnew*** and held that blood draw evidence should have been suppressed under the **Fourth Amendment** in that under the totality of the circumstances, the People failed to show that defendant actually—freely and voluntarily—consented to a blood draw to which she had physically submitted after an incomplete implied consent admonishment. The admonishment, which stated that defendant was required to submit to a blood test, but did not include the consequences of refusal and was misleading. Defendant had a **Fourth Amendment** right, notwithstanding implied (or "deemed") consent, to refuse and to bear the consequences of such a refusal. Implied consent does not constitute real or actual consent in fact, for purposes of the **Fourth Amendment**. Also, the People failed to offer any evidence of any advance express consent by defendant, or even that she was a licensed California driver. (***People v. Mason*** (2016) 8 Cal.App.5th Supp. 11, 18-33.)

> Per the Court, such implied consent "is not real or actual consent in fact for purposes of the **Fourth Amendment**, though it may be perfectly fine for purposes of

> administrative proceedings involving forfeiture of driving privileges under the implied consent law upon a refusal to submit to a duly requested chemical test." (***Id***., at pp. 27-28; see ***Hughey v. Dept. of Motor Vehicles*** (1991) 235 Cal.App.3rd 752, 757.)

In ***People v. Lopez*** (2020) 46 Cal.App.5th 317, at pp. 332-333, the Third District Court of Appeal rejected the reasoning of ***Mason*** in favor of the holdings in ***Agnew***, holding that ***Mason*** improperly "converted the admonitions into a constitutional requirement whenever an officer correctly states that the implied consent law requires motorists to submit to chemical tests if lawfully arrested for driving under the influence." "Relying on [the omission of the admonitions] as the only dispositive fact to defeat consent … in effect elevates that statutory admonition into a constitutional requirement under the Fourth Amendment. … California cases have rejected elevating a similar admonition under the implied consent law to a constitutional requirement, and the United States Supreme Court has rejected imposing analogous admonitions as constitutional requirements." (Quoting ***People v. Agnew***, *supra*, at p. Supp. 19.)

Where a DUI arrestee is forced, over his objection, to submit to a *warrantless blood test* (as opposed to a breath or urine test), the U.S. Supreme Court has held that it is a **Fourth Amendment** violation to threaten incarceration or other penal sanctions, resulting in the suppression of the results of that blood test. (See ***Birchfield v. North Dakota*** (2016) 579 U.S. 438 [136 S.Ct. 2160; 195 L.Ed.2nd 560].)

> However, the **Fourth Amendment** was held *not* to have prohibited a finding of implied consent to a blood draw under California's former law, even though defendant was advised that the law required a chemical test, because he was given a choice of tests. Just because the state cannot compel a warrantless blood test does not mean that it cannot offer one as an alternative to the breath test that it clearly *can* compel. The trial court properly found that defendant's consent to a blood draw was voluntary, even though he had been advised that a breath or blood test was required by the law. Both arresting officers testified to the circumstances under which defendant gave his consent to the blood test and there was no testimony that he only gave actual consent because of the threat of criminal prosecution. (***People v. Nzolameso*** (2019) 39 Cal.App.5th 1181.)

Also, the **Fourth Amendment** does not require suppression of evidence from a warrantless blood draw because substantial evidence supported a finding that defendant consented. After the officer instructed her that the implied consent law required her to undergo a blood draw (she having been arrested for driving while under the influence of a drug), defendant did not object or refuse to undergo the test, did not resist any of the officers' directions, and voluntarily placed her arm on the table to allow the phlebotomist to draw her blood. The result was not changed by the officer's failure to relate the admonitions regarding the consequences of refusal. (***People v. Lopez*** (2020) 46 Cal.App.5th 317; holding, at pp. 333-336: "The fact that a motorist is told he will face serious consequences if he refuses to submit to a blood test does not, in itself, mean that his submission was coerced.")

Threatening to Search the Home of a Loved One:

Even though defendant eventually consented to the search of his residence in writing, that consent was not obtained until after he had repeatedly asserted his rights, and only after the officers threatened to disrupt defendant's parents' lives by searching their residence as well. As ruled by the trial court, "by the time (defendant) put his name and signature on that page (i.e., the written consent form), that did not mean much." (***People v. Superior Court* [*Corbett*]** (2017) 8 Cal.App.5th 670, 680-681.)

Threats to Arrest or to Force Entry:

Qualified immunity denied to a police officer and a social worker who, without a warrant or exigent circumstances, threatened to force their way in plaintiff's home if not allowed in. (***Calabretta v. Floyd*** (9th Cir. 1999) 189 F.3rd 808.)

Threatening to arrest a homeowner for harboring a criminal, made shortly before obtaining her consent to enter her residence to look for a fugitive, creates the issue of the voluntariness of her subsequent consent. (***West v. City of Caldwell*** (9th Cir. 2019) 831 F.3rd 978, 983-894; assuming, without deciding the issue, that her consent was coerced, holding that the defendant officers were entitled to qualified immunity on the issue. The Court, however, after reviewing the circumstances and the attenuating factors between the threat and the later consent, noted that those "factors . . . suggested voluntary consent." [Pg. 894.].)

Implying Guilt: It is arguably improper to purposely put a subject in the position where he feels that by exercising his right to refuse, he would be incriminating himself or admitting participation in illegal activity. (***Crofoot v. Superior Court*** (1981) 121 Cal.App.3rd 717, 725.)

> For example: "*You don't have anything in your pockets you don't want me to see, do you*?" (Negative response) "*Then you wouldn't mind me looking, would you*?" (See ***Ibid***.)
>
> "(I)mplicit in the officer's statement is the threat that by exercising his right to refuse the search (the suspect) would be incriminating himself or admitting participation in illegal activity." (***Ibid***.)

Using a Ruse: A free and voluntary consent, as a general rule, may not be obtained by, or as the product of, a ruse. (***People v. Reyes*** (2000) 83 Cal.App.4th 7, 13; ***People v. Reeves*** (1964) 61 Cal.2nd 268, 273; ***People v. Miller*** (1967) 248 Cal.App.2nd 731.)

> But, where the ruse is only partial, and does not disguise the scope of the proposed search, then the resulting search *may* be upheld. (***People v. Avalos*** (1996) 47 Cal.App.4th 1568.)
>
> Use of a ruse, however, implying exigent circumstances, will likely negate any consent given. For instance, telling defendant that his computer is sending out viruses and promising that they can fix his computer and/or supply him with a free one in exchange, where in reality the agents were looking for child pornography, vitiates any consent given to do a warrantless inspection of his computer. (***Pagán-González v. Moreno*** (1st Cir. P.R. 2019) 919 F.3rd 582.)

Threats to Take Away One's Children: Threatening *to take away one's children*, letting social services take them, if the person does not cooperate, will negate a consent to search. (***United States v. Soriano*** (9th Cir. 2003) 346 F.3rd 963.)

> In ***Soriano***, the consent was saved when a federal agent immediately interrupted the police officer who made the threat, and assured the female subject that she was not then a suspect, nor likely to be arrested, and therefore need not worry about having her children taken away. However, the decision was a split decision, with the dissent arguing that the woman's consent was still not free and voluntary despite the agent's attempt to save it. (See pp. 975-979.)

See also ***Lynum v. Illinois*** (1963) 372 U.S. 528, 534 [83 S.Ct. 917; 9 L.Ed.2nd 922, 926]; and ***United States v. Tingle*** (9th Cir. 1981) 658 F.2nd 1332, 1336; two confession cases where statements were rendered involuntary due to threats to take the children away if the subjects did not cooperate.

And see ***In re Rudy F.*** (2004) 117 Cal.App.4th 1124, where a consent to search was negated by the threat to "*book*" the person's children; the issue not even being contested on appeal.

Other Inducements:

Telling defendant that the owner of the house had already consented to the search, a truthful statement, resulting in defendant giving his own consent to the search of his room in that house, *did not* invalidate defendant's consent. (***People v. Monterroso*** (2004) 34 Cal.4th 743, 758-759.)

Per ***Delia v. City of Rialto*** (9th Cir. 2010) 2010 U.S. App. LEXIS 26968 (certiorari granted; eventually affirmed at ***Delia v. City of Rialto*** (9th Cir. 2012) 682 F.3rd 1213, without further discussion), threatening an employee with the loss of his job if he didn't retrieve certain items from his home was *not* a voluntary consent and a **Fourth Amendment** search violation.

However, because the U.S. Supreme Court, having granted certiorari, held that the attorney hired by the city to investigate the plaintiff and who made the threat had qualified immunity (see ***Filarsky v. Delia*** (2012) 566 U.S. 377 [132 S.Ct. 1657; 182 L.Ed.2nd 662].), the issue of the voluntariness of the plaintiff's consent was never discussed by the Supreme Court.

Combination of Inducements: Being under arrest, in handcuffs, without having received his ***Miranda*** rights and without having been told of his right to refuse a consent search, held *not* to be enough to prevent defendant from validly consenting to the search of his room. (***People v. Monterroso*** (2004) 34 Cal.4th 743, 757-759.)

Note: But this combination of factors certainly made it an issue that could have gone either way.

During a Consensual Encounter:

Asking a person for consent to search his person does not, by itself, convert a consensual encounter into a detention "as long as the police do

not convey a message that compliance with their requests is required." (***United States v. Washington*** (9th Cir. 2007) 490 F.3rd 765, 770.)

After defendant, who had prior drug and firearm-related convictions, paid cash for a last-minute, one-way ticket without checking any luggage, an officer asked defendant for permission to search his bag and his person. Defendant consented twice and spread his arms and legs to facilitate the search. The officer felt something hard and unnatural in defendant's groin area and arrested him. The appellate court determined that defendant voluntarily consented to a patdown search because he was not in custody, officers told him he was free to leave, and officers did not tell him that they could obtain a search warrant if he refused to consent. The scope of the search was reasonable because it was reasonable for the officer to assume the consent included the groin area since the officer specifically advised defendant that the officer was looking for narcotics, defendant lifted his arms and spread his legs, defendant never objected or revoked consent, the search did not extend inside the clothing, and the officer methodically worked his way up defendant's legs before searching the groin. (***United States v. Russell*** (9th Cir. 2012) 664 F.3rd 1279.)

A Suspect's Failure to Object:

The failure to object to police entry by itself, when no request for permission to enter was made, does not constitute effective consent. (***United States v. Johnson*** (9th Cir. 2017) 875 F.3rd 1265, 1276-1278; citing ***United States v. Shaibu*** (9th Cir. 1990) 920 F.2nd 1423, 1428.)

Manner of Inquiry: It is not so much what the officer is asking, but rather the "*manner or mode*" in which it is put to the citizen which determines whether the response is voluntary or not. (***People v. Franklin*** (1987) 192 Cal.App.3rd 938, 941.)

Reasonable Person Test: For a consent search to be valid, the suspect must *reasonably* believe, under the circumstances, he has a choice. (***People v. James*** (1977) 19 Cal.3rd 99, 116.)

"People targeted for police questioning rightly might believe themselves the object of official scrutiny. Such directed scrutiny, however, is not a detention." (***People v. Chamagua*** (2019) 33 Cal.App.5th 925, 929; citing ***People v. Franklin*** (1987) 192 Cal.App.3rd 935, 940.)

Note: Asking for consent to search in a manner implying (even if not expressly stating) that the suspect is being offered a choice, helps to prove that a positive response was voluntary. For

instance: "*Sir, do you mind if I look in your car*?" Or, "*Sir, may I look in your car*?" Not; "*I'm going to search your car*!"

Age of the Suspect:

Obtaining a 15-year-old minor's consent to search her cellphone was upheld where the minor was read and reviewed a consent-to-search form, she was verbally told she could refuse consent, and she signed the form and provided the detective with her passcode for the phone. Although the minor was a patient in a hospital, there was nothing about her medical condition that would have prevented her from providing a free and voluntary consent. (***In re M.S.*** (2019) 32 Cal.App.5th 1177, 1187.)

Product of a Constitutional Violation: A suspect's consent to search given immediately (i.e., without sufficient intervening factors) after each of the following will likely be held to be invalid:

Rule: If an otherwise voluntary consent is the direct product of some other illegal police act (e.g.; illegal search, seizure, arrest, detention, etc.), then the consent and the resulting direct products of the consent may also be suppressed.

See also ***People v. Haven*** (1963) 59 Cal.2nd 713, 719; ***People v. Poole*** (1986) 182 Cal.App.3rd 1004, 1012; ***People v. $48,715 United States Currency*** (1997) 58 Cal.App.4th 1507; ***United States v. Washington*** (2004) 387 F.3rd 1060; ***People v. Krohn*** (2007) 149 Cal.App.4th 1294; ***People v. Werner*** (2012) 207 Cal.App.4th 1195, 1210-1212; ***In re J.G.*** (2014) 228 Cal.App.4th 402, 408-413.)

Illegal Search:

"The rule is clearly established that consent induced by an illegal search or arrest is not voluntary, and that if the accused consents immediately following an illegal entry or search, his assent is not voluntary because it is inseparable from the unlawful conduct of the officers." (***Burrows v. Superior Court***, *supra*; ***People v. Johnson*** (1968) 68 Cal.2nd 629, 632; ***People v. Haven*** (1963) 59 Cal.2nd 713, 719.)

But, a search done under the authority of a search warrant that is held only to be partially invalid may not require the suppression of evidence recovered from a consensual search of another property obtained during the execution of the warrant. (See ***United States v. SDI Future Health, Inc.*** (9th Cir. 2009) 568 F.3rd 684, 707-708.)

