

Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/Contents

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Preface

This update to California Judges Benchbook: Search and Seizure covers all legislation through 2008, and covers case law through the 2008-2009 term of the U.S. Supreme Court, 47 C4th 145 and 174 CA4th.

We are pleased to be able to keep this practical working tool up-to-date for new legislation and new case developments. We thank the California Continuing Education of the Bar for providing this update to the California judiciary and for providing it to California attorneys under its responsibility as the educational arm of the State Bar.

A special note of thanks to the Hon. George Brunn (ret.) who, after writing the update to the Search and Seizure volume, graciously agreed to prepare an update to his original update.

We recognize that the areas of law covered by this benchbook are dynamic, and we welcome comments, criticisms, and suggestions to improve this book. We hope that each reader will become a contributor, editor, and critic for future updates as this benchbook is revised and expanded. Please address all correspondence regarding the contents of this benchbook to:

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December 2009

Diane E. Cowdrey, Ed.D.
Director
Education Division/CJER

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/Chapter Outline

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/DEVELOPMENT OF THE EXCLUSIONARY RULE/The Exclusionary Rule in California/§1.7 From Proposition 8 to the Present

DEVELOPMENT OF THE EXCLUSIONARY RULE

The Exclusionary Rule in California

[§1.7] From Proposition 8 to the Present

 **To Main Book**

By its terms, Cal Const art I, §28(d), which prevents suppression of evidence for state statutory or constitutional violations, does not apply to statutes enacted after 1982 by a "two-thirds vote of each house of the legislature." *People v Jackson* (2005) 129 CA4th 129, 152, 28 CR3d 136.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/RELATION OF FOURTH AMENDMENT TO EXCLUSIONARY RULE/§1.10 Meaning of 'Search' and 'Seizure'

RELATION OF FOURTH AMENDMENT TO EXCLUSIONARY RULE

[§1.10] Meaning of "Search" and "Seizure"

 **To Main Book**

An arrest is "the quintessential seizure of the person." *California v Hodari D.* (1991) 499 US 621, 624, 111 S Ct 1547, 113 L Ed 2d 690.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/Nature and Function of Exclusionary Rule/§1.13 Purposes of Exclusionary Rule

Nature and Function of Exclusionary Rule

[§1.13] Purposes of Exclusionary Rule

 **To Main Book**

People v Sanders (2003) 31 C4th 318, 324, 334, 2 CR3d 630, is in accord with Book §1.13 that the primary purpose of the exclusionary rule is to deter illegal police conduct.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/APPLICATION OF EXCLUSIONARY RULE TO VARIOUS PROCEEDINGS/Application to Stages of a Criminal Case/§1.19 Trial: Impeachment of Defendant

APPLICATION OF EXCLUSIONARY RULE TO VARIOUS PROCEEDINGS

Application to Stages of a Criminal Case

[§1.19] Trial: Impeachment of Defendant

 To Main Book

However, a defense witness may be impeached by defendant's statements that are not tainted by his or her illegally obtained confession. *People v Boyer* (Boyer II) (2006) 38 C4th 412, 462-464, 42 CR3d 677 (statements to defense experts).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/Application to Other Proceedings/§1.22 Juvenile Court

Application to Other Proceedings

[§1.22] Juvenile Court

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Cal Rules of Ct 1419 was renumbered Cal Rules of Ct 5.544, effective January 1, 2007.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/§1.24 Administrative Proceedings

[§1.24] Administrative Proceedings

 To Main Book

In *criminal* cases, the exclusionary rule applies to arrests and detentions based on incorrect information in police records; this aspect of the exclusionary rule does not apply to DMV administrative proceedings. *Park v Valverde* (2007) 152 CA4th 877, 882, 61 CR3d 395.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/SEARCHES AND SEIZURES BY PRIVATE CITIZENS/§1.26 Police Participation or Instigation

SEARCHES AND SEIZURES BY PRIVATE CITIZENS

[§1.26] Police Participation or Instigation

 To Main Book

Factors for determining whether a person acted as a government agent include:

- The extent of the government's role in instigating or participating in the search;
- The degree of control the government exercised over the search and the private party; and
- The extent to which the private party acted primarily to help the government or to serve its own interests. *U.S. v Silva* (1st Cir 2009) 554 F3d 13, 18, quoting with approval *U.S. v Pervaz* (1st Cir 1997) 118 F3d 1, 6.

