TMS

PETALUMA POLICE DEPARTMENT
IN SERVICE TRAINING

EMPLOYEES

NAME	ID#	NAME	ID#	NAME	ID#	NAME	ID#

TRAINING SUMMARY

DATE OF TRAINING	LENGTH OF TRAINING	LOCATION
4-25-19	20 MINUTES	PETALUMA PD

TYPE OF TRAINING
BRIEFING TRAINING

BRIEF DESCRIPTION OF TRAINING:

CASE LAW PRESENTATION RE: ARREST / DETENTIONS / CONSENSUAL ENCOUNTERS

ATTACHMENTS
REFERENCE MATERIAL

SUPERVISORY REVIEW

TRAINER	ID#	SUPERVISOR	ID#
RYAN SCHRKE	3300	[signature]	1770
LIEUTENANT	ID#	DATE	
[signature]			

TRAINING RECORD UPDATE

DATA ENTRY	DATE	TRAINING RECORD

Arrests

"An arrest is distinguished by the involuntary, highly intrusive nature of the encounter."[1]

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

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

(1) GROUNDS FOR ARREST: Grounds for an arrest means having probable cause.

(2) MANNER OF ARREST: The requirements pertaining to the arrest procedure include giving notice, the use of deadly and non-deadly force, the issuance and execution of arrest warrants, restrictions on warrantless misdemeanor arrests, searches incident to arrest, and entries of homes to arrest an occupant.

(3) POST-ARREST PROCEDURE: In this category are such things as booking, phone calls, attorney visits, disposition of arrestees, probable cause hearings, arraignment, and even "perp walks."

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

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

Probable Cause

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

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[1] *Cortez* v. *McCauley* (10th Cir. 2007) 478 F.3d 1108, 1115.
[2] *California* v. *Hodari D.* (1991) 499 U.S. 621, 624.
[3] *Brinegar* v. *United States* (1949) 338 U.S. 160, 176.
[4] See *Virginia* v. *Moore* (2008) __ U.S. __ [2008 WL 1805745] ["Arrest ensures that a suspect appears to answer charges and does not continue a crime"]; *Terry* v. *Ohio* (1968) 392 U.S. 1, 16 ["[I]n traditional terminology," arrests are "seizures of the person which eventuate in a trip to the station house and prosecution for crime"].
[5] See *California* v. *Hodari* (1991) 499 U.S. 621, 626; Pen. Code §§ 841, 835.
[6] See *Dunaway* v. *New York* (1979) 442 U.S. 200, 212 ["the detention of petitioner was in important respects indistinguishable from a traditional arrest"]; *People* v. *Campbell* (1981) 118 Cal.App.3d 588, 597.
[7] See *People* v. *Hubbard* (1970) 9 Cal.App.3d 827, 833 ["[T]he violator is, during the period immediately preceding his execution of the promise to appear, under arrest."]; *U.S.* v. *$404,905* (8th Cir. 1999) 182 F.3d 643, 648 ["A traffic stop is not investigative; it is a form of arrest, based upon probable cause"].
[8] See *Berkemer* v. *McCarty* (1984) 468 U.S. 420, 439, fn.29.
[9] See *People* v. *McKay* (2002) 27 Cal.4th 601, 613-14 ["[N]early every circuit to address the issue [has] held that, once the officer has probable cause to believe a violation of law has occurred, the constitutionality of the arrest does not depend upon compliance with state procedures that are not themselves compelled by the Constitution."].

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

DEFINED: Probable cause to arrest exists if there was a "fair probability" or "substantial chance" that the suspect committed a crime.[10]

WHAT PROBABILITY IS REQUIRED: Probable cause requires neither a preponderance of the evidence, nor "any showing that such belief be correct or more likely true than false."[11] Consequently, it requires something less than a 51% chance.[12]

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

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

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

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

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

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

[10] See *Illinois* v. *Gates* (1983) 462 U.S. 213, 244; *U.S.* v. *Brooks* (9th Cir. 2004) 367 F3 1128, 1133-34.
[11] *Texas* v. *Brown* (1983) 460 U.S. 730, 742.
[12] See *People* v. *Alcorn* (1993) 15 Cal.App.4th 652, 655 [there was probable cause when only a 50% chance existed]; *People* v. *Tuadles* (1992) 7 Cal.App.4th 1777, 1783 ["requires less than a preponderance of the evidence"].
[13] See *Henry* v. *United States* (1959) 361 U.S. 98, 101 ["Arrest on mere suspicion collides violently with the basic human right of liberty."]; *People* v. *Gonzalez* (1998) 64 Cal.App.4th 432, 439 ["Arrests made without probable cause in the hope that something might turn up are unlawful."].
[14] *Gerstein* v. *Pugh* (1975) 420 U.S. 103, 120, fn.21.
[15] See *People* v. *White* (2003) 107 Cal.App.4th 636, 641 ["[A]n officer's reliance on the wrong statute does not render his actions unlawful if there is a right statute that applies to the defendant's conduct."]; *U.S.* v. *Turner* (10th Cir. 2009) __F.3d__ [2009 WL 161737] ["[T]he probable cause inquiry . . . requires merely that officers had reason to believe that a crime—any crime—occurred."].
[16] See *People* v. *Teresinski* (1982) 30 Cal.3d 822, 831.
[17] *BeVier* v. *Hucal* (7th Cir. 1986) 806 F.2d 123, 128.
[18] (2007) 147 Cal.App.4th 1033.

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

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

Warrantless Arrests

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

Arrests for felonies and "wobblers"

If the suspect was arrested for a felony, the only requirement under the Fourth Amendment and California law is that they have probable cause.[23] That's also true if the crime was a "wobbler," meaning a crime that could have been prosecuted as a felony or misdemeanor.[24] Accordingly, if the crime was a felony or wobbler, officers may make the arrest at any time of the day or night,[25] and it is immaterial that the crime did not occur in their presence.[26]

Arrests for misdemeanors

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

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

(1) IN THE PRESENCE: The crime was committed in the officers' presence. (See the "in the presence rule," below.)

(2) DOMESTIC VIOLENCE: The crime was a domestic assault or battery.

(3) CITIZEN'S ARREST: The arrest was made by a citizen.

(4) PUBLIC PLACE: The suspect was arrested in a public place.[27]

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

[19] (10th Cir. 2007) 478 F.3d 1108.
[20] See *Wong Sun* v. *United States* (1963) 371 U.S. 471, 481-82 ["The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police"].
[21] *Gerstein* v. *Pugh* (1975) 420 U.S. 103, 113.
[22] See *United States* v. *Watson* (1976) 423 U.S. 411, 423; *U.S.* v. *Bueno-Vargas* (9th Cir. 2004) 383 F.3d 1104, 1107, fn.4.
[23] See *Carroll* v. *United States* (1925) 267 U.S. 132 156; Pen. Code § 836(a)(3).
[24] See *People* v. *Stanfill* (1999) 76 Cal.App.4th 1137, 1144.
[25] See Pen. Code § 840 ["An arrest for the commission of a felony may be made on any day and at any time of the day or night."].
[26] See Pen. Code § 836(a)(2).
[27] See Pen. Code §§ 836(1); 840; *People* v. *Graves* (1968) 263 Cal.App.2d 719, 730.
[28] See *United States* v. *Santana* (1976) 427 U.S. 38, 42.
[29] See *Lorenzana* v. *Superior Court* (1973) 9 Cal.3d 626, 629
[30] See *United States* v. *Santana* (1976) 427 U.S. 38, 42.

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

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

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

The question arises: Is a crime committed in the officers' presence if they watched a video of the suspect committing it at an earlier time? It appears the answer is no.[40] What if officers watched it live on a television or computer monitor? While there is no direct authority, it would appear that the crime would be occurring in their presence because there does not seem to be a significant difference between watching a crime-in-progress on a computer screen and watching it through a telescope.

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

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

Similarly, in a shoplifting case, *People* v. *Lee*,[44] an officer in an apparel store saw Lee walk into the

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[31] See Pen. Code § 836(a)(1); *People* v. *Johnson* (1981) 123 Cal.App.3d 495, 499.
[32] *People* v. *Bradley* (1957) 152 Cal.App.2d 527, 532.
[33] See Penal Code § 853.6(h) [notice to appear is authorized only if the suspect is "arrested"]
[34] *United States* v. *Watson* (1976) 423 U.S. 411, 418.
[35] See *Barry* v. *Fowler* (9th Cir. 1990) 902 F.2d 770, 772; *Woods* v. *City of Chicago* (7th Cir. 2001) 234 F.3d 979 995; *U.S.* v. *McNeill* (4th Cir. 2007) 484 F.3d 301, 311. **NOTE:** The United States Supreme Court has not ruled on the issue. See *Atwater* v. *City of Lago Vista* (2001) 532 U.S. 318, 340, fn11.
[36] Pen. Code § 836(a)(1).
[37] See *People* v. *McKay* (2002) 27 Cal.4th 601, 608.
[38] See *Royton* v. *Battin* (1942) 55 Cal.App.2d 861, 866 [officer observed fish and game code violations by means of telescope].
[39] See *People* v. *Cahill* (1958) 163 Cal.App.2d 15, 19 [officer overheard solicitation of prostitution]; *In re Alonzo C.* (1978) 87 Cal.App.3d 707, 712 ["The test is whether the misdemeanor is apparent to the officer's senses."].
[40] See *Forgie-Buccioni* v. *Hannaford Brothers, Inc.* (1st Cir. 2005) 413 F.3d 175, 180 ["Although Officer Tompkins watched a partial videotape of Plaintiff allegedly shoplifting, neither Officer Tompkins nor any other police officer *observed* Plaintiff shoplifting."].
[41] See *In re Alonzo C.* (1978) 87 Cal.App.3d 707, 712 ["The term 'in his presence' is liberally construed."].
[42] *In re Alonzo C.* (1978) 87 Cal.App.3d 707, 713.
[43] (1957) 148 Cal.App.2d 855. ALSO SEE *People* v. *Bradley* (1957) 152 Cal.App.2d 527 [bookmaking].
[44] (1984) 157 Cal.App.3d Supp. 9.

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

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

ASSAULT AT SCHOOL: Assault or battery on school property when school activities were occurring.[45]

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

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

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

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

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

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

DUI *PLUS*: Even though officers did not see the suspect driving a vehicle, they may arrest him for DUI if, (1) based on circumstantial evidence, they had probable cause to believe he had been driving while under the influence; and (2) they had probable cause to believe that one or more of the following circumstances existed:

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

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

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

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

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

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

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

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

Warrant Arrests

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

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

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

The basics

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

Warrants are court orders: An arrest warrant is a court order directing officers to arrest a certain person if and when they locate him.[52] Like a search warrant, an arrest warrant "is not an invitation that officers can choose to accept, or reject, or ignore, as they wish, or think, they should."[53]

When a warrant terminates: An arrest warrant remains valid until it is executed or recalled.[54]

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

Investigating the arrestee's identity: An arrest will ordinarily be upheld if the name of the arrestee and the name of the person listed on the warrant

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[49] *Gerstein* v. *Pugh* (1975) 420 U.S. 103, 113.

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

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

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

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

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

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

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

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

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

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

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

The question has arisen on occasion: If officers are inside a person's home after 10 P.M. because, for instance, they are taking a crime report, can they arrest an occupant if they should learn that he is wanted on a misdemeanor warrant that is not endorsed for night service? Although there is no case law directly on point, the California Court of Appeal has pointed out that the purpose of the time limit on misdemeanor arrests "is the protection of an individual's right to the security and privacy of his home, particularly during night hours and the avoidance of the danger of violent confrontations inherent in unannounced intrusion at night."[63] It is at least arguable that none of these concerns would be implicated if officers had been invited in. But, again, the issue has not been decided.

Conventional arrest warrants

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

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

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

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

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

[61] See Pen. Code § 840; *People* v. *Schmel* (1975) 54 Cal.App.3d 46, 51.

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

[63] *People* v. *Whitted* (1976) 60 Cal.App.3d 569, 572.

[64] See Pen. Code §§ 806, 813(a).

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

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

MISDEMEANOR WARRANTS: Warrants may be issued for misdemeanors, as well as felonies.[67]

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

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

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

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

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

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[66] *In re Walters* (1975) 15 Cal.3d 738, 748.

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

[68] See Pen. Code § 815.

[69] See Pen. Code § 815a.

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

[71] (1967) 255 Cal.App.2d 137, 142.

[72] (7th Cir. 1981) 664 F.2d 639, 647.

[73] (3d Cir. 1983) 703 F.2d 745, 748.

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

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

[76] (E.D. Pa. 1984) 596 F.Supp. 86, 90.

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

Ramey warrants

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

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

(1) **Prepare declaration**: Officers must prepare a "Declaration of Probable Cause" setting forth the facts upon which probable cause is based.

(2) **Prepare *Ramey* warrant**: Officers will also complete the *Ramey* warrant which must contain the following: the arrestee's name, the name of the court, name of the city or county in which the warrant was issued, a direction to peace officers to bring the arrestee before a judge, the signature and title of issuing judge, the time the warrant was issued, and the amount of bail (if any).[80] See page 11 for a sample *Ramey* warrant.

(3) **Submit to judge**: Officers submit the declaration and warrant to a judge. This can be done in person, by fax, or by email.[81]

Other arrest warrants

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

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

INDICTMENT WARRANT: An indictment warrant is issued by a judge on grounds that the suspect had been indicted by a grand jury.[82]

PAROLE VIOLATION WARRANT: Issued by the parole authority when there is probable cause to believe that a parolee violated the terms of release.[83]

PROBATION VIOLATION WARRANT: Issued by a judge based on probable cause to believe that a probationer violated the terms of probation.[84]

BENCH WARRANT: Issued by a judge when a defendant fails to appear in court.[85]

WITNESS FTA WARRANT: Issued by a judge for the arrest of a witness who has failed to appear in court after being ordered to do so.[86]

Arrest Formalities

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

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

[78] Pen. Code § 817.
[79] See Pen. Code §§ 817(a)(2), 840.
[80] See Pen. Code §§ 815, 815a, 816; *People* v. *McCraw* (1990) 226 Cal.App.3d 346, 349.
[81] See Pen. Code § 817(c). **NOTE**: For information on the procedure for obtaining a warrant by fax or email, see the chapter on arrest warrants in *California Criminal Investigation*.
[82] See Pen. Code § 945.
[83] See Pen. Code § 3060.
[84] See Pen. Code § 1203.2.
[85] See Pen. Code §§ 978.5; 813(c); 853.8; 983; *Allison* v. *County of Ventura* (1977) 68 Cal.App.3d 689, 701-2
[86] See Code of Civil Procedure § 1993.
[87] See Pen. Code § 841.
[88] See *People* v. *Sjosten* (1968) 262 Cal.App.2d 539, 545; *Lowry* v. *Standard Oil Co.* (1942) 54 Cal.App.2d 782, 791.

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

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

SPECIFY CRIME: If the suspect wants to know what crime he is being arrested for, officers must tell him.[93] (As noted earlier, it is immaterial that officers specified the "wrong" crime.)

Searches Incident to Arrest

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

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

Requirements

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

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

Scope of search

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

ARRESTEE'S CLOTHING: Officers may conduct a "full search" of the arrestee.[96] Although the term "full search" is vague, the courts have ruled that it permits a more intensive search than a pat down; and that it entails a "relatively extensive exploration" of the arrestee, including his pockets.[97]

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

[89] See *People* v. *Vasquez* (1967) 256 Cal.App.2d 342
[90] See *People* v. *Kelley* (1969) 3 Cal.App.3d 146, 151.
[91] Pen. Code § 841.
[92] See *People* v. *Logue* (1973) 35 Cal.App.3d 1, 5 ["A police officer's uniform is sufficient indicia of authority to make the arrest."].
[93] Pen. Code § 841. **NOTE**: Specifying the crime is not required under the Fourth Amendment, but it is considered "good police practice." See *Devenpeck* v. *Alford* (2004) 543 U.S. 146, 155 ["While it is assuredly good police practice to inform a person of the reason for his arrest at the time he is taken into custody, we have never held that to be constitutionally required."].
[94] *United States* v. *Robinson* (1973) 414 U.S. 218, 235.
[95] See *United States* v. *Robinson* (1973) 414 U.S. 218, 234-35 ["It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station."]; *Gustafson* v. *Florida* (1973) 414 U.S. 260, 265.
[96] *United States* v. *Robinson* (1973) 414 U.S. 218, 235.
[97] *United States* v. *Robinson* (1973) 414 U.S. 218, 227.
[98] See *United States* v. *Robinson* (1973) 414 U.S. 218, 236 ["While thorough, the search partook of none of the extreme or patently abusive characteristics which were held to violate the Due Process Clause"].

Insert Ramey and Steagald Warrants

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

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

CELL PHONES: This is currently a hot topic: Can officers search the arrestee's cell phone for evidence pertaining to the crime for which he was arrested?[103] At least two federal circuit courts have upheld such searches in published opinions,[104] while some district courts have ruled otherwise.[105] Stay tuned.

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

ITEMS TO GO WITH ARRESTEE: If the arrestee wants to take an item with him, and if officers permit it, they may search the item.[107]

VEHICLES: Officers may search the passenger compartment of a vehicle in which the arrestee was an occupant.[108]

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

Use of Force

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

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[99] **NOTE:** While more intrusive searches based on reasonable suspicion are permitted at jail before the arrestee is admitted into the general population (see Pen. Code § 4030(f)), we doubt that anything less than probable cause would justify such a search in the field.
[100] See *Illinois* v. *Lafayette* (1983) 462 U.S. 640, 645 ["[T]he interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street"].
[101] See *United States* v. *Robinson* (1973) 414 U.S. 218, 223; *In re Humberto O.* (2000) 80 Cal.App.4th 237, 243.
[102] See *Chimel* v. *California* (1969) 395 U.S. 752, 763.
[103] See *U.S.* v. *Skinner* (E.D. Tenn. 2007) 2007 WL 1556596] ["To say that case law is substantially undeveloped as to what rights are accorded a cell phone's user, particularly in these circumstances, would be an understatement."].
[104] See *U.S.* v. *Finley* (5th Cir. 2007) 477 F.3d 250, 260; *U.S.* v. *Murphy* (4th Cir. 2009) __ F.3d __ [2009 WL 94268].
[105] See, for example, *U.S.* v. *Park* (N.D. Cal. 2007) 2007 WL 1521573; *U.S.* v. *Wall* (S.D. Fla. 2008) [2008 WL 5381412]. ALSO SEE *U.S.* v. *Zavala* (5th Cir. 2008) 541 F.3d 562 [search of cell phone unlawful because officers did not have probable cause to arrest].
[106] See *U.S.* v. *Ortiz* (7th Cir. 1996) 84 F.3d 977, 984 ["[I] is imperative that law enforcement officers have the authority to immediately 'search' or retrieve, incident to a valid arrest, information from a pager in order to prevent its destruction as evidence."]; *U.S.* v. *Reyes* (S.D. N.Y. 1996) 922 F.Supp. 818, 833 ["[T]he search of the memory of Pager #1 was a valid search incident to Reyes' arrest."]; *U.S.* v. *Chan* (N.D. Cal. 1993) 830 F.Supp. 531, 536 ["The search conducted by activating the pager's memory is therefore valid."].
[107] See *People* v. *Topp* (1974) 40 Cal.App.3d 372, 378; *U.S.* v. *Garcia* (9th Cir. 2000) 205 F.3d 1182.
[108] See *New York* v. *Belton* (1981) 453 U.S. 454.
[109] See *Chimel* v. *California* (1969) 395 U.S. 752, 763.
[110] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 334.
[111] See *Graham* v. *Connor* (1989) 490 U.S. 386, 396 ["[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."]; Pen. Code § 835a [the officer "need not retreat or desist from his efforts by reason of the resistance or threatened resistance"].
[112] *Lee* v. *Ferraro* (11th Cir. 2002) 284 F.3d 1188, 1200.
[113] See *Saucier* v. *Katz* (2001) 533 U.S. 194, 202; *Graham* v. *Connor* (1989) 490 U.S. 386, 395.
[114] *Tatum* v. *City and County of San Francisco* (9th Cir. 2006) 441 F.3d 1090, 1095.

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

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

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

Because the reasonableness of any use of force will ultimately depend on the severity or "quantum" of the force utilized by officers, the courts usually begin their analysis by determining whether the force was deadly, non-deadly, or insignificant.[120]

Non-deadly force

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

> Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.[123]

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

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[115] *Scott* v. *Harris* (2007) 550 U.S. 372, __.

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

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

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

[119] (9th Cir. 1994) 25 F.3d 804, 807.

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

[121] See *Smith* v. *City of Hemet* (9th Cir. 2005) 394 F.3d 689, 705.

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

[123] (1989) 490 U.S. 386, 396.

[124] *Drummond* v. *City of Anaheim* (9th Cir. 2003) 343 F.3d 1052, 1057.

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

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

Although force is seldom necessary if the arrestee was not presently resisting, there may be a need for it if the suspect had been actively resisting and, although he was not combative at the moment, he was not yet under the control of the arresting officers. This is especially true if there was probable cause to arrest him for a serious felony.[130] For example, in ruling that officers did not use excessive force in pulling a bank robbery suspect from his getaway car, the court in *Johnson* v. *County of Los Angeles* noted that, even though the suspect was not "actively resisting arrest," it is "very difficult to imagine that any police officer facing a moving, armed bank robbery suspect would have acted any differently—at least not without taking the very real risk of getting himself or others killed. The need to quickly restrain Johnson by removing him from the car and handcuffing him was paramount."[131]

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

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

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

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

[127] *Arpin* v. *Santa Clara Valley Transportation Agency* (9th Cir. 2001) 261 F.3d 912, 921.

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

[129] (1st Cir. 2008) 547 F.3d 1, 10.

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

[131] (9th Cir. 2003) 340 F.3d 787, 793.

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

[133] (2007) 550 U.S. 372, __.

[134] (9th Cir. 2003) 340 F.3d 959, 965.

[135] See *Forrester* v. *City of San Diego* (9th Cir. 1994) 25 F.3d 804, 807 ["[T]he force consisted only of physical pressure administered on the demonstrators' limbs in increasing degrees, resulting in pain."].

[136] (11th Cir. 2002) 284 F.3d 1188, 1198.

example, utilizing a control hold,[137] pepper stray,[138] "hard pulling,"[138] or a trained police dog[140] will often be deemed reasonably necessary if officers were facing resistance that was moderate to severe.

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

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

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

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

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

[138] See *Smith* v. *City of Hemet* (9th Cir. 2005) 394 F.3d 689, 703-4; *McCormick* v. *City of Fort Lauderdale* (11th Cir. 2003) 333 F.3d 1234, 1245 ["Pepper spray is an especially noninvasive weapon and may be one very safe and effective method of handling a violent suspect who may cause further harm to himself or others."]; *Vinyard* v. *Wilson* (11th Cir. 2002) 311 F.3d 1340, 1348 ["[P]epper spray is a very reasonable alternative to escalating a physical struggle with an arrestee."]; *Gaddis* v. *Redford Township* (6th Cir. 2004) 364 F.3d 763, 775 ["[The officer] used an intermediate degree of nonlethal force to subdue a suspect who had previously attempted to evade arrest, was brandishing a knife, showed signs of intoxication or other impairment, and posed a clear risk of leaving the scene behind the wheel of a car."].

[139] *Johnson* v. *City of Los Angeles* (9th Cir. 2003) 340 F.3d 787, 793.

[140] See *Thompson* v. *County of Los Angeles* (2006) 142 Cal.App.4th 154, 167 [court notes that "the great weight of authority" holds that the "use of a trained police dog does not constitute deadly force"]; *People* v. *Rivera* (1992) 8 Cal.App.4th 1000, 1007 [officer testified that he hoped that by using the police dog to "search, bite and hold" a fleeing burglary suspect, he could "alleviate any shooting circumstance."]; *Kuha* v. *City of Minnetonka* (8th Cir. 2003) 365 F.3d 590, 597-98 ["No federal appeals court has held that a properly trained police dog is an instrument of deadly force, and several have expressly concluded otherwise." Citations omitted.]; *Quintanilla* v. *City of Downey* (9th Cir. 1996) 84 F.3d 353, 358 ["Moreover, the dog was trained to release on command, and it did in fact release Quintanilla on command."]; *Miller* v. *Clark County* (9th Cir. 2003) 340 F.3d 959, 963 ["[T]he risk of death from a police dog bite is remote. We reiterate that the possibility that a properly trained police dog could kill a suspect under aberrant circumstances does not convert otherwise nondeadly force into deadly force."].

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

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

[143] (W.D. Wash. 2007) 507 F.Supp.2d 1137, 1144.

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

[145] (11th Cir. 2004) 369 F.3d 1270.

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

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

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

Deadly force

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

Under the Fourth Amendment, the test for determining whether deadly force was justified is essentially the same as the test for non-deadly force. In both cases, the use of force is lawful if it was reasonable under the circumstances.[150] The obvious difference is that deadly force cannot be justified unless there was an especially urgent need for it. As the United States Supreme Court observed, "[N]otwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The intrusiveness of a seizure by means of deadly force is unmatched."[151]

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

(1) **RESISTING ARREST**: The arrestee must have been fleeing or otherwise actively resisting arrest.

(2) **THREAT TO OFFICERS OR OTHERS**: Officers must have had probable cause to believe that the arrestee posed a significant threat of death or serious physical injury to officers or others.[154]

(3) **WARNING**: Officers must, "where feasible," warn the arrestee that they are about to use deadly force.[155]

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

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146 (E.D. Cal. 2008) 551 F.Supp.2d 1149.
147 *Deorle* v. *Rutherford* (9th Cir. 2001) 272 F.3d 1272, 1282-3.
148 See *Vera Cruz* v. *City of Escondido* (9th Cir. 1997) 139 F.3d 659, 660.
149 *Smith* v. *City of Hemet* (9th Cir. 2005) 394 F.3d 689, 705 [emphasis added]. ALSO SEE *Thompson* v. *County of Los Angeles* (2006) 142 Cal.App.4th 154, 165.
150 See *Scott* v. *Harris* (2007) 550 U.S. 372, __ ["*Garner* was simply an application of the Fourth Amendment's 'reasonableness' test"].
151 *Tennessee* v. *Garner* (1985) 471 U.S. 1, 10.
152 *Scott* v. *Harris* (2007) 550 U.S. 372, __.
153 *Brosseau* v. *Haugen* (2004) 543 U.S. 194, 199.
154 See *Scott* v. *Harris* (2007) 550 U.S. 372, __, fn.9; *Munoz* v. *City of Union City* (2004) 120 Cal.App.4th 1077, 1103 ["An officer's use of deadly force is reasonable only if 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."]; *Smith* v. *City of Hemet* (9th Cir. 2005) 394 F.3d 689, 704 ["[A] police officer may not use deadly force unless it is necessary to prevent escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."].
155 See *Tennessee* v. *Garner* (1985) 471 U.S. 1, 11-12 ["some warning" must be given "where feasible"].
156 (1985) 471 US 1, 11.

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

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

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

Entering a home to arrest an occupant

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

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

[158] (2007) 550 U.S. 372, __, fn. 9.

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

[160] (4th Cir. 2005) 393 F.3d 471, 481.

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

Entering the suspect's home

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

(1) **WARRANT ISSUED**: A warrant for the suspect's arrest must have been outstanding. Either a conventional or *Ramey* warrant will suffice.[163]

(2) **ARRESTEE'S HOME**: Officers must have had "reason to believe" the suspect, (a) lived in the residence, and (b) was presently inside. Although most federal courts have ruled that the "reason to believe" standard is merely reasonable suspicion,[164] the Ninth Circuit ruled it means probable cause.[165] The California Supreme Court has not yet decided.[166]

Entering a third person's home

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

Other grounds for entering

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

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

(1) PROBABLE CAUSE TO ARREST: Officers must have had probable cause to arrest the suspect for a felony or misdemeanor.

(2) ATTEMPT TO ARREST OUTSIDE: Officers must have attempted to make the arrest outside the residence.

(3) SUSPECT FLEES INSIDE: The suspect must have tried to escape or otherwise prevent an immediate arrest by going inside the residence.[168]

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

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

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

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

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

[166] See *People* v. *Jacobs* (1987) 43 Cal.3d 472, 479, fn.4.

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

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

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

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

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

Post-Arrest Procedure

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

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

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

ATTORNEY VISITS: Officers must permit the arrestee to visit with an attorney if the arrestee or a relative requested it.[178]

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[169] See *People* v. *Manderscheid* (2002) 99 Cal.App.4th 355, 361-63; *People* v. *Amaya* (1979) 93 Cal.App.3d 424, 428 ["Thus, officers need not secure a warrant to enter a dwelling in fresh pursuit of a fleeing suspect believed to have committed a grave offense and who therefore may constitute a danger to others."].
[170] See *People* v. *Superior Court (Kenner)* (1977) 73 Cal.App.3d 65, 69 ["A person may willingly consent to admit police officers for the purpose of discussion, with the opportunity, thus suggested, of explaining away any suspicions, but not be willing to permit a warrantless and nonemergent entry that affords him no right of explanation or justification."]; *In re Johnny V.* (1978) 85 Cal.App.3d 120, 130 ["A consent for the purpose of *talking* with a suspect is *not* a consent to enter for the purpose of making an arrest"].
[171] See *People* v. *Evans* (1980) 108 Cal.App3d. 193, 196 ["[The officers] were inside with consent, with probable cause to arrest but with the intent to continue the investigation"]; *People* v. *Patterson* (1979) 94 Cal.App.3d 456, 463 ["There is nothing in the record to indicate that the police intended to arrest Patterson immediately following the entry or that they were not prepared to discuss the matter with Patterson first in order to permit her to explain away the basis of the officers' suspicions."]; *In re Reginald B.* (1977) 71 Cal.App.3d 398, 403 [arrest lawful when made after officers confirmed the suspect's identity].
[172] See *People* v. *Superior Court (Logue)* (1973) 35 Cal.App.3d 1, 6.
[173] See Pen. Code § 7.21. ALSO SEE Pen. Code § 13100 *et seq.* [criminal offender record information].
[174] See 4 Witkin, *California Criminal Law* (3rd edition 2000), p. 258 ["[T]here is little statutory or case law coverage of the police practices of . . . booking arrested persons."].
[175] See *Doe* v. *Sheriff of DuPage County* (7th Cir. 1997) 128 F.3d 586, 588 [one purpose of booking is to confirm the arrestee's identity]; 3 LaFave *Search and Seizure* (Fourth Edition) at p. 46 ["law enforcement agencies view booking as primarily a process for their own internal administration"].
[176] See *Doe* v. *Sheriff of DuPage County* (7th Cir. 1997) 128 F.3d 586, 588.
[177] See Pen. Code § 851.5.
[178] See Pen. Code § 825(b) ["After the arrest, any attorney at law entitled to practice in the courts of record of California, may, at the request of the prisoner or any relative of the prisoner, visit the prisoner."].

Insert Perp Walks

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

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

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

ARRAIGNMENT: After an arrestee has been charged with a crime by prosecutors (and thus becomes a "defendant"), he must be arraigned. An arraignment is usually a defendant's first court appearance during which, among other things, a defense attorney is appointed or makes an appearance; the defendant is served with a copy of the complaint and is advised of the charges against him; the defendant pleads to the charge or requests a continuance for that purpose; and the judge sets bail, denies bail, or releases the defendant on his own recognizance.

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

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

[179] See *In re Walters* (1975) 15 Cal.3d 738, 743.
[180] See *County of Riverside* v. *McLaughlin* (1991) 500 U.S. 44, 47.
[181] See *County of Riverside* v. *McLaughlin* (1991) 500 U.S. 44, 56; *Powell* v. *Nevada* (1994) 511 U.S. 79, 80 ["[*Riverside*] established that 'prompt' generally means within 48 hours of the warrantless arrest"].
[182] See *County of Riverside* v. *McLaughlin* (1991) 500 U.S. 44, 58; *Anderson* v. *Calderon* (9th Cir. 2000) 232 F.3d 1053, 1070 ["The *McLaughlin* Court made clear that intervening weekends or holidays would not qualify as extraordinary circumstances"].
[183] See *New York* v. *Harris* (1990) 495 U.S. 14, 18 ["Nothing in the reasoning of [*Payton* v. *New York*] suggests that an arrest in a home without a warrant but with probable cause somehow renders unlawful continued custody of the suspect once he is removed from the house."]; *People* v. *Watkins* (1994) 26 Cal.App.4th 19, 29 ["Where there is probable cause to arrest, the fact that police illegally enter a home to make a warrantless arrest neither invalidates the arrest itself nor requires suppression of any postarrest statements the defendant makes at the police station."]; Pen. Code § 836(a). **NOTE**: The United States Supreme Court indicated that even if a judge ordered the release of a suspect because of a post-arrest time limit violation, the suspect could be immediately rearrested if probable cause continued to exist. *New York* v. *Harris* (1990) 495 U.S. 14, 18.
[184] See *People* v. *Valenzuela* (1978) 86 Cal.App.3d 427, 431.
[185] Pen. Code § 825.
[186] See Pen. Code § 849(a); *Ng* v. *Superior Court* (1992) 4 Cal.4th 29, 38.
[187] *Ng* v. *Superior Court* (1992) 4 Cal.4th 29, 38; *People* v. *Gordon* (1978) 84 Cal.App.3d 913, 923; *O'Neal* v. *Superior Court* (1986) 185 Cal.App.3d 1086, 1090; *People* v. *Hughes* (2002) 27 Cal.4th 287, 326 [parole hold].
[188] See Pen. Code § 825(a)(2); *People* v. *Gordon* (1978) 84 Cal.App.3d 913, 922 ["Sunday was excludable"].
[189] See Pen. Code § 825(a)(2).
[190] See *People* v. *Gordon* (1978) 84 Cal.App.3d 913, 922.
[191] See Pen. Code § 825(a)(2).
[192] See *In re Walker* (1974) 10 Cal.3d 764, 778; *People* v. *Williams* (1977) 68 Cal.App.3d 36, 43.
[193] See *County of Riverside* v. *McLaughlin* (1991) 500 US 44, 54; *People* v. *Bonillas* (1989) 48 Cal.3d 757, 788.

Insert Disposition of Arrestees

Investigative Detentions

"It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." [1]

Of all the police field operations that deter and thwart crime, and result in the apprehension of criminals, the investigative detention is, by far, the most commonplace. After all, detentions occur at all hours of the day and night, and in virtually every imaginable public place, including streets and sidewalks, parks, parking lots, schools, shopping malls, and international airports. They take place in business districts and in "nice" neighborhoods, but mostly in areas that are blighted and beset by parolees, street gangs, drug traffickers, or derelicts.

The outcome of detentions will, of course, vary. Some result in arrests. Some provide investigators with useful—often vital—information. Some are fruitless. All are dangerous.

To help reduce the danger and to confirm or dispel their suspicions, officers may do a variety of things. For example, they may order the detainee to identify himself, stand or sit in a certain place, and state whether he is armed. Under certain circumstances, they may pat search the detainee or conduct a protective search of his car. If they think he just committed a crime that was witnessed by someone, they might conduct a field showup. To determine if he is wanted, they will usually run a warrant check. If they cannot develop probable cause, they will sometimes complete a field contact card for inclusion in a database or for referral to detectives.

But, for the most part, officers will try to confirm or dispel their suspicions by asking questions. "When circumstances demand immediate investigation by the police," said the Court of Appeal, "the most useful, most available tool for such investigation is general on-the-scene questioning."[2]

Because detentions are so useful to officers and beneficial to the community, it might seem odd that they did not exist—at least not technically—until 1968. That's when the Supreme Court ruled in the landmark case of *Terry* v. *Ohio*[3] that officers who lacked probable cause to arrest could detain a suspect temporarily if they had a lower level of proof known as "reasonable suspicion."[4]

In reality, however, law enforcement officers throughout the country had been stopping and questioning suspected criminals long before 1968. But *Terry* marks the point at which the Supreme Court ruled that this procedure was constitutional, and also set forth the rules under which detentions must be conducted.

What are those rules? We will cover them all in this article but, for now, it should be noted that they can be divided into two broad categories:

(1) **Grounds to detain**: Officers must have had sufficient grounds to detain the suspect; i.e., reasonable suspicion.

(2) **Procedure**: The procedures that officers utilized to confirm or dispel their suspicion and to protect themselves must have been objectively reasonable.

Taking note of these requirements, the Court in *Terry* pointed out that "our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[5]

One more thing before we begin: In addition to investigative detentions, there are two other types of temporary seizures. The first (and most common) is the traffic stop. Although traffic stops are technically "arrests" when (as is usually the case) the officer witnessed the violation and, therefore, had probable cause, traffic stops are subject to the same

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[1] *Terry* v. *Ohio* (1968) 392 U.S. 1, 16.
[2] *People* v. *Manis* (1969) 268 Cal.App.2d 653, 665.
[3] (1968) 392 U.S. 1.
[4] See *Florida* v. *Royer* (1983) 460 U.S. 491, 498 ["Prior to *Terry* v. *Ohio*, any restraint on the person amounting to a seizure for the purposes of the Fourth Amendment was invalid unless justified by probable cause."].
[5] *Terry* v. *Ohio* (1968) 392 U.S. 1, 19-20.

rules as investigative detentions.[6] The other type of detention is known as a "special needs detention" which is a temporary seizure that advances a community interest other than the investigation of a suspect or a suspicious circumstance. (We covered the subject of special needs detentions in the Winter 2003 edition in the article "Detaining Witnesses" which can be downloaded on Point of View Online (www.le.alcoda.org).

Reasonable Suspicion

While detentions constitute an important public service, they are also a "sensitive area of police activity"[7] that can be a "major source of friction" between officers and the public.[8] That is why law enforcement officers are permitted to detain people only if they were aware of circumstances that constituted reasonable suspicion. In the words of the United States Supreme Court, "An investigative stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity."[9]

Reasonable suspicion is similar to probable cause in that both terms designate a particular level of suspicion. They differ, however, in two respects. First, while probable cause requires a "fair probability" of criminal activity, reasonable suspicion requires something less, something that the Supreme Court recently described as a "moderate chance."[10] Or, to put it another way, reasonable suspicion "lies in an area between probable cause and a mere hunch."[11] Second, reasonable suspicion may be based on information that is not as reliable as the information needed to establish probable cause. Again quoting the Supreme Court:

> Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable.[12]

Although the circumstances that justify detentions are "bewilderingly diverse,"[13] reasonable suspicion ordinarily exists if officers can articulate one or more specific circumstances that reasonably indicate, based on common sense or the officers' training and experience, that "criminal activity is afoot and that the person to be stopped is engaged in that activity."[14] Thus, officers "must be able to articulate something more than an inchoate and unparticularized suspicion or hunch."[15]

This does not mean that officers must have direct evidence that connects the suspect to a specific crime. On the contrary, it is sufficient that the circumstances were merely *consistent* with criminal activity. In the words of the California Supreme Court, "[W]hen circumstances are consistent with criminal activity, they permit—even demand—an investigation."[16]

We covered the subject of reasonable suspicion in the 2008 article entitled "Probable Cause to Arrest" which can be downloaded on Point of View Online (www.le.alcoda.org).

Detention Procedure

In the remainder of this article, we will discuss the requirement that officers conduct their detentions in an objectively reasonable manner. As with many areas of the law, it will be helpful to start with the general principles.

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[6] See *People* v. *Hubbard* (1970) 9 Cal.App.3d 827, 833 ["[T]he violator is, during the period immediately preceding his execution of the promise to appear, under arrest."]; *People* v. *Hernandez* (2008) 45 Cal.4th 295, 299 [traffic stops "are treated as detentions"].
[7] *Terry* v. *Ohio* (1968) 392 U.S. 1, 9.
[8] *Terry* v. *Ohio* (1968) 392 U.S. 1, 14, fn.11.
[9] *United States* v. *Cortez* (1981) 449 U.S. 411, 417.
[10] See *Safford Unified School District* v. *Redding* (2009) __ U.S. __ [2009 WL 1789472] [Reasonable suspicion "could as readily be described as a moderate chance of finding evidence of wrongdoing."].
[11] *U.S.* v. *Fiasche* (7th Cir. 2008) 520 F.3d 694, 697.
[12] *Alabama* v. *White* (1990) 496 U.S. 325, 330. Edited.
[13] *People* v. *Manis* (1969) 268 Cal.App.2d 653, 659.
[14] *People* v. *Celis* (2004) 33 Cal.4th 667, 674. ALSO SEE *Terry* v. *Ohio* (1968) 392 U.S. 1, 21.
[15] *United States* v. *Sokolow* (1989) 490 U.S. 1, 7.
[16] *People* v. *Souza* (1994) 9 Cal.4th 224, 233.

General principles

The propriety of the officers' conduct throughout detentions depends on two things. First, they must have restricted their actions to those that are reasonably necessary to, (1) protect themselves, and (2) complete their investigation.[17] As the Fifth Circuit explained in *United States* v. *Campbell*, "In the course of [their] investigation, the officers had two goals: to investigate and to protect themselves during their investigation."[18]

Second, even if the investigation was properly focused, a detention will be invalidated if the officers did not pursue their objectives in a prudent manner. Thus, the Ninth Circuit pointed out that "the reasonableness of a detention depends not only on *if* it is made, but also on *how* it is carried out."[19]

Although officers are allowed a great deal of discretion in determining how best to protect themselves and conduct their investigation, the fact remains that detentions are classified as "seizures" under the Fourth Amendment, which means they are subject to the constitutional requirement of objective reasonableness.[20] For example, even if a showup was reasonably necessary, a detention may be deemed unlawful if the officers were not diligent in arranging for the witness to view the detainee. Similarly, even if there existed a legitimate need for additional officer-safety precautions, a detention may be struck down if the officers did not limit their actions to those that were reasonably necessary under the circumstances.

DE FACTO ARRESTS: A detention that does not satisfy one or both of these requirements may be invalidated in two ways. First, it will be deemed a de facto arrest if the safety precautions were excessive, if the detention was unduly prolonged, or if the detainee was unnecessarily transported from the scene. While de facto arrests are not unlawful per se, they will be upheld only if the officers had probable cause to arrest.[21] As the court noted in *United States* v. *Shabazz*, "A prolonged investigative detention may be tantamount to a *de facto* arrest, a more intrusive custodial state which must be based upon probable cause rather than mere reasonable suspicion."[22]

Unfortunately, the term "de facto arrest" may be misleading because it can be interpreted to mean that an arrest results whenever the officers' actions were more consistent with an arrest than a detention; e.g., handcuffing. But, as we will discuss later, arrest-like actions can result in a de facto arrest only if they were not reasonably necessary.[23]

In many cases, of course, the line between a detention and de facto arrest will be difficult to detect.[24] As the Seventh Circuit observed in *U.S.* v. *Tilmon*, "Subtle, and perhaps tenuous, distinctions exist between a *Terry* stop, a *Terry* stop rapidly evolving into an arrest, and a de facto arrest."[25] So, in "borderline" cases—meaning cases in which the detention "has one or two arrest-like features but otherwise is arguably consistent with a *Terry* stop"—the assessment "requires a fact-specific inquiry into

[17] *Florida* v. *Royer* (1983) 460 U.S. 491, 500; *People* v. *Gentry* (1992) 7 Cal.App.4th 1225, 1267.
[18] (5th Cir. 1999) 178 F.3d 345, 348-9
[19] *Meredith* v. *Erath* (9th Cir. 2003) 342 F.3d 1057, 1062.
[20] *People* v. *Soun* (1995) 34 Cal.App.4th 1499, 1515.
[21] See *People* v. *Gorrostieta* (1993) 19 Cal.App.4th 71, 83 ["When the detention exceeds the boundaries of a permissible investigative stop, the detention becomes a de facto arrest requiring probable cause."].
[22] (5th Cir. 1993) 993 F.2d 431, 436.
[23] See *People* v. *Harris* (1975) 15 Cal.3d 384, 390 ["A detention of an individual which is reasonable at its inception may exceed constitutional bounds when extended beyond what is *reasonably necessary* under the circumstances." Emphasis added.]; *Ganwich* v. *Knapp* (9th Cir. 2003) 319 F.3d 1115, 1125 ["The officers should have recognized that the manner in which they conducted the seizure was significantly more intrusive than was necessary"] *U.S.* v. *Acosta-Colon* (1st Cir. 1998) 157 F.3d 9, 17 ["This assessment requires a fact-specific inquiry into whether the measures used were reasonable in light of the circumstances that prompted the stop or that developed during its course."]. **NOTE:** In the past, the Supreme Court suggested that a detention may be deemed a de facto arrest regardless of whether the officers' actions were reasonably necessary. See, for example *Florida* v. *Royer* (1983) 460 U.S. 491, 499 (plurality decision) ["Nor may the police seek to verify their suspicions by means that approach the conditions of arrest."]. However, as we discuss later, even if officers handcuffed the suspect or detained him at gunpoint (both quintessential indications of an arrest), a de facto arrest will not result if the precaution was reasonably necessary.
[24] See *Florida* v. *Royer* (1983) 460 U.S. 491, 506 [no "litmus-paper test" . . . for determining when a seizure exceeds the bounds of an investigative stop"]; *People* v. *Celis* (2004) 33 Cal.4th 667, 674 ["The distinction between a detention and an arrest may in some instances create difficult line-drawing problems."].
[25] (7th Cir. 1994) 19 F.3d 1221, 1224.

whether the measures used were reasonable in light of the circumstances that prompted the stop or that developed during its course."[26]

Second, even if a detention did not resemble an arrest, it may be invalidated on grounds that the officers investigated matters for which reasonable suspicion did not exist; or if they did not promptly release the suspect when they realized that their suspicions were unfounded or that they would be unable to confirm them.