See also ***People v. Lawler*** (1973) 9 Cal.3rd 156, 163.)

Illegal Detention:

As a "seizure" of one's person, the products of an illegal detention are also subject to being suppressed under the Exclusionary Rule. (See ***People v. Krohn*** (2007) 149 Cal.App.4th 1294; detaining defendant for drinking in public, when he was not in a public place, is an illegal detention and requires the suppression of the controlled substances found on his person in a subsequent consensual search.)

"Where an illegal detention occurs, unless 'subsequent events adequately dispel the coercive taint of the initial illegality, i.e., where there is no longer causality, the subsequent consent is' ineffective." ***People v. Zamudio*** (2008) 43 Cal.4th 327, 340; citing ***People v. $48,715 United States Currency*** (1997) 58 Cal.App.4th 1507, 1514.)

But, an illegal detention (or arrest) does not serve to invalidate a *previously obtained*, otherwise lawful, consent. (***People v. $48,715 United States Currency***, *supra,* at pp. 1513-1515.)

"Where an illegal detention occurs, unless 'subsequent events adequately dispel the coercive taint of the initial illegality, i.e., where there is no longer causality, the subsequent consent is' ineffective. (Citations.)" (***People v. Zamudio*** (2008) 43 Cal.4th 327, 341.)

Generally, a consent to search obtained during an unlawfully prolonged detention will require the suppression of any evidence discovered during the resulting search. (See ***United States v. Chavez-Valenzuela*** (9th Cir. 2001) 268 F.3rd 719.)

However, the Ninth Circuit Court of Appeal has held that a minimally prolonged detention (e.g., a couple of minutes), at least when motivated by other newly discovered information even though that new information by itself might not constitute a reasonable suspicion, does not make the prolonging of the detention unreasonable. Under such circumstances, a minimally prolonged detention is not unlawful. A consent to search obtained during that disputed time period is lawful. (***United States v. Turvin et al.*** (9th Cir. 2008) 517 F.3rd 1097.)

Defendant argued that when police showed up at his door with an arrest warrant for another person, and asked for consent to enter to search only where a person might be hiding, that he was in custody (i.e., detained), and that his consent to enter was the product of an unlawful detention. The Court disagreed, noting that nothing the officers said or did would have indicated to a reasonable person that he could not decline the officers' request to enter. (***United States v. Jones*** (7th Cir. 2022) 22 F.4th 667; noting that the time between when the officers first knocked and when defendant opened the door was, at most, a minute and a half, and that the officers spoke in a conversational, non-threatening tone, making it clear to him that they were not there for him.)

But, note that the fact that a suspect is being *illegally detained* does *not* necessarily mean, by itself, that the consent is involuntary. (See ***People v. Llamas*** (1991) 235 Cal.App.3rd 441; noting, but *not* addressing the issue whether being illegally detained invalidated a consent under the "*fruit of the poisonous tree*" doctrine.)

Under the "*fruit of the poisonous tree*" doctrine, subsequent events may dispel the coercive taint of the initial illegality, making a subsequent consent lawful. (See ***United States v. Ibarra*** (10th Cir. 1992) 955 F.2nd 1405, 1411, fn. 8.)

See *"Consent During an Illegally Prolonged Detention*," below

Illegal Arrest:

Handcuffing a person suspected of possible involvement in a narcotics transaction, but where the officer testified only that he was "uncomfortable" with the fact that defendant was tall (6' 6") and that narcotics suspects sometimes carry weapons (although the officer did not pat him down for weapons), converted a detention into an arrest, making the subsequent consent to search involuntary. (***People v. Stier*** (2008) 168 Cal.App.4th 21.)

With only a reasonable suspicion to believe that the occupant of a house might be involved in criminal activity, ordering him out of the house and to back up as he did so, and holding onto him (albeit without handcuffs) with his hands behind his back while asking for his consent to search his person, was illegal. Full probable cause was necessary. The subsequent consent to search his person and his house was the product of that illegal detention was invalid.

(***People v. Lujano*** (2014) 229 Cal.App.4th 175, 182-185; "If consent is induced by an illegal arrest or detention, the illegality vitiates the consent and may require suppression of seized evidence unless attenuating circumstances dissipate the taint.")

Where defendant is unlawfully under arrest (i.e., without probable cause), any resulting consent obtained at that time is likely invalid, depending upon the totality of the circumstances. (***People v. Espino*** (2016) 247 Cal.App.4th 746, 762-765; also finding it irrelevant that defendant was told that he was not under arrest.)

Illegal Interrogation. (***People v. Superior Court* [*Keithley*]** (1975) 13 Cal.3rd 406, 410; following the violation of the suspect's ***Miranda*** rights.)

Right to Counsel Violation: Without informing a charged defendant's lawyer *in violation of the subject's* ***Sixth Amendment*** *rights* (i.e., after his arraignment). (***Tidwell v. Superior Court*** (1971) 17 Cal.App.3rd 780, 789.)

But see ***United States v. Kon YuLeung*** (2nd Cir. 1990) 910 F.2nd 33, 38-40 (consent valid despite having been indicted); and ***United States v. Hidalgo*** (11th Cir. 1993) 7 F.3rd 1566, 1570, both holding that obtaining a defendant's consent to search is not a critical stage of the proceedings protected by the **Sixth Amendment**.)

***Consent During an Illegally Prolonged Detention*:**

General Rule: *Prolonged Detentions are Illegal*: A traffic stop (or any other detention) which is reasonable in its inception may become unreasonable if prolonged beyond that point reasonably necessary for the officer to complete the purposes of the stop or detention. (***People v. McGaughran*** (1979) 25 Cal.3rd 577.)

Under the theory of ***McGaughran***, a consent obtained during an unconstitutionally prolonged detention may be subject to suppression as the product of that illegal detention. (See ***People v. Llamas*** (1991) 235 Cal.App.3rd 441, 447; and ***People v. Valenzuela*** (1994) 28 Cal.App.4th 817, 833.)

An otherwise lawful "*knock and talk*," where officers continued to press the defendant for permission to enter his apartment after his denial of any illegal activity, converted the contact into an unlawfully "*extended*" detention, causing the Court to conclude that a later consent-to-search was the product of the illegal detention, and thus invalid. (***United States v. Washington*** (9th Cir. 2004) 387 F.3rd 1060.)

Lawfully Prolonged Detentions:

> The Ninth Circuit Court of Appeal has held that a minimally prolonged detention (e.g., about four minutes), at least when motivated by other newly discovered information even though that new information by itself might not constitute a reasonable suspicion, does not make the prolonging of the detention unreasonable. Under such circumstances, a minimally prolonged detention is not unlawful. (***United States v. Turvin et al.*** (9th Cir. 2008) 517 F.3rd 1097.)
>
> > However, ***Turvin*** was subsequently abrogated to the extent that a "brief pause" in writing the defendant a ticket to inquire about defendant's possible (but without reasonable suspicion) drug trafficking was upheld as "*reasonable*," and was inconsistent with ***Rodriguez v. United States*** (2015) 575 U.S, 348 [135 S.Ct. 1609; 191 L.Ed.2nd 4927]. (***United States v. Landeros*** (9th Cir. 2019) 913 F.3rd 862, 866-867; see below.
>
> Developing new information to the effect that a vehicle's passenger might be an under-age prostitute and that the defendant driver her pimp, a continued detention for the purpose of investigating that possibility was lawful. (***United States v. Rodgers*** (9th Cir. 2011) 656 F.3rd 1023, 1027; Extending a traffic stop for the purpose of investigating other crimes for which there is no suspicion constitutes an illegal detention. But it is also a rule that "(a) 'period of detention [may be] permissibly extended [where] new grounds for suspicion of criminal activity continue . . . to unfold.'" (Citing ***United States v. Mayo*** (9th Cir. 2005) 394 F.3rd 1271.)

After Detention Ends: If the person voluntarily consents to having his vehicle searched after he is free to leave, there is no prolonged detention. The officer is under no obligation to advise him that he is no longer being detained (or that he has a right to refuse to allow the officer to search). (***Robinette v. Ohio*** (1996) 519 U.S. 33 [117 S.Ct. 417; 136 L.Ed.2nd 347].)

> *However*; the Ninth Circuit Court of Appeal believes that a consent search, obtained after the purposes of the traffic stop had been satisfied, is invalid as a product of an illegally prolonged detention, the extended detention being the result of the officer's unnecessary inquiries made during the traffic stop. (***United States v. Chavez-Valenzuela*** (9th Cir. 2001) 268 F.3rd 719, amended at 279 F.3rd 1062.) ***Robinette*** was not discussed by the Court.
>
> The Ninth Circuit Court of Appeal was, at one time, of the belief that an officer must be able to "articulate suspicious factors that are particularized and objective" in order to "broaden the scope of questioning" beyond the

purposes of the initial traffic stop." (***United States v. Murillo*** (9th Cir. 2001) 255 F.3rd 1169, 1174.); a questionable rule in light of ***Robinette***.)

> But see the dissenting opinion in the denial for a rehearing en banc in ***United States v. Chavez-Valenzuela***, *supra*, pointing out the absurdity of what Justice O'Scannlain refers to as the "*seven minute rule*," noting this decision's conflict with ***Robinette*** and other Supreme Court authority. (281 F.3rd 897.)
>
> The Ninth Circuit's argument on this issue was similar to that made by the Ohio Supreme Court, and rejected by the U.S. Supreme Court, in ***Robinette***: Per the Ohio Supreme Court: "When the motivation behind a police officer's continued detention of a person stopped for a traffic violation is not related to the purpose of the original, constitutional stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some separate illegal activity justifying an extension of the detention, the continued detention constitutes an illegal seizure. (73 Ohio St.3rd at p. 650.)"

Contrary to the Ninth Circuit's published opinions on this issue, the Supreme Court has held: "Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means." (***United States v. Drayton*** (2002) 536 U.S. 194 [122 S.Ct. 2105; 153 L.Ed.2nd 242.); citing ***Florida v. Bostick*** (1991) 501 U.S. 429, 434-435 [111 S.Ct. 2382; 115 L.Ed.2nd 389, 398-399].)

> "Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion." (***United States v. Drayton***, *supra*, at p. 207; see also ***People v. Lopez*** (2019) 8 Cal.5th 353, 371.)

Most recently, in ***Illinois v Caballes*** (2005) 543 U.S. 405 [125 S.Ct. 834; 160 L.Ed.2nd 842], the U.S. Supreme Court rejected the argument that allowing a narcotics-sniffing dog to sniff around the outside of a vehicle that was lawfully stopped for a traffic offense "unjustifiably enlarge(s) the scope of a routine traffic stop into a drug investigation." Per the Supreme Court: No expectation of privacy is violated by this procedure, and therefore does not implicate the **Fourth Amendment**.

Also, the U.S. Supreme Court rejected the Ninth Circuit's unsupported conclusion that, absent "a *particularized reasonable suspicion* that an

individual is not a citizen," it is a **Fourth Amendment** violation to ask him or her about the subject's citizenship (see ***Mena v. City of Simi Valley*** (9th Cir. 2003) 332 F.3rd 1255, 1264-1265; reversed by the U.S. Supreme Court in ***Muehler v. Mena*** (2005) 544 U.S. 93, 100-101 [125 S.Ct. 1465; 161 L.Ed.2nd 299].)

California courts seem to be in line with these latest Supreme Court pronouncements on the issue: "Questioning during the routine traffic stop on a subject unrelated to the purpose of the stop is not itself a **Fourth Amendment** violation. Mere questioning is neither a search nor a seizure. [Citation.] While the traffic detainee is under no obligation to answer unrelated questions, the Constitution does not prohibit law enforcement officers from asking. [Citation.]" (***People v. Brown*** (1998) 62 Cal.App.4th 493, 499-500; see also ***People v. Gallardo*** (2005) 130 Cal.App.4th 234, 239; asking for consent to search during the time it would have taken to write the citation that was the original cause of the stop is legal, despite the lack of any evidence to believe there was something there to search for.)

Citing ***Muehler v. Mena***, *supra*, the Ninth Circuit eventually conceded that so long as questioning of a legally detained suspect does not unlawfully prolong the detention, "mere police questioning does not constitute a seizure" under the Fourth Amendment. Therefore, questioning a detainee about possible criminal activity *unrelated* to the cause of the detention, and without a "*particularized suspicion*" to support a belief that the detainee is involved in that unrelated activity, is lawful. (***United States v. Mendez*** (9th Cir. 2007) 467 F.3rd 1077, 1079-1081.)

Although defendant, driving a semi with an attached trailer, had initially been detained when a highway patrol officer initiated a traffic stop of his tractor-trailer and he pulled to the side of a freeway, that detention had ended by the time defendant gave his consent to search the tractor-trailer. The officer had returned defendant's documents, told him he was free to leave, and allowed him to walk partway back to his vehicle when the officer asked for consent to search his vehicle. Thus, there was no prolonged detention. (***People v. Arebalos-Cabrera*** (2018) 27 Cal.App.5th 179, 183-190.)

The Scope of the Consent; i.e., what areas may be searched based upon the consent given?

Burden of Proof: The prosecution bears the burden to prove that a warrantless search was within the scope of the consent given. (***People v. Cantor*** (2007) 149 Cal.App.4th 961, 965.)