People v North, discussed in [Book §1.26](#), was disapproved by *People v Wilkinson* (2008) 163 CA4th 1554, 1564-1565, 78 CR3d 501. *People v Wilkinson* held that the police do not violate the Fourth Amendment by passively accepting or acquiescing in a private search; a violation occurs only when the police affirmatively encourage, initiate, or instigate the private action. 163 CA4th at 1566-1568.

An officer's statement to an individual that he or she has a right to search does not actively encourage the search. See 163 CA4th at 1568.

Burden of proof. The defendant probably has the burden of proof that the police instigated a private search. See 163 CA4th at 1566-1567.

Subsequent search by police. A police search that follows a private search may not be more intrusive or extensive than the private search. 163 CA4th at 1570-1573; see [Book §1.26](#).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/§1.27A Acts of Tribal Police Officers [NEW]

[§1.27A] Acts of Tribal Police Officers [NEW]

 To Main Book

The Fourth Amendment and its exclusionary rule apply to searches and seizures on Indian land by tribal police officers. *People v Ramirez* (2007) 148 CA4th 1464, 1468, 56 CR3d 631.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/GOOD FAITH AND BAD FAITH/Leon and Its Extensions/The Leon Good-Faith Exception/Illustrative Applications/§1.30 Warrant Lacks Probable Cause

GOOD FAITH AND BAD FAITH

Leon and Its Extensions

The *Leon* Good-Faith Exception

Illustrative Applications

[§1.30] Warrant Lacks Probable Cause



The searching officers' reliance on the warrant is reasonable when, at the time the search warrant was issued, it was debatable whether the available information constituted probable cause. *People v Presley* (2002) 102 CA4th 1178, 1191, 126 CR2d 162 (court ruled that evidence of illegal drug use does not, without more, provide probable cause to search the user's residence; court said "future warrant applications will have to account for our decision in this case"); see also Update §2.39.

Reliance on a warrant based on an anonymous tip of marijuana growing corroborated only as to defendant's residence and vehicles is unreasonable. *People v Gotfried* (2003) 107 CA4th 254, 264, 131 CR2d 840.

It is unreasonable for an officer to believe that a search warrant authorizing use of a thermal imaging device may issue on less than probable cause. 107 CA4th at 265-266.

Reliance on a search warrant lacking probable cause was reasonable when there was no controlling California authority at the time of the search and the absence of probable cause was not obvious. *People v Garcia* (2003) 111 CA4th 715, 724, 3 CR3d 895 (no nexus between drug sales by bar customer and likelihood of drugs on premises; court publishes opinion to establish precedent).

Reliance on the warrant is unreasonable when the officer obtained it 52 days after a drug buy. *People v Hulland* (2003) 110 CA4th 1646, 1648, 2 CR3d 919 (reliance reasonable only when staleness determination presents close question).

Reliance on an order authorizing wiretapping is unreasonable when the order violates the Fourth Amendment. *People v Jackson* (2005) 129 CA4th 129, 153-160, 28 CR3d 136. For discussion of the relation between breaches of wiretap statutes and Fourth Amendment violations, see Update §5.33.

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The *Krull* Extension of *Leon*

[§1.37] Unconstitutional Statutes

 To Main Book

The good-faith exception does not extend to an arrest under a local ordinance that is virtually identical to ordinances long found unconstitutional. *People v McNeil* (2002) 96 CA4th 1302, 1305-1309, 118 CR2d 54.

The good-faith exception applies to a search clause under a probation condition that is set aside after the search; such a search is analogous to one under a statute that is later invalidated. *People v Miller* (2004) 124 CA4th 216, 21 CR3d 13; see *People v Fields* (1981) 119 CA3d 386, 388, 174 CR 49.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/The Evans Extension of Leon/§1.39 Erroneous Warrant Information

The *Evans* Extension of *Leon*

[§1.39] Erroneous Warrant Information

 To Main Book

Evans has been extended to mistakes of law enforcement agencies that were negligent, but not deliberate, reckless, grossly negligent, routine, or widespread. *Herring v U.S.* (2009) ___ US ___, 129 S Ct 695, 172 L Ed 2d 496. Reliance on the mistaken information must be objectively reasonable. 129 S Ct at 703. *Herring* applies *Evans* to a mistake by another police officer; *Evans* had differentiated between mistakes by law enforcement and by other agencies. See Book §1.39; *People v Hamilton* (2002) 102 CA4th 1311, 1316, 126 CR2d 273.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/§1.40 Erroneous Information Regarding Search Condition