TOTALITY OF CIRCUMSTANCES: In determining whether the officers acted in a reasonable manner, the courts will consider the totality of circumstances, not just those that might warrant criticism.[27] Thus, the First Circuit pointed out, "A court inquiring into the validity of a *Terry* stop must use a wide lens."[28]

COMMON SENSE: Officers and judges are expected to evaluate the surrounding circumstances in light of common sense, not hypertechnical analysis. In the words of the United States Supreme Court, "Much as a 'bright line' rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria."[29]

TRAINING AND EXPERIENCE: A court may consider the officers' interpretation of the circumstances based on their training and experience if the interpretation was reasonable.[30] For example, the detainee's movements and speech will sometimes indicate to trained officers that he is about to fight or run.

NO "LEAST INTRUSIVE MEANS" REQUIREMENT: There are several appellate decisions on the books in which the courts said or implied that a detention will be invalidated if the officers failed to utilize the "least intrusive means" of conducting their investigation and protecting themselves. In no uncertain terms, however, the Supreme Court has ruled that the mere existence of a less intrusive alternative is immaterial. Instead, the issue is whether the officers were negligent in failing to recognize and implement it. As the Court explained in *U.S.* v. *Sharpe*, "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it."[31] The Court added that, in making this determination, judges must keep in mind that most detentions are "swiftly developing" and that judges "can almost always imagine some alternative means by which the objectives of the police might have been accomplished."

DEVELOPMENTS AFTER THE STOP: The courts understand that detentions are not static events, and that the reasonableness of the officers' actions often depends on what happened as things progressed, especially whether the officers reasonably became more or less suspicious, or more or less concerned for their safety.[32] For example, in *U.S.* v. *Sowers* the court noted the following:

> Based on unfolding events, the trooper's attention shifted away from the equipment violations that prompted the initial stop toward a belief that the detainees were engaged in more serious skullduggery. Such a shift in focus is neither unusual not impermissible.[33]

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[26] *U.S.* v. *Acosta-Colon* (1st Cir. 1998) 157 F.3d 9, 15.

[27] See *Gallegos* v. *City of Los Angeles* (9th Cir. 2002) 308 F.3d 987, 991 ["We look at the situation as a whole"].

[28] *U.S.* v. *Romain* (1st Cir. 2004) 393 F.3d 63, 71.

[29] *United States* v. *Sharpe* (1985) 470 U.S. 675, 685. ALSO SEE *U.S.* v. *Ruidiaz* (1st Cir. 2008) 529 F.3d 25, 29 ["the requisite objective analysis must be performed in real-world terms . . . a practical, commonsense determination"].

[30] See *U.S.* v. *Ellis* (6th Cir. 2007) 497 F.3d 606, 614 [the officer "was entitled to assess the circumstances and defendants in light of his experience as a police officer and his knowledge of drug courier activity"].

[31] (1985) 470 U.S. 675, 687. ALSO SEE *People* v. *Bell* (1996) 43 Cal.App.4th 754, 761, fn.1 ["The Supreme Court has since repudiated any 'least intrusive means' test for commencing or conducting an investigative stop. The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or pursue it."]; *Gallegos* v. *City of Los Angeles* (9th Cir. 2002) 308 F.3d 987, 992 ["The Fourth Amendment does not mandate one and only one way for police to confirm the identity of a suspect. It requires that the government and its agents act *reasonably*."].

[32] See *United States* v. *Place* (1983) 462 U.S. 696, 709, fn.10 [Court notes the officers may need "to graduate their responses to the demands of any particular situation"]; *U.S.* v. *Ruidiaz* (1st Cir. 2008) 529 F.3d 25, 29 [A detention "is not necessarily a snapshot of events frozen in time and place. Often, such a stop can entail an ongoing process."]; *U.S.* v. *Christian* (9th Cir. 2004) 356 F.3d 1103, 1106 ["police officers must be able to deal with the rapidly unfolding and often dangerous situations on city streets through an escalating set of flexible responses, graduated in relation to the amount of information they possess"].

[33] (1st Cir. 1998) 136 F.3d 24, 27.

Similarly, the Seventh Circuit said that "[o]fficers faced with a fluid situation are permitted to graduate their responses to the demands of the particular circumstances confronting them."[34] Or, in the words of the California Court of Appeal, "Levels of force and intrusion in an investigatory stop may be legitimately escalated to meet supervening events," and "[e]ven a complete restriction of liberty, if brief and not excessive under the circumstances, may constitute a valid *Terry* stop and not an arrest."[35]

Detentions based on reasonable suspicion *plus*: Before moving on, we should note that some courts have sought to avoid the problems that often result from the artificial distinction between lawful detentions and de facto arrests by simply permitting more intrusive actions when there is a corresponding increase in the level of suspicion. In one such case, *U.S.* v. *Tilmon,* the court explained:

> [We have] adopted a sliding scale approach to the problem. Thus, stops too intrusive to be justified by suspicion under *Terry*, but short of custodial arrest, are reasonable when the degree of suspicion is adequate in light of the degree and the duration of restraint.[36]

In another case, *Lopez Lopez* v. *Aran,* the First Circuit said that "where the stop and interrogation comprise more of an intrusion, and the government seeks to act on less than probable cause, a balancing test must be applied."[37]

Having discussed the basic principles that the courts apply in determining whether a detention was conducted in a reasonable manner, we will now look at how the courts have analyzed the various procedures that officers typically utilize in the course of investigative detentions.

Using force to detain

If a suspect refuses to comply with an order to stop, officers may of course use force to accomplish the detention. This is because the right to detain "is meaningless unless officers may, when necessary, *forcibly* detain a suspect."[39] Or, as the Ninth Circuit explained in *U.S.* v. *Thompson*:

> A police officer attempting to make an investigatory detention may properly display some force when it becomes apparent that an individual will not otherwise comply with his request to stop, and the use of such force does not transform a proper stop into an arrest.[40]

How much force is permitted? All that can really be said is that officers may use the amount that a "reasonably prudent" officer would have believed necessary under the circumstances.[38]

Note that in most cases in which force is reasonably necessary, the officers will have probable cause to arrest the detainee for resisting, delaying, or obstructing.[41] If so, it would be irrelevant that the detention had become a de facto arrest.

Officer-safety precautions

It is "too plain for argument," said the Supreme Court, that officer-safety concerns during detentions are "both legitimate and weighty."[42] This is largely because the officers are "particularly vulnerable" since "a full custodial arrest has not been effected, and the officer must make a quick decision as to how to protect himself and others from possible danger."[43]

Sometimes the danger is apparent, as when the detainee was suspected of having committed a felony, especially a violent felony or one in which the

[34] *U.S.* v. *Tilmon* (7th Cir. 1994) 19 F.3d 1221, 1226.
[35] *People* v. *Johnson* (1991) 231 Cal.App.3d 1, 13.
[36] (7th Cir. 1994) 19 F.3d 1221, 1226.
[37] (1st Cir. 1988) 844 F.2d 898, 905.
[38] See *Graham* v. *Connor* (1989) 490 U.S. 386, 396 ["[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."]; *Scott* v. *Harris* (2007) 550 U.S. 372; *People* v. *Brown* (1985) 169 Cal.App.3d 159, 167 ["A police officer may use reasonable force to make an investigatory stop."].
[39] *People* v. *Johnson* (1991) 231 Cal.App.3d 1, 12.
[40] (9th Cir. 1977) 558 F.2d 522, 524.
[41] See Penal Code § 148(a)(1); *People* v. *Johnson* (1991) 231 Cal.App.3d 1, 13, fn. 2 ["Given their right to forcibly detain, California precedent arguably would have allowed the officers to *arrest* for flight which unlawfully delayed the performance of their duties."]; *People* v. *Allen* (1980) 109 Cal.App.3d 981, 987 ["[Running and hiding] caused a delay in the performance of Officer Barton's duty."].
[42] *Pennsylvania* v. *Mimms* (1977) 434 U.S. 106, 110.
[43] *Michigan* v. *Long* (1983) 463 U.S. 1032, 1052.

perpetrators were armed.[44] Or it may be the detainee's conduct that indicates he presents a danger; e.g., he refuses to comply with an officer's order to keep his hands in sight, or he is extremely jittery, or he won't stop moving around.[45]

And then there are situations that are dangerous but the officers don't know *how* dangerous.[46] For example, they may be unaware that the detainee is wanted for a felony or that he possesses evidence that would send him to prison if it was discovered. Thus, in *Arizona* v. *Johnson,* a traffic stop case, the Supreme Court noted that the risk of a violent encounter "stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop."[47]

It is noteworthy that, in the past, it was sometimes argued that any officer-safety precaution was too closely associated with an arrest to be justified by anything less than probable cause. But, as the Seventh Circuit commented, that has changed, thanks to the swelling ranks of armed and violence-prone criminals:

> [W]e have over the years witnessed a multifaceted expansion of *Terry.* For better or for worse, the trend has led to permitting of the use of handcuffs, the placing of suspects in police cruisers, the drawing of weapons and other measures of force more traditionally associated with arrest than with investigatory detention.[48]

Thus, officers may now employ any officer-safety precautions that were reasonably necessary under the circumstances—with emphasis on the word "reasonably."[49] The Ninth Circuit put it this way: "[W]e allow intrusive and aggressive police conduct 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."[50] Or in the words of the Fifth Circuit:

> [P]ointing a weapon at a suspect, ordering a suspect to lie on the ground, and handcuffing a suspect—whether singly or in combination—do not automatically convert an investigatory detention into an arrest [unless] the police were unreasonable in failing to use less intrusive procedures to conduct their investigation safely.[51]

With this in mind, we will now look at how the courts are evaluating the most common officer-safety measures.

KEEP HANDS IN SIGHT: Commanding a detainee to keep his hands in sight is so minimally intrusive that it is something that officers may do as a matter of routine.[52]

OFFICER-SAFETY QUESTIONS: Officers may ask questions that are reasonably necessary to determine if, or to what extent, a detainee constitutes a threat—provided the questioning is brief and to the point. For example, officers may ask the detainee if he has any weapons or drugs in his possession, or if he is on probation or parole.[53]

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[44] See *Terry* v. *Ohio* (1968) 392 U.S. 1 [robbery]; *People* v. *Campbell* (1981) 118 Cal.App.3d 588, 595 [drug trafficking]; *U.S.* v. *$109, 179* (9th Cir. 2000) 228 F.3d 1080, 1084-85 [drug trafficking].

[45] See *Courson* v. *McMillian* (11th Cir. 1991) 939 F.2d 1479, 1496.

[46] See *Terry* v. *Ohio* (1968) 392 U.S. 1, 13 [detention may "take a different turn upon the injection of some unexpected element into the conversation"].

[47] (2009) 129 S.Ct. 781, 787. ALSO SEE *Maryland* v. *Wilson* (1997) 519 U.S. 408, 414.

[48] *U.S.* v. *Vega* (7th Cir. 1995) 72 F.3d 507, 515.

[49] See *Muehler* v. *Mena* (2005) 544 U.S. 93, 99 [officers may "use reasonable force to effectuate the detention"]; *People* v. *Rivera* (1992) 8 Cal.App.4th 1000, 1008 ["physical restraint does not convert a detention into an arrest if the restraint is reasonable"]; *U.S.* v. *Willis* (9th Cir. 2005) 431 F.3d 709, 716 ["Our cases have justified the use of force in making a stop if it occurs under circumstances justifying fear for an officer's personal safety."].

[50] *U.S.* v. *Meza-Corrales* (9th Cir. 1999) 183 F.3d 1116, 1123.

[51] *U.S.* v. *Sanders* (5th Cir. 1993) 994 F.2d 200, 206-7.

[52] See *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1239; *People* v. *Padilla* (1982) 132 Cal.App.3d 555, 558.

[53] See *People* v. *Castellon* (1999) 76 Cal.App.4th 1369, 1377 ["[The officer] asked two standard questions [Do you have any weapons? Do you have any narcotics?] in a short space of time, both relevant to officer safety."]; *People* v. *Brown* (1998) 62 Cal.App.4th 493, 499 ["questions about defendant's probation status . . . merely provided the officer with additional pertinent information about the individual he had detained"]; *People* v. *McLean* (1970) 6 Cal.App.3d 300, 307-8 [asking a detainee "if he had anything illegal in his pocket" is a "traditional investigatory function"]; *U.S.* v. *Long* (8th Cir. 2008) 532 F.3d 791, 795 [OK to ask "whether a driver is carrying illegal drugs"].

CONTROLLING DETAINEES' MOVEMENTS: For their safety (and also in order to carry out their investigation efficiently), officers may require the detainee to stand or sit in a particular place. Both objectives are covered in the section "Controlling the detainee's movements," beginning on page ten.

LIE ON THE GROUND: Ordering a detainee to lie on the ground is much more intrusive than merely ordering him to sit on the curb. Consequently, such a precaution cannot be conducted as a matter of routine but, instead, is permitted only if there was some justification for it.[54]

PAT SEARCHING: Officers may pat search a detainee if they reasonably believed that he was armed or otherwise presented a threat to officers or others. Although the courts routinely say that officers must have reasonably believed that the detainee was armed *and* dangerous, either is sufficient. This is because it is apparent that a suspect who is armed with a weapon is necessarily dangerous to any officer who is detaining him, even if he was cooperative and exhibited no hostility.[55] For example, pat searches are permitted whenever officers reasonably believed that the detainee committed a crime in which a weapon was used, or a crime in which weapons are commonly used; e.g., drug trafficking. A pat search is also justified if officers reasonably believed that the detainee posed an immediate threat, even if there was no reason to believe he was armed.[56]

We covered the subject of pat searches in the Winter 2008 edition which can be downloaded on Point of View Online at www.le.alcoda.org.

HANDCUFFING: Although handcuffing "minimizes the risk of harm to both officers and detainees,"[57] it is not considered standard operating procedure.[58] Instead, it is permitted only if there was reason to believe that physical restraint was warranted.[59] In the words of the Court of Appeal:

> [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.[60]

What circumstances tend to indicate that handcuffing was reasonably necessary? The following are examples:

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[54] See *U.S.* v. *Taylor* (9th Cir. 1983) 716 F.2d 701, 709 [detainee was "extremely verbally abusive" and "quite rowdy"]; *U.S.* v. *Buffington* (9th Cir. 1987) 815 F.2d 1292, 1300 [detainee "had been charged in the ambush slaying of a police officer and with attempted murder"]; *U.S.* v. *Jacobs* (9th Cir. 1983) 715 F.2d 1343, 1345 [ordering bank robbery suspects to "prone out" was justified]; *Courson* v. *McMillian* (11th Cir. 1991) 939 F.2d 1479, 1496 [detainees were "uncooperative" and intoxicated, one was "unruly and verbally abusive," officer was alone, it was late at night]; *U.S.* v. *Sanders* (5th Cir. 1993) 994 F.2d 200, 207 ["[O]rdering a person whom the police reasonably believe to be armed to lie down may well be within the scope of an investigative detention."].

[55] See *Terry* v. *Ohio* (1968) 393 U.S. 1, 28; *Pennsylvania* v. *Mimms* (1977) 434 U.S. 106, 112.

[56] See *Michigan* v. *Long* (1983) 463 U.S. 1032, 1049 ["the protection of police and others can justify protective searches when police have a reasonable belief that the suspect *poses a danger*" [emphasis added]]; *Sibron* v. *New York* (1968) 392 U.S. 40, 65 [purpose of pat search is "disarming a potentially dangerous man"]; *People* v. *Superior Court (Brown)* (1980) 111 Cal.App.3d 948, 956 [pat search permitted if officers reasonably believe "that defendant is armed *or* on other factors creating a potential for danger to the officers." Emphasis added]; *People* v. *Hill* (1974) 12 Cal.3d 731, 746 [pat search is permitted if officers reasonably believe a suspect "might forcibly resist an investigatory detention"]; *U.S.* v. *Bell* (6th Cir. 1985) 762 F.2d 495, 500, fn.7 ["The focus of judicial inquiry is whether the officer reasonably perceived the subject of a frisk as potentially dangerous, not whether he had an indication that the defendant was in fact armed."].

[57] *Muehler* v. *Mena* (2005) 544 U.S. 93, 100.

[58] See *Muehler* v. *Mena* (2005) 544 U.S. 93, 99 [handcuffing "was undoubtedly a separate intrusion in addition to detention"]; *In re Antonio B.* (2008) 166 Cal.App.4th 435, 442 [officer's "'policy' of handcuffing any suspect he detains" was unlawful]; *U.S.* v. *Meadows* (1st Cir. 2009) 571 F.3d 131, 141 ["[P]olice officers may not use handcuffs as a matter or routine."]. ALSO SEE *U.S.* v. *Bautista* (9th Cir. 1982) 684 F.2d 1286, 1289 ["handcuffing substantially aggravates the intrusiveness of an otherwise investigatory detention and is not part of a typical *Terry* stop."]. **NOTE:** One court has observed that "handcuffing—once problematic—is becoming quite acceptable in the context of *Terry* analysis." *U.S.* v. *Tilmon* (7th Cir. 1994) 19 F.3d 1221, 1228.

[59] See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 385 ["The fact that a defendant is handcuffed while being detained does not, by itself, transform a detention into an arrest."]; *Haynie* v. *County of Los Angeles* (9th Cir. 2003) 339 F.3d 1071, 1077 ["A brief, although complete, restriction of liberty, such as handcuffing, during a *Terry* stop is not a de facto arrest, if not excessive under the circumstances."]; *U.S.* v. *Acosta-Colon* (1st Cir. 1998) 157 F.3d 9, 18 ["[O]fficers engaged in an otherwise lawful stop must be permitted to take measures—including the use of handcuffs—they believe reasonably necessary to protect themselves from harm, or to safeguard the security of others."].

[60] *People* v. *Osborne* (2009) 175 Cal.App.4th 1052, 1062.

- Detainee refused to keep his hands in sight.[61]
- Detainee kept reaching inside his clothing.[62]
- Detainee pulled away from officers.[63]
- During a pat search, the detainee tensed up "as if he were attempting to remove his hand" from the officer's grasp.[64]
- Detainee appeared ready to flee.[65]
- Detainee was hostile.[66]
- Onlookers were hostile.[67]
- Officers had reason to believe he was armed.[68]
- Officers had reason to believe the detainee committed a felony, especially one involving violence or weapons.[69]
- Officers were outnumbered.[70]
- Detainee was transported to another location.[71]
- Officers were awaiting victim's arrival for a showup.[72]

Three other points. First, if there was reason to believe that handcuffing was necessary, it is immaterial that officers had previously pat searched the detainee and did not detect a weapon. This is because a patdown "is not an infallible method of locating concealed weapons."[73] Second, in close cases it is relevant that the officers told the detainee that, despite the handcuffs, he was not under arrest and that the handcuffs were only a temporary measure for everyone's safety.[74]

Third, even if handcuffing was necessary, it may convert a detention into a de facto arrest if the handcuffs were applied for an unreasonable length of time,[75] or if they were applied more tightly than necessary. As the Seventh Circuit put it, "[A]n officer may not knowingly use handcuffs in a way that will inflict unnecessary pain or injury on an individual who presents little or no risk of flight or threat of injury."[76] Similarly, the Ninth Circuit observed that "no reasonable officer could believe that the abusive application of handcuffs was constitutional."[77]

WARRANT CHECKS: Because wanted detainees necessarily pose an increased threat, officers may run warrant checks as a matter of routine. Because warrant checks are also an investigative tool, this subject is covered in the section, "Conducting the investigation."

PROTECTIVE CAR SEARCHES: When a person is detained in or near his car, a gun or other weapon in the vehicle could be just as dangerous to the officers as a weapon in his waistband. Consequently, the

[61] See *U.S.* v. *Dykes* (D.C. Cir. 2005) 406 F.3d 717, 720 ["Dykes had kept his hands near his waistband, resisting both the officers' commands and their physical efforts to remove his hands into plain view"].
[62] See *U.S.* v. *Thompson* (9th Cir. 1979) 597 F.2d 187, 190.
[63] See *U.S.* v. *Purry* (D.C. Cir. 1976) 545 F.2d 217, 219-20. *People* v. *Johnson* (1991) 231 Cal.App.3d 1, 14.
[64] *People* v. *Osborne* (2009) 175 Cal.App.4th 1052, 1062.
[65] See *U.S.* v. *Bautista* (9th Cir. 1982) 684 F.2d 1286, 1289 [detainee "kept pacing back and forth and looking, turning his head back and forth as if he was thinking about running"]. ALSO SEE *People* v. *Brown* (1985) 169 Cal.App.3d 159, 167 [detainee "started to run"]; *U.S.* v. *Wilson* (7th Cir. 1993) 2 F.3d 226, 232 ["very actively evading"]; *U.S.* v. *Meadows* (1st Cir. 2009) 571 F.3d 131, 142 [detainee "fled from a traffic stop"].
[66] See *Haynie* v. *County of Los Angeles* (9th Cir. 2003) 339 F.3d 1071, 1077 [detainee "became belligerent"].
[67] See *U.S.* v. *Meza-Corrales* (9th Cir. 1999) 183 F.3d 1116, 1123 ["uncooperative persons . . . and uncertainty prevailed"].
[68] See *U.S.* v. *Meadows* (1st Cir. 2009) 571 F.3d 131, 142; *U.S.* v. *Meza-Corrales* (9th Cir. 1999) 183 F.3d 1116, 1123 ["weapons had been found (and more weapons potentially remained hidden)"].
[69] See *People* v. *Celis* (2004) 33 Cal.4th 667, 676 [handcuffing "may be appropriate when the stop is of someone suspected of committing a felony"]; *People* v. *Soun* (1995) 34 Cal.App.4th 1499, 1517 [murder suspect]; *People* v. *Brown* (1985) 169 Cal.App.3d 159, 166 [bank robbery suspect]; *U.S.* v. *Johnson* (9th Cir. 2009) 581 F.3d 993 [bank robbers].
[70] See *U.S.* v. *Meza-Corrales* (9th Cir. 1999) 183 F.3d 1116, 1123 ["A relatively small number of officers was present"].
[71] See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 385; *Gallegos* v. *City of Los Angeles* (9th Cir. 2002) 308 F.3d 987, 991.
[72] See *People* v. *Bowen* (1987) 195 Cal.App.3d 269, 274 [handcuffing a purse snatch suspect while awaiting the victim's arrival for a showup "does not mean that appellant was under arrest during this time"].
[73] *In re Carlos M.* (1990) 220 Cal.App.3d 372, 385.
[74] See *U.S.* v. *Bravo* (9th Cir. 2002) 295 F.3d 1002, 1011 [telling detainee that the handcuffs "were only temporary" was a factor that "helped negate the handcuffs' aggravating influence and suggest mere detention, not arrest"].
[75] See *Muehler* v. *Mena* (2005) 544 U.S. 93, 100; *Haynie* v. *County of Los Angeles* (9th Cir. 2003) 339 F.3d 1071, 1077.
[76] *Stainback* v. *Dixon* (7th Cir. 2009) 569 F.3d 767, 772. ALSO SEE *Heitschmidt* v. *City of Houston* (5th Cir. 1998) 161 F.3d 834, 839-40 ["no justification for requiring Heitschmidt to remain painfully restrained"]; *Burchett* v. *Kiefer* (6th Cir. 2002) 310 F.3d 937, 944 ["applying handcuffs so tightly that the detainee's hands become numb and turn blue certainly raises concerns of excessive force"].
[77] *Palmer* v. *Sanderson* (9th Cir. 1993) 9 F.3d 1433, 1436.

United States Supreme Court ruled that officers may look for weapons inside the passenger compartment if they reasonably believed that a weapon—even a "legal" one—was located there.[78]

For example, in *People* v. *Lafitte*[79] Orange County sheriff's deputies stopped Lafitte at about 10:15 P.M. because he was driving with a broken headlight. While one of the deputies was talking with him, the other shined a flashlight inside the passenger compartment and saw a knife on the open door of the glove box. The deputy then seized the knife and searched for more weapons. He found one—a handgun—in a trash bag hanging from the ashtray. Although the court described the knife as "legal," and although Lafitte had been cooperative throughout the detention, the court ruled the search was justified because "the discovery of the weapon is the crucial fact which provides a reasonable basis for the officer's suspicion."

Note that a protective vehicle search may be conducted even though the detainee had been handcuffed or was otherwise restrained.[80]

DETENTION AT GUNPOINT: Although a detention at gunpoint is a strong indication that the detainee was under arrest, the courts have consistently ruled that such a safety measure will not require probable cause if, (1) the precaution was reasonably necessary, and (2) the weapon was reholstered after it was safe to do so.[81] Said the Fifth Circuit, "[I]n and of itself, the mere act of drawing or pointing a weapon during an investigatory detention does not cause it to exceed the permissible grounds of a *Terry* stop or to become a de facto arrest."[82] The Seventh Circuit put it this way:

> Although we are troubled by the thought of allowing policemen to stop people at the point of a gun when probable cause to arrest is lacking, we are unwilling to hold that [a detention] is never lawful when it can be effectuated safely only in that manner. It is not nice to have a gun pointed at you by a policeman but it is worse to have a gun pointed at you by a criminal.[83]

For instance, in *United States* v. *Watson* a detainee argued that, even though the officers reasonably believed that he was selling firearms illegally, they "had no right to frighten him by pointing their guns at him." The court responded, "The defendant's case is weak; since the police had reasonable suspicion to think they were approaching an illegal seller of guns who had guns in the car, they were entitled for their own protection to approach as they did."[84]

FELONY CAR STOPS: When officers utilize felony car stop procedures, they usually have probable cause to arrest one or more of the occupants of the vehicle. So they seldom need to worry about the intrusiveness of felony stops.

But the situation is different if officers have only reasonable suspicion. Specifically, they may employ felony stop measures only if they had direct or circumstantial evidence that one or more of the occupants presented a substantial threat of imminent violence. A good example of such a situation is found in the case of *People* v. *Soun* in which the California Court of Appeal ruled that Oakland police officers were justified in conducting a felony stop when they pulled over a car occupied by six people who were suspects in a robbery-murder. As the court pointed out:

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[78] See *Michigan* v. *Long* (1983) 463 U.S. 1032, 1049-51. **NOTE**: For a more thorough discussion of protective vehicle searches, see the article "Protective Car Searches" in the Winter 2008 edition.

[79] (1989) 211 Cal.App.3d 1429.

[80] See *Michigan* v. *Long* (1983) 463 U.S. 1032, 1051-52.

[81] See *People* v. *Glaser* (1995) 11 Cal.4th 354, 366 [the issue is whether "detention at gunpoint [was] justified by the need of a reasonably prudent officer"]; *People* v. *Celis* (2004) 33 Cal.4th 667, 676 ["Faced with two suspects, each of whom might flee if Detective Strain stopped one but not the other, it was not unreasonable for him to draw his gun to ensure that both suspects would stop."]; *People* v. *McHugh* (2004) 119 Cal.App.4th 202, 211 ["A police officer may use force, including . . . 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."]; *Gallegos* v. *City of Los Angeles* (9th Cir. 2002) 308 F.3d 987, 991 ["Our cases have made clear that an investigative detention does not automatically become an arrest when officers draw their guns."].

[82] *U.S.* v. *Sanders* (5th Cir. 1993) 994 F.2d 200, 205.

[83] *U.S.* v. *Serna-Barreto* (7th Cir. 1988) 842 F.2d 965, 968.

[84] (7th Cir. 2009) 558 F.3d 702, 704. Edited. ALSO SEE *U.S.* v. *Vega* (7th Cir. 1995) 72 F.3d 507, 515 [detention to investigate "massive cocaine importation conspiracy"].

> [The officer] concluded that to attempt to stop the car by means suitable to a simple traffic infraction—in the prosecutor's words, "just pull up alongside and flash your lights and ask them to pull over"—"would not be technically sound as far as my safety or safety of other officers." We cannot fault [the officer] for this reasoning, or for proceeding as he did.[85]

Felony extraction procedures may also be used on all passengers in a vehicle at the conclusion of a pursuit, even though officers had no proof that the passengers were involved in the crime that prompted the driver to flee. For instance, in *Allen* v. *City of Los Angeles*, a passenger claimed that a felony stop was unlawful as to him "because he attempted to persuade [the driver] to pull over and stop." That's "irrelevant," said the court, because the officers "could not have known the extent of [the passenger's] involvement until after they questioned him."[86]

UTILIZING TASERS: Officers may employ a taser against a detainee if the detainee "poses an immediate threat to the officer or a member of the public."[87]

Having stopped the detainee, and having taken appropriate officer-safety precautions, officers will begin their investigation into the circumstances that generated reasonable suspicion. As we will now discuss, there are several things that officers may do to confirm or dispel their suspicions.

Controlling the detainee's movements

Throughout the course of investigative detentions and traffic stops, officers may position the detainee and his companions or otherwise control their movements. While this is permitted as an officer-safety measure (as noted earlier), it is also justified by the officers' need to conduct their investigation in an orderly fashion.[88] As the Supreme Court explained, it would be unreasonable to expect officers "to allow people to come and go freely from the physical focal point of [a detention]."[89]

GET OUT, STAY INSIDE: If the detainee was the driver or passenger in a vehicle, officers may order him and any occupants who are not detained to step outside or remain inside.[90] And if any occupants had already exited, officers may order them to return to the vehicle.[91] In discussing the officer-safety rationale for ordering detainees to exit, the Supreme Court noted that "face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements."[92]

STAY IN A CERTAIN PLACE: Officers may order the detainee and his companions to sit on the ground, on the curb, or other handy place; e.g., push bar.[93]

CONFINE IN PATROL CAR: A detainee may be confined in a patrol car if there was some reason for it.[94] For example, it may be sufficient that the officers were awaiting the arrival of a witness for a showup;[95] or waiting for an officer with experience in drug investigations;[96] or when it was necessary to prolong the detention to confirm the detainee's identity;[97] or if the detainee was uncooperative;[98] or if the officers needed to focus their attention on another matter, such as securing a crime scene or dealing with the detainee's associates.[99]

SEPARATING DETAINEES: If officers have detained two or more suspects, they may separate them to prevent the "mutual reinforcement" that may result when a suspect who has not yet been questioned is able to hear his accomplice's story.[100]

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[85] (1995) 34 Cal.App.4th 1499, 1519. ALSO SEE *People* v. *Celis* (2004) 33 Cal.4th 667, 676 [detention for drug trafficking].
[86] (9th Cir. 1995) 66 F.3d 1052, 1057.
[87] See *Bryan* v. *McPherson* (9th Cir. 2009) 590 F.3d. 767, 775. **NOTE**: See the report on *Bryan* in the Recent Cases section.
[88] See *Arizona* v. *Johnson* (2009) 129 S.Ct. 781; *U.S.* v. *Williams* (9th Cir. 2005) 419 F.3d 1029, 1034.
[89] *Brendlin* v. *California* (2007) 551 U.S. 249, 250.
[90] See *Pennsylvania* v. *Mimms* (1977) 434 U.S. 106, 111, fn.6; *Maryland* v. *Wilson* (1997) 519 U.S. 408, 415.
[91] See *U.S.* v. *Williams* (9th Cir. 2005) 419 F.3d 1029, 1032, 1033; *U.S.* v. *Sanders* (8th Cir. 2007) 510 F.3d 788, 790.
[92] *Pennsylvania* v. *Mimms* (1977) 434 U.S. 106, 110.
[93] See *People* v. *Celis* (2004) 33 Cal.4th 667, 676; *People* v. *Vibanco* (2007) 151 Cal.App.4th 1, 12.
[94] See *People* v. *Natale* (1978) 77 Cal.App.3d 568, 572; *U.S.* v. *Stewart* (7th Cir. 2004) 388 F.3d 1079, 1084.
[95] *People* v. *Craig* (1978) 86 Cal.App.3d 905, 913 ["awaiting the victim"].
[96] *People* v. *Gorak* (1987) 196 Cal.App.3d 1032, 1038 ["awaiting the arrival of another officer"].
[97] See *U.S.* v. *Jackson* (7th Cir. 2004) 377 F.3d 715, 717; *U.S.* v. *Rodriguez* (7th Cir. 1987) 831 F.2d 162, 166.
[98] *Haynie* v. *County of Los Angeles* (9th Cir. 2003) 339 F.3d 1071, 1077 [detainee "uncooperative and continued to yell"].
[99] See *People* v. *Lloyd* (1992) 4 Cal.App.4th 724, 734.
[100] See *People* v. *Nation* (1980) 26 Cal.3d 169, 180.

Separating detainees is also permitted for officer-safety purposes. Thus, in *People* v. *Maxwell* the court noted that, "upon effecting the early morning stop of a vehicle containing three occupants, the officer was faced with the prospect of interviewing the two passengers in an effort to establish the identity of the driver. His decision to separate them for his own protection, while closely observing defendant as he rummaged through his pockets for identification, was amply justified."[101]

Identifying the detainee

One of the first things that officers will do as they begin their investigation is determine the detainee's name. "Without question," said the Court of Appeal, "an officer conducting a lawful *Terry* stop must have the right to make this limited inquiry, otherwise the officer's right to conduct an investigative detention would be a mere fiction."[102]

This is also the opinion of the Supreme Court, which added that identifying detainees also constitutes an appropriate officer-safety measure. Said the Court, "Obtaining a suspect's name in the course of a *Terry* stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder."[103]

Not only do officers have a right to require that the detainee identify himself, they also have a right to confirm his identity by insisting that he present "satisfactory" documentation.[104] "[W]here there is such a right to so detain," explained the Court of Appeal, "there is a companion right to request, and obtain, the detainee's identification."[105]

WHAT IS "SATISFACTORY" ID: A current driver's license or the "functional equivalent" of a license is presumptively "satisfactory" unless there was reason to believe it was forged or altered.[106] A document will be deemed the functional equivalent of a driver's license if it contained all of the following: the detainee's photo, brief physical description, signature, mailing address, serial numbering, and information establishing that the document is current.[107] While other documents are not presumptively satisfactory, officers may exercise discretion in determining whether they will suffice.[108]

REFUSAL TO ID: If a detainee will not identify himself, there are several things that officers may do. For one thing, they may prolong the detention for a reasonable time to pursue the matter. As the Court of Appeal observed, "To accept the contention that the officer can stop the suspect and request identification, but that the suspect can turn right around and refuse to provide it, would reduce the authority of the officer to identify a person lawfully stopped by him to a mere fiction."[109]

Officers may also arrest the detainee for willfully delaying or obstructing an officer in his performance of his duties if he refuses to state his name or if he admits to having ID in his possession but refuses to permit officers to inspect it.[110]

Also note that a detainee's refusal to furnish ID is a suspicious circumstance that may be a factor in determining whether there was probable cause to arrest him.[111]

SEARCH FOR ID: If the detainee denies that he possesses ID, but he is carrying a wallet, officers may, (1) order him to look through the wallet for ID

[101] (1988) 206 Cal.App.3d 1004, 1010.

[102] *People* v. *Loudermilk* (1987) 195 Cal.App.3d 996, 1002. ALSO SEE *People* v. *Long* (1987) 189 Cal.App.3d 77, 89 [court notes the "law enforcement need to confirm identity"].

[103] *Hiibel* v. *Nevada* (2004) 542 U.S. 177, 186.

[104] See *People* v. *Long* (1987) 189 Cal.App.3d 77, 86; *People* v. *Loudermilk* (1987) 195 Cal.App.3d 996, 1002.

[105] *People* v. *Rios* (1983) 140 Cal.App.3d 616, 621.

[106] *People* v. *Monroe* (1993) 12 Cal.App.4th 1174, 1186. Also see *People* v. *McKay* (2002) 27 Cal.4th 601, 620.

[107] See *People* v. *Monroe* (1993) 12 Cal.App.4th 1174, 1187.

[108] See *People* v. *McKay* (2002) 27 Cal.4th 601, 622 ["[W]e do not intend to foreclose the exercise of discretion by the officer in the field in deciding whether to accept or reject other evidence—including oral evidence—of identification."].

[109] *People* v. *Long* (1987) 189 Cal.App.3d 77, 87. Edited. ALSO SEE *U.S.* v. *Christian* (9th Cir. 2004) 356 F.3d 1103, 1107 ["Narrowly circumscribing an officer's ability to persist [in determining the detainee's ID] until he obtains the identification of a suspect might deprive him of the ability to relocate the suspect in the future."]; *U.S.* v. *Martin* (7th Cir. 2005) 422 F.3d 597, 602 ["Here, failure to produce a valid driver's license necessitated additional questioning"].

[110] See Penal Code § 148(a)(1); *Hiibel* v. *Nevada* (2004) 542 U.S. 177, 188.

[111] See *People* v. *Loudermilk* (1987) 195 Cal.App.3d 996, 1002.

while they watch, or (2) search it themselves for ID.[112] Officers may not, however, pat search the detainee for the sole purpose of determining whether he possesses a wallet.[113]

If the detainee is an occupant of a vehicle and he says he has no driver's license or other identification in his possession, officers may conduct a search of the passenger compartment for documentation if they reasonably believed it would be impossible, impractical, or dangerous to permit the detainee or other occupants to conduct the search. For example, these searches have been upheld when the officers reasonably believed the car was stolen,[114] the driver fled,[115] the driver refused to explain his reason for loitering in a residential area at 1:30 A.M.,[116] and a suspected DUI driver initially refused to stop and there were two other men in the vehicle.[117]

IDENTIFYING DETAINEE'S COMPANIONS: Officers may request—but not demand—that the detainee's companions identify themselves, and they may attempt to confirm the IDs if it does not unduly prolong the stop. As the First Circuit advised, "[B]ecause passengers present a risk to officer safety equal to the risk presented by the driver, an officer may ask for identification from passengers and run background checks on them as well."[118]

Duration of the detention

As we will discuss shortly, officers may try to confirm or dispel their suspicions in a variety of ways, such as questioning the detainee, conducting a showup, and seeking consent to search. But before we discuss these and other procedures, it is necessary to review an issue that pervades all of them: the overall length of the detention.

Everything that officers do during a detention takes time, which means that everything they do is, to some extent, an intrusion on the detainee. Still, the courts understand that it would be impractical to impose strict time limits.[119] Addressing this issue, the Court of Appeal commented:

> The dynamics of the detention-for-questioning situation may justify further detention, further investigation, search, or arrest. The significance of the events, discoveries, and perceptions that follow an officer's first sighting of a candidate for detention will vary from case to case.[120]

For this reason, the Supreme Court has ruled that "common sense and ordinary human experience must govern over rigid [time] criteria,"[121] which simply means that officers must carry out their duties diligently.[122] As the Court explained:

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[112] See *People* v. *Loudermilk* (1987) 195 Cal.App.3d 996, 1002; *People* v. *Long* (1987) 189 Cal.App.3d 77, 89.

[113] See *People* v. *Garcia* (2007) 145 Cal.App.4th 782, 788.

[114] See *People* v. *Vermouth* (1971) 20 Cal.App.3d 746, 752 ["When the driver was unable to produce the registration certificate and said the car belonged to someone else, it was reasonable and proper for the officers to look in the car for the certificate."]; *People* v. *Martin* (1972) 23 Cal.App.3d 444, 447 ["When the driver was unable to produce a driver's license and stated that he did not know where the registration certificate was located, since the automobile was owned by another person, the police officers were, under the circumstances, reasonably justified in searching the automobile for the registration certificate"]; *People* v. *Turner* (1994) 8 Cal.4th 137, 182 ["Here, the Chrysler was abandoned, and the person observed to have been a passenger disclaimed any knowledge, let alone ownership, of the vehicle."]; *People* v. *Webster* (1991) 54 Cal.3d 411, 431 [the driver said that the car belonged to one of his passengers, but the passengers claimed they were hitchhikers].

[115] See *People* v. *Remiro* (1979) 89 Cal.App.3d 809, 830; *People* v. *Turner* (1994) 8 Cal.4th 137, 182.

[116] See *People* v. *Hart* (1999) 74 Cal.App.4th 479, 490.

[117] See *People* v. *Faddler* (1982) 132 Cal.App.3d 607, 610.

[118] *U.S.* v. *Rice* (10th Cir. 2007) 483 F.3d 1079, 1084. ALSO SEE *People* v. *Vibanco* (2007) 151 Cal.App.4th 1, 14; *People* v. *Grant* (1990) 217 Cal.App.3d 1451, 1461-62; *U.S.* v. *Chaney* (1st Cir. 2009) 584 F.3d 20, 26 ["the officer's initial inquiries into Chaney's identity took at most a minute or two and did not measurably extend the duration of the stop"]; *U.S.* v. *Cloud* (8th Cir. 2010) __ F.3d __ [2010 WL 547041] ["Cloud points to nothing in the record suggesting that he was compelled to give [the officer] his name"].

[119] See *United States* v. *Place* (1983) 462 U.S. 696, 709, fn.10; *People* v. *Gallardo* (2005) 130 Cal.App.4th 234, 238.

[120] *Pendergraft* v. *Superior Court* (1971) 15 Cal.App.3d 237, 242. ALSO SEE *People* v. *Russell* (2000) 81 Cal.App.4th 96, 102; *People* v. *Huerta* (1990) 218 Cal.App.3d 744, 751 ["The officers 'were having to make decisions. We had a lot of things going on."].

[121] *United States* v. *De Hernandez* (1985) 473 U.S. 531, 543.

[122] See *Muehler* v. *Mena* (2005) 544 U.S. 93, 100; *People* v. *Gomez* (2004) 117 Cal.App.4th 531, 537 ["a detention will be deemed unconstitutional when extended beyond what is reasonably necessary"]; *People* v. *Russell* (2000) 81 Cal.App.4th 96, 101 ["An investigatory stop exceeds constitutional bounds when extended beyond what is reasonably necessary under the circumstances that made its initiation permissible."]; *U.S.* v. *Torres-Sanchez* (9th Cir. 1996) 83 F.3d 1123, 1129 ["'Brevity' can only be defined in the context of each particular case."].