Test: The scope of the consent is measured by a standard of *objective reasonableness* based upon all the surrounding circumstances: "What would the typical reasonable person have understood by the exchange between the officer and the suspect?" (***Florida v. Jimeno*** (1991) 500 U.S. 248, 251 [111 S.Ct. 1801; 114 L.Ed.2nd 297, 303]; (***People v. Tully*** (2012) 54 Cal.4th 952, 983-984; ***United States v. Lopez-Cruz*** (9th Cir. 2013) 730 F.3rd 803, 809-811; ***People v. Crenshaw*** (1992) 9 Cal.App.4th 1403, 1408; ***People v. Pickard*** (2017) 15 Cal.App.5th Supp. 12, 15; ***West v. City of Caldwell*** (9th Cir. 2019) 831 F.3rd 978. 989.)

> The test is: "(W)hat would the typical reasonable person have understood by the exchange between the officer and the suspect?" "(A)n officer does not exceed the scope of a suspect's consent by 'searching' when the officer asked only if he or she could 'look.'" Checking under the trunk's carpet lining in the suspect's vehicle, therefore, was no more than part of an otherwise lawful search based upon the defendant's consent to "look" for anything that they were "not supposed to have." (***United States v. McWeeney*** (9th Cir. 2006) 454 F.3rd 1030, 1034-1035.)

Case Law:

> In ***Florida v. Jimeno***, *supra*, it was held that it was "reasonable for an officer to consider a suspect's general consent to a search of his car to include consent to examine a paper bag lying on the floor of the car." (pg. 251.) The Court also noted that it would be "very likely *unreasonable* (italics added) to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk." (pgs. 251-252.)
>
> In determining the reasonableness of a searching officer's conduct in a consensual search of a residence, a court must balance the extent of the intrusion into defendant's privacy rights with the governmental interest justifying it. (***People v. Smith*** (2010) 190 Cal.App.4th 572, 577-580; upholding the opening of the door to a noisy clothes dryer so that the officers could maintain control of a potentially dangerous situation and to communicate with subjects in the house.)
>
> When defendant turned around and raised his arms in response to the officer's statement; "Hey, I'd like to shake you down real quick, if you don't mind," this was held to be a consent to a patdown only, and not to a full body search. (***People v. Tufono*** (1997) 57 Cal.App.4th 1534, 1542-1543; recovery of a vial during a full search held to be illegal.)
>
> Consenting to being searched for weapons did not allow for the officer reaching into his pocket and retrieving marijuana. (***People v. Rice*** (1968) 259 Cal.App.2nd 399, 403.)

And giving an officer permission to enter his home for the purpose of finding someone who had run into the house did not authorize the search for a crowbar used in a burglary and found in a bedroom closet. (***People v. Superior Court* [*Arketa*]** (1970) 10 Cal.App.3rd 122.)

"(N)either a general consent to search a particular premises nor a consent to search for specific items, includes the right to intercept telephone calls to the premises involved." (***People v. Harwood*** (1977) 74 Cal.App.3rd 460, 468.)

A suspect's consent to "search" his phone does not include the right to answer in-coming phone calls. (***United States v. Lopez-Cruz*** (9th Cir. 2013) 730 F.3rd 803, 809-811.)

However, the rule of ***Florida v. Jimeno*** (1991) 500 U.S. 248, 251 [111 S.Ct. 1801; 114 L.Ed.2nd 297, 303] (above) was applied to uphold a car search that involved removing a plastic vent cover on a door post which displayed striation marks indicating recent removal or tampering. (***People v. Crenshaw*** (1992) 9 Cal.App.4th 1403, 1414.)

Stepping aside while swinging the door open to an officer who was responding to an incomplete 911 call for help, was held to be a consent to enter. (***Pavao v. Pagay*** (9th Cir. 2002) 307 F.3rd 915.)

Voluntarily consenting to the search of his vehicle, during which only money was found, and then later that day admitting that methamphetamine was hidden in a particular place in the vehicle, was sufficient to reasonably cause the officers to believe that they had consent to go back into the vehicle to recover the meth. (***United States v. Rodriguez-Preciado*** (9th Cir. 2005) 399 F.3rd 1118, 1131, as amended at 416 F.3rd 939.)

With defendant agreeing to the officer's request to "check (defendant's car) real quick and get you on your way," the scope of that consent was exceeded at some point before the search had continued for fifteen minutes without finding anything, and certainly when the officer later pulled a box from the trunk and removed the back panel to the box by unscrewing some screws. (***People v. Cantor*** (2007) 149 Cal.App.4th 961.)

When asked for consent to search his person, a reasonable person would expect that an officer will then ask him to exit his vehicle for the purpose of conducting that search. (***United States v. Washington*** (9th Cir. 2007) 490 F.3rd 765, 770-771.)

Consent to search defendant's truck found to extend to a second search absent any evidence to indicate that defendant was limiting his consent to the first search only. (***People v. Valencia*** (2011) 201 Cal.App.4th 922.)

After defendant, who had prior drug and firearm-related convictions, paid cash for a last-minute, one-way ticket without checking any luggage, an officer asked defendant for permission to search his bag and his person. Defendant consented twice and spread his arms and legs to facilitate the search. The officer felt something hard and unnatural in defendant's groin area and arrested him. The appellate court determined that defendant voluntarily consented to a patdown search because he was not in custody, officers told him he was free to leave, and officers did not tell him that they could obtain a search warrant if he refused to consent. The scope of the search was reasonable because it was reasonable for the officer to assume the consent included the groin area since the officer specifically advised defendant that the officer was looking for narcotics, defendant lifted his arms and spread his legs, defendant never objected or revoked consent, the search did not extend inside the clothing, and the officer methodically worked his way up defendant's legs before searching the groin. (***United States v. Russell*** (9th Cir. 2012) 664 F.3rd 1279, 1281-1284.)

> *In contrast,* see ***United States v. Sanders*** (8th Cir. 2005) 424 F.3rd 768, 776, where the suspect consented to a search of his person but then withdrew consent by actively shielding his groin area from the officer's search.

Consent to search the Plaintiff's vehicle held *not* to extend to her private documents found in the vehicle. (***Winfield v. Trottier*** (2nd Cir. 2013) 710 F.3rd 49; officer opened and read a private letter.)

A suspect's general consent to search his car does not allow the officers to drill through the floor of the trunk. "Cutting" or "destroying" an object during a search requires either explicit consent for the destructive search or probable cause. (***United States v. Zamora-Garcia*** (8th Cir. Ark. 2016) 831 F.3rd 979.)

Officers who used tear gas on the plaintiff's home to flush out her fugitive boyfriend, having received her consent to enter the house to look for him, were entitled to qualified immunity on a "scope-of-consent" claim because no U.S. Supreme Court or Ninth Circuit case clearly established, as of August, 2014, that the officers exceeded the scope of the consent given them by causing the tear gas canisters to enter the house in an attempt to flush the boyfriend out into the open. (***West v. City of Caldwell*** (9th Cir. 2019) 831 F.3rd 978. 984-986.)

Note the dissent, however, which argued (at p. 989) that to infer that the plaintiff's consent to officers to enter her home for the purpose of apprehending her fugitive boyfriend included consent to lop tear gas in through the windows, doing the damage that it did, "borders on the fantastic," and "that no 'typical reasonable person [would] have understood . . . the exchange between . . . [O]fficer [Richardson] and [West]' as permitting the throwing of destructive tear gas canisters into her house from the outside, before any officers even attempted to 'get inside [the] house and apprehend [Salinas].'" Per the dissent: "Interpreting the exchange between West and Officer Richardson as permitting the SWAT attack on West's house as performed is patently unreasonable. Any reasonable officer would have known at the time that the search exceeded the scope of West's consent."

Where defendant's consent to search of his cellular telephone for matter unrelated to the purpose of the investigation led to evidence of, and his indictment for, possession of child pornography, The Fifth Circuit (in reversing the trial court) held that suppression of the evidence was not warranted under the **Fourth Amendment** because the broad consent given by defendant encompassed the search and seizure conducted. The written consent to search form signed by defendant authorized, among other things, "a complete search of [Gallegos's] phone" as well as the seizure of any "materials, or other property" that the government might want to examine. Applying these terms as written, the court concluded that the government did not exceed the scope of the defendant's consent by extracting the iPhone's data or later reviewing it. First, the Court held that no aspect of the search fell outside the range of conduct that a typical reasonable person would expect from a "complete" iPhone search or from the subsequent seizure of any "materials" that that government might want to examine. Second, the court concluded that a typical reasonable person would know that a cellphone contains extensive personal information and would understand that a "complete" cellphone search refers not just to a physical examination of the phone, but further contemplates an inspection of the phone's "complete" contents. Finally, the court found that a typical reasonable owner of a cellphone would also realize that permission to seize "materials" included permission to seize and examine such information. (***United States v. Gallegos-Espinal*** (5th Cir. TX, 2020) 970 F.3rd 586.)

Multiple Searches Based Upon a Single Consent: A "single grant of consent" does not, as a matter of law, prohibit more than one search depending upon the facts and circumstances. (***People v. Valencia*** (2011) 201 Cal.App.4th 922, 928-932.)

However, the general rule is that "a consent to search usually involves an 'understanding that the search will be conducted forthwith, and that only a single search will be made.'" (***Id***., at p. 937, quoting ***People v. Logsdon*** (Ill. Ct. App. 1991) 567 N.E.2nd 746, 748.)

The non-exclusive list of factors to consider when assessing the reasonableness of conducting more than one search based upon a single grant of consent include, but is not limited to, the following:

(1) Whether the defendant placed any limitations on the scope of the initial consent.
(2) The amount of time that passed between the grant of consent and the contested search.
(3) Whether police remained in control of the area being searched prior to conducting the second search.
(4) Whether the officers were searching a residence or other area that is entitled to a heightened expectation of privacy.
(5) Whether the suspect was arrested between the initial search and the subsequent search.
(6) Whether the searches were part of a continuous criminal investigation having a single objective.
(7) Whether the defendant had advance knowledge of, and an opportunity to object to, a subsequent search.

(***People v. Valencia***, *supra*, at pp. 936-937.)

In ***Valencia***, the Court held that a second search of defendant's vehicle based upon an earlier consent was lawful given the fact that defendant's expectation of privacy with respect to his vehicle was not diminished by the second search, it was defendant's vehicle and not his residence being searched, there was no evidence that defendant was arrested, or even detained, between the two searches, the time period between searches was very minimal, and defendant did not limit his consent to a particular time or place. (***Id***., at pp. 938-940.)

Implied Consent to Provide Blood Sample as a Condition of the Privilege to Drive:

Veh. Code § 23612(a)(1)(D): *Implied Consent*: As the statute reads since being amended, effective 1/1/2019, this section provides: "The person shall be told (by the arresting officer) that his or her failure to submit to, or the failure to complete, the required *breath or urine* testing (eliminating any reference to a blood test) will result in a fine and mandatory imprisonment if the person is convicted of a violation of **Section 23152** or **23153**. The person shall also be told that his or her failure to submit to, or the failure to complete, the required *breath, blood, or urine* tests will

result in (i) the *administrative suspension* by the department of the person's privilege to operate a motor vehicle for a period of one year, (ii) the *administrative revocation* by the department of the person's privilege to operate a motor vehicle for a period of two years if the refusal occurs within 10 years of a separate violation of **Section 23103** as specified in **Section 23103.5**, or of **Section 23140**, **23152**, or **23153** of this code, or of **Section 191.5** or **subdivision (a)** of **Section 192.5** of the **Penal Code** that resulted in a conviction, or if the person's privilege to operate a motor vehicle has been suspended or revoked pursuant to **Section 13353**, **13353.1**, or **13353.2** for an offense that occurred on a separate occasion, or **(iii)** the *administrative revocation* by the department of the person's privilege to operate a motor vehicle for a period of three years if the refusal occurs within 10 years of two or more separate violations of **Section 23103** as specified in **Section 23103.5**, or of **Section 23140**, **23152**, or **23153** of this code, or of **Section 191.5** or **subdivision (a)** of **Section 192.5** of the **Penal Code**, or any combination thereof, that resulted in convictions, or if the person's privilege to operate a motor vehicle has been suspended or revoked two or more times pursuant to **Section 13353**, **13353.1**, **or 13353.2** for offenses that occurred on separate occasions, or if there is any combination of those convictions, administrative suspensions, or revocations."

> The above wording, eliminating prior language that threatened penal sanctions for failing to submit to a blood test, is a result of the U.S. Supreme Court's decision in ***Birchfield v. North Dakota*** (2016) 579 U.S. 438, 478 [136 S.Ct. 2160; 195 L.Ed.2nd 560], where it was held that it is a **Fourth Amendment** violation to threaten incarceration for failure to submit to a blood test, and that to make such a threat would result in the suppression of the results of that blood test.
>
> **Subdivision (a)(4)** of **Veh. Code § 23612** also provides that the officer "*shall* also advise the person that he or she does not have the right to have an attorney present before stating whether he or she will submit to a test or tests, before deciding which test or tests to take, or during the administration of the test or tests chosen, and that, in the event of a refusal to submit to a test or tests, the refusal may be used against him or her in a court of law."

Veh. Code 23612(a)(2)(C): *Drug Cases*: An officer may request an arrestee to submit to a blood test when the arrestee has already chosen to submit to a breath test and the officer has reasonable cause to believe the arrestee was driving under the influence *of a drug* or *the combined influence of alcohol and a drug*: The arrestee may also be requested to submit to a blood test if the officer has "*reasonable cause to believe*" (instead of "*a clear indication*" as the section formerly read) that a blood

test will reveal evidence of the arrestee being under the influence. (See ***People v. Lopez*** (2020) 46 Cal.App.5th 317, 325-336.)