[§1.40] Erroneous Information Regarding Search Condition

 To Main Book

Parole officers and California Department of Corrections and Rehabilitation (CDCR) employees are now regarded as adjuncts to law enforcement; accordingly, the good-faith exception does not apply to reliance on erroneous information from such persons. *People v Willis* (2002) 28 CA4th 22, 38-39, 44, 120 CR2d 105 (erroneous information from state parole officer or CDCR data entry clerk that defendant was on parole and subject to search condition). This is also true of probation officers. See *People v Ferguson* (2003) 109 CA4th 367, 375, 134 CR2d 705.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/Good-Faith Mistakes/§1.42 Mistakes of Law

Good-Faith Mistakes

[§1.42] Mistakes of Law

 **To Main Book**

A traffic stop based on a mistake of law is unreasonable and not subject to the good-faith exception. *People v White* (2003) 107 CA4th 636, 643, 132 CR2d 371 (CHP officer stopped car with one Arizona license plate in mistaken belief that two plates are required; court distinguished and disagreed with *People v Glick* discussed in Book §1.42). Similarly, the good faith exception does not apply to a stop of a pedestrian for violating a local ordinance that had long been preempted by the Vehicle Code. *People v Cox* (2008) 168 CA4th 702, 710, 85 CR3d 716.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/FRUIT OF THE POISONOUS TREE/Attenuation/§1.45 Basic Principles

FRUIT OF THE POISONOUS TREE

Attenuation

[§1.45] Basic Principles

 **To Main Book**

Attenuation also occurs when the interests protected by the rule that has been violated would not be served by suppression of the evidence. *Hudson v Michigan* (2006) 547 US 586, 593, 126 S Ct 2159, 165 L Ed 2d 56 (exclusionary rule does not apply to knock-notice violations).

Police invention of a reason to stop a motorist is particularly flagrant. *People v Rodriguez* (2006) 143 CA4th 1137, 1144, 49 CR3d 811 (if police lied about seeing burnt out brake light, arrest on warrant discovered during warrant check is unlawful, and evidence from subsequent car search is inadmissible). *Rodriguez* applies when the officers did not observe or have information about a traffic violation as compared to using an actual violation as a pretext to stop a motorist for another purpose. See Book §1.43.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/Applications/Confessions Following Illegal Arrest, Detention, or Search/§1.47 Chart: Attenuation as to Confessions After Unlawful Arrest or Detention

Applications

Confessions Following Illegal Arrest, Detention, or Search

[§1.47] Chart: Attenuation as to Confessions After Unlawful Arrest or Detention

 **To Main Book**

Add to chart in Book §1.47.

Name of Case	Time Lapse	Intervening Factors	Misconduct
(1) <i>Attenuated</i> <u><i>People v Jenkins</i></u> <u>(2004) 122 CA4th</u> <u>1160, 1179, 19 CR3d</u> <u>386</u>	3 days	Out-of-custody defendant voluntarily returned to station; <i>Miranda</i> rights reread	Illegal detention for over 16 hours
(2) <i>Not Attenuated</i> <u><i>People v Jenkins</i></u> <u>(2004) 122 CA4th</u> <u>1160, 1178, 19 CR3d</u> <u>386*</u>	None	<i>Miranda</i> admonition	Custodial traffic arrest for purpose of questioning about felony; over 16-hour illegal detention
<u><i>People v Medina</i></u> <u>(2003) 110 CA4th</u> <u>171, 1 CR3d 546</u>	None	Voluntary answer to question	Questioning in conjunction with illegal pat-down

* *Jenkins* involved statements given on different days

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/§1.49 Fruits of Unlawful Confession

[§1.49] Fruits of Unlawful Confession

 To Main Book

Failure to give *Miranda* warnings to a suspect does not require suppression of the physical fruits of the suspect's un-Mirandized but voluntary statements. *U.S. v Patane* (2004) 542 US 630, 639-640, 124 S Ct 2620, 159 L Ed 2d 667 (contrary rule would go beyond self-incrimination clause and is not needed to protect against self-incrimination).