> In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.[123]

For example, in rejecting an argument that a detention took too long, the court in *Ingle* v. *Superior Court* pointed out, "Each step in the investigation conducted by [the officers] proceeded logically and immediately from the previous one."[124] Responding to a similar argument in *Gallegos* v. *City of Los Angeles*, the Ninth Circuit said:

> Gallegos makes much of the fact that his detention lasted forty-five minutes to an hour. While the length of Gallegos's detention remains relevant, more important is that [the officers'] actions did not involve any delay unnecessary to their legitimate investigation.[125]

OFFICERS NEED NOT RUSH: To say that officers must be diligent, does not mean they must "move at top speed" or even rush.[126] Nor does it mean (as we will discuss later) that they may not prolong the detention for a short while to ask questions that do not directly pertain to the crime under investigation. Instead, it simply means the detention must not be "measurably extended."[127]

EXAMPLES: The following are circumstances that were found to warrant extended detentions:

- Waiting for backup.[128]
- Waiting for an officer with special training and experience; e.g. DUI drugs, VIN location.[129]
- Waiting for an interpreter.[130]
- Waiting for a drug-detecting dog.[131]
- Waiting to confirm detainee's identity.[132]
- Officers needed to speak with the detainee's companions to confirm his story.[133]
- Computer was slow.[134]
- Officers developed grounds to investigate another crime.[135]
- Officers needed to conduct a field showup.[136]
- There were multiple detainees.[137]
- Additional officer-safety measures became necessary.[138]

For instance, in *People* v. *Soun* (discussed earlier) police officers in Oakland detained six suspects in a robbery-murder that had occurred the day before in San Jose. Although the men were detained for approximately 45 minutes, the Court of Appeal ruled the delay was justifiable in light of several factors; specifically, the number of detainees, the need for officer-safety precautions that were appropriate to a murder investigation, and the fact that the Oakland officers needed to confer with the investigating officers in San Jose.[139]

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[123] *United States* v. *Sharpe* (1985) 470 U.S. 675, 686.
[124] (1982) 129 Cal.App.3d 188, 196. ALSO SEE *People* v. *Soun* (1995) 34 Cal.App.4th 1499, 1520 [officer "full accounted" for the 30-minute detention].
[125] (9th Cir. 2002) 308 F.3d 987, 992. Edited.
[126] *U.S.* v. *Hernandez* (11th Cir. 2005) 418 F.3d 1206, 1212, fn.7.
[127] See *Johnson* v. *Arizona* (2009) __ U.S. __[2009 WL 160434].
[128] *Courson* v. *McMillian* (11th Cir. 1991) 939 F.2d 1479, 1493 [detention by single officer of three suspects, one of whom was unruly].
[129] See *United States* v. *Sharpe* (1985) 470 U.S. 675, 687, fn.5 ["[A]s a highway patrolman, he lacked Cooke's training and experience in dealing with narcotics investigations."]; *People* v. *Gorak* (1987) 196 Cal.App.3d 1032, 1038 [inexperienced officer awaited arrival of officer with experience in DUI-drugs].
[130] See *People* v. *Avalos* (1996) 47 Cal.App.4th 1569, 1577; *U.S.* v. *Rivera* (8th Cir. 2009) 570 F.3d 1009, 1013.
[131] See *U.S.* v. *Bloomfield* (8th Cir. 1994) 40 F.3d 910, 917.
[132] See *People* v. *Grant* (1990) 217 Cal.App.3d 1451, 1459; *U.S.* v. *Ellis* (6th Cir. 2007) 497 F.3d 606, 614; *U.S.* v. *$109,179* (9th Cir. 2000) 228 F.3d 1080, 1086; *U.S.* v. *Long* (7th Cir. 2005) 422 F.3d 597, 602.
[133] See *U.S.* v. *Brigham* (5th Cir. 2004) 382 F.3d 500, 508 [OK to "verify the information provided by the driver"].
[134] See *U.S.* v. *Rutherford* (10th Cir. 1987) 824 F.2d 831, 834.
[135] See *People* v. *Castaneda* (1995) 35 Cal.App.4th 1222, 1228; *U.S.* v. *Ellis* (6th Cir. 2007) 497 F.3d 606, 614.
[136] See *People* v. *Bowen* (1987) 195 Cal.App.3d 269, 273-74.
[137] See *People* v. *Soun* (1995) 34 Cal.App.4th 1499 [six detainees]; *U.S.* v. *Shareef* (10th Cir. 1996) 100 F.3d 1491, 1506.
[138] See *Muehler* v. *Mena* (2005) 544 U.S. 93, 100 ["[T]his case involved the detention of four detainees by two officers during a search of a gang house for dangerous weapons."]; *People* v. *Castellon* (1999) 76 Cal.App.4th 1369, 1374 ["At the point where Castellon failed to follow [the officer's] order to remain in the car and [the officer] became concerned for his safety, the . . . focus shifted from a routine investigation of a Vehicle Code violation to officer safety."].
[139] (1995) 34 Cal.App.4th 1499, 1524.

DELAYS ATTRIBUTABLE TO THE DETAINEE: One of the most common reasons for prolonging an investigative detention or traffic stop is that the detainee said or did something that made it necessary to interrupt the normal progression of the stop.[140] For example, in *United States* v. *Sharpe* the Supreme Court ruled that an extended detention became necessary when the occupants of two cars did not immediately stop when officers lit them up but, instead, attempted to split up. As a result, they were detained along different parts of the roadway, which necessarily made the detention more time consuming.[141]

Similarly, a delay for further questioning may be necessary because the detainee lied or was deceptive. Thus, the court *U.S.* v. *Suitt* ruled that a lengthy detention was warranted because "Suitt repeatedly gave hesitant, evasive, and incomplete answers."[142]

Finally, it should be noted that the clock stops running when officers develop probable cause to arrest, or when they convert the detention into a contact. See "Converting detentions into contacts," below.

Questioning the detainee

In most cases, the fastest way for officers to confirm or dispel their suspicion is to pose questions to the detainee and, if any, his companions. Thus, after noting that such questioning is "the great engine of the investigation," the Court of Appeal observed in *People* v. *Manis*:

> When circumstances demand immediate investigation by the police, the most useful, most available tool for such investigation is general on-the-scene questioning designed to bring out the person's explanation or lack of explanation of the circumstances which aroused the suspicion of the police, and enable the police to quickly determine whether they should allow the suspect to go about his business or hold him to answer charges.[143]

Detainees cannot, however, be required to answer an officer's questions. For example, in *Ganwich* v. *Knapp* the Ninth Circuit ruled that officers acted improperly when they told the detainees that they would not be released until they started cooperating. Said the court, "[I]t was not at all reasonable to condition the plaintiffs' release on their submission to interrogation."[144]

***MIRANDA* COMPLIANCE:** Although detainees are not free to leave, a *Miranda* waiver is not ordinarily required because the circumstances surrounding most detentions do not generate the degree of compulsion to speak that the *Miranda* procedure was designed to alleviate.[145] "The comparatively nonthreatening character of detentions of this sort," said the Supreme Court, "explains the absence of any suggestion in our opinions that [detentions] are subject to the dictates of *Miranda*."[146]

A *Miranda* waiver will, however, be required if the questioning "ceased to be brief and casual" and had

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140 See *United States* v. *Montoya De Hernandez* (1985) 473 U.S. 531, 543 ["Our prior cases have refused to charge police with delays in investigatory detention attributable to the suspect's evasive actions."]; *People* v. *Allen* (1980) 109 Cal.App.3d 981, 987 ["The actions of appellant (running and hiding) caused a delay"]; *People* v. *Williams* (2007) 156 Cal.App.4th 949, 960 ["The detention was necessarily prolonged because of the remote location of the marijuana grow."]; *U.S.* v. *Shareef* (10th Cir. 1996) 100 F.3d 1491, 1501 ["When a defendant's own conduct contributes to a delay, he or she may not complain that the resulting delay is unreasonable."].

141 (1985) 470 U.S. 675, 687-88.

142 (8th Cir. 2009) 569 F.3d 867, 872. ALSO SEE *U.S.* v. *Sullivan* (4th Cir. 1998) 138 F.3d 126, 132-33; *People* v. *Huerta* (1990) 218 Cal.App.3d 744, 751 [delay resulted from detainee's lying to officers].

143 (1969) 268 Cal.App.2d 653, 665. ALSO SEE *Hiibel* v. *Nevada* (2004) 542 U.S. 177, 185 ["Asking questions is an essential part of police investigations."]; *Berkemer* v. *McCarty* (1984) 468 U.S. 420, 439 ["Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions."]; *People* v. *Loudermilk* (1987) 195 Cal.App.3d 996, 1002 ["Inquiries of the suspect's identity, address and his reason for being in the area are usually the first questions to be asked"].

144 (9th Cir. 2003) 319 F.3d 1115, 1120. ALSO SEE *U.S.* v. *$404,905* (8th Cir. 1999) 182 F.3d 643, 647, fn.2 [the detainee "may not be compelled to answer, and may not be arrested for refusing to answer"].

145 See *People* v. *Clair* (1992) 2 Cal.4th 629, 679 ["Generally, however, [custody] does not include a temporary detention for investigation."]; *People* v. *Farnam* (2002) 28 Cal.4th 107, 1041 ["the term 'custody' generally does not include a temporary detention"]; *U.S.* v. *Booth* (9th Cir. 1981) 669 F.2d 1231, 1237 ["We have consistently held that even though one's freedom of action may be inhibited to some degree during an investigatory detention, *Miranda* warnings need not be given prior to questioning since the restraint is not custodial."].

146 *Berkemer* v. *McCarty* (1984) 468 U.S. 420, 440.

become "sustained and coercive,"[147] or if there were other circumstances that would have caused a reasonable person in the suspect's position to believe that he was under arrest. As the U.S. Supreme Court pointed out in *Berkemer* v. *McCarty:*

> If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him "in custody" for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*.[148]

The question arises: Is a waiver required if the detainee is in handcuffs? In most cases, the answer is yes because handcuffing is much more closely associated with an arrest than a detention.[149] But because the issue is whether a reasonable person would have concluded that the handcuffing was "tantamount to a formal arrest,"[150] it is arguable that a handcuffed detainee would not be "in custody" if, (1) it was reasonably necessary to restrain him, (2) officers told him that he was not under arrest and that the handcuffing was merely a temporary safety measure, and (3) there were no other circumstances that reasonably indicated he was under arrest.[151]

A further question: Is a suspect "in custody" for *Miranda* purposes if he was initially detained at gunpoint? It appears not if, (1) the precaution was warranted, (2) the weapon was reholstered before the detainee was questioned, and (3) there were no other circumstances that indicated the detention had become an arrest. As the court said in *People* v. *Taylor,* "Assuming the citizen is subject to no other restraints, the officer's initial display of his reholstered weapon does not require him to give *Miranda* warnings before asking the citizen questions."[152]

OFF-TOPIC QUESTIONING: Until last year, one of the most hotly debated issues in the law of detentions (especially traffic stops) was whether a detention becomes an arrest if officers prolonged the stop by questioning the detainee about matters that did not directly pertain to the matter upon which reasonable suspicion was based. Although some courts would rule that all off-topic questioning was unlawful, most held that such questioning was allowed if it did not prolong the stop (e.g., the officer questioned the suspect while writing a citation or while waiting for warrant information), or if the length of the detention was no longer than "normal."[153]

In 2009, however, the Supreme Court resolved the issue in the case of *Arizona* v. *Johnson* when it ruled that unessential or off-topic questioning is permissible if it did not "measurably extend" the duration of the stop. Said the Court, "An officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."[154] Although decided before *Johnson*, the case of *United States* v. *Childs* contains a good explanation of the reasons for this rule:

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[147] *People* v. *Manis* (1969) 268 Cal.App.2d 653, 669.
[148] (1984) 468 U.S. 420, 440.
[149] See *New York* v. *Quarles* (1984) 467 U.S. 649, 655; *Dunaway* v. *New York* (1979) 442 U.S. 200, 215; *People* v. *Pilster* (2006) 138 Cal.App.4th 1395, 1405 [handcuffing "is a distinguishing feature of a formal arrest"].
[150] *People* v. *Pilster* (2006) 138 Cal.App.4th 1395, 1406.
[151] See *U.S.* v. *Cervantes-Flores* (9th Cir. 2005) 421 F.3d 825, 830.
[152] (1986) 178 Cal.App.3d 217, 230. ALSO SEE *People* v. *Clair* (1992) 2 Cal.4th 629, 679; *Cruz* v. *Miller* (2nd Cir. 2001) 255 F.3d 77.
[153] See, for example, *Muehler* v. *Mena* (2005) 544 U.S. 93, 101; *People* v. *Bell* (1996) 43 Cal.App.4th 754, 767.
[154] (2009) 129 S.Ct. 781, 788. Edited. ALSO SEE *Muehler* v. *Mena* (2005) 544 U.S. 93, 101 ["We have held repeatedly that mere police questioning does not constitute a seizure."]; *U.S.* v. *Rivera* (8th Cir. 2009) 570 F.3d 1009, 1013 [applies "measurably extend" test]; *U.S.* v. *Chaney* (1st Cir. 2009) 584 F.3d 20, 24 [applies "measurably extend" test]; *U.S.* v. *Taylor* (7th Cir. 2010) __ F.3d __ [2010 WL 522831] ["They asked him a few questions, some of which were unrelated to the traffic stop, but that does not transform the stop into an unreasonable seizure."]. **NOTE:** Prior to *Johnson*, some courts ruled that off-topic questioning was permissible if it did not significantly extend the duration of the stop. See, for example, *U.S.* v. *Alcaraz-Arellano* (10th Cir. 2006) 441 F.3d 1252, 1259; *U.S.* v. *Turvin* (9th Cir. 2008) 517 F.3d 1097, 1102; *U.S.* v. *Stewart* (10th Cir. 2007) 473 F.3d 1265, 1269; *U.S.* v. *Chhien* (1st Cir. 2001) 266 F.3d 1, 9 ["[The officer] did not stray far afield"]; *U.S.* v. *Purcell* (11th Cir. 2001) 236 F.3d 1274, 1279 [delay of three minutes was *de minimis*]; *U.S.* v. *Sullivan* (4th Cir. 1998) 138 F.3d 126, 133 ["brief one-minute dialogue" was insignificant]; *U.S.* v. *Martin* (7th Cir. 2005) 422 F.3d 597, 601-2 [off-topic questions are permitted if they "do not unreasonably extend" the stop]; *U.S.* v. *Long* (8th Cir. 2008) 532 F.3d 791, 795 ["Asking an off-topic question, such as whether a driver is carrying illegal drugs, during an otherwise lawful traffic stop does not violate the Fourth Amendment."]. COMPARE *U.S.* v. *Peralez* (8th Cir. 2008) 526 F.3d 1115, 1121 ["The off-topic questions more than doubled the time Peralez was detained."].

> Questions that hold potential for detecting crime, yet create little or no inconvenience, do not turn reasonable detention into unreasonable detention. They do not signal or facilitate oppressive police tactics that may burden the public—for all suspects (even the guilty ones) may protect themselves fully by declining to answer.[155]

Warrant checks

Officers who have detained a person (even a traffic violator[156]) may run a warrant check and rap sheet if it does not measurably extend the length of the stop.[157] This is because warrant checks further the public interest in apprehending wanted suspects,[158] and because knowing whether detainees are wanted and knowing their criminal history helps enable officers determine whether they present a heightened threat.[159] As the Ninth Circuit put it:

> On learning a suspect's true name, the officer can run a background check to determine whether a suspect has an outstanding arrest warrant, or a history of violent crime. This information could be as important to an officer's safety as knowing that the suspect is carrying a weapon.[160]

While a detention may be invalidated if there was an unreasonable delay in obtaining warrant information, a delay should not cause problems if officers had reason to believe a warrant was outstanding, and they were just seeking confirmation.[161]

Showups

Officers may prolong a detention for the purpose of conducting a showup if the crime under investigation had just occurred, and the detainee would be arrestable if he was ID'd by the victim or a witness.[162]

Single-person showups are, of course, inherently suggestive because, unlike physical and photo lineups, there are no fillers, and the witness is essentially asked, "Is this the guy?" Still, they are permitted for two reasons. First, an ID that occurs shortly after the crime was committed is generally more reliable than an ID that occurs later. Second, showups enable officers to determine whether they need to continue the search or call it off.[163] As the Court of Appeal observed in *In re Carlos M.:*

> [T]he element of suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are fresh in the witness's mind, and because the interests of both the accused and law enforcement are best served by an immediate determination as to whether the correct person has been apprehended.[164]

SHOWUPS FOR OLDER CRIMES: Although most showups are conducted when the crime under investigation occurred recently, there is no prohibition against conducting showups for older crimes. According to the Court of Appeal, "[N]o case has held that a single-person showup in the absence of compelling circumstances is per se unconstitutional."[165]

Still, because showup IDs are more susceptible to attack in trial on grounds of unreliability, it would be better not to use the showup procedure unless there was an overriding reason for not conducting a physical or photo lineup. As the court noted in *People* v. *Sandoval*, the showup procedure "should not be used without a compelling reason because of the great danger of suggestion from a one-to-one viewing which requires only the assent of the witness."[166]

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[155] (7th Cir. 2002) 277 F.3d 947, 954.

[156] **NOTE**: The California Supreme Court's opinion in *People* v. *McGaughran* (1979) 25 Cal.3d 577 has been widely interpreted as imposing strict time requirements on traffic stops. Not only would such an interpretation be contrary to the U.S. Supreme Court's "measurably extend" test (*Arizona* v. *Johnson* (2009) __ U.S. __), the Court of Appeal recently ruled that *McGaughran* was abrogated by Proposition 8. *People* v. *Branner* (2009) __ Cal.App.4th __ [2009 WL 4858105].

[157] See *People* v. *Stoffle* (1991) 1 Cal.App.4th 1671, 1679; *U.S.* v. *Nichols* (6th Cir. 2008) 512 F.3d 789, 796.

[158] See *U.S.* v. *Hensley* (1985) 469 U.S. 221, 229; *U.S.* v. *Villagrana-Flores* (10th Cir. 2006) 467 F.3d 1269, 1277.

[159] See *Hiibel* v. *Nevada* (2004) 542 U.S. 177, 186; *U.S.* v. *Holt* (10th Cir. 2001) 264 F.3d 1215, 1221-22.

[160] *U.S.* v. *Christian* (9th Cir. 2004) 356 F.3d 1103, 1107.

[161] See *Carpio* v. *Superior Court* (1971) 19 Cal.App.3d 790, 792.

[162] See *People* v. *Kilpatrick* (1980) 105 Cal.App.3d 401, 412.

[163] See *People* v. *Irvin* (1968) 264 Cal.App.2d 747, 759; *People* v. *Dampier* (1984) 159 Cal.App.3d 709, 712-13.

[164] (1990) 220 Cal.App.3d 372, 387.

[165] *People* v. *Nash* (1982) 129 Cal.App.3d 513, 518. ALSO SEE *People* v. *Craig* (1978) 86 Cal.App.3d 905, 914.

[166] (1977) 70 Cal.App.3d 73, 85.

TRANSPORTING THE DETAINEE: As a general rule, showups are permitted only if they occur at the scene of the detention. This subject is discussed below in the section, "Transporting the detainee."

DILIGENCE: Because officers must be diligent in carrying out their duties, they must be prompt in arranging for the witness to be transported to the scene of the detention. For example, in *People* v. *Bowen*[167] SFPD officers detained two suspects in a purse snatch that had occurred about a half hour earlier. The court noted that the officers "immediately" radioed their dispatcher and requested that the victim be transported to the scene of the detention. When the victim did not arrive promptly, they asked their dispatcher for an "estimation of the time of arrival of the victim," at which point they were informed that the officer who was transporting her "was caught in traffic and would arrive shortly." All told, the suspects were detained for about 25 minutes before the victim arrived and identified them.

In rejecting the argument that the delay had transformed the detention into a de facto arrest, the court pointed out that the officers had "immediately" requested that the victim be brought to the scene; and when they realized there would be a delay, they asked their dispatcher for the victim's ETA. Because these circumstances demonstrated that the officers took care to minimize the length of the detention, the court ruled it was lawful.

REDUCING SUGGESTIVENESS: As noted earlier, showups are inherently suggestive because the witness is not required to identify the perpetrator from among other people of similar physical appearance. Furthermore, some witnesses might assume that, because officers do not go around detaining people at random in hopes that someone will ID them, there must be a good reason to believe that the person they are looking at is the culprit. This assumption may be inadvertently bolstered if the witness sees the detainee in handcuffs or if he is sitting behind the cage in a patrol car.

Still, the courts have consistently ruled that showup IDs are admissible at trial unless officers did something that rendered the procedure *unnecessarily* suggestive.[168] Consequently, if it was reasonably necessary to present the detainee in handcuffs for the safety of officers, the witness, or others, this circumstance is immaterial. Furthermore, officers will usually take steps to reduce any suggestiveness that is inherent in the showup procedure by providing the witness with some cautionary instructions, such as the following:

- You will be seeing a person who will be standing with other officers. Do not assume that this person is the perpetrator or even a suspect merely because we are asking you to look at him or because other officers are present.

(If two or more witnesses will view the detainee)

- Do not speak with the other witnesses who will be going with us.
- When we arrive, do not say anything in their presence that would indicate you did or did not recognize someone. You will all be questioned separately.

Transporting the detainee

A detention will ordinarily become a de facto arrest if the detainee was transported to the crime scene, police station, or some other place.[169] This is because the act of removing the detainee from the scene constitutes an exercise of control that is more analogous to a physical arrest than a detention. Moreover, officers can usually accomplish their objectives by less intrusive means.

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[167] (1987) 195 Cal.App.3d 269.

[168] See *People* v. *Yeoman* (2003) 31 Cal.4th 93, 125 ["Only if the challenged identification procedure is unnecessarily suggestive is it necessary to determine the reliability of the resulting identification."]; *People* v. *Phan* (1993) 14 Cal.App.4th 1453, 1461, fn.5 ["Even one-person showups are not inherently unfair."].

[169] See *Kaupp* v. *Texas* (2003) 538 U.S. 626, 630 ["Such involuntary transport to a police station for questioning is sufficiently like arrest to invoke the traditional rule that arrests may constitutionally be made only on probable cause."]; *Hayes* v. *Florida* (1985) 470 U.S. 811, 815 ["[T]ransportation to and investigative detention at the station house without probable cause or judicial authorization together violate the Fourth Amendment."]; *People* v. *Harris* (1975) 15 Cal.3d 384, 391 [insufficient justification for transporting the detainee to the crime scene]; *U.S.* v. *Parr* (9th Cir. 1988) 843 F.2d 1228, 1231 ["[A] distinction between investigatory stops and arrests may be drawn at the point of transporting the defendant to the police station."].

There are, however, three exceptions to this rule. First, officers may transport the detainee if he freely consented.[170] Second, they may transport him a short distance if it might reduce the overall length of the detention.[171] As the California Supreme Court observed, "[T]he surrounding circumstances may reasonably indicate that it would be less of an intrusion upon the suspect's rights to convey him speedily a few blocks to the crime scene, permitting the suspect's early release rather than prolonging unduly the field detention."[172]

Third, removing the detainee to another location is permitted if there was good reason for doing so. In the words of the Ninth Circuit:

> [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.[173]

For example, if a hostile crowd had gathered it would be reasonable to take the detainee to a place where the detention could be conducted safely.[174] Or it might be necessary to drive the detainee to the crime scene or a hospital for a showup if the victim had been injured.[175] Thus, in *People* v. *Harris*, the court noted, "If, for example, the victim of an assault or other serious offense was injured or otherwise physically unable to be taken to promptly view the suspect, or a witness was similarly incapacitated, and the circumstances warranted a reasonable suspicion that the suspect was indeed the offender, a 'transport' detention might well be upheld."[176]

Another example of a situation in which a "transport detention" was deemed reasonable is found in the case of *People* v. *Soun*.[177] In *Soun*, the Court of Appeal ruled it was reasonable for Oakland officers to drive six suspects in a San Jose robbery-murder to a parking lot three blocks from the detention site because the officers reasonably believed that they would not be able to resolve the matter quickly (given the number of suspects and the need to coordinate their investigation with SJPD detectives), plus it was necessary to detain the suspects in separate patrol cars which were impeding traffic. Said the court, "A three-block transportation to an essentially neutral site for these rational purposes did not operate to elevate [the suspects'] custodial status from detention to arrest."

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[170] See *In re Gilbert R.* (1994) 25 Cal.App.4th 1121, 1225; *Ford* v. *Superior Court* (2001) 91 Cal.App.4th 112, 125. COMPARE *People* v. *Campbell* (1981) 118 Cal.App.3d 588, 596 [court rejects the argument that "a person who is handcuffed and asked to accompany an officer, freely consents to do so"]; *U.S.* v. *Shaw* (6th Cir. 2006) 464 F.3d 615, 622 ["Although he did not express any resistance to going with SA Ford, neither was he given the option of choosing not to go."].

[171] See *People* v. *Daugherty* (1996) 50 Cal.App.4th 275, 287 [detention at airport, OK to walk the detainee 60 yards to the police office for canine sniff of luggage]; *U.S.* v. *Holzman* (9th Cir. 1989) 871 F.2d 1496, 1502 ["the movement of Holzman from the open floor to the more private counter area" is "not the sort of transporting that has been found overly intrusive"]; *Pliska* v. *City of Stevens Point* (7th Cir. 1987) 823 F.2d 1168, 1176 ["The mere fact that [the officer] drove the squad car a short distance does not necessarily convert the stop into an arrest."]; *U.S.* v. *Bravo* (9th Cir. 2002) 295 F.3d 1002, 1011 [30-40 yard walk to border patrol security office]; *U.S.* v. *$109,179* (9th Cir. 2000) 228 F.3d 1080, 1085 ["only a short distance down the hall"]. COMPARE *In re Dung T.* (1984) 160 Cal.App.3d 697, 714 ["the police simply 'loaded up the occupants, put them in police cars, transported them to the police facility"].

[172] *People* v. *Harris* (1975) 15 Cal.3d 384, 391.

[173] *U.S.* v. *Charley* (9th Cir. 2005) 396 F.3d 1074, 1080.

[174] See *People* v. *Courtney* (1970) 11 Cal.App.3d 1185, 1192. ALSO SEE *Florida* v. *Royer* (1983) 460 U.S. 491, 504 ["[T]here are undoubtedly reasons of safety or security that would justify moving a suspect from one location to another during an investigatory detention, such as from an airport concourse to a more private area."].

[175] See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 382 [permissible to transport a rape suspect to a hospital for a showup because the victim was undergoing a "rape-victim examination" which officers believed would take about two hours]; *People* v. *Gatch* (1976) 56 Cal.App.3d 505, 510 ["this case is one in which it was less of an intrusion to convey the defendant speedily a short distance to the crime scene" for a showup]; *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094 [transport a half block away OK when "the victim is injured and physically unable to be taken promptly to view the suspects"]; *U.S.* v. *Charley* (9th Cir. 2005) 396 F.3d 1074, 1080 ["[W]e have held that the 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."]; *U.S.* v. *Meadows* (1st Cir. 2009) 571 F.3d 131, 143 [person detained inside his house could be transported outside because of "the threat of enclosed spaces and secret compartments to officers who are legitimately in a home and are effecting a [detention]"].

[176] (1975) 15 Cal.3d 384, 391.

[177] (1995) 34 Cal.App.4th 1499.

Keep in mind that this exception will be applied only if officers are able to articulate one or more specific reasons for moving the detainee. Thus, in *U.S.* v. *Acosta-Colon* the court responded as follows when an officer cited only "security reasons" as justification for the move:

> [T]here will *always* exist "security reasons" to move the subject of a *Terry*-type stop to a confined area pending investigation. But if this kind of incremental increase in security were sufficient to warrant the involuntary movement of a suspect to an official holding area, then such a measure would be justified in every *Terry*-type investigatory stop.[178]

Other procedures

CONSENT SEARCHES: During an investigative detention, officers may, of course, seek the detainee's consent to search his person, vehicle, or personal property if a search would assist the officers in confirming or dispelling their suspicions.[179] If a search would not be pertinent to the matter upon which reasonable suspicion was based (such as traffic stops), officers may nevertheless seek consent to search because, as noted earlier, a brief request in the course of a lawful detention does not render the detention unlawful.[180] As the Supreme Court explained in *Florida* v. *Bostick*, "[E]ven when officers have no basis for suspecting a particular individual, they may generally request consent to search his or her luggage."[181]

Note, however, that consent may be deemed invalid if a court finds that it was obtained after the officers had completed all of their duties pertaining to the stop, and were continuing to detain the suspect without sufficient cause.[182] Officers may, however, seek consent to search if they converted the detention into a contact. (See "Converting detentions into contacts," next page.)

FIELD CONTACT CARDS: For various reasons, officers may want to obtain certain information about the detainee, such as his physical description, vehicle description, the location of the detention, the names of his companions, and a summary of the circumstances surrounding the stop. Oftentimes, this information will be uploaded to a database or routed to a particular investigator or outside agency.

In any event, a brief delay for this purpose should not cause problems because, as the Court of Appeal observed, "Field identification cards perform a legitimate police function. If done expeditiously and in an appropriate manner after a lawful stop and in response to circumstances which indicate that a crime has taken place and there is cause to believe that the person detained is involved in same, the procedure is not constitutionally infirm."[183]

FINGERPRINTING THE DETAINEE: Officers may fingerprint the detainee if, (1) they reasonably believed that fingerprinting would help confirm or dispel their suspicion, and (2) the procedure was carried out promptly. As the Supreme Court observed:

> There is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose 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.[184]

PHOTOGRAPHING THE DETAINEE: A detainee may, of course, be photographed if he consented.[185] But

[178] (1st Cir. 1998) 157 F.3d 9, 17.
[179] See *Florida* v. *Jimeno* (1991) 500 U.S. 248, 250-1; *United States.* v. *Drayton* (2002) 536 U.S. 194, 207 ["In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent."].
[180] See *People* v. *Gallardo* (2005) 130 Cal.App.4th 234, 238 [grounds to continue the detention is not required before seeking consent]; *U.S.* v. *Canipe* (6th Cir. 2009) 569 F.3d 597, 602 ["When Canipe signed the citation and [the officer] returned his information, thereby concluding the initial purpose of the stop, Canipe neither refused [the officer's] immediate request for permission to search the truck nor asked to leave."].
[181] (1991) 501 U.S. 429, 434.
[182] See *People* v. *Lingo* (1970) 3 Cal.App.3d 661, 663-64.
[183] See *People* v. *Harness* (1983) 139 Cal.App.3d 226, 233.
[184] *Hayes* v. *Florida* (1985) 470 U.S. 811, 817. ALSO SEE *Davis* v. *Mississippi* (1969) 394 U.S. 721, 727-28; *Virgle* v. *Superior Court* (2002) 100 Cal.App.4th 572.
[185] See *People* v. *Marquez* (1992) 1 Cal.4th 553, 578 [in detaining a person who resembled the composite drawing of a murder suspect, there was "no impropriety in . . . asking defendant for his permission to be photographed."].

what if he doesn't consent? Although we are unaware of any cases in which the issue has been addressed, it seems likely that it would be judged by the same standards as nonconsensual fingerprinting; i.e., taking a photograph of the detainee should be permitted if the officers reasonably believed that the photograph would help them confirm or dispel their suspicion, and the procedure was carried out promptly.[186]

Terminating the detention

Officers must discontinue the detention within a reasonable time after they determine that grounds for the stop did not exist.[187] In the words of the Eighth Circuit, "[A]n investigative stop must cease once reasonable suspicion or probable cause dissipates."[188]

Officers must also terminate the detention if it becomes apparent that they would be unable to confirm or dispel their suspicions within a reasonable time. And, of course, a traffic stop must end promptly after the driver has signed a promise to appear.[189]

Converting detentions into contacts

Many of the procedural problems that officers encounter during detentions can be avoided by converting the detention into a consensual encounter or "contact." After all, if the suspect knows he can leave at any time, and if he says he doesn't mind answering some more questions, there is no reason to prohibit officers from asking more questions.

To convert a detention into a contact, the officers must make it clear to the suspect that he is now free to go. Thus, they must ordinarily do two things. First, they must return all identification documents that they had obtained from the suspect, such as his driver's license.[190] This is because "no reasonable person would feel free to leave without such documentation."[191]

Second, although not technically an absolute requirement,[192] they should inform the suspect that he is now free to leave.[193] As the Court of Appeal observed in *People* v. *Profit*, "[D]elivery of such a warning weighs heavily in favor of finding voluntariness and consent."[194]

One other thing. The courts sometimes note whether officers explained to the suspect *why* they wanted to talk with him further, *why* they were seeking consent to search, or *why* they wanted to run a warrant check. Explanations such as these are relevant because this type of openness is more consistent with a contact than a detention, and it would indicate to the suspect that the officers were seeking his voluntary cooperation.[195] POV

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[186] See *People* v. *Thierry* (1998) 64 Cal.App.4th 176, 184 ["[The officers] merely used the occasion of appellant's arrest for that crime to take a photograph they would have been entitled to take on the street or elsewhere without an arrest."].

[187] See *People* v. *Superior Court (Simon)* (1972) 7 Cal.3d 186, 199; *People* v. *Grace* (1973) 32 Cal.App.3d 447, 451 ["[The officer's] right to detain the driver ceased as soon as he discovered the brakelight was operative and not in violation of statute."]; *People* v. *Bello* (1975) 45 Cal.App.3d 970, 973 [after the officer determined that the detainee was not under the influence "he had no legitimate reason for detaining him further"]; *U.S.* v. *Pena-Montes* (10th Cir. 2009) __ F.3d __ [2009 WL 4547058] [the "investigation was complete when [the officer] saw that the vehicle actually had a plate"].

[188] *U.S.* v. *Watts* (8th Cir. 1993) 7 F.3d 122, 126.

[189] See *People* v. *Superior Court (Simon)* (1972) 7 Cal.3d 186, 199 [in a routine traffic stop, the violator must be released "forthwith" when he gives "his written promise that he will appear as directed."].

[190] See *Florida* v. *Royer* (1983) 460 U.S. 491 504 ["[B]y returning his ticket and driver's license, and informing him that he was free to go if he so desired, the officers might have obviated any claim that the encounter was anything but a consensual matter from start to finish."]; *U.S.* v. *Holt* (10th Cir. 2000) 229 F.3d 931, 936, fn.5; *U.S.* v. *Munoz* (8th Cir. 2010) __ F3 __ [2010 WL 99076] ["Munoz was no longer seized once [the officer] handed him the citation and rental agreement [and] merely requested further cooperation"].

[191] *U.S.* v. *Sandoval* (10th Cir. 1994) 29 F.3d 537, 540.

[192] See *Ohio* v. *Robinette* (1996) 519 U.S. 33, 40 [Court rejects as "unrealistic" a requirement that officers "always inform detainees that they are free to go before a consent search may be deemed voluntary."]; *U.S* v. *Mendenhall* (1980) 446 U.S. 544, 555 ["Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend upon her having been so informed."]; *U.S.* v. *Anderson* (10th Cir. 1997) 114 F.3d 1059, 1064; *U.S.* v. *Sullivan* (4th Cir. 1998) 138 F.3d 126, 132.

[193] See *Berkemer* v. *McCarty* (1984) 468 U.S. 420, 436 ["Certainly few motorists would feel free [to] leave the scene of a traffic stop without being told they might do so."].

[194] (1986) 183 Cal.App.3d 849, 877.

[195] See *People* v. *Spicer* (1984) 157 Cal.App.3d 213, 220; *U.S.* v. *Thompson* (7th Cir. 1997) 106 F.3d 794, 798.

Investigative Contacts

Street encounters between citizens and police officers are incredibly rich in diversity.[1]

There are probably no encounters on the streets (or anywhere else) that are more "rich in diversity" than those daily exchanges between officers and the public. After all, they run the gamut from "wholly friendly exchanges of pleasantries" to "hostile confrontations of armed men involving arrests, or injuries, or loss of life."[2]

Situated between these two extremes—but much closer to the "wholly friendly exchange" end—is a type of encounter known as an investigative contact or "consensual encounter." Simply put, a contact occurs when an officer, lacking grounds to detain a certain suspect, attempts to confirm or dispel his suspicions by asking him questions and maybe seeking consent to search his person or possessions. As the Supreme Court explained:

> 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.[3]

One of the interesting things about contacts is that they usually pose a dilemma for both the suspect and the officer. For the suspect (assuming he's guilty) the last person on earth he wants to chat with is someone who carries handcuffs. But he also knows that his refusal to cooperate, or maybe even a hesitation, might be interpreted as confirmation that he is guilty. So he will ordinarily play along for a while and see how things go, maybe try to outwit the officer or at least make up a story that is not an obvious crock.

Meanwhile, the officer knows that, while his badge might provide some "psychological inducement,"[4] he cannot "throw his weight around."[5] Thus he must employ restraint and resourcefulness, all the while keeping in mind that the encounter will instantly become a de facto detention if it crosses the line between voluntariness and compulsion.[6] So it often happens that both the suspect and the officer are role-playing—and they both know that the other knows it.

For officers, however, acting skills and resourcefulness are not enough. As one court put it, they must also have been "carefully schooled" in certain legal rules—the "do's and don'ts" of police contacts[7]—so as to prevent these encounters from inadvertently becoming de facto detentions, at least until they develop grounds to detain or arrest. What are these "do's and don'ts"? That is the subject of this article.

To set the stage, it should be noted that, whenever an officer interacts with anyone in his official capacity, the law will classify the interaction as an arrest, detention, or contact. Arrests and detentions differ "markedly"[8] from contacts because they constitute Fourth Amendment "seizures" which require some level of suspicion; i.e., probable cause or reasonable suspicion.[9] So, as long as the encounter remains merely a contact, the Fourth Amendment and its various restrictions simply do not apply.

One other thing. Officers will sometimes contact a suspect at his home. Known as "knock and talks," these encounters are subject to the same rules as contacts that occur in public places. But because they are viewed as more of an intrusion, there are some additional restrictions that we will cover in the article "Knock and Talks" that begins on page 15.

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[1] *Terry v. Ohio* (1968) 392 U.S. 1, 13.
[2] *Terry v. Ohio* (1968) 392 U.S. 1, 13.
[3] *United States v. Drayton* (2002) 536 U.S. 194, 200. ALSO SEE *People v. Rivera* (2007) 41 Cal.4th 304, 309.
[4] *U.S. v. Ayon-Meza* (9th Cir. 1999) 177 F.3d 1130, 1133.
[5] See *U.S. v. Tavolacci* (D.C. Cir. 1990) 895 F.2d 1423, 1425.
[6] See *I.N.S. v. Delgado* (1984) 466 U.S. 210, 215.
[7] *People v. Profit* (1986) 183 Cal.App.3d 849, 877.
[8] See *People v. Profit* (1986) 183 Cal.App.3d 849, 866.
[9] See *People v. Hughes* (2002) 27 Cal.4th 287, 327.

The Test: "Free to Terminate"

A police-suspect encounter will be deemed a contact if a reasonable person in the suspect's position would have "felt free to decline the officers' requests or otherwise terminate the encounter."[10] In other words, "So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required."[11] Later we will discuss the many circumstances that are relevant in making this determination. But first it will be helpful to discuss some important general principles.

REASONABLE "INNOCENT" PERSON: We begin with a principle that might seem peculiar at first: The fictitious "reasonable person" is "innocent" of the crime under investigation. What this means is that the circumstances are viewed through the eyes of a person who, although not necessarily a pillar of the community, is not currently worried about being arrested.[12] Said the Third Circuit, "[W]hat a guilty [suspect] would feel and how he would react are irrelevant to our analysis because the reasonable person test presupposes an *innocent* person."[13]

The reason this is significant is that a person who was guilty of the crime under investigation would necessarily view the officers' words and actions much differently—much more ominously—than an innocent person, and might therefore erroneously conclude that any perceived restriction on his freedom was an indication that he had been detained. For example, in *In re Kemonte H.* the court ruled that a reasonable innocent person who saw two officers approaching him on the street "would not have felt restrained" but would instead "only conclude that the officers wanted to talk to him."[14]

FREE TO DO WHAT? In the past, the test was whether a reasonable person would have believed he was "free to leave" or "free to walk away" from the officers.[15] This test made sense—and it still does—if the encounter occurs on the streets or other place that the suspect could easily leave if he wanted to. But contacts also occur in places that the suspect has no desire to leave (e.g., his home, his car) and in places he cannot leave easily (e.g., a bus, the shoulder of a freeway, his workplace. For that reason, the Supreme Court in *Florida v. Bostick* simplified things by ruling that freedom to terminate—not freedom to leave—is the correct test because it can be applied "equally to police encounters that take place on trains, planes, and city streets."[16] (In this article, we will use the terms "free to terminate," "free to go" and "free to leave" interchangeably.)

OBJECTIVE VS. SUBJECTIVE CIRCUMSTANCES: In applying the "free to terminate" test the only circumstances that matter are those that the suspect could have seen or heard. Thus, the officer's thoughts, beliefs, suspicions, and plans are irrelevant unless they were somehow communicated to the suspect.[17] As the California Supreme Court explained:

> [A]n officer's beliefs concerning the potential culpability of the individual being questioned are relevant to determining whether a seizure occurred only if those beliefs were somehow manifested to the individual being interviewed—by word or deed—and would have affected how a reasonable person in that position would perceive his or her freedom to leave.[18]

For the same reason, the suspect's subjective belief that he could not freely terminate the encounter is also immaterial.[19] For example, an encounter will not be deemed a seizure merely because the suspect testified that, based on his prior experiences with officers, he thought he would be arrested if he did not comply with all of the officer's requests.[20]

SHOULD VS. MUST: The test is whether a reasonable person would have believed he *must* stay or was otherwise *required* to cooperate with officers. This means a detention will not result merely because a reasonable person would have believed he *should*

[10] *Florida v. Bostick* (1991) 501 U.S. 429, 438. ALSO SEE *Brendlin v. California* (2007) 551 U.S. 249, 256-57.
[11] *Florida v. Bostick* (1991) 501 U.S. 429, 434.
[12] See *United States v. Drayton* (2002) 536 U.S. 194, 202 ["The reasonable person test is objective and presupposes an *innocent* person."].
[13] *U.S. v. Kim* (3d Cir. 1994) 27 F.3d 947, 953.
[14] (1990) 223 Cal.App.3d 1507, 1512.
[15] See, for example, *Michigan v. Chesternut* (1988) 486 U.S. 567, 573.
[16] See *Florida v. Bostick* (1991) 501 U.S. 429, 438.
[17] See *Brendlin v. California* (2007) 551 U.S. 249, 260-61; *In re Manuel G.* (1997) 16 Cal.4th 805, 821.
[18] *People v. Zamudio* (2008) 43 Cal.4th 327, 345.
[19] See *People v. Cartwright* (1999) 72 Cal.App.4th 1362, 1371; *U.S. v. Thompson* (7th Cir. 1997) 106 F.3d 794, 798.
[20] See *U.S. v. Analla* (4th Cir. 1992) 975 F.2d 119, 124.

stay and cooperate, or because the officer's request made him "uncomfortable."[21] As the Court of Appeal noted, "Cooperative citizens may ordinarily feel they should respond when approached by an officer on the street but this does not, by itself, mean that they do not have a right to leave if they so desire."[22]

REFUSAL TO COOPERATE: Because contacts are, by definition, consensual, a suspect may refuse to talk with officers, refuse to ID himself, or otherwise not cooperate.[23] "Implicit in the notion of a consensual encounter," said the Court of Appeal, "is a choice on the part of the citizen not to consent but to decline to listen to the questions at all and go on his way."[24] Or, as the Ninth Circuit put it, "When a citizen expresses his or her desire *not* to cooperate, continued questioning cannot be deemed consensual."[25]

COMPARE MIRANDA: It is important not to confuse the "free to terminate" test with *Miranda's* test for determining whether a suspect was "in custody." While both tests attempt to gauge the coercive pressures that existed during a police encounter, a suspect will be deemed "in custody" for *Miranda* purposes only if he reasonably believed he was effectively under arrest.[26] But, as noted, a contact will become a de facto detention if the suspect reasonably believed that he was not free to terminate the encounter.

IF THE SUSPECT RUNS: There is one exception to the "free to terminate" rule: If the suspect ran from the officers when they attempted to contact him, and if they gave chase, the encounter will not be deemed a seizure until they apprehend him.[27] Thus, if the suspect discarded drugs, weapons or other evidence while running, the evidence will not be suppressed on grounds that the officers lacked grounds to detain or arrest him.

TOTALITY OF CIRCUMSTANCES: In applying the "free to terminate" test, the courts will consider the totality of circumstances.[28] Although there are some actions that will, in and of themselves, result in a seizure (e.g., pulling a gun), in most cases it takes a "collective show of authority."[29] As the California Supreme Court explained, "This test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation."[30]

FREE TO TERMINATE VS. STREET REALITY: Before going further, it must be acknowledged that many of the things that officers may say and do without converting a contact into a detention would plainly cause some innocent people to believe they were not free to terminate the encounter. But this does not mean, as some have suggested, that the test is a sham or, at best, naive.[31]

Instead, like many other Fourth Amendment "tests" (such as determining whether there are grounds to arrest or pat search a suspect) it is simply a practical—albeit imperfect—compromise between competing interests. As the Fourth Circuit put it, if a suspect decided to walk off, it "may have created an awkward situation," but "awkwardness alone does not invoke the protections of the Fourth Amendment."[32] Similarly, the Ninth Circuit observed that "we must recognize that there is an element of psychological inducement when a representative of the police initiates a conversation. But it is not the kind of psychological pressure that leads, without more, to an involuntary stop."[33]

Having covered the basic principles, we will now examine the various circumstances that are especially relevant in determining whether an encounter with an officer was a contact or a seizure.