Veh. Code § 23577: *Penalties*: "If a person is convicted of a violation of **Section 23152** or **23153** and at the time of the arrest leading to that conviction that person willfully failed refused a peace officer's request to submit to, or willfully failed to complete the *breath or urine* tests pursuant to **Section 23612**, the court shall impose the following penalties:

> **(1)** If the person is convicted of a first violation of **Section 23152**, notwithstanding any other provision of **subdivision (a)** of **Section 23538**, the terms and conditions of probation shall include the conditions in **paragraph (1)** of **subdivision (a)** of **Section 23538**.
>
> **(2)** If the person is convicted of a first violation of **Section 23153**, the punishment shall be enhanced by an imprisonment of *48 continuous hours* in the county jail, whether or not probation is granted and no part of which may be stayed, unless the person is sentenced to, and incarcerated in, the state prison and the execution of that sentence is not stayed.
>
> **(3)** If the person is convicted of a second violation of **Section 23152**, punishable under **Section 23540**, or a second violation of **Section 23153**, punishable under **Section 23560**, the punishment shall be enhanced by an imprisonment of *96 hours* in the county jail, whether or not probation is granted and no part of which may be stayed, unless the person is sentenced to, and incarcerated in, the state prison and execution of that sentence is not stayed.
>
> **(4)** If the person is convicted of a third violation of **Section 23152**, punishable under **Section 23546**, the punishment shall be enhanced by an imprisonment of 10 days in the county jail, whether or not probation is granted and no part of which may be stayed.
>
> **(5)** If the person is convicted of a fourth or subsequent violation of **Section 23152**, punishable under **Section 23550** or **23550.5**, the punishment shall be enhanced by imprisonment of 18 days in the county jail, whether or not probation is granted and no part of which may be stayed.
>
> Note the omission of any reference to a "*blood test*," thus making this provision consistent with the U.S. Supreme Court's decision in ***Birchfield v. North Dakota***, *supra.*

Veh. Code § 23578: *Enhanced Penalties*: "In addition to any other provision of this code, if a person is convicted of a violation of **Section**

23152 or **23153**, the court shall consider a concentration of alcohol in the person's blood of *0.15 percent or more*, by weight, or the refusal of the person to take a *breath or urine* test, as a special factor that may justify enhancing the penalties in sentencing, in determining whether to grant probation, and, if probation is granted, in determining additional or enhanced terms and conditions of probation."

Note the omission of any reference to a "*blood test*," thus making this provision consistent with the U.S. Supreme Court's decision in ***Birchfield v. North Dakota***, *supra.*

Legal Effects of California's Implied Consent Law:

California's "*implied consent law*," **Veh. Code § 23612**, has been held to be a factor, among the "totality of the circumstances," in determining whether or not a DUI arrestee has given "actual consent" to a warrantless blood draw. (***People v. Harris*** (2015) 234 Cal.App.4th 671, 681-692.)

"(A)ctual consent to a blood draw is not 'implied consent,' but rather a possible result of requiring the driver to choose whether to consent under the implied consent law. (Citation.) '[T]he implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether the driver will give or decline to give actual consent to a blood draw when put to the choice between consent or automatic sanctions. Framed in the terms of "implied consent," choosing the "yes" option affirms the driver's implied consent and constitutes actual consent for the blood draw. Choosing the "no" option acts to withdraw the driver's implied consent and establishes that the driver does not give actual consent.' (Citation)" (***Id.***, at p. 686.)

Note: To put this rule into a formula: *Implied consent per **V.C. § 23612**, + circumstances consistent with consent, = actual consent*.

California's implied consent law, for drivers of a motor vehicle arrested for driving while under the influence (**V.C. § 23612(a)(5)**), does not apply to drivers of boats under the same circumstances per Har. & Nav. Code § 655.1. Such a person has the right to refuse to submit to a blood or breath test, and must be told this by the arresting officer. Then, any submission to a blood or breath test must be freely and voluntary consented to in order to

be admissible in evidence. (***People v. Gutierrez*** (2019) 33 Cal.App.5th Supp. 11.)

See **Har. & Nav. Code § 655.1**: *Advisement Requirements for Persons Arrested for DUI, Water Vessels, Etc., per* **Har. & Nav. Code § 655(b)**:

Per **Har. & Nav. Code § 655.1(b)(2)**, a person arrested for DUI while operating a mechanically propelled vessel or manipulating any water skis, aquaplane, or similar device, must be advised of the following (paraphrased):

(A) A criminal complaint may be filed against him . . . .

(B) He or she has a right to refuse chemical testing.

(C) An officer has the authority to seek a search warrant compelling the arrested person to submit a blood sample (per **P.C. § 1524(a)(16)**.)

(D) He or she does not have the right to have an attorney present before stating whether he or she will submit to the chemical testing, before deciding which chemical test or tests to take, or during the administration of the chemical test or tests chosen.

Per **subd. (c)**, a person arrested for DUI boat must also be told that he has a choice between a blood or breath test. This defendant was in fact so advised although as worded, it was never conveyed to him that he could refuse either without penalty.

Per subd. (d), when a person is arrested for driving a boat when under the influence of a drug, he must also be advised that a test of his urine is available to him.

Per **subd. (e)**, an officer with "reasonable cause to believe" (i.e., "probable cause") that drugs are involved, may "request" that he submit to a urine test. But in no case may the arrestee be led to

believe that he has no choice in whether to submit to any kind of testing.

Also note **Veh. Code § 13384** (effective since 1999) requiring all new and renewed driver's licenses to include the applicant's *express written consent* to submit to a chemical test or tests of that person's blood, breath, or urine, or to submit to a preliminary alcohol screening test pursuant to **V.C. § 23136** (persons under 21 years of age with a blood alcohol level of .01% or higher), when requested to do so by a peace officer, with the applicant signing a written declaration consenting to the above.

> **Subd. (a)**: "The department shall not issue or renew a driver's license to any person unless the person consents in writing to submit to a chemical test or tests of that person's blood, breath, or urine pursuant to (**Vehicle Code**) **Section 23612**, or a preliminary alcohol screening test pursuant to (**Vehicle Code**) **Section 23136** (persons under 21 years of age with a blood alcohol level of .01% or higher), when requested to do so by a peace officer."
>
> **Subd. (b)**: "All application forms for driver's licenses or driver's license renewal notices shall include a requirement that the applicant sign the following declaration as a condition of licensure: 'I agree to submit to a chemical test of my blood, breath, or urine for the purpose of determining the alcohol or drug content of my blood when testing is requested by a peace officer acting in accordance with (**Vehicle Code**) **Section 13388** [PAS (Preliminary Alcohol Screening) test] or **23612** [deemed consent] of the Vehicle Code.'"
>
> The legal effect of this mandated written consent has yet to be tested, although the Court in ***People v. Mason*** (2016) 8 Cal.App.5th Supp. 11, 26, below, noted that, "(p)roof of that consent by (defendant) here would have at least brought the case closer to the probation condition or advance express consent context." However, the Court still "doubt(ed)" it would "automatically" encompass the "rights and concerns" addressed under the **Fourth Amendment**. In ***Mason***, no evidence of the defendant's status as a licensed driver was in the record, so the issue was not decided.
>
> Also, the implied consent provisions under **Veh. Code § 23612(a)(5)**, where, by statute, blood may be drawn from an unconscious or dead DUI suspect, does not overcome the need for a search warrant without a showing of exigent circumstances. (See ***People v. Arredondo*** (2016) 245 Cal.App.4th 186, 193-205, & fn. 7.)

Note: Petition for Review was dismissed and the case remanded in light of the decision in ***Mitchell v. Wisconsin*** (June 27, 2019) __ U.S.__, __ [139 S.Ct. 2525; 204 L.Ed.2nd 1040], where the U.S. Supreme Court held that when a DUI arrestee is unconscious, this fact alone will "almost always" constitute an exigency, allowing for a warrantless blood draw.

Case Law:

The results of defendant's warrantless blood draw was improperly suppressed by the trial court where the arresting officer told defendant that the test was required by law, that comment being an accurate statement of the implied consent law. The fact that the officer did not inform defendant of the consequences of refusing was also not enough, by itself, to require suppression of the blood test results. Although providing an admonition about the consequences of withdrawing consent is to be considered in the totality of the circumstances surrounding the consent to a warrantless blood draw, the **Fourth Amendment** does not require the admonition in order to find a voluntary consent. (***People v. Agnew*** (2015) 242 Cal.App.4th Supp. 1, 4-20; a decision of appellate division of the Santa Clara County Superior Court.)

However, in another prosecution for driving under the influence of alcohol, a different panel of the same appellate division of the Santa Clara County Superior Court disagreed with ***Agnew*** and held that blood draw evidence should have been suppressed under the **Fourth Amendment** in that under the totality of the circumstances, the People failed to show that defendant actually—freely and voluntarily—consented to a blood draw to which she had physically submitted after an incomplete implied consent admonishment. The admonishment, which stated that defendant was required to submit to a blood test, but did not include the consequences of refusal and was misleading. Defendant had a **Fourth Amendment** right, notwithstanding implied (or "deemed") consent, to refuse and to bear the consequences of such a refusal. Implied consent does not constitute real or actual consent in fact, for purposes of the **Fourth Amendment**. Also, the People failed to offer any evidence of any advance express consent by defendant, or even that she was a licensed California driver. (***People v. Mason*** (2016) 8 Cal.App.5th Supp. 11, 18-33.)

The Supreme Court in ***McNeely*** did not intend to give a driver arrested for DUI the right to demand that officers obtain a search warrant in order to force a blood draw. Refusal to summit to a

blood test, whether or not the arresting officer chooses to seek a search warrant, is a "*refusal*" and allows for the administrative suspension of the driver's license. (***Espinoza v. Shiomoto*** (2017) 10 Cal.App.5th 85, 103-116.)

An arresting officer's failure to advise defendant under **V.C. § 23612(a)(2)(B)**, of his statutory right to choose either a blood or breath test did not violate the **Fourth Amendment** of the **U.S. Constitution**, and thus **Cal. Const., art. I, § 28, subd. (f)(2)** required the admission of blood test results into evidence. (***People v. Vannesse*** (2018) 23 Cal.App.5th 440.)

Where defendant was charged with misdemeanor DUI, the appellate court concluded that defendant freely consented to the search of his blood. Although a statement by the arresting officer was incomplete under **Veh. Code § 23612(a)(1)(D)**, there was no evidence the officer intended to deceive defendant about his right to refuse a blood altogether. Nor was the officer's statement about the implied consent law demonstrably false. At no point before or after defendant consented to the test did he indicate any objection. Looking at the totality of the circumstances, including the officer's conduct, the existence of the implied consent law, and defendant's actions before and after he consented to the blood test, the appellate court could not say the trial court's finding that defendant voluntarily consented to the test was error. (***People v. Balov*** (2018) 23 Cal.App.5th 696.)

> "[T]he implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether the driver will give or decline to give actual consent to a blood draw when put to the choice between consent or automatic sanctions. Framed in the terms of 'implied consent,' choosing the 'yes' option affirms the driver's implied consent and constitutes actual consent for the blood draw. Choosing the 'no' option acts to withdraw the driver's implied consent and establishes that the driver does not give actual consent." [Citation.]" (***Id.***, at p. 702; ***People v. Lopez*** (2020) 46 Cal.App.5th 317, 326.)

It was initially an undecided issue whether California's Implied Consent statute (**Veh. Code § 23612(a)(1)**) applies when an arrested DUI suspect has neither expressly refused nor consented to a blood draw, which would negate the warrant requirements of ***Missouri v. McNeely*** (2013) 569 U.S. 141 [133 S.Ct. 1552; 185 L.Ed.2nd 696], where the Supreme Court held that being arrested for driving while under the influence did not allow for a non-

consensual warrantless blood test absent exigent circumstances beyond the fact that the blood was metabolizing at a normal rate. Other jurisdictions have split on this issue. (See ***State v. Flonnory*** (2013) 2013 Del. Super. LEXIS 261 (*yes*); and ***State v. Butler*** (Ariz. 2013) 302 P.3rd 609 (*no*).)

Issue: Is evidence (e.g., a victim's DNA) voluntarily provided to law enforcement for one purpose later usable for another, not contemplated when the original consent is given?

An Unsettled Issue:

It's been an unsettled issue in California as to whether blood extracted from a person incident to an arrest for driving under the influence of drugs and/or alcohol allows for the use of that same blood for other purposes (e.g., DNA testing), other jurisdictions have held that the use of blood taken pursuant to such an implied consent is limited to the purpose of testing one's blood/alcohol only, there being no consent, express or implied, to use it for other purposes. (See ***State v. Binner*** (Ore. 1994) 131 Ore.App. 677, 682-683; ***State v. Gerace*** (Ga. 1993) 210 Ga.App. 874, 875-876 [437 S.E.2nd 862, 863.)