An illegally obtained confession does not prevent use of defendant's voluntary statements to defense experts to impeach a defense witness. *People v Boyer* (Boyer II) (2006) 38 C4th 412, 462, 42 CR3d 677 (no exploitation of primary illegality).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/Identification Evidence/§1.50 Fingerprints and Other Physical Evidence of Identity

Identification Evidence

[§1.50] Fingerprints and Other Physical Evidence of Identity

 **To Main Book**

The court may order defendant to provide a fingerprint example absent a showing that the defendant was illegally arrested or detained. *Virgle v Superior Court* (2002) 100 CA4th 572, 575, 122 CR2d 542 (no probable cause showing required for such order).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/§1.55 Consent

[§1.55] Consent

 To Main Book

People v Manderscheid (2002) 99 CA4th 355, 364, 121 CR2d 251, upheld a consent to search that defendant gave after an officer went through his backyard and knocked on the rear door of his residence, while other officers at the front door ordered the occupants out of the building and then requested consent to look for a fugitive. The court did not discuss the cases cited in Book §1.55, but held that although the officer's trespass may invalidate observations made by the officer (see Book §5.19), it did not affect the validity of consent that was otherwise voluntary.

Consent to search after a detention based on an anonymous uncorroborated tip is invalid. See *People v Saldana* (2002) 101 CA4th 170, 173, 123 CR2d 763.

The primary illegality is attenuated when consent was given several hours after defendant's unlawful arrest, at a location remote from where defendant was being held, and after the person who consented was permitted to consult with the defendant and with an attorney. *People v Boyer* (Boyer II) (2006) 38 CA4th 412, 450-451, 42 CR3d 677.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/§1.57A Discovery of Outstanding Arrest Warrant [NEW]

[§1.57A] Discovery of Outstanding Arrest Warrant [NEW]

 To Main Book

Discovery of an outstanding arrest warrant during an unlawful traffic stop attenuates the taint in the absence of purposeful or flagrant police misconduct. *People v Brendlin* (2008) 45 C4th 262, 272, 85 CR3d 496 (stop of vehicle with expired registration tabs and current temporary operating permit taped to rear window is unlawful but not flagrant). A search incident to an arrest on a warrant so discovered is, therefore, lawful. 45 C4th at 272.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/§1.57B Resisting Arrest [NEW]

[§1.57B] Resisting Arrest [NEW]

 To Main Book

Defendant's flight and resistance following an unlawful detention is an independent act that attenuates the illegality. *People v Cox* (2008) 168 CA4th 702, 712, 85 CR3d 716.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/Inevitable Discovery/§1.60 Basic Principles

Inevitable Discovery

[§1.60] Basic Principles

 **To Main Book**

The possibility that the arrestee's companions would have abandoned his car and its contents does not justify invoking the inevitable discovery exception. *People v Hughston* (2008) 168 CA4th 1062, 1073, 85 CR3d 890.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/§1.61 Applications

[§1.61] Applications

 To Main Book

Physical evidence. People v Superior Court (Walker) (2006) 143 CA4th 1183, 1218, 49 CR3d 831 (when university security officers show contraband to police, it defies logic and common sense to say that it would not have been turned over to the police to pursue their own investigation).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/§1.62 Limitation: Argument That Search Warrant Inevitably Would Have Been Obtained

[§1.62] Limitation: Argument That Search Warrant Inevitably Would Have Been Obtained

 To Main Book

People v Hughston (2008) 168 CA4th 1062, 1072, 85 CR3d 890, *People v Robles* (2000) 23 CA4th 789, 801, 97 CR2d 914, and *People v Superior Court (Walker)* (2006) 143 CA4th 1183, 1215, 49 CR3d 831, are in accord with the principle stated in Book §1.62.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/§1.63 TRIAL USE OF ASSERTION OF FOURTH AMENDMENT RIGHTS [NEW]

[§1.63] TRIAL USE OF ASSERTION OF FOURTH AMENDMENT RIGHTS [NEW]

This section was added to this chapter since the publication of the book. Click to return to the book.