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[21] See *U.S. v. McCoy* (4th Cir. 2008) 513 F.3d 405, 411 ["uncomfortable does not equal unconstitutional"].
[22] *In re Kemonte H.* (1990) 223 Cal.App.3d 1507, 1512.
[23] See *Florida v. Bostick* (1991) 501 U.S. 429, 437; *Illinois v. Wardlow* (2000) 528 U.S. 119, 125; *People v. Franklin* (1987) 192 Cal.App.3d 935.
[24] *People v. Spicer* (1984) 157 Cal.App.3d 213, 220.
[25] *Morgan v. Woessner* (9th Cir. 1993) 997 F.2d 1244, 1253.
[26] See *Howes v. Fields* (2012) __ U.S. __ [132 S.Ct. 1181, 1184; *People v. Lopez* (1985) 163 Cal.App.3d 602, 607; *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403, fn.1.
[27] See *California v. Hodari D.* (1991) 499 U.S. 621, 627-28; *Brendlin v. California* (2007) 551 U.S. 249, 254.
[28] See *Florida v. Bostick* (1991) 501 U.S. 429, 439; *Ohio v. Robinette* (1996) 519 U.S. 33, 39.
[29] *U.S. v. Black* (4th Cir. 2013) 707 F.3d 531, 538.
[30] *In re Manuel G.* (1997) 16 Cal.4th 805, 821.
[31] See, for example, *People v. Spicer* (1984) 157 Cal.App.3d 213, 218 [the notion that a contacted suspect would ever feel perfectly free to disregard an officer's requests may be "the greatest legal fiction of the late 20th century"].
[32] See *U.S. v. Weaver* (4th Cir. 2002) 282 F.3d 302, 311.
[33] *U.S. v. Ayon-Meza* (9th Cir. 1999) 177 F.3d 1130, 1133. Also see *U.S. v. Ringold* (10th Cir. 2003) 335 F.3d 1168, 1174.

Engaging the Suspect

Regardless of why the officers wanted to contact the suspect—whether he was acting suspiciously, or he resembled a wanted fugitive, or he was just hanging out in a high-crime area—the manner in which they get him to stop and talk to them is critical. This is because the usual methods of stopping a suspect constitute such an assertion of police authority that they automatically result in a seizure. As the Supreme Court put it, a seizure is likely to occur if an officer's "use of language or tone of voice indicat[ed] that compliance with the officer's request might be compelled."[34]

COMMANDS TO STOP: Commanding a suspect to "stop," "hold it," "come over here," or otherwise make himself immediately available to the officer is such an overt display of police authority that it will automatically render the encounter a de facto detention.[35] "[W]hen an officer 'commands' a citizen to stop," said the Court of Appeal, "this constitutes a detention because the citizen is no longer free to leave."[36]

REQUESTS TO STOP: Unlike a command to stop, a request to do so demonstrates to the suspect that he has a choice and that the officer is not asserting his authority. For example, the courts have ruled that none of the following requests resulted in a detention: "Can I talk to you for a moment?"[37] "Hey, how you doing? You mind if we talk?"[38] "Gentlemen, may I speak with you just a minute?"[39]

The courts are aware, however, that an officer's manner and tone of voice in making such a request may send an implicit message that the suspect has no choice. As the court explained in *People v. Franklin*:

> [I]f the manner in which the request was made constituted a show of authority such that [the suspect] reasonably might believe he had to comply, then the encounter was transformed into a detention[40]

For example, in *U.S. v. Buchanon* a state trooper who had stopped to assist the occupants of a disabled vehicle started thinking they might be transporting drugs, at which point he said, "Gentlemen, why don't you all come over here on the grass a second if you would please." Although the trooper's words were phrased as a request, the court listened to a recording of the incident and concluded that his tone of voice was "one of command."[41]

DEMONSTRATING URGENT INTEREST: A request to stop might be deemed a detention if it was accompanied by one or more circumstances that demonstrated an unusual or urgent interest in the suspect.[42] This occurred in *People v. Jones* when an Oakland police officer engaged three suspects by pulling his patrol car to the wrong side of the road, parking diagonally against traffic, then asking them to stop. Said the court, "A reasonable man does not believe he is free to leave when directed to stop by a police officer who has arrived suddenly and parked his car in such a way as to obstruct traffic."[43]

APPROACH AND ASK QUESTIONS: A detention will not result if an officer merely walks up to a suspect, flashes a badge or otherwise identifies himself and—without saying or doing anything to indicate the suspect was not free to leave—begins to ask him some questions.[44] As the court observed in *People v. Derello*, "[T]he officers were doing exactly what they were lawfully entitled to do, which is to approach and talk if the subject is willing."[45]

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[34] *United States v. Mendenhall* (1980) 446 U.S. 544, 554.
[35] See *People v. Brown* (1990) 216 Cal.App.3d 1442, 1448; *People v. Verin* (1990) 220 Cal.App.3d 551, 555; *People v. Roth* (1990) 219 Cal.App.3d 211; *People v. Rodriguez* (1993) 21 Cal.App.4th 232, 238; *People v. Foranyic* (1998) 64 Cal.App.4th 186, 188.
[36] *People v. Verin* (1990) 220 Cal.App.3d 551, 556. ALSO SEE *U.S. v. Winsor* (9th Cir. en banc 1988) 846 F.2d 1569, 1573, fn.3.
[37] *People v. Bennett* (1998) 68 Cal.App.4th 396, 402.
[38] *People v. Bouser* (1994) 26 Cal.App.4th 1280, 1282.
[39] *U.S. v. McFarley* (4th Cir. 1993) 991 F.2d 1188, 1191. ALSO SEE *Ford v. Superior Court* (2001) 91 Cal.App.4th 112, 128.
[40] (1987) 192 CA3 935, 941. ALSO SEE *In re Manuel G.* (1997) 16 Cal4th 805, 821 [we consider "the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled"]; *U.S. v. Jones* (4th Cir. 2012) 678 F.3d 293, 303 ["A request certainly is not an order [but it may convey] the requisite show of authority"].
[41] (6th Cir. 1995) 72 F.3d 1217, 1220, fn.2.
[42] See *People v. Boyer* (1989) 48 Cal.3d 247, 268 ["The manner in which the police arrived at defendant's home, accosted him, and secured his 'consent' to accompany them suggested they did not intend to take 'no' for an answer."].
[43] (1991) 228 Cal.App.3d 519, 523.
[44] See *Florida v. Bostick* (1991) 501 U.S. 429, 434; *Florida v. Royer* (1983) 460 U.S. 491, 497; *U.S. v. Drayton* (2002) 536 U.S. 194, 204
[45] (1989) 211 Cal.App.3d 414, 427.

RED LIGHTS: Shining a red light at a moving or parked vehicle is essentially a command directed at the driver to stop or stay put and thus necessarily results in a seizure of the driver if he complies.[46] As the Court of Appeal noted, "A reasonable person to whom the red light from a vehicle is directed would be expected to recognize the signal to stop or otherwise be available to the officer."[47]

Although a red light constitutes a command to only those people to whom it reasonably appeared to have been directed (usually the driver),[48] when an officer lights up a vehicle *all* passengers are also deemed detained. This is because they know that, for officer-safety purposes, the officer may prevent them from leaving the vehicle and may otherwise restrict their movements while he is dealing with the driver. As the Supreme Court explained in *Brendlin v. California*, "An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely."[49] Such a detention of the passengers is, however, legal so long as the officer had grounds to detain the driver or other occupant.

SPOTLIGHTS, HIGH BEAMS, AMBER LIGHTS: Using a white spotlight or high beams to get the suspect's attention is a relevant but usually insignificant circumstance. (This subject is covered below in the section "Officer-Safety Measures.") Also note that because an amber warning light is a safety measure that is directed at approaching motorists, it has no bearing on whether the suspect was detained.[50]

BLOCKING THE SUSPECT'S PATH: A detention will ordinarily result if officers stop the suspect by blocking his vehicle or path so as to prevent him from leaving.[51] For example, in *People v. Wilkins*[52] a San Jose police officer was driving through the parking lot of a convenience store when he noticed that two men in a parked station wagon had ducked down as if to conceal themselves. Having decided to contact them, the officer "parked diagonally" behind the vehicle, effectively blocking it in. He soon learned that one of the men, Wilkins, was on searchable probation, so he searched him and found drugs. The court, however, ruled that the search was unlawful because "the occupants of the station wagon were seized when [the officer] stopped his marked patrol vehicle behind the parked station wagon in such a way that the exit of the parked station wagon was prevented."

A detention will not result, however, merely because officers stopped a patrol car behind a pedestrian or to the side of a vehicle. As the court explained in *People v. Franklin*, "Certainly, an officer's parking behind an ordinary pedestrian reasonably would not be construed as a detention. No attempt was made to block the way."[53] Similarly, the courts have ruled that a seizure does not result when an officer only partially blocked the suspect.[54] For example, in *U.S. v. Basher* the Ninth Circuit ruled that, although an officer testified that he "parked his vehicle nose to nose with Basher's truck," this did not constitute a detention because the officer also testified that "there was room to drive way."[55] And in a forfeiture

[46] See *Berkemer v. McCarty* (1984) 468 U.S. 420, 436 ["Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so."]; *Brower v. County of Inyo* (1989) 489 U.S. 593, 597 ["flashing lights" constituted a "show of authority"]; *People v. Ellis* (1993) 14 Cal.App.4th 1198, 1202, fn.3 [a detention results when "an officer activated the overhead red light of his police car"].
[47] *People v. Bailey* (1985) 176 Cal.App.3d 402, 405-6.
[48] See *Brendlin v. California* (2007) 551 U.S. 249, 254; *Brower v. County of Inyo* (1989) 489 U.S. 593, 596-97; *U.S. v. Al Nasser* (9th Cir. 2009) 555 F.3d 722, 731.
[49] (2007) 551 U.S. 249, 257. Edited. ALSO SEE *Arizona v. Johnson* (2009) 555 U.S. 323, 332; *U.S. v. Jones* (6th Cir. 2009) 562 F.3d 768, 774.
[50] See *U.S. v. Dockter* (8th Cir. 1995) 58 F.3d 1284, 1287.
[51] See *U.S. v. Kerr* (9th Cir. 1987) 817 F.2d 1384, 1387; *U.S. v. Jones* (6th Cir. 2009) 562 F.3d 768, 772 ["Here, by blocking in the Nissan, the officers had communicated to a reasonable person occupying the Nissan that he or she was not free to drive away."]; *U.S. v. Packer* (7th Cir. 1994) 15 F.3d 654, 657 ["the officers' vehicles were parked both in front and behind the Defendant's car"]. COMPARE *Michigan v. Chesternut* (1988) 486 U.S. 567, 575 [the officers did not drive their car "in an aggressive manner to block respondent's course or otherwise control the direction or speed of his movement"].
[52] (1986) 186 Cal.App.3d 804.
[53] (1987) 192 Cal.App.3d 935, 940. ALSO SEE *People v. Banks* (1990) 217 Cal.App.3d 1358, 1362 [officer stopped "behind defendant's car"]; *People v. Brueckner* (1990) 223 Cal.App.3d 1500, 1505 [officer parked "next to" suspect's car]; *People v. Juarez* (1973) 35 Cal.App.3d 631 [officer pulled patrol car alongside suspect]; *U.S. v. Pajari* (8th Cir. 1983) 715 F.2d 1378, 1380 [the officers "simply parked behind his car"].
[54] See *People v. Banks* (1990) 217 Cal.App.3d 1358, 1362; *People v. Perez* (1989) 211 Cal.App.3d 1492, 1946; *U.S. v. Summers* (9th Cir. 2001) 268 F.3d 683, 687.
[55] (9th Cir. 2011) 629 F.3d 1161, 1167.

case, *U.S. v. $25,000,* the court ruled that two DEA agents had not inadvertently detained a person they spoke with at LAX because, among other things, one of the agents stood "about two feet" in front of the suspect, and the other stood "behind and to the side" of him.[56]

"You're free to go": The easiest and most direct method of communicating to a suspect that he is free to go is to say so.[57] Although such a notification is not required,[58] it is recommended, especially in close cases. As the Court of Appeal put it, "[T]he delivery of such a warning weighs heavily in favor of finding voluntariness and consent."[59]

When giving a "free to go" advisory, however, officers must not place any conditions or restrictions on the suspect's freedom to leave. This is because a suspect is either free to go or he's not; there's no middle ground. For example, despite such an advisory, the courts have ruled that encounters became detentions when an officer told the suspect that he would have to wait for a K9 to arrive,[60] or "wait a minute,"[61] or remain in the patrol car while the officer talked to another person.[62] Similarly, informing a suspect that he is free to go will have little impact if officers conducted themselves in a manner that reasonably indicated he was not; e.g., the officer used a "commanding tone of voice,"[63] the officer kept "leaning over and resting his arms on the driver's door."[64]

Location of the encounter: The courts frequently mention whether the encounter occurred in a place that was visible to others, the theory being that the presence of potential witnesses might provide the suspect with a greater sense of security.[65] For example, the courts have noted in passing that "many fellow passengers [were] present to witness the officers' conduct,"[66] "the incident occurred on a public street,"[67] "the encounter here occurred in a public place—the parking lot of a [7-Eleven] store—in view of other patrons."[68] Nevertheless, the fact that a contact occurred in a more isolated setting is seldom a significant circumstance. As the Third Circuit observed, "The location in itself does not deprive an individual of his ability to terminate an encounter; he can reject an invitation to talk in a private, as well as a public place."[69]

Officer-Safety Measures

A suspect who is being contacted may, of course, pose a threat to officers. This can present a problem because many basic officer-safety precautions are strongly suggestive of a detention. To help resolve this dilemma, the courts have ruled that some inquiries and requests pertaining to officer safety will not convert the encounter into a seizure.

Remove hands from pockets: A detention will not result if officers simply *requested* that the suspect remove his hands from his pockets or keep them in

[56] (9th Cir. 1988) 853 F.2d 1501, 1503, 1504.

[57] See *Florida v. Royer* (1983) 460 U.S. 491, 504 ["[B]y informing him that he was free to go if he so desired, the officers may have obviated any claim that the encounter was anything but a consensual matter from start to finish."]; *People v. Profit* (1986) 183 Cal.App.3d 849, 856 ["You're not under arrest, I'm not detaining you, you're free to leave and not speak to me if you don't want to."]; *Morgan v. Woessner* (9th Cir. 1993) 997 F.2d 1244, 1254 ["Although an officer's failure to advise a citizen of his freedom to walk away is not dispositive of the question of whether the citizen knew he was free to go, it is another significant indicator of what the citizen reasonably believed."].

[58] See *United States v. Mendenhall* (1980) 446 U.S. 544, 555; *Ohio v. Robinette* (1996) 519 U.S. 33, 39-40; *People v. Daugherty* (1996) 50 Cal.App.4th 275, 283-84; *U.S. v. Jones* (10th Cir. 2012) 701 F.3d 1300, 1314 ["the officers were not required to inform Mr. Jones that he was free to leave"].

[59] *People v. Profit* (1986) 183 Cal.App.3d 849, 877.

[60] See *U.S. v. Finke* (7th Cir. 1996) 85 F.3d 1275, 1281; *U.S. v. Beck* (8th Cir. 1998) 140 F.3d 1129, 1136-37.

[61] *U.S. v. Sandoval* (10th Cir. 1994) 29 F.3d 537. ALSO SEE *U.S. v. Ramos* (8th Cir. 1994) 42 F.3d 1160, 1162-64 [although the driver's license was returned to him, he was asked to remain in the patrol car while the officer spoke with the passenger].

[62] *U.S. v. Ramos*, (8th Cir. 1994) 42 F.3d 1160, 1162-64.

[63] *U.S. v. Elliott* (10th Cir. 1997) 107 F.3d 810, 814.

[64] *U.S. v. McSwain* (10th Cir. 1994) 29 F.3d 558, 563.

[65] See *I.N.S. v. Delgado* (1994) 466 U.S. 210, 217, fn.5 ["other people were in the area"]; *U.S. v. Yusuff* (7th Cir. 1996) 96 F.3d 982, 986 ["the encounter was in a busy, public area of the airport"]; *U.S. v. Sanchez* (10th Cir. 1996) 89 F.3d 715, 718 [the encounter occurred "in an open and well illuminated parking lot"]; *U.S. v. Ringold* (10th Cir. 2003) 335 F.3d 1168, 1172 [the encounter occurred "in the public space outside the service station, in full view of other patrons"]; *U.S. v. Spence* (10th Cir. 2005) 397 F.3d 1280, 1283 ["This court does consider interaction in a nonpublic place and the absence of other members of the public as factors pointing toward a nonconsensual encounter."].

[66] *United States v. Drayton* (2002) 536 U.S. 194, 204.

[67] *People v. Sanchez* (1987) 195 Cal.App.3d 42, 45.

[68] *U.S. v. Thompson* (10th Cir. 2008) 546 F.3d 1223, 1227.

[69] *U.S. v. Kim* (3rd Cir. 1994) 27 F.3d 947, 952.

sight.[70] Thus in such a case, *U.S. v. Basher,* the Ninth Circuit explained that "[p]olice officers routinely ask individuals to keep their hands in sight for officer protection," and here the request "does not appear to have been made in a threatening manner."[71] Once again, note the importance of the officers' choice of words and their attitude. As the Court of Appeal explained, "[I]f the manner in which the request was made constituted a show of authority such that appellant reasonably might believe he had to comply, then the encounter was transformed into a detention."[72]

EXIT THE VEHICLE: For officer-safety purposes, officers may also request that the occupants of a parked vehicle step outside. But a detention will likely result if they expressly or impliedly commanded them to do so. Thus, in *People v. Rico* the court said, "While the appellants' initial stop did not constitute a detention, the officer's subsequent ordering the appellants to alight from their vehicle and remain by the patrol car constituted a detention."[73]

SPOTLIGHTS, HIGH BEAMS: A seizure does not result merely because officers utilized a white spotlight or high beams to illuminate the suspect, whether for officer safety or to get the suspect's attention.[74] For example, in *People v. Perez*[75] a San Jose police officer on patrol at night noticed two men in a car parked in an unlit section of a motel parking lot known for drug sales. As the officer pulled up to the car, he turned on his high beams and white spotlight to "get a better look at the occupants." He eventually arrested the driver for being under the influence of PCP, and one of the issues on appeal was whether his use of the lights converted the encounter into a detention. In ruling it did not, the court said, "While use of high beams and spotlights might cause a reasonable person to feel himself the object of official scrutiny, such directed scrutiny does not amount to a detention."

Similarly, in *People v. Franklin*[76] a Ridgecrest officer on patrol in a high crime area spotlighted Franklin who was walking on the sidewalk. He did this because, although it was a warm night, Franklin was wearing a full-length camouflage jacket. When the officer stopped behind him, Franklin turned and walked toward the officer and repeatedly asked, "What's going on?" Because Franklin was sweating and appeared "real jittery," the officer asked him to remove his hands from his pockets. As he did so, the officer saw blood on his hands, which ultimately led to Franklin's arrest for a murder that had just occurred in a nearby motel room. Again, the court rejected the argument that the spotlighting rendered the encounter a seizure, saying, "the spotlighting of appellant alone fairly can be said not to represent a sufficient show of authority so that appellant did not feel free to leave."

PAT SEARCHES: A nonconsensual pat search is both a search and a seizure and will therefore automatically result in a detention.[77] As the court explained in *In re Frank V.*, "Since Frank was physically restrained by the patdown, it constituted a detention."[78]

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[70] *People v. Ross* (1990) 217 Cal.App.3d 879, 885 [the officer "'asked' but did not demand that appellant remove her hands from her pockets"]; *People v. Epperson* (1986) 187 Cal.App.3d 115, 118, 120 [officer asked the suspect to identify an object in his pocket].
[71] (9th Cir. 2011) 629 F.3d 1161, 1167.
[72] *People v. Franklin* (1987) 192 Cal.App.3d 935, 941. ALSO SEE *U.S. v. Jones* (4th Cir. 2012) 678 F.3d 293, 305 [officers "quickly approached Jones . . . and nearly immediately asked first that he lift his shirt and then that he consent to a pat down"]. **NOTE:** While one California court ruled that such a command did not automatically result in a detention (*In re Frank V.* (1991) 233 Cal.App.3d 1232, 1239), to our knowledge no other court has adopted this reasoning.
[73] (1979) 97 Cal.App.3d 124, 130-31. ALSO SEE *U.S. v. Stewart* (8th Cir. 2011) 631 F.3d 453, 456.
[74] See *People v. Rico* (1979) 97 Cal.App.3d 124, 130 ["momentarily" spotlighting of a vehicle "was ambiguous"]; *People v. Brueckner* (1990) 223 Cal.App.3d 1500, 1505 ["The fact he shined his spotlight on the vehicle as he parked in the unlit area would not, by itself, lead a reasonable person to conclude he or she was not free to leave."]; *U.S. v. Mabery* (8th Cir. 2012) 686 F.3d 591, 597 ["the act of shining a spotlight on Mabery's vehicle from the street was certainly no more intrusive (and arguably less so) than knocking on the vehicle's window"]. **NOTE:** In *People v. Gary* (2007) 156 Cal.App.4th 1100, 1111 the court melodramatically described the spotlighting of the defendant as "bath[ing] him in light." Still, the dip did not appear to be a significant circumstance.
[75] (1989) 211 Cal.App.3d 1492, 1496.
[76] (1987) 192 Cal.App.3d 935.
[77] See *U.S. v. Stewart* (8th Cir. 2011) 631 F.3d 453, 456 [pat search is both a search and seizure]; *People v. Rodriguez* (1993) 21 Cal.App.4th 232, 238 [suspect was patted down and told to sit on the curb]; *U.S. v. Black* (4th Cir. 2013) 707 F.3d 531, 538. BUT ALSO SEE *People v. Singer* (1990) 226 Cal.App.3d 23, 46-67 [routine pat searching of unarrested suspect before he voluntarily got into a police car for a ride to the station did not convert the encounter into an arrest].
[78] (1991) 233 Cal.App.3d 1232, 1240, fn.3.

HANDCUFFS, OTHER RESTRAINT: Not surprisingly, a detention will also automatically result if officers handcuffed or otherwise restrained the suspect. This is because such measures are classic indications of a detention or arrest.[79]

DRAWN WEAPON: Even more obviously, a detention will result if an officer drew a handgun or other weapon as a safety precaution.[80] It is even significant that the officer "had his hand on his revolver."[81] However, the fact that an officer was visibly armed has "little weight in the analysis."[82] As the Supreme Court observed, "That most law enforcement officers are armed is a fact well known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon."[83]

NUMBER OF OFFICERS: Finally, the presence of backup officers, the number of them, their proximity to the suspect, and the manner in which they arrived and conducted themselves are all highly relevant.[84] For example, in *U.S. v. Washington* the court ruled the defendant was seized mainly because he was "confronted" by six officers who had gathered "around him."[85] And in *U.S. v. Buchanon* the court ruled the defendant was detained largely because of "[t]he number of officers that arrived [three], the swiftness with which they arrived, and the manner in which they arrived (all with pursuit lights flashing)." These circumstances, said the court, "would cause a reasonable person to feel intimidated or threatened."[86] In contrast, the presence of backup officers has been deemed less significant when they were "posted in the background,"[87] were "out of sight,"[88] were "four to five feet away,"[89] or were "little more than passive observers."[90]

Conducting the Investigation

After engaging the suspect and taking appropriate safety measures, officers will ordinarily begin their investigation by asking questions. As the court observed in *People v. Manis*, "When circumstances demand immediate investigation by the police, the most useful, most available tool for such investigation is general on-the-scene questioning."[91]

In addition to such questioning, there are some other investigative procedures that officers may ordinarily utilize without converting the encounter into a detention. But first, we will discuss—actually, reiterate—the all-important subject of the officers' general attitude.

Respectfulness

Lacking grounds to detain or arrest the suspect, officers must be courteous and demonstrate a respectful attitude. Even if he is a notorious sleaze with a bloated criminal record and a bad attitude, they must be careful not to impose their authority on him, at least until they develop grounds to do so. It

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[79] See *People v. Zamudio* (2008) 43 Cal.4th 327, 342 ["no one was handcuffed or patted down"]; *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1240, fn.3; *People v. Gallant* (1990) 225 Cal.App.3d 200, 207; *Ford v. Superior Court* (2001) 91 Cal.App.4th 112, 128 ["[he] was never handcuffed" and he "was left in the unlocked backseat of the police car"].

[80] See *United States v. Mendenhall* (1980) 446 U.S. 544, 554 ["the display of a weapon by an officer" is a circumstance "that might indicate a seizure"]; *People v. McKelvy* (1972) 23 Cal.App.3d 1027, 1034 [one of the officers carried a shotgun]; *People v. Gallant* (1990) 225 Cal.App.3d 200, 204 ["One of the police officers answered defendant's knock at the door by drawing his gun, opening the door, and confronting defendant."].

[81] See *U.S. v. Chan-Jimenez* (9th Cir. 1997) 125 F.3d 1324, 1326.

[82] See *People v. Zamudio* (2008) 43 Cal.4th 327, 346; *U.S. v. Thompson* (10th Cir. 2008) 546 F.3d 1223, 1227.

[83] *United States v. Drayton* (2002) 536 U.S. 194, 205.

[84] See *United States v. Mendenhall* (1980) 446 U.S. 544, 554 ["the threatening presence of several officers" is relevant]; *In re Manuel G.* (1997) 16 Cal.4th 805, 821; *U.S. v. Black* (4th Cir. 2013) 707 F.3d 531, 538 ["Four uniformed officers approached the men, a number that quickly increased to six uniformed officers, and then seven."]; *U.S. v. Quintero* (8th Cir. 2011) 648 F.3d 660, 670.

[85] (9th Cir. 2004) 387 F.3d 1060, 1068.

[86] (6th Cir. 1995) 72 F.3d 1217, 1224.

[87] *U.S. v. Kim* (9th Cir. 1994) 25 F.3d 1426, 1431, fn.3. ALSO SEE *People v. Profit* (1986) 183 Cal.App.3d 849, 877 ["Here initially there were three defendants and only two officers. Only later did the third officer even the numbers. This does not constitute a show of force"]; *U.S. v. Crapser* (9th Cir. 2007) 472 F.3d 1141, 1146 ["Although there were four officers present, most of the time only two talked to Defendant, while two talked to Twilligear"]; *U.S. v. Thompson* (10th Cir. 2008) 546 F.3d 1223, 1227 ["while four officers were on the premises, only one . . . approached Mr. Thompson"]; *U.S. v. Yusuff* (7th Cir. 1996) 96 F.3d 982, 986 ["the officers stood several feet away from Yusuff"].

[88] *U.S. v. Kim* (3rd Cir. 1994) 27 F.3d 947, 954.

[89] U.S. v. $25,000 (9th Cir. 1988) 853 F.2d 1501, 1504-1505.

[90] *U.S. v. White* (8th Cir. 1996) 81 F.3d 774, 779; *U.S. v. Jones* (10th Cir. 2012) 701 F.3d 1300, 1314 ["while there were three officers on the scene . . . the officers' presence was nonthreatening"].

[91] (1969) 268 CA2 653, 665.

doesn't matter whether they choose to adopt a friendly tone or one that is more businesslike. What counts is that they create—and maintain—a noncoercive environment. As the Court of Appeal explained, "It is not the nature of the question or request made by the authorities, but rather the manner or mode in which it is put to the citizen that guides us in deciding whether compliance was voluntary or not."[92]

For example, in *U.S. v. Jones*[93] an encounter quickly became a detention when, upon approaching the suspect, the officers immediately requested that he lift his shirt and consent to a search. Said the court, "A request certainly is not an order, but a request—two back-to-back requests in this case—that conveys the requisite show of authority may be enough to make a reasonable person feel that he would not be free to leave." And in *Orhorhaghe v. I.N.S.* the Ninth Circuit ruled that an encounter was converted into a de facto detention mainly because the officer "acted in an officious and authoritative manner that indicated that [the suspect] was not free to decline his requests."[94]

In contrast, in *Ford v. Superior Court* the court ruled that, "[a]lthough petitioner was never told in so many words that he was not under arrest or that he was free to leave, that advice was implicit in the sergeant's apology for the time it was taking to interview other witnesses."[95] Similarly, the courts have noted the following in ruling that a contact had not degenerated into a de facto detention:

- The officer "spoke in a polite, conversational tone."[96]
- The officer "seemed to act cordially."[97]
- His tone "was calm and casual."[98]
- The conversation was "nonaccusatory."[99]
- "[A]t no time did [the officers] raise their voices."[100]
- Their "tone of voice was inquisitive rather than coercive."[101]

To say that officers must be respectful does not mean they may not demonstrate some degree of suspicion. After all, most people are aware that officers do not go around questioning people at random in hopes that they had just committed a crime. Thus, in *People v. Lopez* the court noted that, while the officer's questions "did indicate [he] suspected defendant of something," and that his questions were "not the stuff of usual conversation among adult strangers," his tone was apparently "no different from those presumably gentlemanly qualities he displayed in the witness box."[102]

Officers may also demonstrate respectfulness if they take a moment to explain to the suspect why

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[92] *People v. Franklin* (1987) 192 Cal.App.3d 935, 941. ALSO SEE *People v. Ross* (1990) 217 Cal.App.3d 879, 884-85 ["It is the mode or manner in which the request for identification is put to the citizen, and not the nature of the request that determines whether compliance was voluntary."]; *People v. Lopez* (1989) 212 Cal.App.3d 289, 293, fn.2 ["both form and content are important."]; *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1239 ["Both the nature and the manner must be examined."]; *U.S. v. Ledesma* (10th Cir. 2006) 447 F.3d 1307, 1314 [relevant circumstance is the "use of aggressive language or tone of voice indicating that compliance with an officer's request is compulsory" as opposed to "an officer's pleasant manner and tone of voice that is not insisting"].

[93] (4th Cir. 2012) 678 F.3d 293, 303.

[94] (9th Cir. 1994) 38 F.3d 488, 495.

[95] (2001) 91 Cal.App.4th 112, 128.

[96] *People v. Bennett* (1998) 68 Cal.App.4th 396, 402. ALSO SEE *United States v. Drayton* (2002) 536 U.S. 194, 204 [the officer spoke "in a polite, quiet voice"]; *U.S. v. Kim* (3rd Cir. 1994) 27 F.3d 947, 953 [the officer's tone was "polite and conversational."]; *U.S. v. Flowers* (4th Cir. 1990) 912 F.2d 707, 711 ["they spoke to him in a casual tone of voice"]; *U.S. v. Cruz-Mendez* (10th Cir. 2006) 467 F.3d 1260, 1254 [the officers "acted courteously"]; *U.S. v. Cormier* (9th Cir. 2000) 220 F.3d 1103, 1110 [the officer "never spoke to Cormier in an authoritative tone"]; *U.S. v. Ringold* (10th Cir. 2003) 335 F.3d 1168, 1172 [the officer "was polite and the conversation was friendly in tone"]; *U.S. v. Yusuff* (7th Cir. 1996) 96 F.3d 982, 986, 986 ["a normal, polite tone of voice"]; *U.S. v. Tavolacci* (D.C. Cir. 1990) 895 F.2d 1423, 1425 ["conversational tones"]; *U.S. v. Orman* (9th Cir. 2007) 486 F.3d 1170, 1175 [he "politely asked him if he could have a word with him"].

[97] *People v. Singer* (1990) 226 Cal.App.3d 23, 48.

[98] *U.S. v. Jones* (10th Cir. 2012) 701 F.3d 1300, 1314.

[99] *People v. Hughes* (2002) 27 Cal.4th 287, 328.

[100] *U.S. v. $25,000* (9th Cir. 1988) 853 F.2d 1501, 1505.

[101] *U.S. v. Dockter* (8th Cir. 1995) 58 F.3d 1284, 1287. ALSO SEE *People v. Epperson* (1986) 187 Cal.App.3d 115, 120 ["There was nothing in the officer's attitude or the nature of the inquiry which would indicate to a reasonable person that compliance with the officer's request might be compelled or that defendant was not free to leave."]; *People v. Sanchez* (1987) 195 Cal.App.3d 42, 47 ["The record lacks any indication their dialogue was coercive [there was] nothing apparent in [the officer's] attitude or the nature of his inquiry to reflect compulsory compliance"].

[102] (1989) 212 Cal.App.3d 289, 293.

they wanted to speak with him, rather than begin by abruptly asking questions or making requests. For example, in rejecting an argument that a DEA agent's initial encounter with the defendant at an airport terminal had become a de facto detention, the court in *U.S v. Gray* noted that the agent "informed Gray of the DEA's purpose and function."[103] Similarly, in *U.S. v. Crapser* the Ninth Circuit pointed out that the officer began by "explain[ing] to [the suspect] why the police had come to her motel room."[104]

In contrast, in *People v. Spicer*[105] officers pulled over a car driven by Mr. Spicer because it appeared that he was under the influence of something. While one officer administered the FSTs to Mr. Spicer, the other asked his passenger, Ms. Spicer, to produce her driver's license. Although he had good reason for wanting to see the license (to make sure he could release the car to her) he did not explain this. As Ms. Spicer was looking for her license in her purse, the officer saw a gun and arrested her. But the court ruled the gun was seized illegally mainly because the officer's blunt attitude had effectively converted the encounter into a de facto detention. Said the court, "Had the officer made his purpose known to Ms. Spicer, it would have substantially lessened the probability his conduct could reasonably have appeared to her to be coercive."

Requesting ID

Before attempting to confirm or dispel their suspicions, officers will almost always ask the suspect to identify himself, preferably with a driver's license or other official document. Like a request to stop, a request for ID will not convert an encounter into a seizure unless it was reasonably interpreted as a command.[106] As the Supreme Court put it, "[N]o seizure occurs when officers ask . . . to examine the individual's identification—so long as the officers do not convey a message that compliance with their requests is required."[107] Similarly, the Court of Appeal explained:

> It is the mode or manner in which the request for identification is put to the citizen, and not the nature of the request that determines whether compliance was voluntary.[108]

Even if the suspect freely handed over his license or other identification, a seizure might result if the officer retained it after looking it over. This is mainly because, having examined the suspect's ID, the officer's act of retaining it could reasonably be interpreted as an indication that he was not free to leave.[109] As the Ninth Circuit put it, "When a law enforcement official retains control of a person's identification papers, such as vehicle registration documents or a driver's license, longer than necessary to ascertain that everything is in order, and initiates further inquiry while holding on to the needed papers, a reasonable person would not feel free to depart."[110] For example, the courts have ruled that a detention resulted when an officer did the following without the suspect's consent:

- took his ID to a patrol car to run a warrant check[111]
- kept the ID while conducting a consent search[112]
- pinned the ID to his uniform.[113]

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103 (4th Cir. 1989) 883 F.2d 320, 323.
104 (9th Cir. 2007) 472 F.3d 1141, 1144. ALSO SEE *United States v. Drayton* (2002) 536 U.S. 194, 198.
105 (1984) 157 Cal.App.3d 213. ALSO SEE *People v. Garry* (2007) 156 Cal.App.4th 1100, 1111-12 ["rather than engage in a conversation, [the officer] immediately and pointedly inquired about defendant's legal status as he quickly approached"].
106 See *I.N.S. v. Delgado* (1984) 466 U.S. 210, 216; *Florida v. Royer* (1983) 460 U.S. 491, 501; *United States v. Mendenhall* (1980) 446 U.S. 544, 555; *United States v. Drayton* (2002) 536 U.S. 194, 201; *People v. Leath* (2013) 217 Cal.App.4th 344, 353.
107 *Florida v. Bostick* (1991) 501 U.S. 429, 437.
108 *People v. Ross* (1990) 217 Cal.App.3d 879, 884-85.
109 See *Florida v. Royer* (1983) 460 U.S. 491, 503 ["Here, Royer's ticket and identification remained in the possession of the officers throughout the encounter . . . As a practical matter, Royer could not leave the airport without them."]; *U.S. v. Black* (4th Cir. 2013) 707 F.3d 531, 538 ["We have noted that though not dispositive, the retention of a citizen's identification or other personal property or effects is highly *material* under the totality of the circumstances analysis."]. COMPARE *People v. Profit* (1986) 183 Cal.App.3d 849, 879 [there was "no retention of Profit's briefcase"].
110 *U.S. v. Chan-Jimenez* (9th Cir. 1997) 125 F.3d 1324, 1326.
111 *U.S. v. Jones* (10th Cir. 2012) 701 F.3d 1300, 1315. BUT ALSO SEE *U.S. v. Analla* (4th Cir. 1992) 975 F.2d 119, 124 ["[The officer] necessarily had to keep Analla's license and registration for a short time in order to check it with the dispatcher."]; *U.S. v. Weaver* (4th Cir. 2002) 282 F.3d 303, 309 ["Weaver was in no way impeded physically by holding his identification from him"].
112 *U.S. v. Chan-Jimenez* (9th Cir. 1997) 125 F.3d 1324, 1326.
113 *U.S. v. Black* (4th Cir. 2013) 707 F.3d 531, 538.

Asking Questions

Although officers may pose investigative questions to the suspect,[114] questioning can be problematic if, as often happens, the suspect's answers were vague, nonresponsive, inconsistent, or nonsensical as this will necessarily prolong the encounter and may cause the officers to become frustrated which, in turn, may cause them to act in an aggressive or authoritative manner.[115] As the Tenth Circuit noted, "Accusatory, persistent, and intrusive questioning can turn an otherwise voluntary encounter into a coercive one."[116] Although the line between permissible probing and impermissible pressure can be difficult to detect, the following general principles should be helpful.

INVESTIGATIVE VS. ACCUSATORY QUESTIONING: There is a big difference between investigative and accusatory questions. As the name suggests, accusatory questions are those that are phrased in a manner that communicates to the suspect that the officers believe he is guilty of something, and that their objective is merely to confirm their suspicion. While this type of questioning is appropriate in a police interview room, it is strictly prohibited during contacts. As the Court of Appeal observed:

> [Q]uestions of a sufficiently accusatory nature may by themselves be cause to view an encounter as a nonconsensual detention. . . . [T]he degree of suspicion expressed by the police is an important factor in determining whether a consensual encounter has ripened into a detention.[117]

For example, in *Wilson v. Superior Court*[118] LAPD narcotics officers at LAX received a tip that comedian Flip Wilson would be arriving on a flight from Florida and that he would be transporting drugs. When one of the officers spotted Wilson in the terminal, he approached him and, according to the officer, "I advised Mr. Wilson that I was conducting a narcotics investigation, and that we had received information that he would be arriving today from Florida carrying a lot of drugs." Wilson then consented to a search of his luggage in which the officers found cocaine.

In a unanimous opinion, the California Supreme Court suppressed the drugs because the encounter had become an illegal de facto detention when Wilson gave his consent. Said the court, "[A]n ordinary citizen, confronted by a narcotics agent who has just told him that he has information that the citizen is carrying a lot of drugs, would not feel at liberty simply to walk away from the officer."

In contrast to accusatory questioning, investigative inquiries convey the message that officers are merely seeking information or, at most, are exploring the possibility the suspect might have committed a crime. In other words, while such questioning is "potentially incriminating,"[119] it is also potentially exonerating. For example, in *U.S. v. Kim*[120] a DEA agent approached two suspected drug dealers on an Amtrak train and greeted them with, "You guys don't have drugs in your luggage today, do you?" One of the men, Kim, consented to a search of his

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[114] See *Florida v. Bostick* (1991) 501 U.S. 429, 434; *I.N.S. v. Delgado* (1984) 466 U.S. 210, 216; *Florida v. Royer* (1983) 460 U.S. 491, 497.

[115] See *U.S. v. Beck* (1998) 140 F.3d 1129, 1135 [questioning can result in a seizure if "the questioning is so intimidating, threatening or coercive that a reasonable person would not have believed himself free to leave"]. COMPARE *United States v. Drayton* (2002) 536 U.S. 194, 203 ["The officer gave the passengers no reason to believe that they were required to answer the officers' questions."].

[116] *U.S. v. Ringold* (10th Cir. 2003) 335 F.3d 1168, 1174.

[117] *People v. Lopez* (1989) 212 Cal.App.3d 289, 293. ALSO SEE *Florida v. Royer* (1983) 460 U.S. 491, 502 ["[The officers] informed him they were narcotics agents and had reason to believe that he was carrying illegal drugs."]; *People v. Boyer* (1989) 48 Cal.3d 247, 268 [defendant "was subjected to more than an hour of directly accusatory questioning [at the police station], in which [an officer] repeatedly told him—falsely—that the police knew he was the killer."]; *U.S. v. Washington* (9th Cir. 2004) 387 F.3d 1060, 1069 [suspect detained when officers told him he was "arrestable"]; *U.S. v. Gonzales* (5th Cir. 1996) 79 F3 413, 420 ["There is one troubling element: the officers informed Gonzales that the car he was driving was suspected of being used to transport drugs. This may have pushed the encounter, which was initially consensual, to being a [detention]."].

[118] (1983) 34 Cal.3d 777.

[119] See *Florida v. Bostick* (1991) 501 U.S. 429, 439.

[120] (3rd Cir. 1994) 27 F.3d 947, 953. ALSO SEE *People v. Daugherty* (1996) 50 Cal.App.4th 275, 285 ["[The officer] did not directly accuse Daugherty of transporting narcotics, which may have been sufficient to convert the encounter into a detention."]; *People v. Profit* (1986) 183 Cal.App.3d 849, 865 ["[The officer] made no statement that he had information that the defendants were carrying drugs."]; *People v. Hughes* (2002) 27 Cal.4th 287, 328 ["The conversation was nonaccusatory"]; *U.S. v. Ringold* (10th Cir. 2003) 335 F.3d 1168, 1174 [although the questions were "of an incriminating nature," they were "not worded or delivered in such a manner as to indicate that compliance with any officer directives (or even inquiries) was required"]; *U.S. v. Thompson* (10th Cir. 2008) 546 F.3d 1223, 1228 ["Most importantly, under the precedents, [the officer] did not use an antagonistic tone in asking questions."].

luggage in which the agent found methamphetamine. In rejecting Kim's argument that the agent's question rendered the encounter a seizure, the court said "[t]he tone of the question in no way implied that [the agent] accused or believed that Kim had drugs in his possession; it was merely an inquiry."

PERSISTENCE: If the suspect agreed to answer the officers' questions (and, again, assuming he was guilty), officers will often be unable to obtain the truth unless they are persistent. But persistence, in and of itself, will not render an encounter a detention. For example, in *United States v. Sullivan*[121] a U.S. Parks police officer contacted Sullivan and asked him "if he had anything illegal in [his] vehicle." Sullivan hesitated, then asked "illegal"? The officer repeated the question, at which point Sullivan "turned his head forward and looked straight ahead." The officer persisted, telling Sullivan that "if he had anything illegal in the vehicle, it's better to tell me now." Still no response. Eventually, Sullivan admitted "I have a gun" and, as a result, he was convicted of being a felon in possession of a firearm. In rejecting Sullivan's argument that the officer's persistent questioning had converted the contact into a seizure, the court said, "[T]he repetition of questions, interspersed with coaxing, was prompted solely because Sullivan had not responded. They encouraged an answer, but did not demand one."

On the other hand, a seizure will certainly result if officers persisted in asking questions after the suspect made it clear that he wanted to discontinue the interview. For example, in *Morgan v. Woessner* the court ruled that baseball star Joe Morgan was unlawfully seized at Los Angeles International Airport when an LAPD narcotics officer continued to question him after Morgan had "indicated in no uncertain terms that he did not want to be bothered." Said the court, "We find that Morgan's unequivocal expression of his desire to be left alone demonstrates that the exchange between Morgan and [the officer] was not consensual."[122]

LENGTHY QUESTIONING: Because contacts are usually brief, the length of the encounter is seldom a significant issue.[123] But lengthy questioning will not ordinarily convert a contact into a seizure so long as the suspect continued to express—explicitly or implicitly—his willingness to assist officers in their investigation. An example is found in an Oakland murder case, *Ford v. Superior Court.*[124] Here, a contact with a "witness" to a murder (who was actually the murderer) began at the crime scene and ended with his arrest twelve hours later in a police interview room. Despite the length, the court ruled the encounter had remained consensual throughout because the suspect "deliberately chose a stance of eager cooperation in the hopes of persuading the police of his innocence," and the officers merely played along until they had probable cause.

***MIRANDA* WARNINGS:** If an encounter is merely a contact, officers should never *Mirandize* the suspect before asking questions.[125] This is mainly because *Miranda* warnings are commonly associated with arrests and, furthermore, they are likely to be interpreted as an indication that the officers have evidence of the suspect's guilt.

"YOU'RE FREE TO DECLINE": Just as officers are not required to inform suspects that they are free to leave (discussed earlier), they need not inform them that they can refuse to answer their questions.[126] Still, it is a highly relevant circumstance.[127]

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[121] (4th Cir. 1998) 138 F.3d 126, 133-34.