However, testing of deoxyribonucleic acid (DNA) from saliva that defendant deposited on the mouthpiece of a preliminary alcohol screening (PAS) device, connecting defendant with a series of residential burglaries where genetic material had been left, was not an illegal search. The court reasoned in part that the breath sample was used only to measure any blood alcohol in defendant's body, consistent with **V.C. § 23612(h)** & **(i)**, while the saliva, in which defendant could claim no right to privacy, was a mere incident to the PAS (Preliminary Alcohol Screening) test. The subsequent testing of the saliva was thus not dependent on defendant's express or implied consent under **V.C. § 23612(a)(1)**. (***People v. Thomas*** (2011) 200 Cal.App.4th 338, 343-344.)

Recent Restriction:

In ***Jane Doe v. City and County of San Francisco*** (N. Dist. Cal. 2023) 2023 U.S. Dist. LEXIS 125532, the plaintiff Jane Doe alleged that she had provided a DNA sample to the San Francisco Police Department to aid in the investigation of her alleged sexual assault, where she was the victim. Sometime later (the specific dates are not mentioned), Doe's DNA sample was used by San Francisco P.D. investigators to link Doe herself to a burglary where it was alleged that she was the culprit. Doe complained in a

federal **42 U.S.C. § 1983** lawsuit that using her DNA to investigate her culpability in the burglary violated the scope of the consent she gave when she originally provided her DNA as a sexual assault victim. In denying the civil defendants' motion to dismiss Doe's lawsuit, the trial court judge issued an order to the effect that if the facts prove to be as alleged by Jane Doe (i.e., that SFPD investigators agreed not to use her DNA for anything other than the rape case), then she has "clearly established (a) **Fourth Amendment** violation."

Express vs. Implied Consent to Search, Etc.*:** A person's consent to search may be "*express*" or "*implied*." (Torbet v. United Airlines, Inc.*** (9th Cir. 2002) 298 F.3rd 1087, 1089; ***People v. Panah*** (2005) 35 Cal.4th 395, 466-467.)

Express Consent: Answering in the affirmative when asked for consent to search is the most obvious example of an "*express consent*."

Also, however, an affirmative head-nod made by defendant to his son in response to an officer's request for permission for his son to retrieve a gun from defendant's tent, held to be an express consent. (***United States v. Basher*** (9th Cir. 2011) 629 F.3rd 1161, 1168-1169.)

Implied Consent: An "*implied consent*" exists when, considering the "*totality of the circumstances*," a reasonable person would have understood that the person from whom a consent is requested is agreeing to a search. (***United States v. Jenkins*** (4th Cir. 1993) 986 F.2nd 76, 79.)

Raising one's arms into the air after being asked by a police officer for consent to search his person was held to be the defendant's implied consent to such a search. (***United States v. Vongxay*** (9th Cir. 2010) 594 F.3rd 1111, 1119-1120.)

"(O)nly in narrow circumstances may consent be implied by actions and in most implied consent cases it is the suspect himself (as opposed to a third party) who takes an action which implies consent." ***Espinosa v. City and County of San Francisco*** (9th Cir. 2010) 598 F.3rd 528, 536.)

Examples Where Implied Consent was Found:

Upon submission to having one's luggage x-rayed (***Torbet v. United Airlines, Inc.***, *supra*.) and/or by walking through a magnetometer (***United States v. Aukai*** (9th Cir., 2007) 497 F.3rd 955.) at an airport.

See "*Airport Searches*," under "*Searches with a Search Warrant*" (Chapter 10), above.

Upon entering a military base where signs are posted warning that persons on the base are subject to being searched. (***United States v. Ellis*** (5th Cir. 1977) 547 F.2nd 863, Naval base; ***United States v. Jenkins***, *supra*, military base; ***Morgan v. United States*** (9th Cir. 2003) 323 F.3rd 776, Air Force base.)

A civilian staying in the on-base housing of a military serviceman has possibly impliedly waived his right to privacy when his property (e.g., computers) is searched. (***United States v. Krupa*** (9th Cir. 2011) 658 F.3rd 1174, 1179-1180,)

Defendant visiting a county jail visitor center is subject to search, particularly where signs are posted warning him that he was subject to search. This includes outside lockers on the jail property where visitors could deposit items not allowed in the jail. "Implied consent" applies to administrative searches of closely regulated businesses, including a county jail. (***People v. Boulter*** (2011) 199 Cal.App.4th 761.)

> But see ***Estes v. Rowland*** (1993) 14 Cal.App.4th 508: At least for purposes of persons attempting to visit an inmate of any of the prisons of the California Department of Corrections, while justifying the lowered search standard on the theory that keeping weapons and contraband out of a prison is an important governmental interest and that therefore searching visitors is an "*administrative search*," the visitor must be given the option of forgoing the visit, and leaving, rather than submitting to a strip search.

A co-owner of a laptop computer has actual authority to give consent to the police to search. And if it turns out that the person is not actually a co-owner, the doctrine of apparent authority may justify the search when it reasonably appears under the circumstances that she did have such authority. (***United States v. Stanley*** (9th Cir. 2011) 653 F.3rd 946, 950-952.)

In response to a police officer's question; "*Mind if we come in*?" where the apartment owner then opened the door wider, and moved out of the way, it was held that the owner had impliedly consented to the officers' entry. (***United States v. Faler*** (8th Cir. Iowa 2016) 832 F.3rd 849; see also ***United States v. Rodriguez*** (8th Cir. Neb. 2016) 834 F.3rd 937.)

Consent to enter defendant's apartment when the officers had a drug-sniffing dog with them, and where the dog was visible to defendant, impliedly included defendant's consent to the entry of the dog as well. When the dog alerted on illegal drugs defendant had in his compartment, the dog being in a place it had the legal right to be, the alert did not

constitute an illegal search. (***United States v. Iverson*** (2nd Cir. 2018) 897 F.3rd 450.)

Defendant's mother was found to have impliedly consented (i.e., "non-verbal" consent) to an officer following her into her home to retrieve her son's (the defendant) cellphone after defendant told the officer that he was "fine" with them to take the phone (the officers having a search warrant to seize and search the phone). Per the Court, silently accepting an officer's expressed intent to enter the house solely for the purpose of retrieving a phone is a valid consent, especially when the owner of the phone, who is a co-occupant of the house, has already verbally consented to turning it over (pursuant to a valid warrant) and has told the officers in which room it is located. Based on these facts, the court held that the officers had valid consent, obtained voluntarily from defendant and his mother to enter the house for the sole purpose of retrieving the phone. (***United States v. Sanchez*** (11th Cir. 2022) 30 F.4th 1063.)

Totality of the Circumstances: Consent may be implied as determined by the *totality of all the circumstances*. For instance, in the case of a military base, one impliedly consents to the search of his or her vehicle when driving upon the base and noting:

- The barbed-wire fence;
- The security guards at the gate;
- The sign warning of the possibility of search; *and*
- A civilian's common-sense awareness of the nature of a military base.

(***United States v. Jenkins*** (4th Cir. 1993) 986 F.2nd 76, 78; ***Morgan v. United States*** (9th Cir. 2003) 323 F.3rd 776, 787-788.)

***Specific Issues*:**

- May a suspect *withdraw consent* once it's given? *Yes*. (***People v. Martinez*** (1968) 259 Cal.App.2nd Supp. 943, 945; ***United States v. McWeeney*** (9th Cir. 2006) 454 F.3rd 1030, 1035; see also (***United States v. Krupa*** (9th Cir. 2011) 658 F.3rd 1174.)

  But see ***People v. Schomer*** (1971) 17 Cal.App.3rd 427, where an unlimited search for a runaway minor of the defendant's apartment was allowed for some twenty minutes until defendant realized that the officers were getting close to his marijuana, at which time he tried to withdraw the consent. The marijuana was seen in plain sight. Defendant testified that he did not object to the officers searching for a person, but objected to them looking for narcotics. The attempted withdrawal of consent was held to be ineffective under these circumstances where the defendant later testified

that he had not objected to the officers searching for a person, but only to searching for contraband.

And see "*Warrantless Searches*," "*Airport Searches*," above, where by submitting one's carryon luggage and/or his person to the initial x-ray and/or magnetometer screening at an airport, a person loses his right to revoke permission when asked to submit to a secondary screening. (***Torbet v. United Airlines, Inc.*** (9th Cir. 2002) 298 F.3rd 1087, 1089-1090.)

Where officers "created a setting in which the reasonable person would believe that he or she had no authority to limit or withdraw their consent," the resulting consent search may be invalidated. (***United States v. McWeeney***, *supra*, at pp. 1036-1037.)

Per the Court in ***McWeeney*** (at p. 1037), factors to consider in evaluating this issue include, but are not limited to:

- The language used to instruct the suspect;
- The physical surroundings of the search;
- The extent to which there were legitimate reasons for the officers to preclude the suspect from observing the search;
- The relationship between the means used to prevent observation of the search and the reasons justifying the prevention;
- The existence of any changes in circumstances between when consent is obtained and when the officers prevent the suspect from observing the search; *and*
- The degree of pressure applied to prevent the suspect either from observing the search or voicing his objection to its proceeding further.

Once a suspect voluntarily consents to a search, it is the suspect's burden to establish that he has withdrawn that consent. Although a suspect does not need to use a special set of words to withdraw consent, the suspect must do more than express unhappiness about the search to which he has consented. (***United States v. Williams*** (3rd Cir. PA 2018) 898 F.3rd 323.)

- May a suspect *limit the consent* to certain areas? *Yes*. (***Ibid.***)

But, if he does not limit the consent to a specific area, the officer may search the whole thing reasonably believed to be included in the request. E.g.; A consent to search one's car, unless specifically limited, includes the whole car and any containers in the car. (***People Clark*** (1993) 5 Cal.4th 950, 977-980.)

- May a *drug-sniffing dog* be used without obtaining any more than a general consent to search? *Yes*; at least when it is a vehicle (as opposed to a residence) being searched, the defendant should have been aware that a dog was available, and he failed to object when the dog was used. (***People v. Bell*** (1996) 43 Cal.App.4th 754.)

  See also ***People v. $48,715 United States Currency*** (1997) 58 Cal.App.4th 1507, 1515-1516: "'A "*sniff*" by a trained drug-sniffing dog in a public place is not a "*search*" within the meaning of the **Fourth Amendment**' at all. Accordingly, no consent is needed for participation of the dog. (Citation)" (See also ***United States v. Todhunter*** (9th Cir. 2002) 297 F.3rd 886, 891.)

  See "*Used to Search*," under "*Dogs*," under "*New and Developing Law Enforcement Tools and Technology*" (Chapter 14), above.

- May a suspect *place conditions* on the search? (E.g.; "*Yes officer, but only if I may be present*.") Arguably; *Yes*.

  If a person may limit the areas to be searched, it would seem that he could also impose any conditions he chooses. (E.g., see ***People Clark*** (1993) 5 Cal.4th 950, 977-980, recognizing the validity of a conditional consent even though not discussing the issue.)

- May an officer *use a ruse or deception* in obtaining a consent? Generally, *No*.

  Consent has to be given freely and voluntarily, with a knowledge of the right to refuse. If the suspect reasonably misconstrues, due to an officer's misrepresentations, the purpose of the search, it will probably be held to be involuntary. (See ***People v. Reeves*** (1964) 61 Cal.2nd 268, 273; ***People v. Mesaris*** (1970) 14 Cal.App.3rd 71.)

  But, a ruse is but one factor to consider. If, under the totality of the circumstances, a suspect is *not* materially misled as to the privacy rights he is giving up by consenting, the search will be held to be valid. (***People v. Avalos*** (1996) 47 Cal.App.4th 1569.)

  > "Here, the police actually offered a dual purpose for searching defendant's truck. They said they wanted to look for stolen property, which was clearly not the case. But they also disclosed they were looking for 'other contraband,' which was *entirely accurate and reasonably alerted defendant the object of the search would include narcotics.* The officers were also careful to ensure defendant's consent was voluntary. Once it became clear defendant had difficulty understanding English, (the officer) summoned a Spanish-speaking officer to assist him. Defendant was also given a Spanish-language consent-to-search form, which he read and

signed. He was *not under arrest*, physically restrained, or threatened in any manner." (***Id.*** at p. 1578.)

A police officer, obtaining plaintiff's consent to enter her house to look for her fugitive boyfriend, was held to be entitled to qualified immunity on a voluntariness-of-consent claim in that a lack of consent was not clearly established. The facts showed that time had passed between the officer's threat to arrest the homeowner for concealing her former boyfriend's whereabouts and his subsequent request for consent to enter her house, where the evidence shows that she handed the officer her house key without being asked for it. (***West v. City of Caldwell*** (9th Cir. 2019) 831 F.3rd 978, 982-988.)

- Can a suspect who is either *detained* or *under arrest* validly consent to being searched? *Yes*.

  Whether or not a detained individual has validly consented to the search of his property depends upon an evaluation of the totality of the circumstances. (***United States v. Blomquist*** (6th Cir. 2020) 976 F.3rd 755; defendant, after being detained and ***Mirandized***, volunteered to show officers the workings of his illegal marijuana growing operation.)

  The fact that the defendant is in custody at the time is but one factor to consider when determining whether that defendant gave a free and voluntary consent. (***United States v. Crapser*** (9th Cir. 2007) 472 F.3rd 1141, 1149.)

  The co-occupant of a hotel room, who was arrested along with defendant, held to have voluntarily consented to the search of the room despite being under arrest at the time. (***United States v. Whitehead*** (8th Cir. 2021) 995 F.3rd 624.)

- Does a *consensual search of a residence* have to be based upon some level of suspicion. *No*.