[122] (9th Cir. 1993) 997 F.2d 1244, 1253. ALSO SEE *I.N.S. v. Delgado* (1984) 466 U.S. 210, 216-17 [a seizure results "if the person refuses to answer and the police [persist]"]; *U.S. v. Wilson* (4th Cir. 1991) 953 F.2d 116, 122 ["but the persistence of [the officers] would clearly convey to a reasonable person that he was not free to leave the questioning by the police"].

[123] See *I.N.S. v. Delgado* (1984) 466 U.S. 210, 219 ["The questioning by INS agents seems to have been nothing more than a brief encounter.]; *People v. Hughes* (2002) 27 Cal.4th 287, 328 ["The conversation was nonaccusatory, routine, and brief"]; *People v. Bouser* (1994) 26 Cal.App.4th 1280, 1283 ["The whole incident took around 10 minutes from the initial contact to Bouser's arrest."]; *U.S. v. Crapser* (9th Cir. 2007) 472 F.3d 1141, 1146 ["The entire event . . . lasted about five minutes."]; *U.S. v. McFarley* (4th Cir. 1993) 991 F.2d 1188, 1192 [20 minutes was not too long under the circumstances]; *U.S. v. Cruz-Mendez* (10th Cir. 2006) 467 F.3d 1260, 1267 [30 minutes was not unreasonable under the circumstances].

[124] (2001) 91 Cal.App.4th 112, 128. ALSO SEE *People v. Hughes* (2002) 27 Cal.4th 287, 328-29; *Green v. Superior Court* (1985) 40 Cal.3d 126.

[125] See *People v. Boyer* (1989) 48 Cal.3d 247, 268.

[126] See *United States v. Mendenhall* (1980) 446 U.S. 544, 555.

[127] See *Florida v. Bostick* (1991) 501 U.S. 429, 436; *United States v. Mendenhall* (1980) 446 U.S. 544, 559. Also see *United States v. Washington* (1977) 431 U.S. 181, 188 ["Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled."

Warrant checks

Running a warrant check without the suspect's consent will not automatically result in a detention.[128] But it can be problematic, especially if the officer walks off with his ID to run the warrant check on his radio or in-car computer. For example, in *U.S. v. Jones* the court said that "[w]ithin thirty seconds" after initiating a contact with Jones, the officer asked for some identification. At that point, "Mr. Jones handed his identification to [the officer], who relayed it to [another officer who] then walked back to his patrol vehicle to run Mr. Jones's license." "Mr. Jones was seized," said the court, "once the officers took [his] license and proceeded to conduct a records check based upon it."[129]

In contrast, the court in *U.S. v. Analla* ruled that a detention did not result because, instead of taking the suspect's license to his patrol car, the officer "stood beside the car, near where Analla was standing."[130] Note that this issue can usually be avoided if officers obtain the suspect's consent to temporarily carry his ID a short distance for the purpose of running a warrant check.[131]

Seeking consent to search

Officers who have contacted a suspect will frequently seek his consent to search his person, possessions, or vehicle. Like any other request, this will not convert the encounter into a seizure if the officers neither pressured the suspect nor asserted their authority.[132] But if the suspect declines the request, they must, of course, not persist or otherwise encourage him to change his mind.

For example, in *United States v. Wilson*[133] a DEA agent approached Albert Wilson at the National Airport terminal in Washington, D.C. and asked to speak with him. At first, Wilson was cooperative. But when the agent asked if he would consent to a search of his coat he angrily refused and began walking away. Undeterred, the agent trailed behind him, repeatedly asking Wilson why he would not consent to a search. As they stepped outside the terminal, Wilson bolted but was quickly apprehended. The agents then searched his coat and found cocaine. On appeal, however, the court ordered it suppressed because the agent's "persistence" had converted the encounter into a seizure.

It should also be noted that, although officers are not required to notify the suspect that he has a right to refuse consent,[134] such a warning is a relevant circumstance.[135]

Seeking consent to transport

In some cases, officers will seek the suspect's consent to accompany them to some location such as a police station (e.g., for questioning, fingerprinting, a lineup) or to the crime scene (e.g., for a showup). Again, such a request will not convert the encounter into a detention so long as officers made it clear to the suspect that he was free to decline.[136]

For example, in *In re Gilbert R.*[137] LAPD detectives went to Gilbert's home to see if he would voluntarily accompany them to the police station to answer some questions about an ADW. Both Gilbert and his mother consented. At the station, Gilbert confessed but later argued that his confession should have been suppressed because the officers had effectively arrested him by driving him to the station. In rejecting the argument, the court said that a reasonable person in Gilbert's position "would have believed that he or she did not have to accompany the detectives."

In contrast, in *People v. Boyer*[138] several Fullerton police officers went to Boyer's home to question him about a murder. Two of them covered the back yard

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[128] See *People v. Bouser* (1994) 26 Cal.App.4th 1280, 1286; *People v. Terrell* (1999) 69 Cal.App.4th 1246.
[129] (10th Cir. 2012) 701 F.3d 1300, 1306, 1315.
[130] (4th Cir. 1992) 975 F.2d 119, 124.
[131] See *People v. Bennett* (1998) 68 Cal.App.4th 396, 402.
[132] See *Bumper v. North Carolina* (1968) 391 U.S. 543, 548; *Florida v. Royer* (1983) 460 U.S. 491, 497.
[133] (4th Cir. 1991) 953 F.2d 116.
[134] See *United States v. Drayton* (2002) 536 U.S. 194, 206; *Ohio v. Robinette* (1996) 519 U.S. 33, 39-40.
[135] See *United States v. Mendenhall* (1980) 446 U.S. 544, 559; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 249.
[136] See *United States v. Mendenhall* (1980) 446 U.S. 544, 557-58; *Ford v. Superior Court* (2001) 91 Cal.App.4th 112, 125; *People v. Zamudio* (2008) 43 Cal.4th 327, 344-45; *People v. Hughes* (2002) 27 Cal.4th 287, 329.
[137] (1994) 25 Cal.App.4th 1121.
[138] (1989) 48 Cal.3d 247.

while the others went to the front door and knocked. Boyer responded by running out the back door, where the officers ordered him to "freeze." He complied and later agreed to be interviewed at the police station where he made an incriminating statement. But the court suppressed it on grounds the consent was involuntary. Said the court, "[The] manner in which the police arrived at defendant's home, accosted him, and secured his 'consent' to accompany them suggested they did not intend to take 'no' for an answer."

One other thing. Before transporting a suspect to a police station or anywhere else, officers may be required by departmental policy or officer-safety considerations to pat search him even though he is not being detained. As discussed earlier, this will not ordinarily convert the encounter into a detention provided that the suspect freely consented to the intrusion.

Converting Detentions Into Contacts

In the course of detaining a suspect, officers may conclude that, although they still have their suspicions, they no longer have grounds to hold him. At that point, the detention must, of course, be terminated. Nevertheless, they may be able to continue to question him if they can effectively convert the detention into a contact. As the Tenth Circuit said, "[I]f the encounter between the officer and the [suspect] ceases to be a detention but becomes consensual, and the [suspect] voluntarily consents to additional questioning, no further detention occurs."[139]

What must officers do to convert a detention into a contact? The cases indicate there are three requirements:

(1) **Return documents**: If officers obtained the suspect's ID or any other property from him, they must return it.[140] Again quoting the Tenth Circuit, "[W]e have consistently concluded that an officer must return a driver's documentation before a detention can end."[141] Also see "Investigative requests" (Requests for ID), above.

(2) **"You're free to go"**: While not technically a requirement,[142] officers should inform the suspect that he is now free to leave.[143] As the court explained in *Morgan v. Woessner*, "Although an officer's failure to advise a citizen of his freedom to walk away is not dispositive of the question of whether the citizen knew he was free to go, it is another significant indicator of what the citizen reasonably believed."[144]

(3) **No contrary circumstances**: There must not have been other circumstances that, despite the "free to go" advisory, would have reasonably indicated to the suspect that he was, in fact, not free to leave. For example, in *U.S. v. Beck*[145] the court ruled that a suspect was detained because, although he was told he was free to go, he was also told he could not leave unless he consented to a search or waited for a canine unit to arrive. Similarly, in *U.S. v. Ramos*[146] the court ruled that an attempt to convert a traffic stop into a contact had failed mainly because the driver and passenger remained separated.

In addition to these three requirements, it would be significant that the officers explained to the suspect *why* they wanted to continue speaking with him. As discussed earlier in the section entitled "Respectfulness," a brief explanation of this sort is significant because such openness is more consistent with a contact than a detention, and it tends to communicate the idea that the officers are seeking the suspect's voluntary cooperation.[147] POV

[139] *U.S. v. Anderson* (10th Cir. 1997) 114 F.3d 1059, 1064.
[140] See *U.S. v. Sandoval* (10th Cir. 1994) 29 F.3d 537, 540 ["no reasonable person would feel free to leave without such documentation"]; *U.S. v. White* (8th Cir. 1996) 81 F.3d 775, 779.
[141] *U.S. v. Elliott* (10th Cir. 1997) 107 F.3d 810, 814.
[142] See *Ohio v. Robinette* (1996) 519 U.S. 33, 39-40; *U.S. v. Sullivan* (4th Cir. 1998) 138 F.3d 126, 133; *U.S. v. Anderson* (10th Cir. 1997) 114 F.3d 1059, 1064.
[143] See *U.S. v. Thompson* (7th Cir. 1997) 106 F.3d 794, 798.
[144] (9th Cir. 1993) 997 F.2d 1244, 1254.
[145] (8th Cir. 1998) 140 F.3d 1129, 1136-37. ALSO SEE *U.S. v. Finke* (7th Cir. 1996) 85 F.3d 1275, 1281.
[146] (8th Cir. 1994) 42 F.3d 1160, 1162-64.
[147] See *U.S. v. Thompson* (7th Cir. 1997) 106 F.3d 794, 798 [the officer "justified his desire to ask Thompson more questions by explaining that part of his job was to prevent the transport of illegal guns and drugs"].

PETALUMA POLICE DEPARTMENT
BRIEFING TRAINING RECORD

TM

EMPLOYEES

NAME	ID#	NAME	ID#	NAME	ID#	NAME	ID#

TRAINING SUMMARY

DATE	LENGTH OF TRAINING	LOCATION
3/13/2019	0 HOURS 45 MINUTES	☒ MAIN STATION

TYPE OF TRAINING
☐ VIDEO ☒ LECTURE ☐ PRACTICAL DEMONSTRATION ☐ CRITICAL INCIDENT DEBRIEFING
☐ OTHER:

BRIEF DESCRIPTION OF TRAINING:

Petaluma Police Department 3/13/2019

Briefing Training:
Policy 388- Department Use of Social Media
Policy 212- Electronic Mail
Policy 447- Mobile Digital Computer Use
Policy 342- Information Technology Use

Reviewed policy and had open discussion on the topics.

ATTACHMENTS
☐ HANDOUT MATERIALS ☐ LECTURE NOTES ☐ LESSON PLAN ☐ OTHER:

SUPERVISORY REVIEW

TRAINER	ID#	SUPERVISOR	ID#
Chris Ricci	2754	G. Glaviano GVG	2676
LIEUTENANT	ID# 1359	DATE 4/04/2019	

TRAINING RECORD UPDATE

DATA ENTRY	DATE	TRAINING RECORD

S:\Police\Department Forms\In-Service Training Record.doc Revised 02/2002

TMS

PETALUMA POLICE DEPARTMENT

BRIEFING / TRAINING RECORD

Employees:

TRAINING SUMMARY

Date: 3-11-19 Length of Training: ____ hours 15 min

Video: ____ Lecture: X Practical Demonstration: ____

Other: POWERPOINT

BRIEF DESCRIPTION OF TRAINING

POLICY 212 — ELECTRONIC MAIL
POLICY 447 — MOBILE DATA COMP USE
POLICY 342 — BRIEFING UPDATE + REVIEW INFORMATION TECHNOLOGY USE
POLICY 388 — ~~[illegible]~~ DEPT. USE OF SOCIAL MEDIA

ATTACHMENTS

[ ] Handout materials [ ] Lecture materials [ ] Lesson Plan [ ] Other

SUPERVISORY REVIEW

Trainer: DEBAEKE Supervisor: NOVELLO

Lieutenant: CROSBY Date: 3/18/19

TRAINING RECORD UPDATE

Data Entry: ____ Date: ____ Training Record: ____

449 BODYCAM

TMS

PETALUMA POLICE DEPARTMENT

BRIEFING / TRAINING RECORD

Employees:

TRAINING SUMMARY

Date: 4-8-19 Length of Training: ____ hours 30 min

Video: ______ Lecture: X Practical Demonstration: ______

Other: ______

BRIEF DESCRIPTION OF TRAINING

REVIEWED AND DISCUSSED RAMEY AND STEAGALD CASES, INCLUDING PRACTICLE APPLICATION TO SONOMA COUNTY AND PPD PROCEDURE

ATTACHMENTS

[X] Handout materials [ ] Lecture materials [ ] Lesson Plan [ ] Other

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SUPERVISORY REVIEW

Trainer: GUTIERREZ Supervisor: NOVELLO

Lieutenant: Crosby 1749 Date: 4/8/19

TRAINING RECORD UPDATE

Data Entry: ______ Date: ______ Training Record: ______

Entry to Arrest
Ramey, Payton, and *Steagald*

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

There was a time when officers who had developed probable cause to arrest someone would simply drive over to his house and arrest him. If they needed to break in, no problem. If they needed to search the premises for him, that was okay, too. And if they happened to see any evidence in plain view while they were looking around, they could seize it. This was, in fact, standard police practice in most states for around two hundred years and it was, to say the least, efficient. (It was also good for the environment because there was no paperwork.) But despite its efficiency and usefulness, it became illegal. What happened?

The immediate cause was a pair of landmark court decisions. The first was the California Supreme Court's 1976 decision in *People* v. *Ramey* in which the court ruled that entries into a person's home to arrest him were prohibited unless the officers had an arrest warrant.[2] Then, four years later, the U.S. Supreme Court in *Payton* v. *New York* essentially adopted the *Ramey* rule in its entirety and made it a constitutional requirement.[3]

But the underlying cause was that routine warrantless entries into homes to arrest a resident had become repugnant to the American people, especially since such intrusions had been common occurrences in Nazi Germany and were still the norm in many dictatorships and communist countries. The court in *Ramey* described it as "[t]he frightening experience of certain foreign nations with the unexpected invasion of private homes by uniformed authority to seize individuals therein, often in the dead of night."

While the decisions in *Ramey* and *Payton* were based in part of the need to protect the privacy interests of arrestees, there was equal—maybe even greater—concern about the impact of warrantless entries on innocent occupants, especially any children in the residence.[4] After all, such an intrusion into a home is a "frightening experience" to everyone there.[5]

These were the reasons that the courts in *Ramey* and *Payton* ruled that officers must ordinarily have an arrest warrant for a suspect in order to enter his home to take him into custody. But the Court in *Payton* announced two additional requirements: the officers must have had reason to believe that the arrestee currently lived in the residence, and they must have had reason to believe that he was inside when they made entry.

As the title of this article suggests, there is a third case that has a bearing on entries to arrest. That case is *Steagald* v. *United States,*[6] and it was announced by the U.S. Supreme Court just one year after it decided *Payton*. In *Steagald* the Court ruled that, while an arrest warrant was sufficient to enter the home of the arrestee, greater protections were necessary when officers needed to search for the arrestee in the home of a friend or relative. In these situations, said the Court, officers must have a special type of search warrant that has become known as a *Steagald* warrant.

Later in this article, we will explain exactly what officers must do to comply with *Ramey-Payton* and *Steagald*, how the courts enforce these rules, and the exceptions to the warrant requirement. But because the first issue that officers are apt to confront is whether compliance is, in fact, required, that is where we will start.

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[1] *People* v. *Ramey* (1976) 16 Cal.3d 263, 275.
[2] (1976) 16 Cal.3d 263.
[3] (1980) 445 U.S. 573.
[4] See *Minnesota* v. *Olson* (1990) 495 U.S. 91, 95.
[5] See *People* v. *Tillery* (1979) 99 Cal.App.3d 975, 978 ["The emphasis is on the intrusion, not on the residential status of the arrestee"].
[6] (1981) 451 U.S. 204.

When Compliance Is Required

Because *Ramey-Payton* and *Steagald* apply only if officers entered a "private" building for the purpose of making an arrest, compliance is required only if all of the following circumstances existed: (1) the location of the arrest was a home or other structure in which the occupants had a reasonable expectation of privacy, (2) the officers physically entered the structure, and (3) they entered with the intent to immediately arrest an occupant.

Private Buildings

At the top of the list of places in which most people can reasonably expect privacy are homes—whether detached houses, apartments, duplexes, or condominiums.[7] Thus, one of the Supreme Court's most-quoted observations is that "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."[8]

Ramey-Payton and *Steagald* are not, however, limited to homes and other residences.[9] Instead, as the court explained in *People* v. *Willis*, "for *Ramey* purposes, 'home' should be defined in terms as broad as necessary to protect the privacy interests at stake and, therefore, would include any premises in which the occupant had acquired a legitimate expectation of privacy."[10] Thus, the term includes such places as motel and hotel rooms, mobile homes, even sheds and tents that serve as residences.[11] It also covers those areas of businesses and other commercial structures in which the arrestee could reasonably expect privacy; e.g., his private office.[12] On the other hand, *Ramey-Payton* and *Steagald* would not apply if the arrest occurred in a place or area that was open to the public, such as a store, restaurant, or the reception area of an office.[13]

Physical entry

Since the sole concern of *Ramey-Payton* and *Steagald* is the intrusion into the structure,[14] they do not apply unless officers actually entered; i.e., crossed the threshold.

ARREST OUTSIDE THE DOORWAY: Officers do not violate *Ramey-Payton* or *Steagald* if they arrest the suspect anywhere outside the doorway; e.g., on the front porch.[15] Furthermore, officers may ask the arrestee to exit, then arrest him as he steps outside. For example, in *People* v. *Tillery* the court ruled that an officer did not violate *Ramey* when he arrested the defendant in the hallway of his apartment building after asking him to step out to talk. Said the court, "Once he stepped outside, it was lawful for the officer to arrest him."[16]

Officers may also trick or even order the arrestee to exit the premises—then arrest him as he does so. As for trickery, the Court of Appeal observed that "the use of a ruse to persuade a potential arrestee to leave a house, thereby subjecting himself to arrest

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[7] See *People* v. *Ramey* (1976) 16 Cal.3d 263; *Payton* v. *New York* (1980) 445 U.S. 573.

[8] *Payton* v. *New York* (1980) 445 U.S. 573, 590.

[9] See *People* v. *Lee* (1986) 186 Cal.App.3d 743, 746 [*Ramey* covers any structure of "private retreat"]; *U.S.* v. *Driver* (9th Cir. 1985) 776 F.2d 807, 809 ["The relevant question . . . is the individual's expectation of privacy."].

[10] (1980) 104 Cal.App.3d 433, 443.

[11] See *People* v. *Tillery* (1979) 99 Cal.App.3d 975, 979 ["The expectation of privacy against warrantless searches and seizures applies to tenancy of any kind, regardless of duration of the stay or nature of any consideration paid."]; *People* v. *Bennett* (1998) 17 Cal.4th 373, 384 [hotel room]; *People* v. *Superior Court (Arketa)* (1970) 10 Cal.App.3d 122 [shed in which a light was burning, the shed was about 25 yards from a house]; *People* v. *Bigham* (1975) 49 Cal.App.3d 73, 81 [converted garage]; *People* v. *Boyd* (1990) 224 Cal.App.3d 736, 744 [mobile home]; *People* v. *Watkins* (1994) 26 Cal.App.4th 19 [motel room].

[12] See *People* v. *Lee* (1986) 186 Cal.App.3d 743, 750 ["Lee had a reasonable expectation of privacy in his locked interior office, which was not accessible to the public without permission."]; *U.S.* v. *Driver* (9th Cir. 1985) 776 F.2d 807, 810 ["Mrs. Driver was not in an area exposed or visible to the public, but in an area of the warehouse with a reasonable expectation of privacy."]; *O'Rourke* v. *Hayes* (11th Cir. 2004) 378 F.3d 1201, 1206 [area was "off-limits to the general public"].

[13] See *United States* v. *Watson* (1976) 423 U.S. 411, 418, fn.6 [restaurant]; *People* v. *Lovett* (1978) 82 Cal.App.3d 527, 532 [a store]; *People* v. *Pompa* (1989) 212 Cal.App.3d 1308, 1311 [upholstery store open for business].

[14] See *New York* v. *Harris* (1990) 495 U.S. 14, 17; *Minnesota* v. *Olson* (1990) 495 U.S. 91, 95; *People* v. *McCarter* (1981) 117 Cal.App.3d 894, 908 ["It is the intrusion into, rather than the arrest in, the dwelling which offends constitutional standards under *Ramey*."]; *People* v. *Lewis* (1999) 74 Cal.App.4th 662, 672.

[15] See *Steagald* v. *United States* (1981) 451 U.S. 204, 221 [the arrestee "can be readily seized . . . after leaving"].

[16] (1979) 99 Cal.App.3d 975, 979-80. Also see *People* v. *Jackson* (1986) 187 Cal.App.3d 499, 505.

on the street where the concerns attendant to *Ramey* are not present is not necessarily precluded."[17] For example, in *People* v. *Porras*[18] an undercover narcotics officer, having developed probable cause to arrest Porras for drug trafficking, phoned him and identified himself as one of Porras's drug customers. He then warned him that some underhanded officers had forced him to reveal that Porras was his supplier and, in fact, a bunch of them were on their way to Porras's house now with a search warrant. The officer concluded by suggesting that Porras immediately "get rid of the dope."

Shortly thereafter, officers who were watching the house saw Porras stick his head out the door, look around, then advise someone inside that "the coast is clear." He then ran off with a tool box filled with drugs which the officers recovered after he tripped and dropped it. On appeal, the court ruled there was nothing illegal about the officers' trickery, noting that "[m]any cases have held that the mere fact that a suspect is led to incriminate himself by use of some ruse or stratagem does not make the evidence thus obtained inadmissible."

As noted, officers may also order the suspect to exit, then arrest him when he complies. This happened in *People* v. *Trudell*[19] in which Fremont officers arrested a rape suspect after he exited his house in response to a command by an officer using a loudspeaker. On appeal, he claimed the arrest violated *Ramey-Payton* because his decision to exit was not consensual. But the court ruled the validity of his consent did not matter because, "[g]iven that the police made no warrantless entry into appellant's residence," *Payton* and *Ramey* were "inapplicable."

"DOORWAY" ARRESTS: A "doorway" arrest occurs when officers, having probable cause to arrest a suspect, make the arrest as he is standing in his doorway.[20] Such an arrest is permissible because the Supreme Court ruled in *United States* v. *Santana* that a person who is standing in the doorway of a home is in a "public" place (i.e., "one step forward would have put her outside, one step backward would have put her in the vestibule").[21] The Court reasoned that Ms. Santana "was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house."

Note that if the arrestee runs inside after officers attempt to arrest him at the doorway (as occurred in *Santana*) officers may chase him inside. This subject is covered later in the section on the exigent circumstance exception to *Ramey-Payton* and *Steagald*.

ARRESTS JUST INSIDE THE DOORWAY: If the arrestee is standing just inside an open doorway, the question arises: Do officers violate *Ramey-Payton* or *Steagald* if they reach in and grab him? Unfortunately, this is a gray area. On the one hand, there is a case from the Eleventh Circuit in which the court announced a broad rule that any intrusion past the threshold violates *Payton*.[22] On the other hand, the Ninth Circuit has ruled that a violation would not result if (1) the arrestee voluntarily opened the door; (2) he opened it so widely that he was exposed to public view; and (3) he knew, or should have known, that the callers were officers; e.g., the officers identified themselves as they knocked.

In the Ninth Circuit case, *U.S.* v. *Vaneaton*,[23] several Portland police officers went to Vaneaton's motel room to arrest him for a series of burglaries. When they knocked on the door, Vaneaton "opened the curtains of a window, looked at the officers, and opened the door." As he was standing "just inside the

[17] *In re Danny E.* (1981) 121 Cal.App.3d 44, 51. Also see *People* v. *Martino* (1985) 166 Cal.App.3d 777, 789 ["The cops are getting a search warrant. If you have any dope, you had better get it out of there."]; *U.S.* v. *Michaud* (9th Cir. 2001) 268 F.3d 728, 733.
[18] (1979) 99 Cal.App.3d 874.
[19] (1985) 173 Cal.App.3d 1221.
[20] See *People* v. *Watkins* (1994) 26 Cal.App.4th 19, 29.
[21] (1976) 427 U.S. 38. Also see *People* v. *Hampton* (1985) 164 Cal.App.3d 27, 36; *U.S.* v. *Whitten* (9th Cir. 1983) 706 F.2d 1000, 1015.
[22] *McClish* v. *Nugent* (11th Cir. 2007) 483 F.3d 1231, 1248.
[23] (9th Cir. 1995) 49 F.3d 1423. Compare *U.S.* v. *Johnson* (9th Cir. 1980) 626 F.2d 753, 757 ["[I]t cannot be said that Johnson voluntarily exposed himself to warrantless arrest by opening his door to agents who misrepresented their identities."]; *U.S.* v. *McCraw* (4th Cir. 1990) 920 F.2d 224, 229 ["By opening the door only halfway, Mathis did not voluntarily expose himself to the public to the same extent as the arrestee in *Santana*"]; *U.S.* v. *Edmondson* (11th Cir. 1986) 791 F.2d 1512 [entry unlawful because the suspect opened the door after an agent yelled, "FBI. Open the door"].

threshold," an officer arrested him and obtained his consent to search the room. The search produced a gun which Vaneaton argued should have been suppressed on grounds that, unlike Santana, he was standing *inside* the threshold. Even so, said the court, the arrest did not violate *Payton* because, "[w]hen Vaneaton saw [the officers] through the window, he voluntarily opened the door and exposed both himself and the immediate area to them."

Although the California Supreme Court has not directly addressed the issue, it seemed to indicate that it, too, would rule that a violation would not result if the arrestee voluntarily opened to door to officers who had identified themselves. Specifically, in *People* v. *Jacobs* the court indicated that a warrantless entry might not violate *Ramey-Payton* if, under the circumstances, it did not "undermine the statutory purposes of safeguarding the privacy of citizens in their homes and preventing unnecessary violent confrontations between startled householders and arresting officers."[24]

Entry to arrest

Because *Ramey-Payton* and *Steagald* apply only if officers entered with the intent to immediately arrest an occupant, neither would apply if officers entered for some other purpose, even though the entry culminated in an arrest.

ENTRY TO INTERVIEW: Apart from the fact that *Ramey-Payton* and *Steagald* do not pertain to most consensual entries (a subject we will discuss shortly), they are also inapplicable to situations in which officers were admitted for the purpose of interviewing a person about a crime for which he was a suspect. Thus, a violation would not occur if officers made the arrest after the suspect said or did something that provided them with probable cause. As the California Court of Appeal explained, "[I]f probable cause to arrest arises *after* the officers have been voluntarily permitted to enter a residence in connection with their investigative work, an arrest may then be effected within the premises without the officers being required to beat a hasty retreat to obtain a warrant."[25]

If, however, the officers had probable cause to arrest when they entered, a court might find that they intended to make an arrest (which, as we will also discuss later, would probably invalidate the consent) unless the court was satisfied that the officers had not yet made the decision to do so. In other words, it must appear that the evidence against the suspect was such that he might have been able to explain it away, or at least cause the officers to postpone making an arrest until they could investigate further.

For example, in *People* v. *Patterson*[26] an untested informant told LAPD narcotics officers that he had observed the manufacture and sale of PCP inside a certain house. While an officer listened in on an extension, the informant phoned the house and spoke with an unidentified woman who said he could pick up an ounce for $105. About ten minutes later, four officers arrived at the house and knocked on the door. A woman, Patterson, came to the door and, after being informed of the tip and the ruse phone call, told the officers, "I don't know anything about any angel dust. Come on in." As the officers entered, they saw some vials containing a crystalline substance, and they could smell a strong chemical odor that was associated with cooking PCP. At that point, they arrested Patterson, obtained her consent to search the premises, and seized additional evidence.

On appeal, Patterson argued that, because the officers had probable cause when they entered, they must have intended to arrest her. The court disagreed, pointing out that the informant did not name Patterson as the source, plus the officers were not certain that Patterson was the woman who spoke with the informant on the phone. It was, therefore, possible that Patterson could have provided information that undermined or negated probable cause. "There is nothing in the record," said the court, "to indicate that the police intended to arrest Patterson immediately following the entry or that they were not prepared to discuss the matter with Patterson first in order to permit her to explain away the basis of the officers' suspicions."

[24] (1987) 43 Cal.3d 472, 480-81. Edited.
[25] *In re Danny E.* (1981) 121 Cal.App.3d 44, 52. Also see *People* v. *Villa* (1981) 125 Cal.App.3d 872, 878.
[26] (1979) 94 Cal.App.3d 456.

ENTRY TO MAKE UNDERCOVER BUY: Undercover officers are often admitted into the homes of suspects to buy or sell drugs or other contraband. As the officers walk through the door, they may intend to arrest the suspect *if* the sale is made. Nevertheless, the restrictions imposed by *Ramey-Payton* and *Steagald* do not apply because (1) the intent to arrest was contingent on what happened after the officers entered, and (2) the entry was consensual. We will discuss the subject of undercover entries below in the section on the consent exception.

PROBATION SEARCH, SEARCH WARRANT: *Ramey-Payton* and *Steagald* do not apply if officers entered to conduct a probation or parole search, or to execute a search warrant.[27] Accordingly, a violation would not result if officers arrested an occupant after they found incriminating evidence and thereby developed probable cause to arrest. (As noted on the next page, such authorization to search also constitutes authorization to enter to arrest.)

EXIGENT CIRCUMSTANCES: If officers entered because they reasonably believed an immediate entry was necessary to save lives or prevent the destruction of evidence, they do not violate *Ramey-Payton* or *Steagald* if they arrested an occupant after having developed probable cause.[28] Also see "Exceptions" (Exigent Circumstances) on page 13.

How to Comply: Entering the Arrestee's Home

As we will now discuss, if *Ramey-Payton* apply, officers may enter a suspect's home to arrest him only if all of the following circumstances existed:

(1) **Authorization to enter**: The officers must have had a legal right to enter.

(2) **Arrestee's home**: The officers must have had reason to believe the arrestee lived in the house or that he otherwise owned or controlled it.

(3) **Arrestee now inside**: The officers must have reasonably believed the arrestee was inside.

Authorization to enter

Legal authorization to enter the suspect's home will exist if the officers were aware that a conventional or *Ramey* warrant for his arrest had been issued, or that a warrant to search the premises had been issued, or that a warrantless entry was authorized by the terms of the suspect's probation or parole.

CONVENTIONAL ARREST WARRANT: A conventional arrest warrant is issued by a judge who, based on the filing of a criminal complaint by prosecutors and supporting documents (e.g., witness statements, laboratory reports, police reports), determined that there is probable cause to arrest.[29] A conventional warrant may be based on either a felony or a misdemeanor.[30]

RAMEY WARRANT: A so-called *Ramey* warrant is an arrest warrant that is issued by a judge *before* a complaint has been filed by prosecutors. As the name implies, *Ramey* warrants were developed in response to the *Ramey* decision, the reason being that, until then, most arrest warrants were conventional; i.e., they were issued only after prosecutors were satisfied that they could establish the arrestee's guilt beyond a reasonable doubt. But in many cases, officers could not obtain such proof unless they were able to take the suspect into custody and, for example, interrogate him, place him in a lineup, monitor his phone calls or visitor conversations, or obtain his fingerprints or a DNA sample.

As prosecutors considered the situation, they concluded that, because the Fourth Amendment permits judges to issue search warrants based on nothing more than probable cause, there was no reason to impose a higher standard for arrest warrants. And the courts subsequently agreed, ruling that an arrest warrant need not also demonstrate that prosecutors had made the decision to charge the suspect with the crime. As the Court of Appeal explained in *People* v. *Case*:

[27] See *Payton* v. *New York* (1980) 445 U.S. 573, 576 [restrictions apply only if officers enter "in order to make a routine felony arrest"].
[28] See *People* v. *Bacigalupo* (1991) 1 Cal.4th 103, 122 ["The [arrest] warrant requirement is excused when exigent circumstances require prompt action by the police to prevent imminent danger to life or to forestall the imminent escape of a suspect or destruction of evidence."].
[29] See *Steagald* v. *United States* (1981) 451 U.S. 204, 213 ["An arrest warrant is issued upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense."].
[30] See Pen. Code § 813 [felony warrants], Pen. Code § 1427 [misdemeanor warrants].

> From a practical standpoint the use of the "*Ramey* Warrant" form was apparently to permit, prior to an arrest, judicial scrutiny of an officer's belief that he had probable cause to make the arrest without involving the prosecutor's discretion in determining whether to initiate criminal proceedings.[31]

Today, the procedure for obtaining *Ramey* warrants has been incorporated into the Penal Code which authorizes judges to issue them if officers comply with the following procedure:[32]

(1) PREPARE DECLARATION: The officer prepares a Declaration of Probable Cause which, like a search warrant affidavit, contains the facts upon which probable cause is based.

(2) PREPARE *RAMEY* WARRANT: The officer prepares the *Ramey* warrant, which is technically known as a "Warrant of Probable Cause for Arrest."[33] A sample *Ramey* warrant is shown on page 19.

(3) SUBMIT TO JUDGE: The officer submits the declaration and warrant to a judge for review. This may be done in person, by fax, or by email.[34]

(4) WARRANT ISSUED: If the judge finds there is probable cause, he or she will issue the warrant.

(5) FILE CERTIFICATE OF SERVICE: After the warrant is executed, officers must file a "Certificate of Service" with the court clerk.[35] Such a certificate must include the date and time of arrest, the location of arrest, and the location of the facility in which the arrestee is incarcerated.

It is important to note that, although *Ramey* warrants sometimes contain the arrestee's last known address or some other address at which he might be staying, this does not constitute authorization to enter the home at that address. The reason (as we will explain in more detail below in the section "Arrestee's house?") is that, regardless of the inclusion of an address on the warrant, a *Ramey* warrant constitutes authorization to enter only a home in which officers—at the moment they entered—had reason to believe the arrestee was living and is now present. Thus, unlike an address that appears on a search warrant, an address on a *Ramey* warrant has no legal significance; i.e., it serves only as an aid in locating the arrestee.[36] (A sample *Ramey* Warrant is shown on page 19. Officers and prosecutors may obtain a copy of this form in Microsoft Word format (which can be edited) by sending a request from a departmental email address to POV@acgov.org.)

SEARCH WARRANT: Because a search warrant authorizes officers to enter the listed premises, it satisfies the "legal authorization" requirement even if they intended only to make an arrest. As the court observed in *People* v. *McCarter*, "[N]o *Ramey* violation as to [the arrestee] could have occurred under the present facts since the police had judicial authorization to enter her home via a validly issued and executed search warrant."[37] (It is arguable that officers with a search warrant who intended only to make an arrest could enter even if they lacked reason to believe that the arrestee lived there or that he is now on the premises. We are, however, unaware of any cases in which this issue was raised.)

PROBATION OR PAROLE SEARCH CONDITION: Officers have legal authorization to enter the arrestee's home for the purpose of arresting him if they were legally authorized to search it without a warrant pursuant to the terms of probation or parole.[38]

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[31] (1980) 105 Cal.App.3d 826, 831 [Edited]. Also see *Godwin* v. *Superior Court* (2001) 90 Cal.App.4th 215, 225.
[32] Pen. Code § 817.
[33] See Pen. Code §§ 815, 815a, 816; *People* v. *McCraw* (1990) 226 Cal.App.3d 346, 349.
[34] See Pen. Code § 817(c)(2).
[35] See Pen. Code § 817(h).
[36] See *Wanger* v. *Bonner* (5th Cir. 1980) 621 F.2d 675, 682 [court rejects the argument that "the inclusion of an address for the person to be arrested in the warrant provided the deputies with a reasonable basis for the belief that the [arrestee] could be found within the premises"]; *U.S.* v. *Lauter* (2d Cir. 1995) 57 F.3d 212, 215 ["Any discrepancy between the address in the supporting affidavit and the address where Lauter was ultimately arrested is irrelevant because all an arrest warrant must do is identify the person sought."]; *U.S.* v. *Bervaldi* (11th Cir. 2000) 226 F.3d 1256, 1263 [insignificant "that the arrest warrant listed the 132nd Place address"].
[37] (1981) 117 Cal.App.3d 894, 908.
[38] See *People* v. *Palmquist* (1981) 123 Cal.App.3d 1, 15 ["Since the officers had authorization to enter the home to search, the arrest inside was of no constitutional significance."]; *People* v. *Lewis* (1999) 74 Cal.App.4th 662, 673 ["The parolee who could not stop entry into the home for a search can have no greater power to prevent an entry for an arrest. The intrusion for the latter purpose is virtually the same as for the former."].

OTHER ARREST WARRANTS: There are five other types of arrest warrants that provide officers with authorization to enter:

PROBATION VIOLATION WARRANT: Issued by a judge based on probable cause to believe that the arrestee has violated the terms of his probation.[39]

PAROLE VIOLATION WARRANT: A parole violation warrant (also known as a parolee-at-large or PAL warrant) is issued by the parole board based on probable cause to believe that the parolee absconded.[40]

INDICTMENT WARRANT: Issued by a judge on grounds that the arrestee was indicted by a grand jury.[41]

BENCH WARRANT: Issued by a judge when a defendant fails to appear in court.[42]

WITNESS FTA WARRANT: Issued by a judge for the arrest of a witness who failed to appear in court after being ordered to do so.[43]

Arrestee's house?

In addition to having legal authorization to enter the residence, officers must have reason to believe the arrestee is, in fact, living there.[44] In many cases, however, this requirement is difficult to satisfy, especially when the arrestee is a transient or when he knows he is wanted, in which case he may try to conceal his whereabouts or move around a lot, staying with friends and relatives, or moving in and out of motels.[45] To complicate matters even more, it is common for a suspect's friends to furnish officers with false leads as to his current residence.[46] Nevertheless, this requirement is strictly enforced by the courts and is frequently litigated.

"LIVES" = COMMON AUTHORITY: An arrestee will be deemed "living" in a home if he has "common authority" or some other "significant relationship" to it.[47] As the Eighth Circuit observed, when a person has common authority over a residence, "that dwelling can certainly be considered her 'home' for Fourth Amendment purposes."[48]

Although there is no easy definition of the term "common authority,"[49] the Supreme Court noted that people will ordinarily have it if they had "joint access or control for most purposes."[50] Thus, in discussing this subject in *U.S.* v. *Franklin*, the Ninth Circuit observed that "[r]esidential arrangements take many forms. A 'residence' does not have to be an old ancestral home, but it requires more than a sleepover at someone else's place. It is insufficient to show that the [arrestee] may have spent the night there occasionally."[51]

On the other hand, an arrestee may be deemed to be "living in" a residence in which he stays on a regular basis for any significant period. For example, in *Washington* v. *Simpson* the Eighth Circuit ruled that an arrestee "resided" in a house in which she stayed two to four nights per week, kept some of her personal belonging there, and had previously given that address as her residence when she was booked."[52]

[39] See Pen. Code § 1203.2(a).
[40] See Pen. Code § 3060(a); *People* v. *Hunter* (2006) 140 Cal.App.4th 1147, 1153-54; *U.S.* v. *Harper* (9th Cir. 1991) 928 F.2d 894, 896; *U.S.* v. *Pelletier* (1st Cir. 2006) 469 F.3d 194, 200.
[41] See Pen. Code § 945.
[42] See Pen. Code §§ 978.5, 813(c), 853.8, 983; *Allison* v. *County of Ventura* (1977) 68 Cal.App.3d 689, 701-2; *U.S.* v. *Gooch* (9th Cir. 2007) 506 F.3d 1156, 1159; *U.S.* v. *Spencer* (2nd Cir. 1982) 684 F.2d 220, 222.
[43] See Code Civ. Proc. § 1993.
[44] See *Payton* v. *New York* (1980) 445 U.S. 573, 602-3 [officers must have "reason to believe the suspect is within" the residence].
[45] See *U.S.* v. *Gay* (10th Cir. 2001) 240 F.3d 1222, 1227 ["Indeed the officers may take into account the fact that a person involved in criminal activity may be attempting to conceal his whereabouts."]; *U.S. Magluta* (11th Cir. 1995) 44 F.3d 1530, 1538.
[46] See *Motley* v. *Parks* (9th Cir. en banc 2005) 432 F.3d 1072, 1082 ["It is not an unheard-of phenomenon that one resident will tell police that another resident is not at home, when the other resident actually is hiding under a bed when the police came to call."].
[47] See *Case* v. *Kitsap County Sheriff's Department* (9th Cir. 2001) 249 F.3d 921, 931; *Valdez* v. *McPheters* (10th Cir. 1999) 172 F.3d 1120, 1225; *U.S.* v. *Gay* (10th Cir. 2001) 240 F.3d 1222, 1226.
[48] *U.S.* v. *Risse* (8th Cir. 1996) 83 F.3d 212, 217.
[49] See *U.S.* v. *Nezaj* (S.D.N.Y. 1987) 666 F.Supp. 494, 500 ["The question of when a dwelling is someone's home can be a difficult factual and legal issue"].
[50] *United States* v. *Matlock* (1974) 415 U.S. 164, 171, fn.7.
[51] (9th Cir. 2010) 603 F.3d 652, 656. Also see *Perez* v. *Simpson* (9th Cir. 1989) 884 F.2d 1136, 1141 [arrestee did not reside in the house merely because "he spent the night there on occasion"].
[52] (8th Cir. 1986) 806 F.2d 192, 196.

It should be noted that a person may have common authority over two or more residences, or a residence that is owned by someone else.[53] Consequently, when this issue arose in *U.S.* v. *Risse* the court explained:

> [S]o long as [the arrestee] possesses common authority over, or some other significant relationship to, the Huntington Road residence, that dwelling can certainly be considered her "home" for Fourth Amendment purposes, even if the premises are owned by a third party and others are living there, and even if [the arrestee] concurrently maintains a residence elsewhere as well.[54]

"REASON TO BELIEVE": As noted, officers must have "reason to believe" that the arrestee currently lives in the residence. Unfortunately, when the United States Supreme Court announced the "reason to believe" standard in *Payton* v. *New York* it neglected to mention whether it means probable cause, reasonable suspicion, or some hybrid level of proof. Not surprisingly, the Court's failure has resulted in much confusion, and has required the lower courts to expend substantial resources in trying to resolve the matter.[55]

In any event, most courts have concluded that the term means reasonable suspicion,[56] while only one—the Ninth Circuit—has categorically ruled that it means probable cause.[57] Other courts that have been presented with the issue—including the California Supreme Court—have declined to rule on the issue in cases where it was unnecessary to do so since it was apparent that, even if probable cause were required, the officers had it.[58]

It would be pointless to try to resolve the matter here, except perhaps to note that, because the U.S. Supreme Court is quite familiar with the term "probable cause" (after all, it plays a central role in the text of the Fourth Amendment), and because the Court elected not to use it in *Payton*, there is a strong possibility that it had something else in mind.[59] As the District of Columbia Circuit aptly observed, "We think it more likely that the Supreme Court in *Payton* used a phrase other than 'probable cause' because it meant something other than 'probable cause.'"[60]

That being said, it doesn't seem to matter much whether the standard is reasonable suspicion or probable cause. This is because officers usually have sufficient information as to where arrestees live to

[53] See *Case* v. *Kitsap County Sheriff's Department* (9th Cir. 2001) 249 F.3d 921, 931 [officers reasonably believed that the arrestee lived at the house "at least part of the time"]; *U.S.* v. *Litteral* (9th Cir. 1990) 910 F.2d 547, 553 ["But if the suspect is a co-resident of the third party, then . . . *Payton* allows both arrest of the subject of the arrest warrant and use of the evidence found against the third party."]; *U.S.* v. *Junkman* (8th Cir. 1998) 160 F.3d 1191, 1194 ["As long as the officers reasonably believed Kent Junkman was a co-resident of the room, the entry into the room to arrest Kent Junkman was a reasonable one."].

[54] (8th Cir. 1996) 83 F.3d 212, 217.