  Conducting a "*knock and talk*," and asking the homeowner for consent to conduct a search of the residence, follows the same rules as in the case of a "*consensual encounter*" of a person on the street, and need not be supported by even a "*reasonable suspicion*." (***People v. Rivera*** (2007) 41 Cal.4th 304; contact initiated due to an uncorroborated anonymous tip.)

Other Elements of a Consent Search:

The Right to Refuse: There is no legal requirement that a suspect be told that he has a right to refuse to consent. (***Ohio v. Robinette*** (1996) 519 U.S. 33 [117 S.Ct.

417; 136 L.Ed.2nd 347]; ***Schneckloth v. Bustamonte*** (1973) 412 U.S. 218 [93 S.Ct. 2041; 36 L.Ed.2nd 854]; ***United States v. Drayton*** (2002) 536 U.S. 194 [122 S.Ct. 2105; 153 L.Ed.2nd 242]; ***People v. Monterroso*** (2004) 34 Cal.4th 743, 757-759; ***People v. Williams*** (2007) 156 Cal.App.4th 949, 961.)

> The fact he has been asked for consent should indicate to a reasonable person that he has a right to refuse.
>
> However, should an officer tell a suspect he has the right to refuse, this fact adds to the weight of the argument that his consent was voluntary.
>
> A person's refusal to consent to a search is *not* admissible in court against that person to show a *consciousness of guilt*, even where the officers had a legal right to make a warrantless entry. To use a person's refusal "merely serves to punish the exercise of the right to insist upon a warrant." I.e.; "(A) penalty imposed by courts for exercising a constitutional right." (***People v. Wood*** (2002) 103 Cal.App.4th 803, 808; ***People v Keener*** (1983) 148 Cal.App.3rd 73, 79.)

Miranda: There is no requirement that a suspect be advised of his ***Miranda*** rights (per ***Miranda v. Arizona*** (1966) 384 U.S. 436 [86 S.Ct. 1602; 16 L.Ed.2nd 694].) prior to giving a valid consent. (***People v. Brewer*** (2000) 81 Cal.App.4th 442; ***People v. Monterroso***, *supra*.)

> Nor is it relevant that the subject had already invoked his ***Miranda*** rights. (***United States v Kon Yu Leung*** (2nd Cir. 1990) 910 F.2nd 33, 38; ***United States v. Hidalgo*** (11th Cir. 1993) 7 F.3rd 1566; ***United States v. Shlater*** (7th Cir. 1996) 85 F.3rd 1251, 1255-1256.)
>
> Requesting a consent to search is not an interrogation, does not implicate the **Fifth Amendment**, and does not require a ***Miranda*** admonishment. (***People v. Ruster*** (1976) 16 Cal.3rd 690, 700; ***People v. Woolsey*** (1979) 90 Cal.App.3rd 994; ***People v. Ramirez*** (1997) 59 Cal.App.4th 1548, 1559; ***Doe v. United States*** (1988) 487 U.S. 201 [101 L.Ed.2nd 184]; ***United States v. Henley*** (9th Cir. 1993) 984 F.2nd 1040, 1042-1043; ***United States v. Hidalgo*** (11th Cir. 1993) 7 F.3rd 1566; ***United States v. Kon Yu Leung*** (2nd Cir. 1990) 910 F.2nd 33, 38; ***United States v. Shlater*** (7th Cir. 1996) 85 F.3rd 1251, 1255-1256; ***United States v. Russell*** (9th Cir. 2012) 664 F.3rd 1279, 1281-1282.)
>
> > But see ***United States v. Reilly*** (9th Cir. 2000) 224 F.3rd 986, 994, where it was erroneously held that a defendant's invocation of his right to an attorney precluded officers from asking him for his consent to search.

An advisal of one's ***Miranda*** rights before asking for consent to search is *some* evidence, however, that his consent is given freely and voluntarily, in that the giving of a ***Miranda*** admonishment infers that he is not without rights. (***United States v. Morning*** (9th Cir. 1995) 64 F.3rd 531, 533.)

Note also, older authority indicating that illegally continuing an interrogation after the suspect invokes his ***Miranda*** rights, followed by a request for a consent search, *will* likely result in the consent being held to be invalid (***People v. Superior Court* [*Keithley*]** (1975) 13 Cal.3rd 406, 410.), which is questionable authority in light of the rule that the "*fruit of the poisonous tree*" doctrine does not apply to ***Miranda*** violations. (***Oregon v. Elstad*** (1985) 470 U.S. 298 [84 L.Ed.2nd 222]; ***Dickerson v. United States*** (2000) 530 U.S. 428, 441 [147 L.Ed.2nd 405, 418]; ***United States v. Patane*** (2004) 542 U.S. 630 [159 L.Ed.2nd 667].)

And the Ninth Circuit Court of Appeal has recently called into question whether the giving of a ***Miranda*** admonishment is really a factor that should be considered at all when determining the validity of a consent to search. (***United States v. Perez-Lopez*** (9th Cir. 2003) 348 F.3rd 839, 846-847, criticizing its own contrary decision in ***United States v. Morning***, *supra*.)

Need for a Written Consent:

There is *no* legal requirement that a consent to search be obtained in writing. However, obtaining a suspect's consent in writing tends to help to convince a court of the voluntariness of the resulting consent. (***United States v. Rodriguez*** (2006) 464 F.3rd 1072, 1078.)

Also, *written* consent provided after the search had already occurred does not retroactively establish valid consent. ***United States v. Howard*** (9th Cir. 1987) 828 F.2nd 552, 556. It is, however, corroborative of the officers' testimony that she had earlier consented orally to the search. (***United States v. Johnson*** (9th Cir. 2017) 875 F.3rd 1265, 1278, fn. 7.)

But the refusal to sign a written waiver form does not necessarily invalidate one's consent. (***United States v. Thurman*** (7th Cir. IL 2018) 889 F.3rd 356.)

Practice Note: Obtaining a written consent provides for strong in-court evidence that the suspect did in fact consent, freely and voluntarily.

***Answering the Telephone*:**

Consent to enter a residence does *not* include an implied consent to answer the telephone while there. (***People v. Harwood*** (1978) 74 Cal.App.3rd 460.)

However, while lawfully in a residence, probable cause to believe that a caller might be the fugitive defendant, officers may answer the telephone and pretend to be a resident when done for the purpose of attempting to locate the defendant. (***People v. Ledesma*** (2006) 39 Cal.4th 641, 704.)

Giving law enforcement permission to search a cellphone does not, without more, include the right to answer in-coming calls and/or pretend to be the defendant. (***United States v. Lopez-Cruz*** (9th Cir. 2013) 730 F.3rd 803, 809-811.)

Consent by Others:

General Rule: Police may rely upon the consent of whoever they "*reasonably believe*," under the circumstances, possesses "*common authority*" over the premises. (***Illinois v. Rodriguez*** (1990) 497 U.S. 177 [111 L.Ed.2nd 148]; ***People v. Reed*** (1967) 252 Cal.App.2nd 994, 996; ***People v. Superior Court* [*Walker*]** (2006) 143 Cal.App.4th 1183, 1198-1201.) The person giving consent must have either the "*actual authority*," or the "*apparent authority*," to give consent:

> "*Actual Authority*:" Where the owner of property has expressly granted authority for a person to give consent, or where it is known that the person has mutual use or joint access, then he or she is said to have "*actual authority*" to consent to a search of that property. (***United States v. Davis*** (9th Cir. 2003) 332 F.3rd 1163, 1169; ***People v. Superior Court* [*Walker*]**, *supra*, at pp. 1205-1208.)
>
> "*Apparent Authority*:" A determination made based upon the circumstances and whether the officers reasonably believe that the person giving consent had the authority to do so. (***United States v. Fiorillo*** (9th Cir. 1999) 186 F.3rd 1136; ***People v. Superior Court* [*Walker*]**, *supra*, at pp. 1208-1214; ***United States v. Arreguin*** (9th Cir. 2013) 735 F.3rd 1168, 1174-1178; see also ***United States v. Casey*** (1st Cir. 2016) 825 F.3rd 1.)
>
> To establish "*apparent authority*," the prosecution must show:
>
> - The police believed an untrue fact that they used to assess the consenter's control over the area to be searched;
> - It was objectively reasonable for the officers to believe that the fact was true; *and*
> - If that fact were true, the consenter would have had actual authority to give that consent.
>
> (***United States v. Reid*** (9th Cir. 2000) 226 F.3rd 1020, 1025; ***United States v. Enslin*** (9th Cir. 2003) 315 F.3rd 1205,

1215; ***United States v. Ruiz*** (9th Cir. 2005) 428 F.3rd 877; ***Espinosa v. City and County of San Francisco*** (9th Cir. 2010) 598 F.3rd 528, 536-537.)

General Case Law:

Where U.S. Marshals knew that the person giving consent was a resident of the home, and had no reason to know that defendant was occupying a back bedroom, the officers could reasonably assume the consenter/resident had the authority to authorize entry into that back bedroom. (***United States v. Enslin*** (9th Cir. 2003) 315 F.3rd 1205, 1215.)

When the estranged wife retains property within the residence, remains liable for rent, civil liability for accidents, etc., and has not established a permanent residence elsewhere, she still has the "apparent authority" to allow police into her residence where the husband still lives. (***People v. Bishop*** (1996) 44 Cal.App.4th 220.)

> The fact that the husband had changed the locks is only indicative of the level of antagonism, and is not a limitation of the wife's authority to allow the police to enter and search. (***Ibid***.)

Paper bags left by defendant in an acquaintance's garage, where the acquaintance had free access to the bags, may be lawfully searched with consent from the acquaintance. By leaving the bags with the acquaintance, knowing and not objecting to the fact that she (the acquaintance) would go into the bags, defendant "*assumed the risk*" that she would allow others to look into the bags. (***People v. Schmeck*** (2005) 37 Cal.4th 240, 280-282.)

Apparent authority found where the resident of a house gave consent to search a container set out in plain sight and no one objected when such consent was requested. (***United States v. Ruiz*** (9th Cir. 2005) 428 F.3rd 877.)

However, the search of a purse based upon the consent of the purse owner's boyfriend was held to be unlawful because it was unreasonable for the officers to think that the boyfriend had the necessary authority. (See ***United States v. Welch*** (9th Cir. 1993) 4 F.3rd 761.)

"(A) guest who has the run of the house in the occupant's absence has the apparent authority to give consent to enter an area where a visitor normally would be received." (***People v. Ledesma*** (2006) 39 Cal.4th 657, 703-704.)

> And, although receiving consent to enter a residence *does not* infer a consent to answer the telephone while in the residence (***People v. Harwood*** (1977) 74 Cal.App.3rd 460, 458.), the telephone may be answered where the officers have probable cause to believe defendant will be calling and taking the time to get a warrant would compromise the officer's ability to quickly locate and apprehend him. (***People v. Ledesma***, *supra*, at p. 704.)

A business that owns the company's computers may consent to the search of a computer used by an employee, at least when the employee is on notice that he has no reasonable expectation of privacy in the contents of the computer he is using. (***United States v. Ziegler*** (9th Cir. 2007) 474 F.3rd 1184.)

Where officers seized evidence from defendant's home office, his wife had the apparent authority to grant the police access to the materials because there were no objective indications that her access to the office was limited. (***United States v. Tosti*** (9th Cir. 2013) 733 F.3rd 816, 723-724.)

But the mere fact that a person answers the door is insufficient by itself to allow officers to reasonably conclude that they had a valid consent to search the entire residence. Officers entering "in a state of near ignorance" based upon the consent given by the person answering the door, who was later determined to be a mere visitor, without making further inquiry of the person as to his status, was not reasonable. Search of the residence based upon that person's consent held to be unlawful. (***United States v. Arreguin*** (9th Cir. 2013) 735 F.3rd 1168, 1174-1178.)

"In searching a probationer's residence, officers are not required either to inquire about the ownership of or access rights to each item on the premises or to believe the probationer's statements on this topic. (Citations)" (***People v. Carreon*** (2016) 248 Cal.App.4th 866, 877-878.)

> In ***Carreon***, officers searched the defendant's room (a converted garage) under the authority of the home-owner's **Fourth** waiver, believing the probationer had access to any room that was unlocked. The Court found this belief to be unreasonable, having failed to consider any other circumstances that may have indicated that the probationer did not in fact have free access to defendant's room. (***Id***., at pp. 877-881.)

Being in possession of the garage door opener as well as keys to the lobby door and mailbox for the unit was sufficient to cause the officers to reasonably believe that defendant had authority to give consent to search the apartment. (***United States v. Correa*** (7th Cir. IL 2018) 908 F.3rd 208.)

Defendant's sister's authority over a rented storage unit did not, by itself, establish that she also had either actual or apparent authority to open and gain access to several black bags contained in the storage unit. The officers' belief that the sister had authority to allow officers to search her brother's property, when it was specifically pointed out to the officers that the bags belonged to defendant, was not reasonable. (***United States v. Moran*** (1st Cir. 2019) 944 F.3rd 1.)

The 18-year old defendant's father, who owned the house, was held to have apparent authority to allow agents to enter and search the master bedroom, where defendant slept, resulting in the recovery of defendant's backpack. The court found that at the time of the search, the agents knew that that father owned the house and permitted his adult son—defendant—to live there. Although the door to defendant's bedroom had a lock on it, which to some extent undermined that father's apparent authority, the door was wide open when the agents arrived. No one in the house ever raised any objection to the search of the bedroom. In addition, at no point did anyone limit where the agents could look. Even if, as defendant claimed, the agents knew he occupied the master bedroom when the search began, they had no way of knowing that defendant's father supposedly only entered that room with defendant's permission. When the father voluntarily consented to the search of the home, no one mentioned any agreement he had with defendant about access to the master bedroom. As a result, the Court concluded that the facts known to the agents at the time of the search created an objectively reasonable perception that defendant's father had authority to consent to the search of defendant's bedroom and its contents. (***United States v. Guillen*** (10th Cir. N.M. 2021) 995 F.3rd 1095.)

After defendant was arrested on an armed robbery warrant, officers failed to find the gun used in the robbery. Monitoring phone calls from the jail, defendant was heard telling his girlfriend to hide "the thing." Assuming that this referred to the missing gun, the investigating detective went to the girlfriend's apartment where he sought her permission to search for the gun. The girlfriend (and sole lessee of the apartment) provided written consent to search her apartment, and led the detective to her closet where "her gun" was stored. Upon finding a gender-neutral black bag (although referred to at one point by the searching officer as a "man bag") hanging from the door handle of a closet, the officer was reasonable in assuming that the female had authority to give consent to the opening and search of the bag. Drugs and a firearm found in the bag were improperly suppressed by the trial court. The gun in the bag was subsequently determined to be the one used by the defendant to commit the robbery. The Court concluded this evidence provided the detective with a reasonable basis to believe that the girlfriend had authority over the bag and therefore could

consent to its search. (***United States v. Williams*** (8th Cir. 2022) 36 F.3rd 792.)

Defendant's girlfriend, who possessed defendant's cellphone and had if not sole, at least mutual, access and control over the phone for some seven months before giving it to law enforcement, during which time she regularly used the phone for purely personal purposes, was held to have authority to grant law enforcement's access to the phone. Importantly, she had access to the contents of the entire phone. Under such circumstances, the Court concluded she had "actual" authority to consent to the search of the phone. (***People v. Perry*** (4th Cir. 2024) 92 F.4th 500.)

Examples:

Landlord:

A landlord may *not* give a valid consent for police to search a renter's home, the renter having a superior right to possession at least for the duration of the agreed rental period. (***Chapman v. United States*** (1961) 365 U.S. 610, [81 S.Ct. 776; 5 L.Ed.2nd 828]; ***People v. Roman*** (1991) 227 Cal.App.3rd 674.)

However, a landlord has a right to inspect the home for violations of the rental agreement, with notice to the renter and at a reasonable time, and under other limited circumstances. (**Civil Code § 1954**) Anything they observe in the process may serve as probable cause to obtain a warrant for a search by law enforcement.

Same rule applies to the manager or clerk in a hotel or motel. (***Stoner v. California*** (1964) 376 U.S. 483 [84 S.Ct. 889; 11 L.Ed.2nd 856]; ***People v. Burke*** (1962) 208 Cal.App.2nd 149, 160-161.)

And with an *apartment manager*. (***People v. Roberts*** (1956) 47 Cal.2nd 374, 377.)

"[A] landlord may not give valid third party consent to a police search of a house rented to another. [Citations.] The same principle applies to prevent a finding of third party consent where the leased property is an apartment unit [citation], a room in a boarding house [citation], a garage [citation], or a locker [citation]. Likewise, a hotel clerk may not consent to the search of an occupant's room. [Citations.]" (***People v. Superior Court*** [***Walker***] (2006) 143 Cal.App.4th 1183, 1200.)

Military personnel, living off base in a motel, but with the housing paid for by the military as an alternative to living in the on-base barracks, retain the same privacy protections as anyone else in the civilian world. (***People v. Rodriguez*** (1966) 242 Cal.App.2nd 744.)

> The same rule applies to any off-base military housing, at least when the case is a state case being investigated by state law enforcement officers for presentation in state court. (***People v. Miller*** (1987) 196 Cal.App.3rd 307.)
>
> However, on the base, a commanding officer may authorize a warrantless search of property, including the serviceman's locker (***People v. Shepard*** (1963) 212 Cal.App.2nd 697, 700.) and his room in the barracks. (***People v. Jasmin*** (2008) 167 Cal.App.4th 98.)
>
> > Evidence properly seized pursuant to a service member's commanding officer's (or "competent military authority") oral or written authorization to search a person or an area, for specified property or evidence or for a specific person (see **Military Rules of Evidence, Rule 315(a)** & **(b)**), the results may be used in state court. (***People v. Jasmin***, *supra*, at p. 110.)

Parent:

A parent may give consent to search the home and even the child's room over the child's objection, *except* areas exclusive to the child (e.g.; a footlocker which was locked by the child). (***In re Scott K.*** (1979) 24 Cal.3rd 395, 404-405.)

The search of an adult child's bedroom in his parents' home, made with the consent of a parent, is reasonable "absent circumstances establishing the son has been given exclusive control over the bedroom." (***People v. Daniels*** (1971) 16 Cal.App.3rd 36; see also see also ***United States v. Casey*** (1st Cir. 2016) 825 F.3rd 1; grandparents had "apparent authority" to give consent to officers to search defendant's room where defendant lived there for free and the grandparents had open access to his unlocked bedroom.)

Parents of an 18-year-old adult son were held to have "*actual*" authority to give consent to search the son's room when the son did not pay rent, and there was no evidence of any agreement on the part of the parent not to enter the son's room. (***United States v. Rith*** (10th Cir. 1999) 164 F.3rd 1323.)

Father, with the apparent authority to allow police officers to search his entire residence, including the bedroom of his adult son, under circumstances where the father and defendant son had apparent free access to each other's room, validly authorized police to enter the son's room. (***People v. Oodham*** (2000) 81 Cal.App.4th 1.)

Query: If the adult child is paying rent and there is nothing else to suggest that the parents have free access to the child's room, would not the landlord-tenant rules (See **Civil Code §§ 789.3**, **1954**) be applicable?

Parents have to have access to their minor child's bedroom and the power to give consent to the search of the bedroom to the police in order to properly execute their duty of supervision and control over the child. "In the absence of evidence suggesting a parent has abdicated this role toward his or her child, police officers may reasonably conclude that a parent can validly consent to the search of a minor child's bedroom." (***In re D.C.*** (2010) 188 Cal.App.4th 978.)

The Court reaffirmed the California Supreme Court's decision in ***In re Scott K.***, *supra*, noting that a minor may retain the right to exclude others from areas that are exclusive to the minor (a footlocker which was locked by the child). (***In re D.C.***, *supra*, at pp. 987-988.)

The Court also rejected the contrary rule of ***United States v. Whitfield*** (D.C. Cir. 1991) 939 F.2nd 1071, which held that a parent does not have the authority to consent to the search of their adult son's closet despite access to the bedroom. (***In re D.C.*** *supra*, at pp. 986-987.)

Child: Whether or not a child may validly allow police into the family residence depends upon a determination whether, under the circumstances, it is reasonable to believe that the child had the authority to do so.

An 11-year-old step-daughter, baby-sitting in the defendant's absence, was held *not* to have the authority to admit the police. (***People v. Jacobs*** (1987) 43 Cal.3rd 472.)

"Minor children . . . do not have coequal dominion over the family home. [Citation.] Although parents may choose to grant their minor children joint access and mutual use of the home, parents normally retain control of the home as

> well as the power to rescind the authority they have given. 'It does not startle us that a parent's consent to a search of the living room in the absence of his minor child is given effect; but we should not allow the police to rely on the consent of the child to bind the parent. The common sense of the matter is that the . . . parent has not surrendered his privacy of place in the living room to the discretion of the . . . child; rather, the latter [has] privacy of place there in the discretion of the former.' [Citations.]" (***Id***., at p. 482.)
>
> The Court recognized, however, that the rule is not absolute: "In some circumstances, a teenager may possess sufficient authority to allow the police to enter and look about common areas." (***Id***., at p. 483.)

But, where a 12-year-old abuse victim led police to her aunt's house and where, in her aunt's absence, the victim was in charge of the house, living and working there, the victim could validly give consent to search for implements used to abuse her when the aunt had initially invited police inside, and after the aunt was arrested and removed from the house. (***People v. Santiago*** (1997) 55 Cal.App.4th 1540.)

The 16-year-old daughter of the defendant had the apparent authority to allow the officers the right to enter defendant's residence. (***People v. Hoxter*** (1999) 75 Cal.App.4th 406.)

Co-Occupants (*Roommates, Husband and Wife, Parent and Child*): When two or more people have equal access to a residence (e.g.; roommates, husband and wife, etc.), the rules regarding one co-occupant giving consent vary depending upon the circumstances:

General Rules:

The adult sister sharing an apartment with her adult brothers does *not* have apparent authority to consent to the search of the brothers' bedroom. (***Beach v. Superior Court*** (1970) 11 Cal.App.3rd 1032, 1034–1035.)

When adult roommates have separate rooms, exclusive control by each of the individuals over his or her own room is presumed, absent evidence to the contrary. (***United States v. Almeida-Perez*** (8th Cir. 2008) 549 F.3rd 1162, 1172; ***U.S. v. Barrera-Martinez*** (N.D. Ill. 2003) 274 F.Supp.2nd 950, 962.)

A warrantless entry of a residence does not violate the **Fourth Amendment** if the police reasonably believe that the person who consented had the authority to do so. (***Illinois v. Rodriguez*** (1990) 497 U.S. 177 [110 S.Ct. 2793; 111 L.Ed.2nd 148].)

The Rule of ***Georgia v. Randolph***:

Rule: When two equally-situated cotenants, both present at the scene, are asked for permission to enter and/or search a residence, with one saying "*yes*" but the other saying "*no*," entry and/or search may *not* be made absent an exigent circumstance or a search warrant. The "*no*" takes precedence. (***Georgia v. Randolph*** (2006) 547 U.S. 103 [126 S.Ct. 1515; 164 L.Ed.2nd 208].)

> "(W)hen an occupant consents to a search, but a co-occupant who 'is present at the scene … expressly refuses to consent,' the co-occupant's refusal 'prevails, rendering the warrantless search unreasonable and invalid as to' him." (***People v. Byers*** (2016) 6 Cal.App.5th 856, 862; quoting ***Georgia v. Randolph***, *supra*, at p. 106.)
>
> California's prior authority to the contrary (e.g., see ***People v. Wilkins*** (1993) 14 Cal.App.4th 761, 769-776.) is no longer valid in light of this Supreme Court opinion.
>
> A warrantless entry of a residence does not violate the **Fourth Amendment** if the police reasonably believe that the person who consented had the authority to do so. (***Illinois v. Rodriguez*** (1990) 497 U.S. 177 [110 S.Ct. 2793; 111 L.Ed.2nd 148].)

Exceptions According to ***Randolph***:

The Supreme Court in ***Randolph*** listed a number of exceptions to this rule:

- 1. Where there is a "*recognized hierarchy*" (e.g., parent vs. child), objections from the one with the inferior status may be ignored.

  > See also ***In re D.C.*** (2010) 188 Cal.App.4th 978, 988-989, and ***United States v. Rith*** (10th Cir. 1999) 164 F.3rd 1323, below.

- 2. With a reasonable (articulable) fear for the safety of the person inviting officers inside, or anyone else

inside, entry may be made to check the victim's welfare and/or to stop pending violence.

> See ***Bonivert v. City of Clarkston*** (9th Cir. 2018) 883 F.3rd 865, 874: "***Randolph*** called out an important exigent circumstance related to domestic violence, explicitly acknowledging that a co-occupant's refusal is vitiated where there is a threat to the victim: 'No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence.'"

- 3. An objection from an *absent cotenant* (even if handcuffed in a patrol car immediately out front) may be ignored in the face of a present cotenant's consent, at least so long as he is not led away from the scene for the purpose of justifying an entry into the residence.
  - *But see* ***United States v. Murphy*** (9th Cir. 2008) 516 F.3rd 1117, and ***Fernandez v. California*** (2014) 571 U.S. 292, 298-307 [134 S.Ct. 1126, 1132-1137; 188 L.Ed.2nd 25], below.

- 4. It is not necessary to solicit possible objections from a cotenant, even if that person is inside and/or available and even if it could be expected that that person would object.

- 5. Any other exigent circumstance (safety of the occupants, protection of possible physical evidence, etc.) may justify an immediate entry, at least until the scene is secured and/or the suspects detained pending the obtaining of a search warrant.

- 6. Entering with the victim of domestic violence, at her request, for the purpose of protecting her as she collects her belongings.

- 7. The consenting cotenant may retrieve evidence and bring it out to the police.

- 8. With probable cause, a search warrant may be obtained for the search of the residence.

The "*Absent*" *Co-Occupant*:

General Rule: Generally, consent to a search given by someone with authority cannot be revoked by an *absent* co-occupant's denial of consent, even if that denial is clear and contemporaneous with the search. (***United States v. Matlock*** (1974) 415 U.S. 164, 172 [94 S.Ct. 988; 39 L.Ed.2nd 242]: The mutual use of property carries with it the risk that just one of the occupants might permit a search of the common areas.)

Defendant in ***Matlock*** was in a patrol car out front of the residence, "a distance from the home." (pg. 179.) For purposes of this rule, he was deemed to be "absent."

See also ***People v. Haskett*** (1982) 30 Cal.3rd 841, 855-857; with defendant outside in a police car, objecting, but his wife, in the residence, saying okay, the entry was held to be lawful.