[55] See *U.S.* v. *Diaz* (9th Cir. 2007) 491 F.3d 1074, 1077 ["The question of what constitutes an adequate 'reason to believe' has given difficulty to many courts, including the district court in the present case. The Supreme Court did not elaborate on the meaning of 'reason to believe' in *Payton* and has not done so since then."]; *U.S.* v. *Magluta* (11th Cir. 1995) 44 F.3d 1530, 1533 ["The 'reason to believe' standard was not defined in *Payton*, and since *Payton*, neither the Supreme Court, nor the courts of appeals have provided much illumination."].

[56] See *U.S.* v. *Lauter* (2nd Cir. 1995) 57 F.3d 212, 215; *U.S.* v. *Lovelock* (2nd Cir. 1999) 170 F.3d 339, 343; *U.S.* v. *Thomas* (D.C. Cir. 2005) 429 F.3d 282, 286; *U.S.* v. *Route* (5th Cir. 1997) 104 F.3d 59, 62; *U.S.* v. *Risse* (8th Cir. 1996) 83 F.3d 212, 216; *Valdez* v. *McPheters* (10th Cir. 1999) 172 F.3d 1220, 1224.

[57] *U.S.* v. *Gorman* (9th Cir. 2002) 314 F.3d 1105, 1111. Also see *Cuevas* v. *De Roco* (9th Cir. 2008) 531 F.3d 726, 736 [court notes the "inconsistency" between the Ninth Circuit and other circuits]; *U.S* v. *Harper* (9th Cir. 1991) 900 F.2d 213; *U.S.* v. *Diaz* (9th Cir. 2007) 491 F.3d 1074, 1077 ["The phrase 'reason to believe' is interchangeable with and conceptually identical to the phrases 'reasonable belief' and 'reasonable grounds for believing,' which frequently appear in our cases."]. Also see *People* v. *Downey* (2011) 198 Cal.App.4th 652, 661 ["The Ninth Circuit stands alone among the federal circuits in its interpretation of *Payton* as requiring probable cause."].

[58] See *People* v. *Jacobs* (1987) 43 Cal.3d 472, 479, fn.4 ["Whatever the quantum of probable cause required by the Fourth Amendment, the officers in this case did not have it"; but the court also noted that Pen. Code § 844 requires "reasonable grounds" which has been deemed the "substantial equivalent" of probable cause, at p. 479.]; *People* v. *White* (1986) 183 Cal.App.3d 1199, 1207 [California cases "leave open the question whether this means a full measure of probable cause or something less"].

[59] See *U.S.* v. *Magluta* (11th Cir. 1995) 44 F.3d 1530, 1534 ["The strongest support for a lesser burden than probable cause remains the text of *Payton*, and what we must assume was a conscious effort on the part of the Supreme Court in choosing the verbal formulation of 'reason to believe' over that of 'probable cause.'"].

[60] *U.S.* v. *Thomas* (D.C. Cir. 2005) 429 F.3d 282, 286. Also see *People* v. *Downey* (2011) 198 Cal.App.4th 652, 661.

satisfy the higher standard. In fact, we are unaware of any case decided on grounds that the officers had reasonable suspicion but not probable cause. As the Fifth Circuit observed, "The disagreement among the circuits has been more about semantics than substance."[61]

It is, however, clear that, in applying the "reason to believe" standard, the courts will consider the totality of circumstances known to the arresting officers; and they will analyze the circumstances by applying common sense, not hypertechnical analysis.[62] And although a single circumstance will sometimes suffice, in most cases it will take a combination of two or more. Finally, the significance of a particular circumstance will naturally depend on when it occurred. Thus, if the information concerning the arrestee's residence is old, officers will be required to prove that they had reason to believe he still lives there.[63]

RELEVANT CIRCUMSTANCES: Although the courts will consider the totality of circumstances in making a determination as to where the arrestee lives, the following are especially relevant:

LISTED ADDRESS: The address was listed as the arrestee's residence on one or more of the following: rental or lease agreement,[64] hotel or motel registration,[65] utility billing records,[66] telephone or internet records,[67] credit card application,[68] employment application,[69] post office records,[70] DMV records,[71] vehicle repair work order,[72] jail booking records,[73] bail bond application,[74] police or arrest report,[75] parole or probation records.[76]

INFORMATION FROM ARRESTEE OR OTHERS: The arrestee, a reliable informant, or a citizen informant notified officers that the arrestee was presently living at that address.[77] On this subject, two things should be noted. First, the significance of information from an untested informant will usually

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[61] *U.S.* v. *Barrera* (5th Cir. 2006) 464 F.3d 496, 501, fn.5.

[62] See *U.S.* v. *Graham* (1st Cir. 2009) 553 F.3d 6, 14; *U.S.* v. *Bervaldi* (11th Cir. 2000) 226 F.3d 1256, 1263; *U.S.* v. *Lovelock* (2nd Cir. 1999) 170 F.3d 339, 344; *U.S.* v. *Gay* (10th Cir. 2001) 240 F.3d 1222, 1227.

[63] See *People* v. *Bennetto* (1974) 10 Cal.3d 695, 699-700; *U.S.* v. *Bervaldi* (11th Cir. 2000) 226 F.3d 1256, 1264.

[64] See *U.S.* v. *Edmonds* (3d Cir. 1995) 52 F.3d 1236, 1247-48 [arrestee "signed the lease and paid the rent"]; *U.S.* v. *Bennett* (11th Cir. 2009) 555 F.3d 962, 965 ["Bennett had recently delivered the rent for the apartment to the building's landlord"].

[65] See *People* v. *Fuller* (1983) 148 Cal.App.3d 257, 263 [hotel room was registered to suspect]; *U.S.* v. *Franklin* (9th Cir. 2010) 603 F.3d 652, 657 ["When the location in question is a motel room, however, especially one identified as having been rented by the person in question, establishing that location as the person's residence is much less difficult."].

[66] See *People* v. *Downey* (2011) 198 Cal.App.4th 652, 659 [officer testified that "utility bills were a very good source in finding out where someone lives because in his experience many probationers and parolees . . . did not know that police had access to utility bills"]; *U.S.* v. *Route* (5th Cir. 1997) 104 F.3d 59, 61, fn.1; *U.S.* v. *Romo-Corrales* (8th Cir. 2010) 592 F.3d 915.

[67] See *People* v. *Icenogle* (1977) 71 Cal.App.3d 576, 581; *U.S.* v. *Terry* (2nd Cir. 1983) 702 F.2d 299, 319.

[68] See *U.S.* v. *Route* (5th Cir. 1997) 104 F.3d 59, 62, fn.1.

[69] See *People* v. *Jacobs* (1987) 43 Cal.3d 472, 478.

[70] See *U.S.* v. *Route* (5th Cir. 1997) 104 F.3d 59, 61, fn.1; *U.S.* v. *Stinson* (D. Conn. 1994) 857 F.Supp. 1026, 1031.

[71] See *U.S.* v. *Route* (5th Cir. 1997) 104 F.3d 59, 62, fn.1; *People* v. *Boyd* (1990) 224 Cal.App.3d 736, 740; *U.S.* v. *Ayers* (9th Cir. 1991) 924 F.2d 1468, 1480.

[72] See *U.S.* v. *Manley* (2d Cir. 1980) 632 F.2d 978, 983.

[73] See *Washington* v. *Simpson* (8th Cir. 1986) 806 F.2d 192, 196; *U.S.* v. *Clayton* (8th Cir. 2000) 210 F.3d 841, 842-43.

[74] See *U.S.* v. *Barrera* (5th Cir. 2006) 464 F.3d 496, 504.

[75] See *People* v. *Ott* (1978) 84 Cal.App.3d 118, 126; *U.S.* v. *Graham* (1st Cir. 2009) 553 F.3d 6, 13; *U.S.* v. *Ayers* (9th Cir. 1991) 924 F.2d 1468, 1479.

[76] See *U.S.* v. *Lovelock* (2nd Cir. 1999) 170 F.3d 339, 344; *People* v. *Kanos* (1971) 14 Cal.App.3d 642, 645, 648; *U.S.* v. *Thomas* (D.C. Cir. 2005) 429 F.3d 282, 286; *U.S.* v. *Mayer* (9th Cir. 2008) 530 F.3d 1099, 1104; *U.S.* v. *Graham* (1st Cir. 2009) 553 F.3d 6, 13.

[77] See *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 659 [motel desk clerk had reason to believe that the arrestee was staying with a guest]; *U.S.* v. *Risse* (8th Cir. 1996) 83 F.3d 212, 216-17; *People* v. *Alcorn* (1993) 15 Cal.App.4th 652, 655; *U.S.* v. *Junkman* (8th Cir. 1998) 160 F.3d 1191, 1192 [motel desk clerk ID'd the arrestee as a guest]; *U.S.* v. *De Parias* (11th Cir. 1986) 805 F.2d 1447, 1457 ["The apartment manager had informed the FBI agents that the De Pariases lived there"]; *U.S.* v. *Franklin* (9th Cir. 2010) 603 F.3d 652, 656 [an officer "previously received a tip that Franklin was living in the room from a credible informant"]; *U.S.* v. *Edmonds* (3d Cir. 1995) 52 F.3d 1236, 1248 [apartment manager notified agents that the arrestee had just been observed "exiting his apartment and departing the area"]; *U.S.* v. *Mayer* (9th Cir. 2008) 530 F.3d 1099, 1104 ["one of Mayer's Hansen Lane neighbors called Rauch to report that Mayer was residing at 103 Hansen Lane"]; *U.S.* v. *Graham* (1st Cir. 2009) 553 F.3d 6, 13 ["officers showed a picture of Graham to a person outside the apartment who pointed the officers towards the apartment"].

depend on whether there was some corroboration or other reason to believe the information was accurate.[78]

Second, officers are not required to accept information from a friend or relative that the arrestee lives or does not live in a certain residence. Thus, in *Motley* v. *Parks* the court noted that "Motley's statement that [the parolee] did not live at that address, coming from a less-than-disinterested source, did not undermine the information that officers previously had received from their advance briefing."[79]

DIRECT OBSERVATION: Officers, neighbors, landlords, or others had repeatedly or recently seen the arrestee on the premises.[80] It is especially relevant that the arrestee was observed doing things that residents commonly do; e.g. taking out the garbage, chatting with neighbors, leaving early in the morning, opening the door with a key.[81]

ARRESTEE'S CAR PARKED OUTSIDE: The arrestee's car (or a car he was using) was regularly parked in the driveway, in front of the residence, or nearby; e.g., "cars known to be driven by [the arrestee] were at the [residence],"[82] the apartment manager confirmed that the arrestee "used the black Ford Mustang then parked immediately in front of the apartment."[83]

Arrestee is now inside

Even if officers had reason to believe that the arrestee was living in a certain residence, they may not enter the premises unless they also had reason to believe that he was presently inside.[84] This requirement may be satisfied by direct or circumstantial evidence, so we will start with the most common examples of direct evidence:

SURVEILLANCE: Officers saw the arrestee enter but not exit.[85]

INFORMATION FROM OTHERS: A friend, relative, property manager, or other person provided officers with firsthand information that the arrestee was now inside; e.g., the person had just seen him inside.[86] Again, officers are not required to accept the word of a friend or relative of the arrestee as to his current whereabouts because, as the Ninth Circuit observed, "It is not an unheard-of phenomenon that one resident will tell police that another resident is not at home, when the other resident actually is hiding under a bed when the police came to call."[87]

INFORMATION FROM PERSON WHO ANSWERED THE DOOR: The person who answered the door said the arrestee was now inside.[88]

ARRESTEE ANSWERED THE PHONE: Officers phoned the residence, and the arrestee answered.[89]

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[78] See *U.S.* v. *Mayer* (9th Cir. 2008) 530 F.3d 1099; *People* v. *Spratt* (1980) 104 Cal.App.3d 562, 568; *People* v. *Icenogle* (1977) 71 Cal.App.3d 576, 581.

[79] (9th Cir. en banc 2005) 432 F.3d 1072, 1082.

[80] See *People* v. *Gibson* (2001) 90 Cal.App.4th 371, 381; *U.S.* v. *Bervaldi* (11th Cir. 2000) 226 F.3d 1256, 1263; *People* v. *Kanos* (1971) 14 Cal.App.3d 642, 645, 648-49; *U.S.* v. *Risse* (8th Cir. 1996) 83 F.3d 212, 217; *U.S.* v. *Romo-Corrales* (8th Cir. 2010) 592 F.3d 915, 919; *People* v. *Ford* (1975) 54 Cal.App.3d 149, 156.

[81] See *U.S.* v. *Dally* (9th Cir. 1979) 606 F.2d 861; *People* v. *Kanos* (1971) 14 Cal.App.3d 642, 648 [officers saw the suspect leaving the house at 7:30 A.M. with his wife and child]; *U.S.* v. *Harper* (9th Cir. 1991) 928 F.2d 894, 896 ["the police observed David entering the home with his own key once or twice during a three day period"]; *People* v. *Icenogle* (1977) 71 Cal.App.3d 576, 582; *People* v. *Ford* (1975) 54 Cal.App.3d 149, 156.

[82] *U.S.* v. *Barrera* (5th Cir. 2006) 464 F.3d 496, 504. Also see *People* v. *Icenogle* (1977) 71 Cal.App.3d 576, 581; *U.S.* v. *Magluta* (11th Cir. 1995) 44 F.3d 1530, 1537-38; *U.S.* v. *Edmonds* (3d Cir. 1995) 52 F.3d 1236; *U.S.* v. *Harper* (9th Cir. 1991) 928 F.2d 894, 896; *U.S.* v. *Bervaldi* (11th Cir. 2000) 226 F.3d 1256, 1264; *People* v. *Boyd* (1990) 224 Cal.App.3d 736, 750.

[83] *U.S.* v. *Edmonds* (3d Cir. 1995) 52 F.3d 1236, 1248.

[84] See *Payton* v. *New York* (1980) 445 U.S. 573, 603; *People* v. *Alcorn* (1993) 15 Cal.App.4th 652, 655.

[85] See *People* v. *Ford* (1975) 54 Cal.App.3d 149, 156. *People* v. *Wader* (1993) 5 Cal.4th 610, 633 [an officer saw the suspect inside the house in the early morning hours; at about 2:30 A.M. the lights in the house were turned off; officers entered at 6:15 A.M.]; *U.S.* v. *Agnew* (3d Cir. 2005) 407 F.3d 193, 196, ["they saw him through the window"].

[86] See *U.S.* v. *Jackson* (7th Cir. 2009) 576 F.3d 465, 469; *People* v. *Jacobs* (1987) 43 Cal.3d 472, 479; *People* v. *Alcorn* (1993) 15 Cal.App.4th 652, 655; *People* v. *Superior Court (Dai-Re)* (1980) 104 Cal.App.3d 86, 89; *People* v. *Bacigalupo* (1991) 1 Cal.4th 103, 121; *U.S.* v. *Hardin* (6th Cir. 2009) 539 F.3d 404, 414; *People* v. *Manderscheid* (2002) 99 Cal.App.4th 355, 361-62; *People* v. *Marshall* (1968) 69 Cal.2d 51, 56; *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 659.

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

[88] See *U.S.* v. *Clayton* (8th Cir. 2000) 210 F.3d 841, 844; *U.S.* v. *Taylor* (D.C. Cir. 2007) 497 F.3d 673, 679.

[89] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 328; *Case* v. *Kitsap County Sheriff's Department* (9th Cir. 2001) 249 F.3d 921, 931.

As for circumstantial evidence, the following will help support an inference that the arrestee is now inside the residence:

SUSPICIOUS RESPONSE BY PERSON AT THE DOOR: The person who answered the door did not respond or was evasive when officers asked if the arrestee was inside.[90]

ARRESTEE'S CAR WAS PARKED OUTSIDE: The arrestee's car (or a car he was known to be using) was parked at or near the residence. As the court observed in *United States* v. *Magluta*, "The presence of a vehicle connected to a suspect is sufficient to create the inference that the suspect is at home."[91] It is, of course, also relevant that the hood over the engine compartment was relatively warm.[92]

ARRESTEE LIVED ALONE, PLUS SIGNS OF ACTIVITY: Officers reasonably believed that the suspect lived alone and there were indications that someone was inside; e.g., sounds of TV or radio, a "thud," lights on. Thus, the court in *U.S.* v. *Morehead* pointed out that the illuminated lights "could have reasonably led the officers to believe that [the arrestee] was inside."[93]

SUSPICIOUS RESPONSE TO KNOCKING: When officers knocked and announced, they heard sounds or saw activity inside the premises that reasonably indicated an occupant was trying to hide or avoid them; e.g., someone yelled "cops," then there was a "commotion in the room."[94]

WORK SCHEDULE, HABITS: Officers entered when the arrestee was usually at home based on his work schedule or habits. As the Eleventh Circuit observed, "[O]fficers may presume that a person is at home at certain times of the day—a presumption which can be rebutted by contrary evidence regarding the suspect's known schedule."[95]

Also note that the failure of anyone to respond to the officers' knock and announcement does not conclusively prove that the arrestee was not at home, especially if there were other circumstances that reasonably indicated he was present.[96]

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[90] See *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 659 [the person who opened the door "appeared nervous and uncooperative"]. Compare *People* v. *Jacobs* (1987) 43 Cal.3d 472, 479 ["When they asked Gretchen if defendant was home, she told them he would be back in an hour. The evidence does not suggest that Gretchen's response or behavior further aroused the officers' suspicions."].

[91] (11th Cir. 1995) 44 F.3d 1530, 1538. Also see *People* v. *Williams* (1989) 48 Cal.3d 1112, 1139 ["The proximity of the [murder] victim's car clearly suggested defendant's presence in the apartment"]; *U.S.* v. *Morehead* (10th Cir. 1992) 959 F.2d 1489, 1496 ["[T]he presence of a car in the carport and a truck in front of the house gave the officers reason to believe [the arrestee] was on the premises."]; *U.S.* v. *Litteral* (9th Cir. 1990) 910 F.2d 547, 554 ["The informant told the agents that if Litteral's car was there, he would be there."]; *Valdez* v. *McPheters* (10th Cir. 1999) 172 F.3d 1120, 1225 ["The suspect's presence may be suggested by the presence of an automobile."]; *U.S.* v. *De Parias* (11th Cir. 1986) 805 F.2d 1447, 1457 ["The apartment manager had informed the FBI agents that the De Pariases lived there and that they were home if a certain car was parked in front of the apartment."]. Compare *People* v. *White* (1986) 183 Cal.App.3d 1199, 1209 ["[W]hen they arrived at the house they did not see any car fitting the victim's description anywhere in the vicinity."]; *People* v. *Jacobs* (1987) 43 Cal.3d 472, 479 ["Defendant's vehicles were nowhere in sight."].

[92] See *U.S.* v. *Boyd* (8th Cir. 1999) 180 F.3d 967, 978 ["the hood of Troup's black Volvo was still warm which confirmed the CI's statement that Troupe had just arrived"].

[93] (10th Cir. 1992) 959 F.2d 1489, 1496-97. Also see *U.S.* v. *Gay* (10th Cir. 2001) 240 F.3d 1222, 1227 [a "thud"]. Compare *People* v. *Bennetto* (1974) 10 Cal.3d 695, 700 ["the police heard no sounds during the short time they listened outside the apartment"].

[94] *U.S.* v. *Junkman* (8th Cir. 1998) 160 F.3d 1191, 1193. Also see *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 659 [someone inside said "it's the fucking pigs"].

[95] *U.S.* v. *Magluta* (11th Cir. 1995) 44 F.3d 1530, 1535. Also see *U.S.* v. *Diaz* (9th Cir. 2007) 491 F.3d 1074, 1078 [the arrestee previously told officers that he was usually home during the day, and that he worked at home as a mechanic]; *U.S.* v. *Terry* (2d Cir. 1983) 702 F.2d 299, 319 ["[T]he agents arrived at the apartment at 8:45 A.M. on a Sunday morning, a time when they could reasonably believe that [the arrestee] would be home."]; *U.S.* v. *Edmonds* (3d Cir. 1995) 52 F.3d 1236, 1248 ["Normally a person who is currently living at an apartment returns there at some point to spend the night and does not leave prior to 6:45 A.M."]; *U.S.* v. *Lauter* (2d Cir. 1995) 57 F.3d 212, 215 [reliable informant said the arrestee was unemployed and usually slept late]; *Valdez* v. *McPheters* (10th Cir. 1999) 172 F.3d 1120, 1227 [officer was aware that the suspect "was unemployed, liked to stay out late drinking, sometimes abused drugs such as heroin and cocaine, and was suspected of having committed at least two nighttime burglaries"]. But also see *People* v. *Jacobs* (1987) 43 Cal.3d 472, 478-79 ["Although [the officer's] testimony supports an inference that [the unemployed] defendant *could* be home at 3:20 P.M. . . . it does not, without more, support a finding that the officers had reasonable grounds to believe defendant was in fact home."].

[96] See *U.S.* v. *Beck* (11th Cir. 1984) 729 F.2d 1329, 1332; *U.S.* v. *Edmonds* (3d Cir. 1995) 52 F.3d 1326, 1248; *Case* v. *Kitsap County Sheriff's Department* (9th Cir. 2001) 249 F.3d 921, 931.

Steagald Warrants: Entering a Third Party's Home

Until now, we have been discussing the requirements for entering the arrestee's home. But officers will often have reason to believe that the arrestee is temporarily staying elsewhere, such as the home of a friend or relative. This typically occurs when the arrestee does not have a permanent address or when he is staying away from his home because he knows that officers are looking for him.

Although officers may enter a third party's home to arrest a guest or visitor if they obtained consent from a resident or if there were exigent circumstances (discussed below), they may not enter merely because they had an arrest warrant. Instead, the Supreme Court ruled in *Steagald* v. *United States* that they must have a search warrant—commonly known as a *Steagald* warrant—that expressly authorizes a search of the premises for the arrestee.[97]

There are essentially two reasons for this requirement. First, a warrant helps protect the privacy interests of the people who live in the home because it cannot be issued unless a judge has determined there is, in fact, probable cause to believe that the arrestee is on the premises. Second, there would exist a "potential for abuse"[98] because officers with an arrest warrant would have carte blanche to forcibly enter any home in which the arrestee was reasonably believed to be temporarily located.

As we will now discuss, there are two types of *Steagald* warrants: conventional and anticipatory.

Conventional Steagald warrants

Conventional *Steagald* warrants can be issued only if there is both probable cause to search the premises for the arrestee, and probable cause to arrest him. Thus, the affidavit in support of a conventional *Steagald* warrant must establish the following:

PROBABLE CAUSE TO ARREST: There are two ways to establish probable cause to arrest the suspect:

(1) WARRANT OUTSTANDING: If an arrest warrant had already been issued, the affiant can simply attach a copy and incorporate it by reference; e.g., *"Attached hereto and incorporated by reference is a copy of the warrant for the arrest of [name of arrestee]. It is marked Exhibit A."*

(2) SET FORTH FACTS: If an arrest warrant had not yet been issued, probable cause to arrest can be established in two ways, depending on whether officers are seeking a conventional *Steagald* warrant or an anticipatory *Steagald* warrant.

STANDARD STEAGALD WARRANT: The affidavit must contain the facts upon which probable cause to arrest is based.

ANTICIPATORY STEAGALD WARRANT: If officers are seeking an anticipatory *Steagald* warrant (discussed below), the affidavit must contain the facts demonstrating that probable cause to arrest will exist when a triggering event occurs.

PROBABLE CAUSE TO SEARCH: To establish probable cause to search the premises for the arrestee, the affidavit must contain facts that establish a "fair probability" or "substantial chance"[99] of the following: (1) the arrestee was inside the residence when the warrant was issued, and (2) he would still be there when the warrant was executed. A sample *Steagald* Warrant is shown on page 20. (Officers and prosecutors may obtain a copy of this form in Microsoft Word format (which can be edited) by sending a request from a departmental email address to POV@acgov.org.)

Anticipatory Steagald warrants

If officers expect that it will be difficult to establish probable cause for a conventional *Steagald* warrant, they may be able to obtain an "anticipatory" *Steagald* warrant which will authorize them to enter the premises and search for the arrestee if and when a "triggering event" occurs; e.g., a completed sale of drugs. As the Fourth Circuit observed, "[M]ost anticipatory warrants subject their execution to some condition precedent—a so-called 'triggering condition'—which, when satisfied, becomes the final piece of evidence needed to establish probable cause."[100]

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[97] (1981) 451 U.S. 204, 216.
[98] *Steagald* v. *United States* (1981) 451 U.S. 204, 215.
[99] See *Illinois* v. *Gates* (1983) 462 U.S. 213, 238, 244, fn13.
[100] *U.S.* v. *Andrews* (4th Cir. 2009) 577 F.3d 231, 237. Edited.

To obtain an anticipatory warrant, the affiant must describe the triggering event in terms that are "explicit, clear, and narrowly drawn."[101] In addition, the affidavit must contain facts that establish the following:

(1) PROBABLE CAUSE TO ARREST: Probable cause to arrest the suspect will exist when the triggering event occurs.

(2) PROBABLE CAUSE FOR TRIGGERING EVENT: There is probable cause to believe the triggering event will occur,[102] and that it will occur before the warrant expires.[103]

(3) PROBABLE CAUSE TO SEARCH: There is probable cause to believe the arrestee will be inside the premises when the triggering event occurs.[104]

An example of an Anticipatory *Steagald* Warrant is shown on page 20.

Alternatives to Steagald warrants

Steagald warrants—whether conventional or anticipatory—are often impractical. Anticipatory warrants are problematic because it may be difficult to satisfy the triggering event requirement. And conventional warrants may not be feasible because it is often difficult to prove that the arrestee will still be inside the residence when officers arrive to execute the warrant. As the Justice Department noted in its argument in *Steagald*, "[P]ersons, as opposed to objects, are inherently mobile, and thus officers seeking to effect an arrest may be forced to return to the magistrate several times as the subject of the arrest warrant moves from place to place."[105]

In many cases, however, officers can avoid the need for a *Steagald* warrant if they can locate the arrestee inside his own home (in which case only an arrest warrant would be required) or if they can wait until he leaves the premises or is in a public place (in which case only probable cause would be required).[106] Also, as we will discuss next, officers may enter if they obtained consent or if there were exigent circumstances.

Exceptions

There are three exceptions to the rule that officers must have an arrest warrant or a *Steagald* search warrant to enter a residence to arrest an occupant: (1) exigent circumstances, (2) consent, and (3) "consent once removed."

Exigent circumstances

While there are many types of exigent circumstances that will justify a warrantless entry, there are essentially only four that are relevant in situations where officers enter with the intent to arrest an occupant: hot pursuits, fresh pursuits, armed standoffs, and evidence destruction.

HOT PURSUITS: In the context of *Ramey-Payton* and *Steagald*, a "hot" pursuit occurs when (1) officers attempt to arrest a suspect in a public place, and (2) he responds by fleeing into his home or other private structure. When this happens, as the Court of Appeal explained, officers may go in after him:

> As the term suggests, this exception dispenses with the warrant requirement when officers are chasing a suspect who is in active flight. The justification is that otherwise he might escape again while the police sit around waiting for the warrant to be issued.[107]

For example, in *United States* v. *Santana*[108] officers in Philadelphia went to Santana's home to arrest her shortly after she sold heroin to an undercover officer. As they pulled up, Santana was standing in the doorway to the house, but then quickly ran inside. The officers followed her and, in the course of making the arrest, they seized some heroin in plain view. On appeal, the Supreme Court ruled that the entry fell within the "hot pursuit" exception, explaining that "a suspect may not defeat an arrest which has been set in motion in a public place by the expedient of escaping to a private place." Note that an entry under the hot pursuit exception is permitted even though the arrestee was wanted for only a misdemeanor.[109]

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[101] *U.S.* v. *Penney* (6th Cir. 2009) 576 F.3d 297, 310.
[102] See *United States* v. *Grubbs* (2006) 547 U.S. 90, 96; *People* v. *Sousa* (1993) 18 Cal.App.4th 549, 559-60.
[103] See *Alvidres* v. *Superior Court* (1970) 12 Cal.App.3d 575, 581.
[104] See *United States* v. *Grubbs* (2006) 547 U.S. 90, 96; *People* v. *Sousa* (1993) 18 Cal.App.4th 549, 559.
[105] *Steagald* v. *United States* (1981) 451 U.S. 204, 220-21.
[106] See *Steagald* v. *United States* (1981) 451 U.S. 204, 221, fn.14.
[107] *People* v. *White* (1986) 183 Cal.App.3d 1199, 1203.
[108] (1976) 427 U.S. 38, 43.
[109] See *People* v. *Lloyd* (1989) 216 Cal.3d 1425, 1430.

FRESH PURSUITS: Unlike "hot" pursuits, "fresh" pursuits are not physical chases. Instead, they are better defined as investigative pursuits in the sense that officers are actively attempting to apprehend the perpetrator of a crime and, in doing so, are quickly responding to leads as to his whereabouts; and eventually they develop reason to believe that he is presently inside a certain home or other private structure. In such situations, officers may enter the premises under the "fresh pursuit" exception if the following circumstances existed:

(1) SERIOUS FELONY: The crime under investigation must have been a serious felony, usually a violent one.

(2) DILIGENCE: After the crime was committed, the officers must have been diligent in their attempt to apprehend the perpetrator.

(3) PROBABLE CAUSE: At some point in their investigation, the officers must have developed probable cause to arrest the suspect.

(4) SUSPECT LOCATED: The officers must have developed "reason to believe" that the perpetrator was inside the premises. (The "reason to believe" standard was covered earlier.)

(5) CIRCUMSTANTIAL EVIDENCE OF FLIGHT: The officers must have been aware of circumstances indicating the perpetrator was in active flight or soon would be; e.g., he knew he had been identified by a witness or that an accomplice had been arrested.[110]

ARMED STANDOFFS: An armed standoff is loosely defined as a situation in which (1) officers have probable cause to arrest a person who is reasonably believed to be armed and dangerous, (2) the person is inside his home or other structure, and (3) he refuses to surrender. In these situations, officers may enter without a warrant for the purpose of arresting him. As the Ninth Circuit explained in *Fisher* v. *City of San Jose*:

> [D]uring such a standoff, once exigent circumstances justify the warrantless seizure of the suspect in his home, and so long as the police are actively engaged in completing his arrest, police need not obtain an arrest warrant before taking the suspect into full physical custody.[111]

DESTRUCTION OF EVIDENCE: Officers may also make a warrantless entry to arrest an occupant if they reasonably believed (1) there was evidence on the premises, and (2) the arrestee would destroy it if they waited for a warrant.[112] Note that, although the crime under investigation need not be "serious" or even a felony,[113] the courts may be less apt to find exigent circumstances if the evidence did not pertain to a serious crime.[114] Also, officers must be able to cite specific facts that reasonably indicated the evidence was about to be destroyed. For example, in *People* v. *Edwards* the court ruled that an officer's testimony that the arrestee "might destroy evidence" was insufficient because, said the court, "Those generalized misgivings present in every case do not constitute exigent circumstances."[115]

Consensual entry

Officers may, of course, enter a home if they had obtained voluntary consent to do so from a person who reasonably appeared to have had the authority to admit them. But such consent may be ineffective if the officers intended to immediately arrest the consenting person or other occupant but neglected to reveal their intentions. This is because such consent would not have been "knowing and intelligent," and also because an immediate arrest would have been beyond the scope and intensity of the consent.

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[110] See *Minnesota* v. *Olson* (1990) 495 U.S. 91, 100; *People* v. *Bacigalupo* (1991) 1 Cal.4th 103, 123; *People* v. *Escudero* (1979) 23 Cal.3d 800, 811; *People* v. *Lanfrey* (1988) 204 Cal.App.3d 491, 509; *People* v. *Williams* (1989) 48 Cal.3d 1112, 1139.

[111] (9th Cir. 2009) 558 F.3d 1069, 1071.

[112] See *Kentucky* v. *King* (2011) __ U.S. __ [2011 WL 1832821] ["to prevent the imminent destruction of evidence has long been recognized as a sufficient justification for a warrantless search"]; *United States* v. *Santana* (1976) 427 U.S. 38, 43 ["Once Santana saw the police, there was likewise a realistic expectation that any delay would result in destruction of evidence."]; *People* v. *Ramey* (1976) 16 Cal.3d 263, 276 ["exigent circumstances" exist if reasonably necessary to "forestall the . . . destruction of evidence"].

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

[114] See *People* v. *Thompson* (2006) 38 Cal.4th 811, 820-25; *People* v. *Hua* (2008) 158 Cal.App.4th 1027, 1035-36; *U.S.* v. *Johnson* (9th Cir. 2001) 256 F.3d 895, 908 [the fact the crime was a misdemeanor "does not definitely preclude a finding of exigent circumstances, [but] it weighs heavily against it"].

[115] (1981) 126 Cal.App.3d 447.

DETERMINING THE OFFICERS' INTENT: In determining the officers' intent, the courts are especially interested in the following circumstances: (1) whether they had probable cause to arrest an occupant when they obtained consent; and (2) whether they made the arrest immediately after entering. For example, consent that was given to officers who said they wanted to come inside to "talk" with a suspect will ordinarily be deemed invalid if they had probable cause to arrest him and immediately did so. As the Court of Appeal explained, "A right to enter for the purpose of talking with a suspect is not consent to enter and effect an arrest."[116]

On the other hand, if the officers had something less than probable cause, their entry may be deemed consensual if they made the arrest only after they saw or heard something that generated it. For example, in *People* v. *Villa*[117] a man raped and beat a woman who immediately reported the attack to Sacramento County sheriff's deputies. A deputy who overheard a description of the rapist on the sheriff's radio thought the attacker might have been Villa because he had been arrested about a month earlier for prowling in the victim's yard. So the deputy and others went to Villa's home, knocked on the door, and spoke with his mother. After explaining that they wanted to talk with her son about the attack, she consented to their entry and told them that Villa was sleeping in his bedroom. As they entered the bedroom, they saw that Villa was not sleeping; he was watching television. More importantly, he was wearing clothing that matched the clothing worn by the rapist, and he had scratch marks on his face. So the deputies arrested him.

Villa argued that his mothers' consent was ineffective because the deputies lied to her about their intentions. The Court of Appeal disagreed, saying "the evidence disclosed the entry was for the purpose of investigating the earlier incident. There was no evidence of subterfuge at the time consent to enter was given."

While the existence of probable cause is a strong indication that the officers intended to make an immediate arrest, in some cases they may have good reason to defer making the arrest until they had heard what the suspect had to say; e.g., his explanation of what had occurred. This might happen, for example, if the officers' probable cause was not so overwhelming that they would have disregarded the suspect's story in determining whether an immediate arrest was appropriate. Under such circumstances, an arrest may not invalidate the consent if officers made it clear that they wanted to enter for the purpose of talking with the suspect. As the court observed in *People* v. *Superior Court (Kenner)*:

> A person may willingly consent to admit police officers for the purpose of discussion, with the opportunity, thus suggested, of explaining away any suspicions, but not be willing to permit a warrantless and nonemergent entry that affords him no right to explanation or justification.[118]

OFFICERS' INTENT WAS REASONABLY APPARENT: Even if officers had probable cause and intended to make an immediate arrest, consent may be deemed knowing and intelligent if a court finds that they had effectively notified the consenting person of their intentions based on a reasonable interpretation of their stated purpose. As the Supreme Court explained, "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"[119]

For example, in *People* v. *Newton*[120] LAPD officers, having developed probable cause to arrest Newton for rape, went to a house in which they thought he might be staying. When a woman answered the door, an officer asked if Newton lived there. The woman said no, claiming she had not seen him for several months. One of the officers then asked if they could "come in and look around." She replied, "Yes, come on in, but you are not going to find anything,

[116] *In re Johnny V.* (1978) 85 Cal.App.3d 120, 130. Also see *People* v. *Williams* (1979) 93 Cal.App.3d 40, 57-58; *U.S.* v. *Johnson* (9th Cir. 1980) 626 F.2d 753.
[117] (1981) 125 Cal.App.3d 872.
[118] (1977) 73 Cal.App.3d 65, 69.
[119] *Florida* v. *Jimeno* (1991) 500 U.S. 248, 251.
[120] (1980) 107 Cal.App.3d 568. Also see *People* v. *Ford* (1979) 97 Cal.App.3d 744.

I am here by myself." As the officers entered one of the bedrooms, they found Newton watching TV and arrested him. Apparently, they also saw some evidence because Newton filed a motion to suppress, claiming his arrest violated *Ramey*. Specifically, he argued that the woman had given the officers consent to "look around," not arrest him. The motion was denied and, on appeal, the court ruled that the nature of the conversation between the woman and the officers at the front door would "lead the officers reasonably to believe that they had a consent to enter to find defendant for any purpose they desired, either to question him or to arrest him."

ENTRY TO ARREST FOR DOMESTIC VIOLENCE: In domestic violence cases, if one spouse consented to an entry for the purpose of arresting the other, officers may enter even though the other spouse objected. This is because the rule that prohibits an entry if one spouse objects—the rule of *Georgia* v. *Randolph*[121]—applies only when the objective of the officers' entry was to obtain evidence against the non-consenting spouse. Thus, it does not apply when the purpose was to arrest him or protect the consenting spouse.

Consent to undercover officers

Suspects will frequently consent to an entry by undercover officers for the purpose of engaging in some sort of illegal activity, such as selling drugs. If the suspect was immediately arrested, the analysis will depend on whether the arrest was made by the undercover officers themselves, or whether it was made by backup officers.

ARREST BY UNDERCOVER OFFICERS: When undercover officers obtain consent to enter from a suspect, they will necessarily have misrepresented their identities and purpose. Although such consent is therefore not technically "knowing and intelligent," it is nevertheless valid based on an overriding rule that criminals who admit strangers into their homes to commit or plan crimes are knowingly taking a chance that the strangers are officers or police informants. As the Ninth Circuit pointed out, "It is well-settled that undercover agents may misrepresent their identity to obtain consent to entry."[122] Consequently, even if the undercover officers had probable cause to arrest the suspect when they entered, and even if they fully intended to arrest him after the sale was completed, the entry does not violate *Ramey-Payton* or *Steagald* because it was consensual.

It should also be noted that, apart from the validity of the consent, *Ramey-Payton* and *Steagald* do not apply to most entries by undercover officers because, even if they arrested the suspect on the premises, their intent upon entering would ordinarily have been contingent on what happened inside. Thus, when this issue arose in *People* v. *Evans* the court found no violation because the officers "were inside with consent, with probable cause to arrest but with the intent to continue the investigation by effecting a purchase of [drugs]."[123]

ARREST BY BACKUP OFFICERS: Because it would be extremely dangerous for an undercover officer to arrest a suspect who had admitted him into his home (and it would be foolhardy for a police informant to make a citizens arrest), the courts developed a rule—known as "consent once removed"—by which backup officers may be permitted to forcibly enter to make the arrest.[124] While the term "consent once removed" suggests that the suspect's act of consenting to an entry by an undercover officer may somehow be conferred on the backup officers, in reality the rule is based on the theory that a suspect who admits someone into his home for a criminal purpose has assumed the "incremental risk" that officers would immediately enter to arrest him.[125]

This does not mean, however, that the arresting officers may enter whenever a suspect has allowed an undercover officer or police agent inside for a criminal purpose. Instead, such entries are permitted only if the following five circumstances existed:

(1) CONSENT: The undercover officer or police agent must have entered with the consent of someone with apparent authority to do so.

(2) PROBABLE CAUSE: Probable cause must have developed after the undercover officer entered.

[121] (2006) 547 U.S. 103, 108.
[122] *U.S.* v. *Bramble* (9th Cir. 1997) 103 F.3d 1475. 1478. Also see *Toubus* v. *Superior Court* (1981) 114 Cal.App.3d 378, 383.
[123] (1980) 108 Cal.App.3d 193, 196.
[124] See *Pearson* v. *Callahan* (2009) 555 U.S. 223, 244; *People* v. *Cespedes* (1987) 191 Cal.App.3d 768,771-73.
[125] *U.S.* v. *Paul* (7th Cir. 1986) 808 F.2d 645, 648. Also see *Toubus* v. *Superior Court* (1981) 114 Cal.App.3d 378, 384.

(3) NOTIFICATION: The undercover officer or police agent must have notified the backup officers by radio signal or other means that probable cause now existed.
(4) DILIGENCE: The notification must have been made without unnecessary delay after probable cause developed.
(5) ENTRY WHILE UNDERCOVER IS INSIDE: The backup officers must have entered while the undercover officer or police agent was on the premises, or at least so quickly after he stepped outside that there existed an implied right to reenter.[126]

One other thing: A suspect's attempt to withdraw "consent" (e.g., by trying to close the door on the arresting officers) is ineffective if they had probable cause to arrest.[127]

Entry and Search Procedure

Even when the officers' entry was authorized under *Ramey-Payton* or *Steagald*, there are certain restrictions on what they may do after they enter. For example, if the entry was consensual, they may do only those things that they reasonably believed the consenting person authorized them to do. If, however, the entry was based on the issuance of a conventional arrest warrant, a *Ramey* warrant, a *Steagald* warrant, exigent circumstances, or on "consent once removed," the required procedure is as follows:

POSSESSION OF ARREST WARRANT: Although it is "highly desirable" for officers to possess a copy of the warrant when they enter, this is not a requirement.[128]

KNOCK-NOTICE: If officers entered under the authority of a search or arrest warrant, they must comply with the knock-notice requirements unless there were exigent circumstances that justified an immediate entry. On the other hand, if the entry was based "consent once removed," compliance will ordinarily be excused because (1) an announcement would alert the arrestee that he had been "set up" by the undercover officer or police agent, who would then be in imminent danger;[129] and (2) when an undercover officer or police agent is already inside the residence, the purposes behind the knock-notice requirements would not be sufficiently served by compliance.[130]

SEARCH FOR THE ARRESTEE: If it is necessary to search the premises for the arrestee, officers may look in those places in which a person might be hiding.[131]

SEARCH INCIDENT TO ARREST: If officers arrest the suspect, they may, as an incident to the arrest, search those places and things to which he had immediate access when the search occurred.[132] Even if the suspect lacked immediate access, officers may inspect areas and things that were (1) "immediately adjoining the place of arrest," and (2) large enough to conceal a hiding person.[133]

ACCOMPANY ARRESTEE: If officers permit the arrestee to go into any other rooms (e.g., to obtain a wallet or jacket) they may accompany him and stay "literally at his elbow."[134]

PROTECTIVE SWEEP: Officers may conduct a protective sweep if they reasonably believed there was another person on the premises who posed a threat to them.[135]

Three other things should be noted about the required procedure. First, if the officers have probable cause to believe that an item they observed in plain view is evidence, they may seize it.[136] Second, if they decide to seek a search warrant after they have entered, they may secure the premises for a

[126] See *People* v. *Cespedes* (1987) 191 Cal.App.3d 768, 774; *U.S.* v. *Bramble* (9th Cir. 1996) 103 F.3d 1475,1478; *O'Neil* v. *Louisville/Jefferson County Metro Government* (6th Cir. 2011) __ F.3d __ [2011 WL 5345409].
[127] See *U.S.* v. *Jachimko* (7th Cir. 1994) 19 F.3d 296, 299.
[128] See *Nunes* v. *Superior Court* (1980) 100 Cal.App.3d 915, 935-36; *Washington* v. *Simpson* (8th Cir. 1986) 806 F.2d 192, 196, fn.4.
[129] See *United States* v. *Banks* (2003) 540 U.S. 31, 37; *U.S.* v. *Pollard* (6th Cir. 2000) 215 F.3d 643, 646.
[130] See *People* v. *Toubus* (1981) 114 Cal.App.3d 378, 384.
[131] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 330; *U.S.* v. *Harper* (9th Cir. 1991) 928 F.2d 894, 897.
[132] See *Arizona* v. *Gant* (2009) 556 U.S. 332; *People* v. *Arvizu* (1970) 12 Cal.App.3d 726, 729.
[133] *Maryland* v. *Buie* (1990) 494 U.S. 325, 333.
[134] *Washington* v. *Chrisman* (1982) 455 U.S. 1, 7. Also see *U.S.* v. *Roberts* (5th Cir. 2010) 612 F.3d 306, 310-11.
[135] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 334; *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 661-62.
[136] See *Arizona* v. *Hicks* (1987) 480 U.S. 321, 326-28; *Payton* v. *New York* (1980) 445 U.S. 573, 587.

reasonable period of time pending issuance of the warrant.[137] Third, if the entry was made under the authority of a *Ramey* warrant, they must file a "Certificate of Service" with the clerk of the issuing court within a reasonable time after the arrest.[138] (To obtain a copy of a certificate in Microsoft Word format (which can be edited), send a request from a departmental email address to POV@acgov.org.)

Suppression Rules

Because the sole purpose of *Ramey-Payton* and *Steagald* is to protect the reasonable privacy expectations of the occupants of homes and other protected structures, a violation will render the entry—and the fruits of the entry—unlawful. But it will not render the arrest unlawful. As the Court of Appeal explained, "[I]t is the unlawful *intrusion* into the dwelling which offends constitutional safeguards and which is therefore at the heart of the matter, rather than the arrest itself."[139]

Consequently, the admissibility of statements and other evidence obtained after officers made an entry in violation of *Ramey-Payton* or *Steagald* will depend on two things: (1) whether the evidence was the "fruit" of the entry; i.e., whether the officers obtained it while they were inside the building, and (2) whether the defendant had a reasonable expectation of privacy in the premises.

EVIDENCE OBTAINED IN THE ARRESTEE'S HOME: If officers entered the arrestee's home in violation of *Ramey-Payton*, their presence there is illegal. Consequently, any evidence and statements they obtained while inside will be suppressed.[140]

EVIDENCE OBTAINED AFTER EXITING: Evidence and statements obtained from the arrestee after he had been removed from the premises will not be suppressed so long as officers had probable cause to arrest.[141] This is because, as noted above, a violation of *Ramey-Payton* or *Steagald* renders the entry illegal—but not the arrest. As the Ninth Circuit explained in *U.S.* v. *Crawford*, "[T]he presence of probable cause to arrest has proved dispositive when deciding whether the exclusionary rule applies to evidence or statements obtained after the defendant is placed in custody."[142]

For example, in *New York* v. *Harris*[143] NYPD officers arrested Harris in his home in violation of *Payton*. While still inside the house, an officer obtained a *Miranda* waiver from Harris who essentially confessed. The officers then took him to a police station where, after again informing Harris of his *Miranda* rights, they resumed the questioning which produced a written incriminating statement. Although the trial court suppressed the statement obtained inside Harris's home because of the *Payton* violation, it admitted the written statement obtained at the police station.

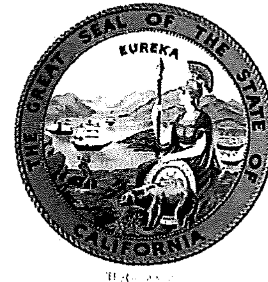
The United States Supreme Court upheld the trial court's ruling, explaining that, "where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*."

EVIDENCE OBTAINED IN A THIRD PARTY'S HOME: If officers entered the home of an arrestee's friend, relative, or other third party in violation of *Steagald*, any evidence they discovered inside the premises will be inadmissible against the third party.[144] It will, however, be admissible against the arrestee unless he had a reasonable expectation of privacy in the place or thing in which it was found.[145] POV

[137] See *Illinois* v. *McArthur* (2001) 531 U.S. 326, 331-32.
[138] See Pen. Code § 817(h).
[139] *People* v. *Ford* (1979) 97 Cal.App.3d 744, 748.
[140] See *New York* v. *Harris* (1990) 495 U.S. 14, 20.
[141] See *People* v. *Marquez* (1992) 1 Cal.4th 553, 569 ["[T]he lack of an arrest warrant does not invalidate defendant's arrest or require suppression of statements he made at the police station."]; *People* v. *Watkins* (1994) 26 Cal.App.4th 19, 29; *In re Jessie L.* (1982) 131 Cal.App.3d 202, 214.
[142] (9th Cir. 2004) 372 F.3d 1048, 1056.
[143] (1990) 495 U.S. 14.
[144] See *Steagald* v. *United States* (1981) 451 U.S. 204, 219; *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 658.
[145] See *U.S.* v. *McCarson* (D.C. Cir. 2008) 527 F.3d 170, 172; *U.S.* v. *Agnew* (3d Cir. 2005) 407 F.3d 193, 196. Compare *Minnesota* v. *Olson* (1990) 495 U.S. 91, 96-97 [overnight houseguest had a reasonable expectation of privacy].

SUPERIOR COURT OF CALIFORNIA

County of ________________



ARREST WARRANT

Probable Cause Arrest Warrant
Ramey Warrant

The People of the State of California
To Any California Peace Officer:

Warrant No. ________________

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

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

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

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

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

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

______________________________ Date and time warrant issued

______________________________ Judge of the Superior Court

◆ Arrestee Information ◆

For identification purposes only

Name:

AKAs:

Last known address(es):

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

Scars, marks, tattoos:

Vehicle(s) linked to Arrestee:

Other identifying information:

SUPERIOR COURT OF CALIFORNIA

County of ________________

SEARCH and ARREST WARRANT
Steagald Warrant

The People of the State of California
To Any Peace Officer in ____________ **County** **Warrant No.** _________

Name of arrestee: *[Insert name]*, hereinafter "Arrestee."
Premises to be searched: *[Insert address]*, hereinafter "Premises."
Affiant: *[Insert name and agency]*, hereinafter "Affiant."

Findings: Based on the affidavit sworn to and subscribed before me on this date (hereinafter "Affidavit"), I make the following findings in accordance with Penal Code § 1524(a)(6):

Probable cause to arrest: There is probable cause to arrest Arrestee for the following crime[s]: *[List crime(s)]*:

Basis of probable cause to arrest: Probable cause to arrest was established as follows:
- ☐ **Affidavit:** The facts are set forth in Affidavit.
- ☐ **Arrest warrant:** A warrant for the arrest of Arrestee has been issued and is outstanding.

Probable cause to search: There is probable cause to believe that Arrestee is now inside the Premises and will be there when this warrant is executed.

Orders: You are hereby ordered to search the Premises for Arrestee forthwith and, if located, place Arrestee under arrest for the crime[s] listed above and bring Arrestee before a magistrate in this county pursuant to Penal Code §§ 821, 825, 826, and 848.

Bail: ☐ No bail ☐ Bail is set at $_______

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

______________________ Date and time issued

______________________ Judge of the Superior Court

◆ Arrestee Information ◆
For identification purposes only

Name:

AKAs:

Last known address(es):

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

Scars, marks, tattoos:

Vehicle(s) linked to Arrestee:

Other information:

SUPERIOR COURT OF CALIFORNIA

County of ________________

SEARCH and ARREST WARRANT
Anticipatory Steagald Warrant

The People of the State of California
To Any Peace Officer in ____________ **County** **Warrant No.** _________

Name of arrestee: *[Insert name]*, hereinafter "Arrestee."
Premises to be searched: *[Insert address]*, hereinafter "Premises."
Affiant: *[Insert name and agency]*, hereinafter "Affiant."

Findings: Based on the affidavit sworn to and subscribed before me on this date (hereinafter "Affidavit"), I make the following findings in accordance with Penal Code § 1524(a)(6):

Probable cause to arrest: Probable cause to arrest Arrestee for the following crime(s) will exist upon the occurrence of the Triggering Event described in Affidavit: *[List crime(s)*

Probable cause for triggering event: There is probable cause to believe the Triggering Event will occur.

Probable cause to search: There is probable cause to believe that Arrestee will be inside the Premises when the Triggering Event occurs.

Orders: Without undue delay after the Triggering Event occurs, you are ordered to search Premises for Arrestee and, if located, place Arrestee under arrest for the crime[s] listed above and bring Arrestee before a magistrate in this county pursuant to Penal Code §§ 821, 825, 826, and 848.

Bail: ☐ No bail ☐ Bail is set at $_______

☐ **Night service**: Good cause for night service will exist, and is therefore authorized, if the Triggering Event occurs at night.

______________________ Date and time issued

______________________ Judge of the Superior Court

◆ Arrestee Information ◆
For identification purposes only

Name:

AKAs:

Last known address(es):

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

Scars, marks, tattoos:

Vehicle(s) linked to Arrestee:

Other information:

Petaluma Police Department
BRIEFING TRAINING RECORD

EMPLOYEES							
Name	ID#	Name	ID#	Name	ID#	Name	ID#

TRAINING SUMMARY

Date of Training	Length of Training	Time of Training	Location
6/26/2019	HRS: MIN: 15	START: END:	☒ Main Station ☐ Other:

Type of Training
☐ Video ☑ Lecture ☐ Practical Demonstration ☐ Critical Incident Debriefing ☒ Other: Email DISCUSSED DURING BRIEFING.

ATTACH TRAINING MATERIALS. Submit only the cover sheet for lengthy documents. Exclude department policies.

- **Safe packaging of fentanyl. Email containing instructions and directions for the safe packaging of fentanyl or suspected fentanyl.**

Supervisory Review

Trainer	ID#	Supervisor	ID#
Gilman	2042	[signature]	7709
Lieutenant	**ID#**	**Date**	
Miller	2709	6/26/2019	

Training Record Update

Data Entry	Date	Training Record

Gilman, Paul

From: Neve, Kerri
Sent: Wednesday, May 08, 2019 3:26 PM
To: -- Police Patrol
Cc: Litzie, Nicole
Subject: New evidence packaging requirements for fentanyl

To All :

We recently had a case where the DA's office was requesting suspected fentanyl be sent to the DOJ lab for testing. Prior to sending the evidence item up, I contacted the lab to confirm how the fentanyl needed to be packaged. I learned that an evidence item being sent to the lab which contains any suspected fentanyl ***MUST BE HEAT SEALED* prior to being placed in the DOJ drug envelope**.
If you book any fentanyl and/or suspected fentanyl into evidence, please do the following:

1. Heat seal the items in a provided heat seal bag. (Heat seal bags are located inside a manila envelope hanging from the bulletin board in the evidence room) The black heat sealer is located on the counter top.
2. Date/initial the heat seal bag after sealing
3. Place the heat sealed bag into the DOJ envelope, seal/date/initial and fill out the envelope as standard
4. Be sure to use the bright orange hazard stickers for the outside of the envelope

The property room manual has been updated to reflect this new procedure. Instructions are on page 24 of the manual.

If you have any questions, please see me.

Kerri Neve
Property/Evidence Unit
Petaluma Police Department
969 Petaluma Boulevard North
Petaluma, CA 94952
#707-778-4328
kneve@ci.petaluma.ca.us

LEGAL UPD

TMS

PETALUMA POLICE DEPARTMENT
BRIEFING TRAINING RECORD

EMPLOYEES

NAME	ID#	NAME	ID#	NAME	ID#	NAME	ID#

TRAINING SUMMARY

DATE OF TRAINING		LOCATION
3/29/19	Duration: 15 Minutes	PPD

TYPE OF TRAINING
RISK MANAGEMENT DISCUSSION

BRIEF DESCRIPTION OF TRAINING:

THE TEAM REVIEWED AND DISCUSSED THE ARTICLE, "10 WAYS TO LOSE POLICE LAWSUITS."

ATTACHMENTS

SUPERVISORY REVIEW

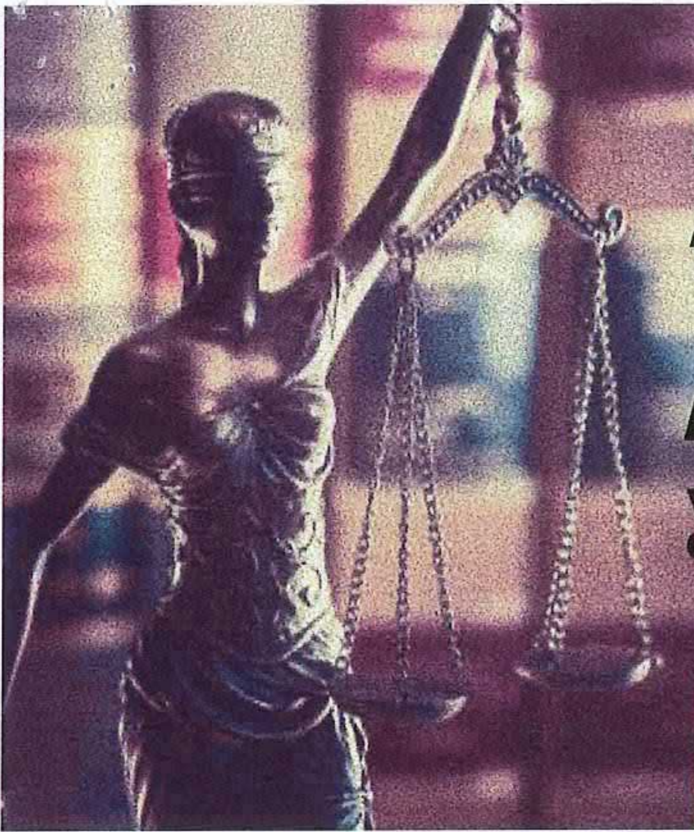
TRAINER	ID#	SUPERVISOR	ID#
Garrett Glaviano	2676	Garrett Glaviano GVG	2676
LIEUTENANT		DATE	
Tim Lyons	1354	3/29/19	

TRAINING RECORD UPDATE

DATA ENTRY	DATE	TRAINING RECORD

S:\Police\Department Forms\In-Service Training Record.doc

Revised 02/2002



10 WAYS TO LOSE POLICE LAWSUITS

Veteran Attorney Provides COURTROOM ADVICE FOR OFFICERS

"I wish every cop could get sued in federal court before you hit the street, because you would change the way you do things."

That's police attorney Bruce Praet speaking, a former LEO, a defender of officers and agencies in legal actions for more than three decades, and co-founder of Lexipol, the prominent policy advisory and risk-management consulting organization for law enforcement that's active nationwide.

In the past year, Praet has defended eight lawsuits against police in federal courtrooms and has won them all, but he's seen plenty of obstacles to victory that agencies and officers throw in their own path because they don't understand important factors in winning civil litigation.

Based on his experience, he recently presented a "10 Ways to Lose Police Lawsuits" webinar hosted by Lexipol. "I had a tough time narrowing it down to ten," Praet says, "because there are probably at least a hundred."

The topics he chose range from the pitfalls of failing to record the statements of non-witnesses of use-of-force events to the cost of refusing to offer quick, on-scene cash settlements to persons unintentionally victimized by police mistakes.

He also addressed such hot-potato issues as social media posts, pre-report video viewing, properly characterizing the mentally ill in reports, and photographing injured suspects.

Meanwhile, here's a summation of the most critical ways Praet believes officers and agencies sabotage themselves before they walk into the civil courtroom:

1. Failure to know policy

Too often, Praet says, cops have the attitude, "Why would I look at the policy manual, unless I'm either studying for promotion or about to get disciplined?" But many civil trials involve policy issues, and failure to know specifics can prove at least embarrassing if not disastrous.

He cites this witness-stand exchange from a recent dog-bite case:

Plaintiff's Attorney: "Isn't it true, officer, that you can only use that amount of force that's necessary to overcome resistance?"

Officer: "Yes, sir. That's correct."

"Wrong!" Praet declares. That department's policy permits only the amount of force "that reasonably appears necessary," a significant distinction.

"When some seasoned attorney cross-examines you, unless you're really up to speed on policy, your [imprecise] memory is not going to serve you," Praet says.

(Later, the officer quoted above said he planned to get a tattoo: "RAN," an abbreviation for reasonably appears necessary.)

2. Failure of officers/agencies to keep training updated

A lot of POST boards require mandated annual training updates, Praet points out, and mandated training may give you certain immunities in the legal arena.

"But Murphy's Law says that the one time you are delinquent in your training is the time you're going

to get sued. They're going to go back in your records and see that you were supposed to have training," Praet says. When it's discovered the training didn't take place, you have problems.

He cautions strongly against miserly economies on the part of departments, citing one agency that cancelled its [Lexipol] Daily Training Bulletins to save a nickel—and is now involved in a multi-million-dollar lawsuit with heightened vulnerability to a significant payout.

Issuing and keeping an up-to-date file of training bulletins can be priceless in court, Praet says.

3. Failure to review video before statements

Praet emphatically favors officers viewing video of their involved incidents before writing reports or giving statements. He cites the video-related Supreme Court case of Scott v. Harris (550 US 372) from 2007 as supporting his position.

"Don't conform your report or statement to what's in the video, but know what exists," he advises. This is important because an officer's memory may include inaccuracies due to stress-related sensory distortions that occurred during the encounter. It makes the strongest case, Praet believes, to see the video and then address any discrepancies in your initial account of what happened.

"Your report," he says, "is going to be the script for the case down the road. Ten minutes spent reviewing video can save you thousands of dollars later." Make reports as accurate and comprehensive as possible.

"Your report is going to be the script for the case down the road. Ten minutes spent reviewing video can save you thousands of dollars later."

He recommends video review of shootings, but also of nickel-and-dime arrests. He recalls a drunk driving case in which the officer skipped checking the dash-cam recording before filing his report. He wrote that the defendant told him to "Go fuck yourself" during the arrest, and insisted on the witness stand that this was an accurate quote.

The arrestee's attorney started to play the video and told jurors to raise their hand when they heard those words. Of course, they never did because the expletive was not on tape. "What an idiot the cop looked like," Praet says.

4. Failure to record witness interviews

Just writing up what witnesses—and alleged non-witnesses—say is no longer enough, Praet insists. "A lot of witnesses change their stories, some inadvertently, some intentionally. All of a sudden, your police report differs from what witnesses testify to on the stand.

"I would love to say we're living 50 years ago when people trusted cops and their reports, but now you know your written word carries no weight," Praet says. "If today's 'iPad jurors' don't see it or hear it, it's immediately subject to suspicion. [So] if a witness goes sideways on you, it's a whole lot more persuasive if you have audio or video."

Use your body cam or dash cam to capture their words, he suggests. And make certain to include non-witnesses—people who insist they didn't see what happened—in this documentation.

"Non-witnesses can be more important than eye-witnesses," Praet says. "Six months later when a plaintiff's attorney gets out there and finds [non-witnesses], it could be a different story when they suddenly become eye-witnesses with some BS story," Praet explains. "You can do nothing to refute them unless you have them on tape."

5. Failure to voluntarily share 'state-of-mind' information

Officers sometimes think they're protecting themselves after an OIS by providing only a compelled statement for administrative review and not cooperating with criminal investigators who want to document the officer's state of mind at the time of the incident. Praet's strong advice: "Unless you've murdered somebody outright—and know you did—by all means give a voluntary statement to share your critical state of mind with criminal investigators."

If a suspect was wielding a cell phone that you mistook for a weapon and you don't explain your perspective of the encounter, investigators are going to go with the prima facie evidence—and the prima facie evidence is that you shot an unarmed man and there's no evidence why you did it, Praet explains.

Waiting 24 to 48 hours to come down from the adrenalin high is fine, he says, but ultimately not cooperating is high-risk.

In recent months, more than a dozen cops in California have been criminally prosecuted for on-duty uses of force. Praet says, "the one common denominator was a refusal to give a voluntary statement to criminal investigators. DAs under political pressure punt to the grand jury, and cops are getting indicted for that one reason."

6. Failure to 'clean up' injured suspects before photography

Bloody pictures of suspects injured by police don't help your civil case in court, Praet says. If the suspect looks "all bloodied up," be ready to add a couple of zeros to the amount you'll pay.

For one thing, when a person gets injured because of contact with you, your primary concern is first aid. Taking photos while the subject is drenched in blood looks as if his injuries have not received medical attention. It is perceived as cold and callous.

Also, blood can exaggerate wounds. Scalp injuries can bleed profusely, for example, so what's really a small cut may look like major damage because of blood flow.

When possible, let EMS treat him and clean him up, then take your pictures, Praet advises. Focus closely on the actual injury. Get him to smile for the camera, if you can. And don't include piles of bloody gauze.

"If a cop gets injured," Praet adds facetiously, "throw a

bucket of blood on him!"

7. Failure to avoid posting social-media comments

Plaintiffs' attorneys are profiling cops on social media, Praet says, and any lawyer suing you is going to check out what you're posting.

Praet is currently working on a case that involves a suspect's death that occurred proximate to use of a CEW. The plaintiff's attorney checked the involved officer's Facebook and found a post in which the officer described himself as "the only cop on my department who's ever killed somebody with a Taser."

"That's what the plaintiff's attorney got, courtesy of our cop," Praet laments.

Everything you post is out there in the public domain, he warns. And courts have held that anything you post even on your personal devices that is work-related is all on the table in a lawsuit.

One officer took a photo of a 16-year-old girl who'd been decapitated in an auto accident. He sent it to his "closest friends on his agency." Inevitably, it got forwarded and ended up in the in-box of the dead girl's parents. For the first time, they saw their daughter without a head. Cost for that indiscretion: $2.4 million.

As an LEO, if you're participating in social media, in Praet's opinion, "you're out of your mind."

As an LEO, if you're participating in social media, in Praet's opinion, "you're out of your mind."

8. Failure to appreciate unique stresses of civil court

No matter how many times you've testified against suspects in your local criminal court, stepping into federal court in a civil case is a whole different experience.

"There is nothing more stressful in your career than having the word 'defendant' in front of your name," Praet says. "When some experienced civil-rights attorney starts cross-examining you on every minute detail of something that happened three years ago, you are a fish out of water. You're not getting cross-examined by the public defender who couldn't get hired by the DA's office."

And when the jury goes into the jury room to determine your fate, that is the definition of stress. To survive and thrive in that atmosphere, you need to know your case inside and out. Practice testifying and being ruthlessly cross-examined with your attorneys, Praet says.

9. Failure to frame mental-health encounters to your advantage

With an ever-increasing possibility of officers landing in a civil suit involving a mentally ill subject, Praet suggests modifying the language typically used to describe encounters with bizarre human behavior.

The naked guy jumping on the hood of a car might be mentally ill, but he might also be drugged or intoxicated, Praet says. He believes that somebody acting "crazy" should be referenced in dispatches and reports not just as a "possible mental-health subject," but also "possibly under the influence of drugs."

Adding the drug potential allows your attorney to bring in toxicological results at trial, Praet explains. Jurors tend to look less sympathetically on illegal drug users and more favorably on officers trying to deal with them, he says. But the possibility of drug involvement has to be [recorded as] part of your state of mind at the time. If not, it doesn't get admitted as evidence.

Likewise, include in your report any negative past experience or knowledge you had of the suspect as part of your state of mind. It may allow your attorney to introduce information that otherwise would likely be suppressed, such as a long rap sheet, Praet says.

10. Failure to pay cash on the spot for inadvertently causing harm

Occasionally, police make mistakes—a K-9 bites the wrong person, SWAT raids the wrong house, you crash into a civilian's car as you race to a call without lights and siren. "One-hundred percent liability!" Praet declares.

His solution: There should be someone in your agency or the DA's office who's authorized 24/7 to make a prompt cash payment of $500 to $2,500 to the wronged individual.

These signed settlements are being consistently upheld in state and federal courts, he says. Clients following this approach are saving millions of dollars, plus they're making friends for law enforcement. People who've been mistakenly injured generally don't want to sue you if you step up to the plate and take care of their damages, ideally within the first 24 hours.

Otherwise, he believes the risk is well-illustrated by a case in which a K-9 during an area search bit a non-threatening homeless man sleeping behind a dumpster. The officer involved apologized and had the victim happily locked in to accepting an on-scene cash settlement.

But when the officer contacted the prosecutor to get $500 for the victim, the DA refused, saying the man had to follow procedures by filing a formal claim and waiting for it to be evaluated. Six months later, Praet recalls, the guy had an attorney. The city ended up settling for $50,000.

Could an unsuccessful attempt at reaching an impromptu settlement be used against you in court?

"No," Praet says. "Settlement offers and negotiations are 100 percent inadmissible in court in any subsequent civil proceedings. It doesn't hurt you at all to try."

Revised from an article in the "Force Science News published by . . . the Force Science Institute. To subscribe to this free, twice-monthly e-newsletter, visit: www.forcescience.org

BRUCE PRAET is a partner in the law firm of Ferguson, Praet, & Sherman in Santa Ana, California. He can be reached at: bpraet@aol.com

TMS

PETALUMA POLICE DEPARTMENT
BRIEFING TRAINING RECORD

EMPLOYEES

NAME	ID#	NAME	ID#	NAME	ID#	NAME	ID#

TRAINING SUMMARY

DATE	LENGTH OF TRAINING	LOCATION
7-28-19	15 MINUTES	☒ MAIN STATION ☐ STOREFRONT

TYPE OF TRAINING
☐ VIDEO ☒ LECTURE ☐ PRACTICAL DEMONSTRATION ☐ CRITICAL INCIDENT DEBRIEFING
☒ OTHER: **BRIEFING TRAINING**

BRIEF DESCRIPTION OF TRAINING:

PPD 402: Bias Based Policing
PPD 428: Immigration Violations

ATTACHMENTS
☒ HANDOUT MATERIALS (POLICY) ☐ LECTURE NOTES ☐ LESSON PLAN ☒ OTHER: GROUP LED DISCUSSION

SUPERVISORY REVIEW

TRAINER	ID# 3306	SUPERVISOR	ID#
R. Flores		Sgt N. McGowan	2800
LIEUTENANT E. Crosby	ID# 1749	07-28-2019	

TRAINING RECORD UPDATE

DATA ENTRY	DATE	TRAINING RECORD

PETALUMA POLICE DEPARTMENT
BRIEFING TRAINING RECORD

EMPLOYEES

NAME	ID#	NAME	ID#	NAME	ID#	NAME	ID#

TRAINING SUMMARY

DATE	LENGTH OF TRAINING	LOCATION
7/12/2019	0 HOURS 20 MINUTES	☒ MAIN STATION

TYPE OF TRAINING
☐ VIDEO ☒ LECTURE ☐ PRACTICAL DEMONSTRATION ☐ CRITICAL INCIDENT DEBRIEFING
☐ OTHER:

BRIEF DESCRIPTION OF TRAINING:

Petaluma Police Department 7/12/2019

Briefing training on POBAR. Reviewed pertinent Government Codes and had open discussion on the topic.

ATTACHMENTS
☐ HANDOUT MATERIALS ☐ LECTURE NOTES ☐ LESSON PLAN ☐ OTHER:

SUPERVISORY REVIEW

TRAINER	ID#	SUPERVISOR	ID#
Chris Ricci	ID# 2754	Glaviano	2676
LIEUTENANT	ID# 1359	DATE 7/12/2019	

TRAINING RECORD UPDATE

DATA ENTRY	DATE	TRAINING RECORD

PEACE OFFICERS BILL OF RIGHTS

Public Safety Officers Procedural Bill of Rights Act

Government Code Sections 3300-3312

3300 – Title

This chapter is known and may be cited as the Public Safety Officers Procedural Bill of Rights Act.

3301 – Definition; Legislative findings and declaration

For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision ©, 830.36, 830.37, 830.38, 830.4, and 830.5 of the Penal Code.

The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and

Resources

Peace Officers Bill of Rights

Helpful Links

Business Directory

Law Enforcement Presumptive On-Duty Injuries

Hazardous Exposure Listing Program (HELP)

their employers. In order to assure that stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated within the State of California.

3302 – Political activity: Membership on school board

(a) Except as otherwise provided by law, or whenever on duty or in uniform, no public safety officer shall be prohibited from engaging, or be coerced or required to engage, in political activity.

(b) No public safety officer shall be prohibited from seeking election to, or serving as a member of, the governing board of a school district.

3303 – Investigations interrogations; conduct; conditions; representation; reassignment

When any public safety officer is under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department, that could lead to punitive action, the interrogation shall be conducted under the following conditions. For the purpose of this chapter, punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.

(a) The interrogation shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer, unless the seriousness of the investigation requires otherwise. If the interrogation does occur during off-duty time of the public safety officer being interrogated, the

public safety officer shall be compensated for any off-duty time in accordance with regular department procedures, and the public safety officer shall not be released from employment for any work missed.

(b) The public safety officer under investigation shall be informed prior to the interrogation of the rank, name, and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation. All questions directed to the public safety officer under interrogation shall be asked by and through no more than two interrogators at one time.

(c) The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation.

(d) The interrogating session shall be for a reasonable period taking into consideration gravity and complexity of the issue being investigated. The person under interrogation shall be allowed to attend to his or her own personal physical necessities.

(e) The public safety officer under interrogation shall not be subjected to offensive language or threatened with punitive action, except that an officer refusing to respond to questions or submit to interrogations shall be informed that failure to answer questions directly related to the investigation or interrogation may result in punitive action. No promise of reward shall be made as an inducement to answering any question. The employer shall not cause the public safety officer under interrogation to be subjected to visits by the press or news media without his or her express consent nor shall his or her home address or photograph be given to the press or news media without his or her express consent.

(f) No statement made during interrogation by a public safety officer under duress, coercion, or threat of punitive action shall be admissible in any subsequent civil proceeding. This subdivision is subject to the following qualifications:

(1) This subdivision shall not limit the use of statements made by a public safety officer when the employing public safety department is seeking civil sanctions against any public safety officer, including disciplinary action brought under Section 19572.

(2) This subdivision shall not prevent the admissibility of statements made by the public safety officer under interrogation in any civil action, including administrative actions, brought by that public safety officer, or that officer's exclusive representative, arising out of a disciplinary action.

(3) This subdivision shall not prevent statements made by a public safety officer under interrogation from being used to impeach the testimony of that officer after an in camera review to determine whether the statements serve to impeach the testimony of the officer.

(4) This subdivision shall not otherwise prevent the admissibility of statements made by a public safety officer under interrogation if that officer subsequently is deceased.

(g) The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential. No notes or reports that are deemed to be confidential may be

entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his or her own recording device and record any and all aspects of the interrogation.

(h) If prior to or during the interrogation of a public safety officer it is deemed that he or she may be charged with a criminal offense, he or she shall be immediately informed of his or her constitutional rights.

(i) Upon the filing of a formal written statement of charges, or whenever an interrogation focuses on matters that are likely to result in punitive action against any public safety officer, that officer, at his or her request, shall have the right to be represented by a representative of his or her choice who may be present at all times during the interrogation. The representative shall not be a person subject to the same investigation. The representative shall not be required to disclose, nor be subject to any punitive action for refusing to disclose, any information received from the officer under investigation for noncriminal matters.

This section shall 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, nor shall this section apply to an investigation concerned solely and directly with alleged criminal activities.

(j) No public safety officer shall be loaned or temporarily reassigned to a location or duty assignment if a sworn member of his or her department would not normally be sent to that location or would not normally be given that duty assignment under similar circumstances.

3304 – Lawful exercise of rights; insubordination; administrative appeal

(a) No public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with any such treatment, because of the lawful exercise of the rights granted under this chapter, or the exercise of any rights under any existing administrative grievance procedure. Nothing in this section shall preclude a head of an agency from ordering a public safety officer to cooperate with other agencies involved in criminal investigations. If an officer fails to comply with such an order, the agency may officially charge him or her with insubordination.

(b) No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer who has successfully completed the probationary period that may be required by his or her employing agency without providing the public safety officer with an opportunity for administrative appeal.

(c) No chief of police may be removed by a public agency, or appointing authority, without providing the chief of police with written notice and the reason or reasons therefore and an opportunity for administrative appeal. For purposes of this subdivision, the removal of a chief of police by a public agency or appointing authority, for the purpose of implementing the goals or policies, or both, of the public agency or appointing authority, for reasons including, but not limited to, incompatibility of management styles or as a result of a change in administration, shall be sufficient to constitute "reason or reasons." Nothing in this subdivision shall be construed to create a property interest, where one does not exist by rule or law, in the job of Chief of Police.

(d) Except as provided in this subdivision and subdivision (g), no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken for any act, omission,

or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct. This one-year limitation period shall apply only if the act, omission, or other misconduct occurred on or after January 1, 1998. In the event that the public agency determines that discipline may be taken, it shall complete its investigation and notify the public safety officer of its proposed disciplinary action within that year, except in any of the following circumstances:

(1) If the act, omission, or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation or criminal prosecution is pending shall toll the one-year time period.

(2) If the public safety officer waives the one-year time period in writing, the time period shall be tolled for the period of time specified in the written waiver.

(3) If the investigation is a multijurisdictional investigation that requires a reasonable extension for coordination of the involved agencies.

(4) If the investigation involves more than one employee and requires a reasonable extension.

(5) If the investigation involves an employee who is incapacitated or otherwise unavailable.

(6) If the investigation involves a matter in civil litigation where the public safety officer is named as a party defendant, the one-year time period shall be tolled while that civil action is pending.

(7) If the investigation involves a matter in criminal litigation where the complainant is a criminal defendant, the one-year time period shall be tolled during the period of that defendant's criminal investigation and prosecution.

(8) If the investigation involves an allegation of workers' compensation fraud on the part of the public safety officer.

(e) Where a predisciplinary response or grievance procedure is required or utilized, the time for this response or procedure shall not be governed or limited by this chapter.

(f) If, after investigation and any predisciplinary response or procedure, the public agency decides to impose discipline, the public agency shall notify the public safety officer in writing of its decision to impose discipline, including the date that the discipline will be imposed, within 30 days of its decision, except if the public safety officer is unavailable for discipline.

(g) Notwithstanding the one-year time period specified in subdivision (c), an investigation may be reopened against a public safety officer if both of the following circumstances exist:

(1) Significant new evidence has been discovered that is likely to affect the outcome of the investigation.

(2) One of the following conditions exist:

(A) The evidence could not reasonably have been discovered in the normal course of investigation without resorting to extraordinary measures by the agency.

(B) The evidence resulted from the public safety officer's predisciplinary response or procedure.

(h) For those members listed in subdivision (a) of Section 830.2 of the Penal Code, the 30-day time period provided for in subdivision (e) shall not commence with the service of a preliminary notice of adverse action, should the public agency elect to provide the public safety officer with such a notice.

3304.5 – Administrative appeal

An administrative appeal instituted by a public safety officer under this chapter shall be conducted in conformance with rules and procedures adopted by the local public agency.

3305 – Comments adverse to interest; personnel files; opportunity to read and sign; refusal to sign

No public safety officer shall have any comment adverse to his interest entered in his personnel file, or any other file used for any personnel purposes by his employer, without the public safety officer having first read and signed the instrument containing the adverse comment indicating he is aware of such comment, except that such entry may be made if after reading such instrument the public safety officer refuses to sign it. Should a public safety officer refuse to sign, that fact shall be noted on that document, and signedor initialed by such officer.

3306 – Response to adverse comment in personnel file; time

A public safety officer shall have 30 days within which to file a written response to any adverse comment entered in his personnel file. Such written response shall be attached to, and shall accompany, the adverse comment.

3306.5 – Inspection of personnel files; request for correction of file; time

(a) Every employer shall, at reasonable times and at reasonable intervals, upon the request of a public safety officer, during usual business hours, with no loss of compensation to the officer, permit that officer to inspect personnel files that are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.

(b) Each employer shall keep each public safety officer's personnel file or a true and correct copy thereof , and shall make the file or copy thereof available within a reasonable period of time after a request therefore by the officer.

(c) If, after examination of the officer's personnel file, the officer believes that any portion of the material is mistakenly or unlawfully placed in the file, the officer may request, in writing, that the mistaken or unlawful portion be corrected or deleted. Any request made pursuant to this subdivision shall include a statement by the officer describing the corrections or deletions from the personnel file requested and the reasons supporting those corrections or deletions. A statement submitted pursuant to this subdivision shall become part of the personnel file of the officer.

(d) Within 30 calendar days of receipt of a request made pursuant to subdivision (c), the employer shall either grant the officer's request or notify the officer of the decision to refuse to grant the request. If the employer refuses to grant the request, in whole or in part, the employer shall state in writing the reasons for refusing the request, and that written statement shall become part of the personnel file of the officer.

3307 – Polygraph examination; right to refuse; effect

(a) No public safety officer shall be compelled to submit to a lie detector test against his or her will. No disciplinary action or other recrimination shall be taken against a public safety officer refusing to submit to a lie detector test, nor shall any comment be

entered anywhere in the investigator's notes or anywhere else that the public safety officer refused to take, or did not take, a lie detector test, nor shall any testimony or evidence be admissible at a subsequent hearing, trial, or proceeding, judicial or administrative, to the effect that the public safety officer refused to take, or was subjected to, a lie detector test.

(b) For the purpose of this section, "lie detector" means a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device, whether mechanical or electrical, that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.

3307.5 – Use of photograph; penalties

(a) No public safety officer shall be required as a condition of employment by his or her employing public safety department or other public agency to consent to the use of his or her photograph or identity as a public safety officer on the Internet for any purpose if that officer reasonably believes that the disclosure may result in a threat, harassment, intimidation, or harm to that officer or his or her family.

(b) Based upon his or her reasonable belief that the disclosure of his or her photograph or identity as a public safety officer on the Internet as described in subdivision (a) may result in a threat, harassment, intimidation, or harm, the officer may notify the department or other public agency to

cease and desist from that disclosure. After the notification to cease and desist, the officer, a district attorney, or a United States Attorney may seek an injunction prohibiting any official or unofficial use by the department or other public agency on the Internet of his or her photograph or identity as a public safety officer. The court may impose a civil penalty in an amount not to exceed five hundred dollars ($500) per day commencing two working days after the date of receipt of the notification to cease and desist.

3308 – Financial disclosure; right to refuse; exceptions

No public safety officer shall be required or requested for purposes of job assignment or other personnel action to disclose any item of his property, income, assets, source of income, debts or personal or domestic expenditures (including those of any member of his family or household) unless such information is obtained or required under state law or proper legal procedure, tends to indicate a conflict of interest with respect to the performance of his official duties, or is necessary for the employing agency to ascertain the desirability of assigning the public safety officer to a specialized unit in which there is a strong possibility that bribes or other improper inducements may be offered.

3309 – Search of locker or storage space; consent; search warrant

No public safety officer shall have his locker, or other space for storage that may be assigned to him searched except in his presence, or with his consent, or unless a valid search warrant has been obtained or where he has been notified that a search will be conducted. This section shall apply only to lockers or other space for storage that are owned or leased by the employing agency.

3309.5 – Local public safety officers; applicability of chapter; jurisdiction; remedies

(a) It shall be unlawful for any public safety department to deny or refuse to any public safety officer the rights and protections guaranteed to him or her by this chapter.

(b) Nothing in subdivision (h) of Section 11181 shall be construed to affect the rights and protections afforded to state public safety officers under this chapter or under Section 832.5 of the Penal Code.

(c) The superior court shall have initial jurisdiction over any proceeding brought by any public safety officer against any public safety department for alleged violations of this chapter.

(d) (1) In any case where the superior court finds that a public safety department has violated any of the provisions of this chapter, the court shall render appropriate injunctive or other extraordinary relief to remedy the violation and to prevent future violations of alike or similar nature, including, but not limited to, the granting of a temporary restraining order, preliminary, or permanent injunction prohibiting the public safety department from taking any punitive action against the public safety officer.

(2) If the court finds that a bad faith or frivolous action or a filing for an improper purpose has been brought pursuant to this chapter, the court may order sanctions against the party filing the action, the parties attorney, or both, pursuant to Sections 128.6 and128.7 of the Code of Civil Procedure. Those sanctions may include, but not be limited to, reasonable expenses, including attorney's fees, incurred by a public safety department, as the court deems appropriate. Nothing in this paragraph is intended to subject actions or filings under this section to rules or standards that are different from those applicable to other civil actions or filings

subject to Section 128.6 or 128.7 of the Code of Civil Procedure.

(e) In addition to the extraordinary relief afforded by this chapter, upon a finding by a superior court that a public safety department, its employees, agents, or assigns, with respect to acts taken within the scope of employment, maliciously violated any provision of this chapter with the intent to injure the public safety officer, the public safety department shall, for each and every violation, be liable for a civil penalty not to exceed twenty-five thousand dollars ($25,000) to be awarded to the public safety officer whose right or protection was denied and for reasonable attorney's fees as may be determined by the court. If the court so finds, and there is sufficient evidence to establish actual damages suffered by the officer whose right or protection was denied, the public safety department shall also be liable for the amount of the actual damages. Notwithstanding these provisions, a public safety department may not be required to indemnify a contractor for the contractor's liability pursuant to this subdivision if there is, within the contract between the public safety department and the contractor, a "hold harmless" or similar provision that protects the public safety department from liability for the actions of the contractor. An individual shall not be liable for any act for which a public safety department is liable under this section.

3310-Procedures of public agency providing same rights or protections; application of chapter

Any public agency which has adopted, through action of its governing body or its official designee, any procedure which at a minimum provides to peace officers the same rights or protections as provided pursuant to this chapter shall not be subject to this chapter with regard to such a procedure.

3311 – Mutual aid agreements; effect of chapter upon

Nothing in this chapter shall in any way be construed to limit the use of any public safety agency or any public safety officer in the fulfilling of mutual aid agreements with other jurisdictions or agencies, nor shall this chapter be construed in any way to limit any jurisdictional or interagency cooperation under any circumstances where such activity is deemed necessary or desirable by the jurisdictions or the agencies involved.

3312 – American Flag; pins

Notwithstanding any other provision of law, the employer of a public safety officer may not take any punitive action against an officer for wearing a pin or displaying any other item containing the American flag, unless the employer gives the officer written notice that includes all of the following:

(a) A statement that the officer's pin or other item violates an existing rule, regulation, policy, or local agency agreement or contract regarding the wearing of a pin, or the displaying of any other item, containing the American flag.

(b) A citation to the specific rule, regulation, policy, or local agency agreement or contract that the pin or other item violates.

(c) A statement that the officer may file an appeal against the employer challenging the alleged violation pursuant to applicable grievance or appeal procedures adopted by the department or public agency that otherwise comply with existing law.

Follow

PORAC

LEGISLATIVE ALERT

Peace Officers Day at the Capitol

Check out this great video from the California Public Safety Partnership highlighting the inaugural Peace Officers Day at the Capitol! ***Read More »***

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TMS

Petaluma Police Department
Briefing Training Record

Employees

Name	ID#	Name	ID#	Name	ID#	Name	ID#

Training Summary

Date	Length of Training	Location
7/11/2019	0 Hours 20 Minutes	☒ Main Station

Type of Training

☐ Video ☒ Lecture ☐ Practical Demonstration ☐ Critical Incident Debriefing
☐ Other:

Brief Description of Training:

Petaluma Police Department 7/11/2019

Briefing training on Terry v. Ohio. Reviewed attached hand out regarding case law and had open discussion on the topic.

Attachments

☒ Handout Materials ☐ Lecture Notes ☐ Lesson Plan ☐ Other:

Supervisory Review

Trainer	ID#	Supervisor	ID#
Garrett Glaviano	2676	Glaviano GVG	2676
Lieutenant	**ID#**	**Date**	
NOB #1359		7/11/2019	

Training Record Update

Data Entry	Date	Training Record

Terry v. Ohio

Decision

Cites

392 U.S. 1

Terry v. Ohio (No. 67)

Argued: December 12, 1967

Decided: June 10, 1968

Syllabus

Opinion, Warren

Concurrence, Harlan

Concurrence, White

Dissent, Fortas

Syllabus

A Cleveland detective (McFadden), on a downtown beat which he had been patrolling for many years, observed two strangers (petitioner and another man, Chilton) on a street corner. He saw them proceed alternately back and forth along an identical route, pausing to stare in the same store window, which they did for a total of about 24 times. Each completion of the route was followed by a conference between the two on a corner, at one of which they were joined by a third man (Katz) who left swiftly. Suspecting the two men of "casing a job, a stick-up," the officer followed them and saw them rejoin the third man a couple of blocks away in front of a store. The officer approached the three, identified himself as a policeman, and asked their names. The men "mumbled something," whereupon McFadden spun petitioner around, patted down his outside clothing, and found in his overcoat pocket, but was unable to remove, a pistol. The officer ordered the three into the store. He removed petitioner's overcoat, took out a revolver, and ordered the three to face the wall with their hands raised. He patted down the outer clothing of Chilton and Katz and seized a revolver from Chilton's outside overcoat pocket. He did not put his hands under the outer garments of Katz (since he discovered nothing in his pat-down which might have been a weapon), or under petitioner's or Chilton's outer garments until he felt the guns. The three were taken to the police station. Petitioner and Chilton were charged with carrying [p2] concealed weapons. The defense moved to suppress the weapons. Though the trial court rejected the prosecution theory that the guns had been seized during a search incident to a lawful arrest, the court denied the motion to suppress and admitted the weapons into evidence on the ground that the officer had cause to believe that petitioner and Chilton were acting suspiciously, that their

interrogation was warranted, and that the officer, for his own protection, had the right to pat down their outer clothing having reasonable cause to believe that they might be armed. The court distinguished between an investigatory "stop" and an arrest, and between a "frisk" of the outer clothing for weapons and a full-blown search for evidence of crime. Petitioner and Chilton were found guilty, an intermediate appellate court affirmed, and the State Supreme Court dismissed the appeal on the ground that "no substantial constitutional question" was involved.

Held:

1. The Fourth Amendment right against unreasonable searches and seizures, made applicable to the States by the Fourteenth Amendment, "protects people, not places," and therefore applies as much to the citizen on the streets as well as at home or elsewhere. Pp. 8-9.