Issue: When the objecting co-occupant is arrested and taken away from the scene:

The Ninth Circuit has ruled that when an objecting cotenant is taken to jail before the consenting cotenant shows up at the scene and gives his consent, the rule of ***Randolph*** still applies. It is not necessary, despite the specific language in ***Randolph*** to the contrary, that the objecting party be taken away "*for the purpose of*" avoiding the rule of ***Randolph***. (***United States v. Murphy*** (9th Cir. 2008) 516 F.3rd 1117, 1124-1125.)

The Ninth Circuit took it even a step further, setting out a new rule: "Once a co-tenant has registered his objection, his refusal to grant consent remains effective barring some objective manifestation that he has changed his position and no longer objects." (***Ibid***.)

> At least four other federal circuits and two state Supreme Courts disagree with ***Murphy*** on this issue. (See ***United States v. Hudspeth*** (8th Cir. 2008) 518 F.3rd 954; ***United States v. Henderson*** (7th Cir. 2008) 536 F.3rd 776; ***United States v. Shrader*** (4th Cir. Apr. 4, 2012) 675 F.3rd 300; ***United States v. Cooke*** (5th Cir. 2012) 674 F.3rd 491, 499; ***People v. Stimple*** (Colo. 2012) 267 P.3rd 1219, 1221-1226; ***State v. St. Martin*** (2011) 334 Wis.2nd 290, 306-310.)

The Supreme Court in the ***Randolph*** decision itself sets out an exception to its rule, such as when a potentially objecting cotenant is removed from the scene in order to avoid the ruling in ***Randolph***: "So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it." (pgs. 121-122.)

Subsequent to ***Murphy***, the Ninth Circuit decided ***United States v. Brown*** (9th Cir. 2009) 563 F.3rd 410, which reemphasized the rule that a cotenant must have been removed "*for the purpose of*" avoiding a possible objection, ruling that there must be some evidence that that was the purpose of the police in taking the defendant from the scene. It was also noted that there is no duty to ask the absent cotenant for consent. (***Id***., pp. 414-418.)

The United States Supreme Court shot down this theory altogether, noting that so long as it is "*objectively reasonable*" for officers to remove the objecting party from the premises (e.g. there was probable cause to arrest him), then officers may come back later and seek the consent for a warrantless entry from the remaining co-tenant. The now absent co-tenant's previous objection is no longer valid. The officers' *subjective motivations* for removing the objecting co-tenant are irrelevant

so long as the removal was objectively reasonable. (***Fernandez v. California*** (2014) 571 U.S. 292, 298-307 [134 S.Ct. 1126, 1132-1137; 188 L.Ed.2nd 25].)

At the Door: In discussing what the Supreme Court in ***Randolph*** meant when it specified that an objecting co-tenant must be "*at the door*," the Ninth Circuit determined that this term cannot be taken too literally. In discussing this issue, the Ninth Circuit reviewed the circumstances of ***Bailey v. United States*** (2013) 568 U.S. 186, 192-202 [133 S.Ct. 1031, 1037-1043; 185 L.Ed.2nd 19] (where the issue of whether defendant was "present" during the execution of a search warrant despite being contacted a mile away after having left the premise to be searched, holding that he was *not* in the "*immediate vicinity*" of the premises when detained, making the detention unlawful.) In the instant case, defendant (upon objecting to the search of his residence) was only about 20 feet away from his apartment, and within line-of-sight; close enough for the officers in the residence to hear his objections. This, the Court ruled, being within the "immediate vicinity" of his residence, was sufficient to trigger the rule of ***Randolph***. Per the Court: "(A) defendant need not stand at the doorway to count as being physically present—presence on the premises (including its immediate vicinity) is sufficient." (Citing ***Fernandez v. California*** (2014) 571 U.S. 292, at pg. 306 [134 S.Ct. 1126; 1132-1137; 188 L.Ed.2nd 25]; and ***Bailey v. United States***, *supra*, at p. 201.) (***United States v. Parkins*** (9th Cir. Feb. 14, 2024) 92 F.4th 882, __ [2024 U.S.App. LEXIS 3427].)

Necessity of an "*Explicit Objection*:"

"A defendant's objection (to a consent search of one's residence) must be express. '[I]mplicit refusals' are insufficient. (***United States v. Parkins*** (9th Cir. Feb. 14, 2024) 92 F.4th 882, __ [2024 U.S.App. LEXIS 3427]; quoting ***United States v. Moore*** (9th Cir. 2014) 770 F.3rd 809, 813.)

Defendant's statement: "Don't let the cops in," which all the officers heard, was held to be sufficiently clear to convey his objection to allowing the police to enter his apartment. (***Parkins***, at p. __.)

The fact that defendant never specifically told the officers that he did not want them in his apartment was held to be irrelevant. (***Id***., at p. __.)

The Court noted also that "both words and actions can constitute an express refusal to grant the police entry." (***Ibid***.; citing ***Bonivert v. City of Clarkston*** (9th Cir. 2018) 883 F.3rd 865, 875.)

In ***Bonivert***, the defendant first "locked the side door" and then "attempted to close the back door" on the officers as they tried to gain entry to his home.

See also ***United States v. Williams*** (8th Cir. 2008) 521 F.3rd 902, 907; where defendant "slammed the door and put the dead bolt on."

Other Limitations:

The Supreme Court in ***Randolph*** specifically held that an officer has *no* duty to seek out other cotenants to see if anyone objects. An objecting co-tenant must be at the scene to object. (***Id***., at p. 122.)

The rule of ***Randolph*** does not govern when a minor objects to the search of his room but is overruled by his mother. ***Randolph*** applies only to disagreements between joint *adult* occupants having apparently equal authority over a residence. (***In re D.C.*** (2010) 188 Cal.App.4th 978, 988-989.)

The fact that the defendant was not given the opportunity to object is irrelevant, at least "(s)o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection. (***People v. Byers*** (2016) 6 Cal.App.5th 856, 867.)

Knock and Notice:

"When the police obtain consent from a co-occupant who is off the premises, they must comply with the knock-and-

announce rule." ***People v. Byers*** (2016) 6 Cal.App.5th 856, 862-864.)

However, "when a search is conducted pursuant to an absent co-tenant's consent, the purposes of the knock-notice requirement (Citation) do not include preventing law enforcement from seeing or seizing evidence pursuant to the consent exception," finding the failure to comply with knock and notice to be harmless error. (***Id.***, at p. 864.)

Additional Case Law:

In a civil lawsuit, it was held that the consent exception to the warrant requirement did not justify the officers' entry into plaintiff's home because even though the officers secured his girlfriend's consent (she being outside, in front of the house), plaintiff was physically present inside and expressly refused to permit them to enter on two different occasions. The officers were not entitled to qualified immunity under the consent exception to the **Fourth Amendment** because a reasonable officer would have understood that "no" meant "no." (***Bonivert v. City of Clarkston*** (9th Cir. 2018) 883 F.3rd 865, 874-876.)

> A refusal to allow officers to enter need not be expressed verbally. Refusing to open the door, or even talk to officers, reflects one's objection to entry just as clearly as if the occupant had verbally denied consent. (***Id.***, at p. 875.)
>
> But see ***United States v. Moore*** (9th Cir. 2014) 770 F.3rd 809, below.

When a cotenant who is absent from the scene consents to a law enforcement entry into a residence, but another cotenant who is present at the scene objects, an entry is unlawful. (***Tompkins v. Superior Court*** (1959) 59 Cal.2nd 65; a pre-***Randolph*** case.)

> But note, should the present cotenant fail to object, consent from the absent cotenant allows the entry. (***People v. Viega*** (1989) 214 Cal.App.3rd 817.)

And also note ***United States v. Rith*** (10th Cir. 1999) 164 F.3rd 1323, where the absent parents' permission to enter

the house took precedence over the present 18-year-old son's objection to the officers' entry.

With roommates, the consenting co-occupant may only consent to entry of his personal room and any common areas. He may not give a valid consent to another co-tenant's private room. (***People v. Boyer*** (1989) 48 Cal.3rd 247, 276; ***United States v. Davis*** (9th Cir. 2003) 332 F.3rd 1163.)

When the estranged wife retains property within the residence, remains liable for rent, civil liability for accidents, etc., and has not established a permanent residence elsewhere, she still has the apparent authority to allow police into her residence where the husband still lives. (***People v. Bishop*** (1996) 44 Cal.App.4th 220.)

> The fact that the husband had changed the locks is only indicative of the level of antagonism, and is not a limitation of the wife's authority to allow the police to enter and search. (***Ibid***.)

Randolph was not violated when officers searched defendant's residence after obtaining his cotenant fiancée's consent to search their joint residence. Defendant, who was inside but refusing to answer the door or phone calls made to him, never expressly refused to consent to the entry and search, acquiescing in letting his fiancée deal with the police. At best, defendant "*implicitly*" refused to allow the police to enter and search by not answering the door or his cellphone. The Court declined to extend ***Randolph*** to include implied refusals. (***United States v. Moore*** (9th Cir. 2014) 770 F.3rd 809, 813-814.)

> But see ***Bonivert v. City of Clarkston*** (9th Cir. 2018) 883 F.3rd 865, 874-876, above, noting at fn. 9 that in ***Moore***, the defendant's refusal to talk to police was at best "*implicit*," as opposed to "*express*," and insufficient under ***Randolph*** to prevent the police from entering the residence.
> Also, it was held in ***Moore*** that there was nothing in ***Randolph*** to prevent the officers from using a battering ram to gain access when the fiancée, who was locked out, expressly consented to the use of such a method to gain entry. (***United States v. Moore***, *supra*, at p. 814.)

See ***United States v. Williams*** (8th Cir. 2008) 521 F.3rd 902, 907, where it was held that by the defendant slamming the door shut on the officers and closing the deadbolt door lock, there was sufficient "*affirmative conduct*" to qualify as an express refusal to consent to the officers' entry.
A warrantless entry into defendant's apartment was justified under the **Fourth Amendment** when officers received the voluntary consent of defendant's housemate. The consent was not coerced even though the housemate was handcuffed and in custody outside the apartment. The officer credibly testified that the housemate admitted to having drugs and a gun in his bedroom and that no threats or promises were made to obtain consent to search the bedroom to retrieve these items. The trial court abused its discretion by excluding evidence on whether the officers waited long enough to comply with the knock-notice requirement when they entered the apartment, but the error was harmless because exclusion of evidence, the only relief requested, was not the proper remedy. (***People v. Byers*** (2016) 6 Cal.App.5th 856, 862-865.)

A warrantless search of a residence based upon a probationer's (or parolee's) search and seizure conditions, when the probationer is a co-occupant of the residence, is lawful as a matter of law, even over the objection of another co-tenant (the probationer's mother who also lived there, in this case). The principles behind ***Georgia v. Randolph*** (2006) 547 U.S. 103 [126 S.Ct. 1515; 164 L.Ed.2nd 208], ***Randolph*** being a consensual search issue unrelated to a **Fourth** waiver search, are inapplicable. (***Smith v. City of Santa Clara*** (9th Cir. 2017) 876 F.3rd 987, 991-995; rejecting defendant's argument that ***Randolph*** created an exception to the probationary search rule.)

Also see ***United States v. McKerrell*** (10th Cir. 2007) 491 F.3rd 1221, where the police had outstanding warrants to arrest McKerrell. When they showed up to do so, McKerrell barricaded himself in the house, which the court concluded "related solely to his desire to avoid arrest." After McKerrell peacefully surrendered, his wife gave consent to search the house. The factual findings, warrants, peaceful surrender, and timing of the wife's consent place this case beyond the teachings of ***Randolph*** or ***Bonivert's*** situation.

Once officers are lawfully in a residence with a co-tenant's consent, the fact that the defendant belatedly objects to the officers' presence in his house does not negate the earlier lawfully obtained consent from the cotenant. (***United States v. Coleman*** (8th Cir. AR 2018) 909 F.3rd 925.)

***Evidence of a Defendant's Refusal to Consent to a Warrantless Search*:**

"Presenting evidence of an individual's exercise of a right to refuse to consent to entry in order to demonstrate a consciousness of guilt merely serves to punish the exercise of the right to insist upon a warrant." (***People v. Keener*** (1983) 148 Cal.App.3rd 73, 79.)

It is improper for a prosecutor to introduce evidence of, or comment to a jury about, a defendant's refusal to consent to a warrantless search of his property. (***People v. Wood*** (2002) 103 Cal.App.4th 803.)

***Sanctions for Violations*:** If the consent is held to be involuntary, then all the direct products of that "consent" will be suppressed under the "*fruit of the poisonous tree*" doctrine. (See cases cited above.)

If an otherwise voluntary consent is the direct product of some other illegal police act (e.g.; illegal arrest, detention, etc.), then the consent and the resulting direct products of the consent may also be suppressed. (***People v. Valenzuela*** (1994) 28 Cal.App.4th 817, 833.)

A consent to search that is the product of an illegal detention is also subject to suppression, as are the products of that search. (***People v. Krohn*** (2007) 149 Cal.App.4th 1294.)

Handcuffing a person suspected of possible involvement in a narcotics transaction, but where the officer testified only that he was "uncomfortable" with the fact that defendant was tall (6' 6") and that narcotics suspects sometimes carry weapons (although the officer did not pat him down for weapons), converted a detention into an arrest, making the subsequent consent to search involuntary. (***People v. Stier*** (2008) 168 Cal.App.4th 21.)

See "*Product of a Constitutional Violation*," above.