2. The issue in this case is not the abstract propriety of the police conduct, but the admissibility against petitioner of the evidence uncovered by the search and seizure. P. 12.

3. The exclusionary rule cannot properly be invoked to exclude the products of legitimate and restrained police investigative techniques, and this Court's approval of such techniques should not discourage remedies other than the exclusionary rule to curtail police abuses for which that is not an effective sanction. Pp. 13-15.

4. The Fourth Amendment applies to "stop and frisk" procedures such as those followed here. Pp. 16-20.

(a) Whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person within the meaning of the Fourth Amendment. P. 16.

(b) A careful exploration of the outer surfaces of a person's clothing in an attempt to find weapons is a "search" under that Amendment. P. 16.

5. Where a reasonably prudent officer is warranted in the circumstances of a given case in believing that his safety or that of others is endangered, he may make a reasonable search for weapons of the person believed by him to be armed and dangerous [p3] regardless of whether he has probable cause to arrest that individual for crime or the absolute certainty that the individual is armed. Pp. 20-27.

(a) Though the police must, whenever practicable, secure a warrant to make a search and seizure, that procedure cannot be followed where swift action based upon on-the-spot observations of the officer on the beat is required. P. 20.

(b) The reasonableness of any particular search and seizure must be assessed in light of the particular circumstances against the standard of whether a man of reasonable caution is warranted in believing that the action taken was appropriate. Pp. 21-22.

(c) The officer here was performing a legitimate function of investigating suspicious conduct when he decided to approach petitioner and his companions. P. 22.

(d) An officer justified in believing that an individual whose suspicious behavior he is investigating at close range is armed may, to neutralize the threat of physical harm, take necessary measures to determine whether that person is carrying a weapon. P. 24.

(e) A search for weapons in the absence of probable cause to arrest must be strictly circumscribed by the exigencies of the situation. Pp. 25-26.

(f) An officer may make an intrusion short of arrest where he has reasonable apprehension of danger before being possessed of information justifying arrest. Pp. 26-27.

6. The officer's protective seizure of petitioner and his companions and the limited search which he made were reasonable, both at their inception and as conducted. Pp. 27-30.

(a) The actions of petitioner and his companions were consistent with the officer's hypothesis that they were contemplating a daylight robbery and were armed. P. 28.

(b) The officer's search was confined to what was minimally necessary to determine whether the men were armed, and the intrusion, which was made for the sole purpose of protecting himself and others nearby, was confined to ascertaining the presence of weapons. Pp. 29-30.

7. The revolver seized from petitioner was properly admitted into evidence against him, since the search which led to its seizure was reasonable under the Fourth Amendment. Pp. 30-31.

Affirmed. [p4]

(Cornell Law School; Legal Information Institute; https://www.law.cornell.edu/supremecourt/text/392/1)

Contacts and Temporary Detentions

439.1 PURPOSE AND SCOPE
The purpose of this policy is to establish guidelines for temporarily detaining but not arresting persons in the field, conducting field interviews (FI) and pat-down searches, and the taking and disposition of photographs.

439.1.1 DEFINITIONS
Definitions related to this policy include:

Consensual encounter - When an officer contacts an individual but does not create a detention through words, actions, or other means. In other words, a reasonable individual would believe that his/her contact with the officer is voluntary.

Field interview - The brief detainment of an individual, whether on foot or in a vehicle, based on reasonable suspicion for the purpose of determining the individual's identity and resolving the officer's suspicions.

Field photographs - Posed photographs taken of a person during a contact, temporary detention, or arrest in the field. Undercover surveillance photographs of an individual and recordings captured by the normal operation of a Mobile Audio Video (MAV) system, body-worn camera, or public safety camera when persons are not posed for the purpose of photographing are not considered field photographs.

Pat-down search - A type of search used by officers in the field to check an individual for dangerous weapons. It involves a thorough patting-down of clothing to locate any weapons or dangerous items that could pose a danger to the officer, the detainee, or others.

Reasonable suspicion - When, under the totality of the circumstances, an officer has articulable facts that criminal activity may be afoot and a particular person is connected with that possible criminal activity.

Temporary detention - When an officer intentionally, through words, actions, or physical force, causes an individual to reasonably believe he/she is required to restrict his/her movement without an actual arrest. Temporary detentions also occur when an officer actually restrains a person's freedom of movement.

439.2 POLICY
The Petaluma Police Department respects the right of the public to be free from unreasonable searches or seizures. Due to an unlimited variety of situations confronting the officer, the decision to temporarily detain a person and complete a field interview (FI), pat-down search, or field photograph shall be left to the officer based on the totality of the circumstances, officer safety considerations, and constitutional safeguards.

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439.3 FIELD INTERVIEWS

Based on observance of suspicious circumstances or upon information from investigation, an officer may initiate the stop of a person, and conduct an FI, when there is articulable, reasonable suspicion to do so. A person, however, shall not be detained longer than is reasonably necessary to resolve the officer's suspicion.

Nothing in this policy is intended to discourage consensual contacts. Frequent casual contact with consenting individuals is encouraged by the Petaluma Police Department to strengthen community involvement, community awareness, and problem identification.

439.3.1 INITIATING A FIELD INTERVIEW

When initiating the stop, the officer should be able to point to specific facts which, when considered with the totality of the circumstances, reasonably warrant the stop. Such facts include but are not limited to an individual's:

(a) Appearance or demeanor suggesting that he/she is part of a criminal enterprise or is engaged in a criminal act

(b) Actions suggesting that he/she is engaged in a criminal activity

(c) Presence in an area at an inappropriate hour of the day or night

(d) Presence in a particular area is suspicious

(e) Carrying of suspicious objects or items

(f) Excessive clothes for the climate or clothes bulging in a manner that suggest he/she is carrying a dangerous weapon

(g) Location in proximate time and place to an alleged crime

(h) Physical description or clothing worn that matches a suspect in a recent crime

(i) Prior criminal record or involvement in criminal activity as known by the officer

439.4 PAT-DOWN SEARCHES

Once a valid stop has been made, and consistent with the officer's training and experience, an officer may pat a suspect's outer clothing for weapons if the officer has a reasonable, articulable suspicion the suspect may pose a safety risk. The purpose of this limited search is not to discover evidence of a crime, but to allow the officer to pursue the investigation without fear of violence. Circumstances that may establish justification for performing a pat-down search include but are not limited to:

(a) The type of crime suspected, particularly in crimes of violence where the use or threat of deadly weapons is involved.

(b) Where more than one suspect must be handled by a single officer.

(c) The hour of the day and the location or neighborhood where the stop takes place.

(d) Prior knowledge of the suspect's use of force and/or propensity to carry weapons.

(e) The actions and demeanor of the suspect.

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(f) Visual indications which suggest that the suspect is carrying a firearm or other weapon.

Whenever practicable, a pat-down search should not be conducted by a lone officer. A cover officershould be positioned to ensure safety and should not be involved in the search.

439.5 FIELD PHOTOGRAPHS

All available databases should be searched before photographing any field detainee. If a photograph is not located, or if an existing photograph no longer resembles the detainee, the officer shall carefully consider, among other things, the factors listed below.

439.5.1 FIELD PHOTOGRAPHS TAKEN WITH CONSENT

Field photographs may be taken when the subject being photographed knowingly and voluntarily gives consent. When taking a consensual photograph, the officer should have the individual read and sign the appropriate form accompanying the photograph.

439.5.2 FIELD PHOTOGRAPHS TAKEN WITHOUT CONSENT

Field photographs may be taken without consent only if they are taken during a detention that is based upon reasonable suspicion of criminal activity, and the photograph serves a legitimate law enforcement purpose related to the detention. The officer must be able to articulate facts that reasonably indicate that the subject was involved in or was about to become involved in criminal conduct. The subject should not be ordered to remove or lift any clothing for the purpose of taking a photograph.

If, prior to taking a photograph, the officer's reasonable suspicion of criminal activity has been dispelled, the detention must cease and the photograph should not be taken.

All field photographs and related reports shall be submitted to a supervisor and retained in compliance with this policy.

439.5.3 DISPOSITION OF PHOTOGRAPHS

All detainee photographs must be adequately labeled and submitted to the Watch Commander with either an associated FI card or other documentation explaining the nature of the contact. If an individual is photographed as a suspect in a particular crime, the photograph should be submitted as an evidence item in the related case, following standard evidence procedures.

If a photograph is not associated with an investigation where a case number has been issued, the Watch Commander should review and forward the photograph to one of the following locations:

(a) If the photograph and associated FI or documentation is relevant to criminal organization/enterprise enforcement, the Watch Commander will forward the photograph and documents to the designated criminal intelligence system supervisor. The supervisor will ensure the photograph and supporting documents are retained as prescribed in the Criminal Organizations Policy.

(b) Photographs that do not qualify for retention in a criminal intelligence system or temporary information file shall be forwarded to the Records Team.

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When a photograph is taken in association with a particular case, the investigator may use such photograph in a photo lineup. Thereafter, the individual photograph should be retained as a part of the case file. All other photographs shall be retained in accordance with the established records retention schedule.

439.5.4 SUPERVISOR RESPONSIBILITIES

While it is recognized that field photographs often become valuable investigative tools, supervisors should monitor such practices in view of the above listed considerations. This is not to imply that supervisor approval is required before each photograph is taken.

Access to, and use of, field photographs shall be strictly limited to law enforcement purposes.

439.6 WITNESS IDENTIFICATION AND INTERVIEWS

Because potential witnesses to an incident may become unavailable or the integrity of their statements compromised with the passage of time, officers should, when warranted by the seriousness of the case, take reasonable steps to promptly coordinate with an on-scene supervisor and/or criminal investigator to utilize available members for the following:

(a) Identifying all persons present at the scene and in the immediate area.

    1. When feasible, a recorded statement should be obtained from those who claim not to have witnessed the incident but who were present at the time it occurred.

    2. Any potential witness who is unwilling or unable to remain available for a formal interview should not be detained absent reasonable suspicion to detain or probable cause to arrest. Without detaining the individual for the sole purpose of identification, officers should attempt to identify the witness prior to his/her departure.

(b) Witnesses who are willing to provide a formal interview should be asked to meet at a suitable location where criminal investigators may obtain a recorded statement. Such witnesses, if willing, may be transported by Petaluma Police Department members.

    1. A written, verbal, or recorded statement of consent should be obtained prior to transporting a witness. When the witness is a minor, consent should be obtained from the parent or guardian, if available, prior to transport.

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Petaluma Police Department
BRIEFING TRAINING RECORD

EMPLOYEES							
Name	ID#	Name	ID#	Name	ID#	Name	ID#

TRAINING SUMMARY			
Date of Training 6/26/2019	Length of Training HRS: MIN: 15	Time of Training START: END:	Location ☒ Main Station ☐ Other:

Type of Training
☐ Video ☑ Lecture ☐ Practical Demonstration ☐ Critical Incident Debriefing ☒ Other: Email DISCUSSED DURING BRIEFING.

ATTACH TRAINING MATERIALS. Submit only the cover sheet for lengthy documents. Exclude department policies.

- **Safe packaging of fentanyl. Email containing instructions and directions for the safe packaging of fentanyl or suspected fentanyl.**

Supervisory Review			
Trainer Gilman	ID# 2042	Supervisor [signature]	ID# 7709
Lieutenant Miller	ID# 2709	Date 6/26/2019	

Training Record Update		
Data Entry	Date	Training Record

Gilman, Paul

From: Neve, Kerri
Sent: Wednesday, May 08, 2019 3:26 PM
To: -- Police Patrol
Cc: Litzie, Nicole
Subject: New evidence packaging requirements for fentanyl

To All :

We recently had a case where the DA's office was requesting suspected fentanyl be sent to the DOJ lab for testing. Prior to sending the evidence item up, I contacted the lab to confirm how the fentanyl needed to be packaged. I learned that an evidence item being sent to the lab which contains any suspected fentanyl ***MUST BE HEAT SEALED* prior to being placed in the DOJ drug envelope**.
If you book any fentanyl and/or suspected fentanyl into evidence, please do the following:

1. Heat seal the items in a provided heat seal bag. (Heat seal bags are located inside a manila envelope hanging from the bulletin board in the evidence room) The black heat sealer is located on the counter top.
2. Date/initial the heat seal bag after sealing
3. Place the heat sealed bag into the DOJ envelope, seal/date/initial and fill out the envelope as standard
4. Be sure to use the bright orange hazard stickers for the outside of the envelope

The property room manual has been updated to reflect this new procedure. Instructions are on page 24 of the manual.

If you have any questions, please see me.

Kerri Neve
Property/Evidence Unit
Petaluma Police Department
969 Petaluma Boulevard North
Petaluma, CA 94952
#707-778-4328
kneve@ci.petaluma.ca.us

TMS

Petaluma Police Department
Briefing Training Record

Employees							
Name	ID#	Name	ID#	Name	ID#	Name	ID#

Training Summary

Date of Training	Length of Training	Location
06/26/2019	20 MINUTES	MAIN STATION

Type of Training
POLICY REVIEW/TRAINING EVIDENCE PACKAGING FOR SUSPECTED FENTANYL

Brief Description of Training:

Review package procedures for suspected fentanyl.
Location of packaging materials and heat seal equipment in PPD Evidence room.

Any evidence item being sent to the lab which contains any suspected fentanyl ***MUST BE HEAT SEALED*** **prior to being placed in the DOJ drug envelope**.
If you book any fentanyl and/or suspected fentanyl into evidence, please do the following:

1. Heat seal the items in a provided heat seal bag. (Heat seal bags are located inside a manila envelope hanging from the bulletin board in the evidence room) The black heat sealer is located on the counter top.
2. Date/initial the heat seal bag after sealing
3. Place the heat sealed bag into the DOJ envelope, seal/date/initial and fill out the envelope as standard
4. Be sure to use the bright orange hazard stickers for the outside of the envelope

The property room manual has been updated to reflect this new procedure. Instructions are on page 24 of the manual.

Attachments

Supervisory Review

Trainer	ID#	Supervisor	ID#
SGT J. Walsh	2405	Sgt. J. Walsh	2405
Lieutenant	**ID#**	**Date**	
LT B. Miller	2709		

Training Record Update

Entry	Date	Training Record

TMS

PETALUMA POLICE DEPARTMENT
BRIEFING TRAINING RECORD

EMPLOYEES

NAME	ID#	NAME	ID#	NAME	ID#	NAME	ID#

TRAINING SUMMARY

DATE	LENGTH OF TRAINING	LOCATION	
07-3-19	15 MINUTES	☒ MAIN STATION	☐ STOREFRONT

TYPE OF TRAINING
☒ VIDEO: 5 MIN YOUTUBE VIDEO ON TENNESSEE V. GARNER PRODUCED BY "DONUT OPERATOR" (HTTPS://WWW.YOUTUBE.COM/WATCH?V=W6B3JRNZTNS) ☒ LECTURE: GROUP LED DISCUSSION

ATTACHMENTS
☐ HANDOUT MATERIALS ☐ LECTURE NOTES ☐ LESSON PLAN ☐ OTHER:

SUPERVISORY REVIEW

TRAINER	ID#	SUPERVISOR	ID#
D. Giomi	ID# 2937	Sgt Garihan	1757
LIEUTENANT T. Lyons	ID# 1359	7-3-19	

TRAINING RECORD UPDATE

DATA ENTR	DATE	TRAINING RECORD

S:\Police\Department Forms\In-Service Training Record.doc — Revised 02/2002

Force

OFFICER INVOLVED SHOOTING / INTERNAL AFFAIRS, PUBLIC INFO RELEASE

PETALUMA POLICE DEPARTMENT

BRIEFING / TRAINING RECORD

TMS

Employees:

TRAINING SUMMARY

Date: 6-3-19 **Length of Training:** ____ hours 45 min

Video: ____ **Lecture:** X **Practical Demonstration:** ____

Other: POWERPOINT

BRIEF DESCRIPTION OF TRAINING

REQUIRED BRIEFING TRAINING: POBR, IA, POLICY 1020
PRESENTED OIS POWERPOINT AND DISCUSSED, POBR (3303 GC),
IA PROCEDURE, PERSONNEL COMPLAINTS (1020) AND THE
NEW EFFECTS OF SB1421
FORCE PRA

ATTACHMENTS

[ ] Handout materials [X] Lecture materials [ ] Lesson Plan [ ] Other

---

SUPERVISORY REVIEW

Trainer: NOVELLO Supervisor: [signature] 2363

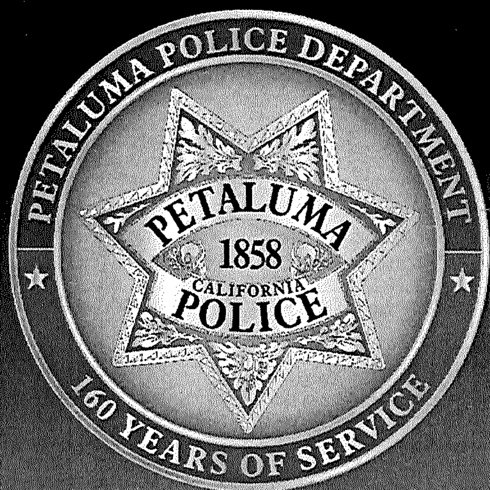
Lieutenant: Lyon 6/7/19 Date: ____

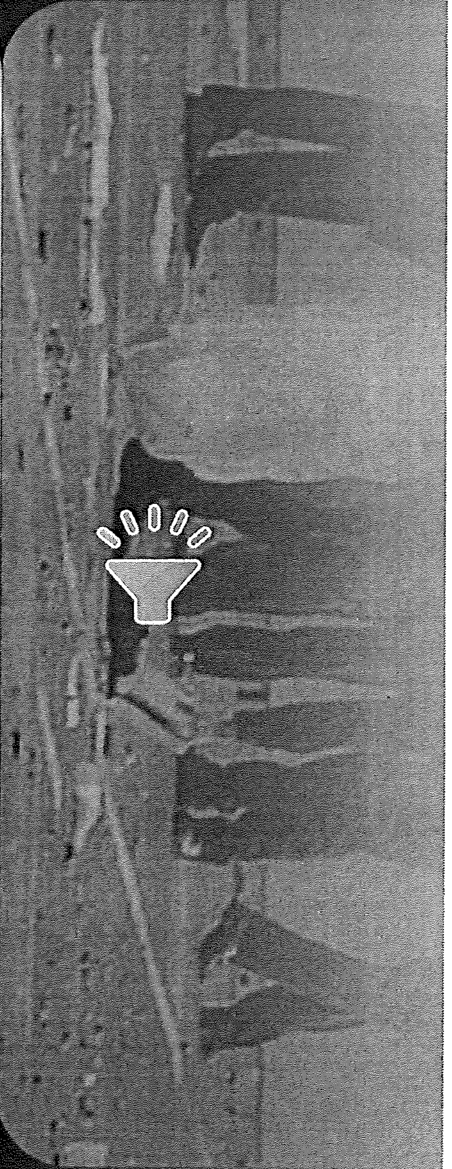
TRAINING RECORD UPDATE

Data Entry: ____ Date: ____ Training Record: ____

OFFICER INVOLVED SHOOTINGS

What you should expect





- PPD Policy 310 (OIS and Deaths)
- Policy 311 (SCLECA - Law Enforcement Employee Involved Fatal Incident Protocol)
- Government Code 3303 (POBR)
- Penal Code 835a (Reasonable Force to Arrest)
- Statistics / Notes

Fatal Incident Protocol
(PPD Policy 310)

- Definition: a specific incident involving one or more persons, in which a law enforcement employee is involved as an actor or injured person; when a fatal injury occurs

- Examples: intentional / unintentional shootings; use of dangerous or deadly weapons; assaults upon LE or employees acting within the scope of their duties

Fatal Incident Protocol

- Lead agencies: SCSO, SRPD, PPD, RPDPS, CHP (pursuit related), or Sonoma County DA's Office
- Employer agency generally will not directly participate in criminal investigation
- Venue agency will determine Lead agency
- If jurisdiction is in dispute, the venue agency will be the agency with the predominate involvement

Fatal Incident Protocol

- Investigators: supervisor, investigators, and evidence technicians from lead agency; DDA and DA Investigator; employer liaison to facilitate investigation only
- Lead agency will notify coroner, assign overall supervisor and at least 2 investigators to respond within 2 hours, obtains necessary assistance, responsible for documentation and evidence collection, responsible for media releases for at least 72 hours, and conduct full DA (with "right to know") briefing

Fatal Incident Protocol

- <u>Investigator qualifications</u>:

- Sergeants will have supervised an Investigative Unit, and attended OIS, Homicide Investigation, and IA Investigation

- Investigators will have at least 5 years sworn, Investigative Unit background, and attended OIS, Homicide Investigation, and I&I

- Evidence Techs will have completed 80 hour field evidence training program

- Invocation: criminal investigation shall be immediate upon incident; *venue* agency will notify their internal personnel, DA's Office, and the *lead* agency. *The criminal portion is only to establish the presence or absence of criminal liability.*

- Scene procedure: life saving measures; secure and protect evidence; sequester involved officers w/ uninvolved; officer(s) will maintain their weapons until interview; officer(s) will be expected to provide a public safety statement

- Interview:

OFFICER(S) WILL BE TREATED AS A
WITNESS OR VICTIM

consultation w/ private counsel before interview; employer staff will not be present during interview; short of Miranda, Beheler should be given

POBR???

Government Code 3303
Police Officer Bill of Rights

Officer under investigation and subjected to interrogation that could lead to punitive action – the interrogation shall be conducted under the following conditions:

- A) reasonable hour
- B) informed of all persons present
- C) informed of nature of interrogation
- D) reasonable length
- E) no offensive language; threats; promises; no media w/o consent
- F) duress = not admissible
- G) may be recorded; officer to have full access to recordings, and can bring own recording device
- H) criminal = Miranda
- I) right to representation
- J) cannot be loaned or reassigned

Interview Basics

- Chemical testing may occur
- Your uniform (could) and firearm will be taken as evidence
- Should be COMPELLED statement *with counsel*
- Thought out; specific; describe state of mind
- Garrity: compelled statement cannot be used in criminal proceeding, but can be used in civil or federal case
- Lybarger: advised of your rights
- "feared for my life" – not good enough
- "state of mind" relies on reasonable belief for deadly force
- Articulate everything you knew about the subject during your statement
- REMEMBER, YOU ARE THE VICTIM
- 835a PC ALLOWS YOU TO USE REASONABLE FORCE TO EFFECT AN ARREST

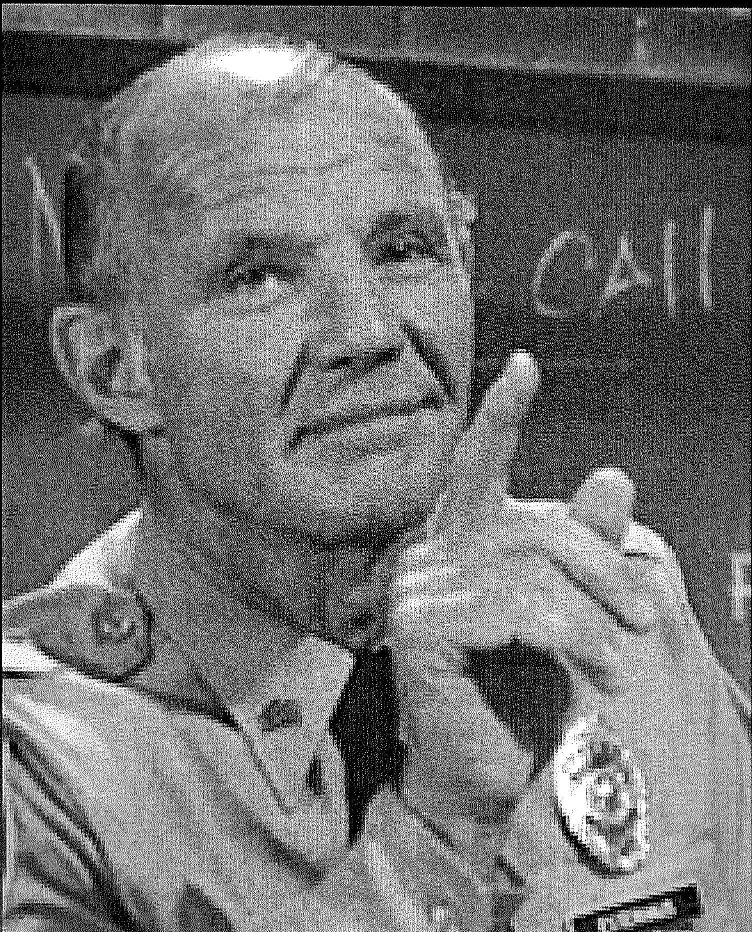
You have completed your interview, but

- Administrative investigation (IA)
- Potential civil litigation
- Return to duty could be one week or longer, and only after "fit for duty" evaluation
- Final decision from DA will be at least a few months; probably one year
- Your name will be released to the media (832.7 PC / SB 1421)

Notes

- Depending on source, approximately 1000 OIS/year
- 98 LEO arrested / 35 convicted since 2005
- OIS stats proposed in 1994, but began in 2016
- LAPD research revealed 45% of OIS occur in first minute; 26% in first 30 seconds
- Average of 40 to 70 officers are killed by gunfire every year; 21 of 46 (as of 6-1-19)

Remember



PETALUMA POLICE DEPARTMENT
BRIEFING TRAINING RECORD

TMS

EMPLOYEES

NAME	ID#	NAME	ID#	NAME	ID#	NAME	ID#

TRAINING SUMMARY

DATE	LENGTH OF TRAINING	LOCATION
05-30-2019	30 MINUTES	☒ MAIN STATION ☐ STOREFRONT

TYPE OF TRAINING

☒ VIDEO ☒ LECTURE ☐ PRACTICAL DEMONSTRATION ☐ CRITICAL INCIDENT DEBRIEFING

☒ OTHER: **BRIEFING TRAINING**

BRIEF DESCRIPTION OF TRAINING:

Vehicle Searches
Arizona v Gant
Lecture led by Z. Rivera using handout from Ray Hill's 2019 law text book.
10 min Youtube video reviewing automobile exceptions during searches.

ATTACHMENTS

X☐ HANDOUT MATERIALS ☐ LECTURE NOTES ☐ LESSON PLAN ☐ OTHER:

SUPERVISORY REVIEW

TRAINER	ID# 2846	SUPERVISOR	ID#
Z. Rivera		Sgt A. Garihan	1757
LIEUTENANT T. Lyons	ID# 1359	05-30-2019	

TRAINING RECORD UPDATE

DATA ENTRY	DATE	TRAINING RECORD

ARIZONA v GANT

ZEUS

11.16 VEHICLE SEARCH (INCIDENT TO ARREST) - After the custodial arrest of a driver, passenger, or a person who is immediately associated with a vehicle, the passenger compartment and its contents may be searched for weapons or "FICE" (New York v. Belton, U.S.,1981; Arizona v. Gant, U.S., 4/09). There are four requirements for an arrest search in a vehicle:

1) Custody and transportation of a person who was inside or "closely associated" with the vehicle. Examples:

* When a passenger is arrested (Peo. v. Hunt, 3DCA, 11/90); When the driver was standing at the rear of the car drinking a beer (Peo. v. Stoffle, 3DCA, 12/91); When the defendant was standing next to his open car door in the parking lot of a grocery store (U.S. v. Osife, 9USCA, 2/05).

* An Iowa officer stopped the defendant for speeding. Iowa law allowed the officer to cite the violator or make a custodial arrest. The officer issued a citation, searched the defendant's car, and found marijuana. U.S. ruled an arrest search was not permitted for issuance of a citation. "No further evidence of excessive speed was going to be found in the passenger compartment of the car" (Knowles v. Iowa, U.S., 12/98).

"We hold that Belton does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee had been secured and cannot access the interior of the vehicle" (Gant v. Arizona, U.S., 4/09).

2) When there is reasonable suspicion to believe evidence associated with the arrest will be found in the passenger area. Examples:

* A Norfolk, Virginia officer investigated a vehicle because the license plates didn't match the vehicle model (Lincoln town car plate on a Chevrolet 2-door). The defendant consented to a search. The officer retrieved three bags of marijuana and a large amount of rock cocaine. Defendant was arrested and placed in the patrol unit. The officer searched the passenger area and found a 9 mm pistol under the driver's seat. U.S. ruled the search was reasonable because the officer believed there could be more illegal drugs related to the arrest in the passenger area (Thornton v. U.S., U.S., 5/04).

* Defendant was stopped for speeding. The officer smelled the fresh odor of beer emitting from vehicle. The officer searched the passenger compartment for open alcohol containers. An open beer can was located, along with several knives, and a billy club. In pockets sewn into the seat cover, a gun magazine was found. Eventually a loaded .380 auto was found in a duffel bag and cocaine and methamphetamine packaged for sale in a toiletry bag. DCA ruled 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 resulting in the discovery of the additional evidence (Peo. v. Molina, 1DCA, 6/94).

"Illegal possession of a firearm is more akin to illegal possession of illegal drugs, which would provide such reasonable belief" (Peo. v. Osborne, 1DCA, 7/09).

* Antioch Police officers detained the defendant for auto burglary. A frisk located a loaded 9mm in his pocket. A search of the passenger compartment of his car revealed drugs inside a backpack. DCA ruled the passenger area search was reasonable. Though the defendant was outside the car and handcuffed, it was "reasonable to believe evidence relevant to arrest might be found in the vehicle" (additional firearms, ammunition) (Peo. v. Osborne, 1DCA, 7/09).

* A Santa Cruz County deputy stopped the defendant's vehicle for speeding (90 MPH in a 65 MPH zone). Defendant was arrested for driving under the influence of drugs. A search under the driver's seat recovered a loaded Glock .50 handgun and "tooters" for snorting drugs. DCA ruled the nature of the arrest offense (DUI) "supplied a reasonable basis for believing that evidence relevant to that type of offense might be in the vehicle". "The deputies had unqualified authority under Gant to search the passenger compartment of the vehicle and any container found therein" (Peo. v. Nottoli, 6DCA, 10/11).

In some cases, the reasonable suspicion standard was not justified. Examples:

* While conducting a drug investigation, Tucson, Arizona officers observed the defendant drive into his driveway. Officers had prior knowledge he had a suspended driver's license and an outstanding arrest warrant for this violation. Officers met the defendant 10-12 feet from his car. He was arrested, handcuffed, and placed in the back of a patrol unit. Officers returned to the car, searched, and found a handgun and a bag of cocaine. U.S. ruled the search was unlawful. The arrest offense was not one commonly associated with evidence or contraband (Gant v. Arizona, U.S., 4/09).

* Los Angeles Police Gang Enforcement officers stopped the defendant's vehicle for failing to signal a turn. Defendant refused to exit the car, locked himself inside, repeatedly questioned why he was being stopped, and insisted on talking with a police supervisor. After ten minutes, officers broke a window, "tased" the defendant, and arrested him for 148 P.C. - Resisting and Obstructing. A search of the passenger area located empty baggies and cash in the center console and rock cocaine hidden in an air vent. DCA ruled the nature of this

arrest did not give rise to any reasonable suspicion that more evidence would be found in the passenger area. Allowing officers to look for "motive evidence" as to why the defendant "resisted officers" was overbroad. "Impeding an officer's investigation is unlikely to leave evidentiary traces, such as fruits or instrumentalities of a crime, in a vehicle" (Peo. v. Evans, 2DCA, 11/11).

* A Washington State trooper arrested the defendant for driving with a suspended license. The trooper returned to the defendant's truck, searched, and found methamphetamine and a handgun. The evidence was suppressed because there was no reason to believe any evidence related to the custody offense would be found inside the truck (U.S. v. Maddox, 9USCA, 4/10).

Note: One part of the Arizona v. Gant decision states a passenger area search can be conducted when an arrestee is unsecured (not handcuffed or placed in a police car) and within reaching distance of the passenger compartment at the time of the search. This procedure presents obvious officer safety concerns and is highly discouraged. An officer would be careless to turn his or her back to an unsecured suspect and conduct a passenger area search. Safety always trumps finding evidence!

With traditional "non-FICE" arrests (i.e. driving with a suspended driver's license, reckless driving, warrant arrest, disturbing the peace, battery, trespassing, etc.), officers should always perform a full personal search of the arrestee prior to transportation to the station or jail (See 11.14). Additional evidence or contraband found on the arrestee's person, the smell of alcohol on the driver's breath, symptoms of drug influence, etc. would provide the "reasonable suspicion" to conduct a passenger area search. On "non-FICE" arrests, always consider asking for a consent search ("Sir, is there anything against the law in your vehicle tonight?" "Do I have your permission to take a look?") (See 11.21). Finally, when there is a "caretaking purpose" for impounding the vehicle, an "administratively-driven" inventory search may be conducted. Evidence found "fortuitously" is admissible (See 11.18).

When an arrest search is justified, containers inside the passenger area belonging to other passengers can be opened (Peo. v. Mitchell, 1DCA, 7/95; Peo. v. Prance, 1DCA, 1/91).

"Articles inside the relatively narrow compass of the passenger compartment are in fact generally, if not inevitably, within the area into which an arrestee might reach to grab a weapon or evidentiary item, albeit with some difficulty in some instances". "The ability to search should not be clouded by the interposition of a cover" (U.S. v. Mayo, 9USCA, 1/05).

3) The passenger area includes any compartment or container accessible from inside the car. Example:

* "Container here denotes any object capable of holding another object". "Includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like" (New York v. Belton, U.S., 1981); The only question the trial court should ask is whether the area searched is generally reachable without exiting the vehicle (U.S. v. Doward, 1USCA, 1991); There is no distinction between a covered and uncovered cargo area. Case law has approved arrest searches of a covered cargo area inside a sport utility vehicle and the search of the cargo area of a mid-size station wagon (U.S. v. Mayo, 9USCA, 1/05); An arrest search includes looking into a duffel bag attached with bungee cords to the rear seat of a motorcycle. There is no difference between a bag temporarily attached and a more permanent receptacle like a glove compartment (Peo. v. Needham, DCA, 2000).

An arrest search doesn't extend to the trunk. The trunk must be searched under probable cause, impound-inventory, consent, or probation/parole.

"There is no fixed outer limit for the number of minutes that may pass between an arrest and a valid, warrantless search". "The issue is "whether the arrest and search are so separated in time or by intervening acts" (U.S. v. Weaver, 9USCA, 1/06).

4) A search incident to arrest must be **contemporaneous.** Examples:

* A search started five minutes after the defendant was arrested and transported to jail was closely related in time (U.S. v. McLaughlin, 9USCA, 3/99); In order to safely secure the scene, Riverside County deputies waited 10-15 minutes for a third deputy to arrive before conducting a passenger area search. This search recovered 46 blank personal checks in the name of another. Defendant was a postal carrier and the checks had been stolen from a house on her route. 9USCA ruled the search was contemporaneous. Summoning a third deputy was not an unreasonable intervening act (U.S. v. Weaver, 9USCA, 1/06).

* Conducting a search 30-45 minutes after arrest without exigency justification (U.S. v. Vasey, 9USCA, 1987) and searching after a car was impounded to the police station (U.S. v. Ramos-Oseguera, 9USCA, 1997) were no longer contemporaneous.

"The exception to the warrant requirement for moving vehicles, recognizes a necessary difference between a search of a store, dwelling house, or other structure for which a search warrant must be obtained, and a search of a ship, motor boat, wagon, or automobile" (U.S. v. Carroll, U.S., 1925).

Petaluma Police Department
BRIEFING TRAINING RECORD

TMS

EMPLOYEES							
Name	ID#	Name	ID#	Name	ID#	Name	ID#

TRAINING SUMMARY

Date of Training	Length of Training	Time of Training	Location
06272019	HRS: MIN: 30	START: **2230** END: 2300	☒ Main Station ☐ Other:

Type of Training

☒ Video ☒ Lecture ☐ Practical Demonstration ☐ Critical Incident Debriefing ☐ Other:

ATTACH TRAINING MATERIALS. Submit only the cover sheet for lengthy documents. Exclude department policies.

TRAINING TOPIC(S): General Description of Training

EXAMPLE

- Use of Force: PPD Policy 300, discussion, handouts
- Search & Seizure: Vehicle searches, Arizona v Gant, PowerPoint

Training topics included;

Peace Officer Bill or Rights, Lecture (Rivera)

Terry v. Ohio, Video (Joerger)

Steagald Warrants, Video (Joerger)

Consensual encounters and Detentions, Lecture (Sawyer)

Supervisory Review

Trainer	ID#	Supervisor B. Sawyer	3108
Lieutenant	ID#	Date	

Training Record Update

Data Entry	Date	Training Record

PETALUMA POLICE DEPARTMENT
BRIEFING TRAINING RECORD

TMS

EMPLOYEES

NAME	ID#	NAME	ID#	NAME	ID#	NAME	ID#

TRAINING SUMMARY

DATE OF TRAINING		LOCATION
5/23/19	Duration: 15 Minutes	PPD

TYPE OF TRAINING
PRESENTATION OF THE LETHALITY ASSESSMENT PROGRAM

BRIEF DESCRIPTION OF TRAINING:

THE LETHALITY ASSESSMENT PROGRAM POWER POINT WAS REVIEWED WITH OFFICER SUTHERLAND. SEE ATTACHED.

ATTACHMENTS

SUPERVISORY REVIEW

TRAINER	ID#	SUPERVISOR	ID#
Garrett Glaviano	2676	Garrett Glaviano GVG	2676
LIEUTENANT		DATE	
Tim Lyons		5/23/19	

TRAINING RECORD UPDATE

DATA ENTRY	DATE	TRAINING RECORD

Lethality Assessment Program: The Maryland Model

PETALUMA PD 2019

LAW REQUIRES LETHALITY SCREENING ON DV CALLS

- In July 2018, a bill was passed which requires CA law enforcement to conduct lethality assessments on domestic violence calls starting January 1, 2019.
- There are several variations of this assessment in California.
- This assessment has been reviewed by all Sonoma County law enforcement agencies, the YWCA, the DA's office, and the City Attorney's office.
- This lethality assessment will be done by all Sonoma County law enforcement agencies.
- It begins at Petaluma PD when it's been approved by the City Attorney's Office.

Background

- Maryland Model
  - Created by Dr. Jacqueline Campbell after review of hundreds of domestic violence homicide cases from eleven randomly populated cities involving a variety of races, ages, and socioeconomic status'
  - Study also involved 664/187 DV cases – interviewed surviving victim
  - Questions on assessment found to be the most predictive of homicide in domestic relationships
  - Initially developed for law enforcement but now utilized by educators, health care providers, case workers, court personnel, etc...

Background

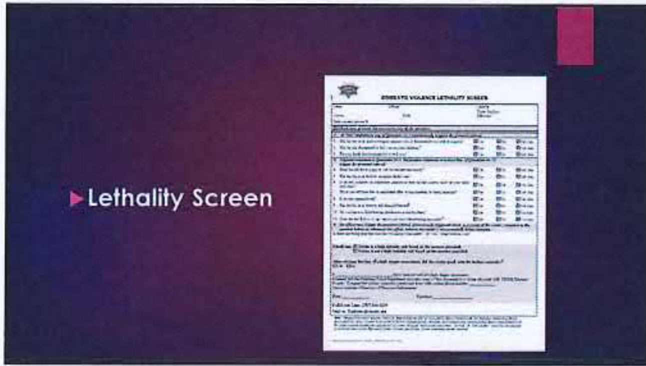
- Lethality Assessment
  - Process of identifying victims of domestic violence who are in danger of being killed.
- Lethality Assessment Program
  - 1. Identifying victims of domestic violence who are at the greatest risk of being killed
  - 2. Encouraging them to utilize the services such as the YWCA or Family Justice Center.

When to Initiate the Lethality Assessment

- Only in cases of intimate relationships and a manifestation of danger:
  - When you believe there has been an assault/act of domestic violence
  - When you believe the victim faces danger when you leave
  - When your gut tells you that the situation is dangerous
  - Consider using when the involved parties are repeals

Initiating the Lethality Screen

- Approach the Lethality Screen **simply, positively, and privately** with the victim
- Advise the victim you would like to ask him/her some questions to get a better idea of his/her situation.



Hotline Calls

Call the Hotline

"Yes" to Questions 1, 2, **OR** 3

OR

"No" to Questions 1, 2 and 3 but "Yes" to at least four questions of questions #4-11

Call the Hotline

"No" to all

or

"Yes" to no more than 3 questions of questions 4-11

****But officer believes it is appropriate**

Don't Call Hotline

Victim "does not answer" because he/she needs medical attention

Victim adamantly refuses to speak with advocate

Victim is not assessed at high-danger and officer has no other information to believe otherwise

Non-High Danger

- Non-High Danger victims do not warrant the same urgent level of communication. When the lethality assessment **does not** trigger a hotline call officers should:
  - Advise victim that domestic violence situations are dangerous
  - Advise victim to look for signs of danger
  - Refer victim to domestic violence program and other assistance
  - Provide Resource Booklet
  - Victim is not to complete bottom of lethality form (aka Consent Language) in non-high danger cases because the lethality form is not sent to YWCA in non-high danger assessments

HIGH-DANGER

- Advise victim they are in high danger, that people in their situation have been seriously hurt and killed.
- When the victim **agrees** to speak with the advocate
  - Call the YWCA hotline
  - Provide basic information to hotline
  - Victim speaks to advocate (5-10 minutes)
  - Officer concludes call by speaking with advocate
  - Ensure safety-plan with Victim before leaving scene
- If victim agrees to future advocate contact, even if Victim spoke to YWCA on phone, have victim complete bottom of form (Consent Language) indicating Victim will allow the YWCA to have a copy of the lethality form.

HIGH-DANGER

- If the Victim is assessed at high danger and **declines** speaking to advocate:
  - Ask victim to reconsider
  - Reiterate to the victim the seriousness of the situation
  - Engage in basic safety plan with victim
  - Inform victim to watch for lethality predictors (screening questions)
  - Encourage victim to utilize the YWCA's services
  - Provide/review resource booklet with victim
  - If Victim refused to speak at time of investigation but agrees to future YWCA contact, have victim complete bottom of lethality form (Consent language) indicating Victim will allow the YWCA to have a copy of the lethality form.
  - If Victim refused to speak at time of investigation and does not want future contact from YWCA, do not have them complete bottom of lethality form (consent language).

CONSENT LANGUAGE

- I, ______________________, have been advised of a high danger assessment.
- I request that the Petaluma Police Department provide a copy of this document to a victim advocate with YWCA Sonoma County. I request the hotline counselor contact me at my safe contact phone number __________.
- I have received a Directory of Resource Information.
-
- Date____________
  Signature________________

ROUTING THE FORM TO THE YWCA

- The bottom of the lethality form has the "Consent Language." It is essential the victim complete this if he/she is willing future contact from the YWCA. This is the only way law enforcement can provide the lethality form to the YWCA.
- The form is in English/Spanish. Make sure the victim completes the consent form in his/her primary language. If they speak another language, indicate in your report what language he/she speaks and who translated (such as the AT&T language line).

- There should not be an occasion where an advocate does not answer or return a call. However, If you are unsuccessful in reaching an advocate, note in your report that you made the call, left a message, and were unsuccessful in reaching an advocate
- Be mindful this is a county-wide program and if the YWCA is assisting another victim, they will call you back
- Note in your report the victim spoke with an advocate from the YWCA via telephone. DO NOT put the advocate's name in the report

---

- Detectives do not need to be called/notified by the officer of high danger assessments. Detectives already receive all DV reports.
- Document in your report you completed the lethality assessment and the form is attached to your report.
- No need to write in report which question Victim answered yes/no.
- If Victim was assessed "High Danger," note that in the report.
- If the victim meets the criteria for High Danger and declines speaking with the YWCA, note that in your report.
- If the victim meets the criteria for High Danger and does speak to an advocate, indicate that in your report (don't provide advocate's name).
- The bottom of the form in which the victim agrees to have the assessment sent to the YWCA should only be completed if the Victim was assessed at high-danger. **If the victim was not assessed at high danger, that portion of the form does not get completed by the victim.**
- **Reminder** The law ALWAYS requires officers to provide domestic violence victims a resource booklet.

Emergency Protective Orders

When completing the DV Lethality Checklist and you have determined the victim is not wanting contact from the YWCA, but you have determined the victim is at risk for High Lethality, seek an EPO. The mere checking of the box should warrant a call to the On Call Judge, and notify the Judge of the "high lethality" determination based on the assessment.

- This is a new program. Constructive feedback as to what is and what is not working is welcomed. Adjustments will be made accordingly.

QUESTIONS???