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Evidence that the defendant asserted Fourth Amendment rights during the investigation of the offense is inadmissible at trial to show consciousness of guilt. *People v Wood* (2002) 103 CA4th 803, 809, 127 CR2d 132. Such evidence is admissible to impeach the defendant. *People v Wood, supra*.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/1 The Fourth Amendment and the Exclusionary Rule/§1.64 KNOCK-NOTICE VIOLATIONS [NEW]

[§1.64] KNOCK-NOTICE VIOLATIONS [NEW]

This section was added to this chapter since the publication of the book. Click to return to the book.

 To Main Book

The exclusionary rule does not apply to knock-notice violations. *Hudson v Michigan* (2006) 547 US 586, 593-599, 126 S Ct 2159, 165 L Ed 2d 56 (search warrant); *In re Frank S.* (2006) 142 CA4th 145, 152, 47 CR3d 320 (no search warrant); see Update §1.45. The court said suppression is not worth the cost in this situation because the police have no incentive to violate the rule in the first place. *Hudson v Michigan, supra*, 547 US at 594-599; see *People v Rodriguez* (2006) 143 CA4th 1137, 1146, 49 CR3d 811.

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Search Warrants

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/§2.1 SCOPE OF CHAPTER

[§2.1] SCOPE OF CHAPTER

 To Main Book

For administrative subpoenas, see, *e.g.*, *City of Santa Cruz v Patel* (2007) 155 CA4th 234, 249-251, 65 CR3d 824.

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CONSTITUTIONAL AND STATUTORY FRAMEWORK

[§2.4] Statutory Grounds for Issuance



A search warrant may also issue for records or evidence in the possession of an "electronic communications service" or "remote computing service" that show misdemeanor theft or embezzlement, or that a person possesses things that he or she intends to use to commit a misdemeanor public offense. Pen C §1524(a)(7).

An "electronic communication service" is any service that gives its users "the ability to send or receive wire or electronic communications." 18 USC §2510(15); see Pen C §1524(a)(7); 18 USC §2711(1); for definition of "electronic communication," see 18 USC §2510(12). A "remote computing service" is one that provides "computer storage or processing services by means of an electronic communications system." 18 USC §2711(2); see Pen C §1524(a)(7).

A search warrant may require service providers to disclose a subscriber's or customer's

- Name and address;
- Local and long distance billing records;
- Telephone number or other subscriber number or identity;
- Length of service; and
- Types of services (Pen C §1524.3(a), effective January 1, 2003).

A service provider may move to quash or modify the search warrant on the ground that the information or records requested are unusually voluminous or that compliance would otherwise be unduly burdensome. Pen C §1524.3(c).

Title 18, United States Code §2703(d) authorizes state courts to issue orders to disclose such records on a showing that they are relevant to an ongoing criminal investigation unless state law prohibits courts from making such orders. It has not been decided whether California courts may do so. See 86 Ops Cal Atty Gen 198 (2003) (no); 32 *Point of View* 35 (Alameda County District Attorney's Office, Spring 2004) (yes).

Judicial Tip: Some judges grant such applications when they are accompanied by an affidavit that shows probable cause to search or seize the records.

Penal Code §1524(a)(8) authorizes a search warrant for evidence of violation of Lab C §3700.5, which makes an employer's failure to secure the payment of workers' compensation a misdemeanor. See Lab C §§3700 et seq for the obligations of employers to provide such security.

Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/Limitations in Particular Situations/Papers of Lawyers, Doctors, Psychotherapists, and Members of Clergy/§2.6 Suspicion of Criminal Activity by Person Whose Place Is to Be Searched

Limitations in Particular Situations

Papers of Lawyers, Doctors, Psychotherapists, and Members of Clergy

[§2.6] Suspicion of Criminal Activity by Person Whose Place Is to Be Searched

 **To Main Book**

An attorney's right to an in camera hearing, discussed in [Book §2.6](#), is not affected by the limitations on sustaining a work product claim. [Pen C §1524\(i\)](#), effective September 29, 2002; see also [Update §6.147](#).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/Bodily Intrusions/
§2.11 In General

Bodily Intrusions

[§2.11] In General

 **To Main Book**

Taking blood and saliva samples from convicted felons, as authorized by statute, requires neither a search warrant nor individualized suspicion. See [Update §4.119](#).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/§2.12 HIV Blood Testing

[§2.12] HIV Blood Testing

 To Main Book

Penal Code §§1524.1 and 1202.1, discussed in Book §2.12, have been amended to provide for blood or saliva testing. The statutes do not expressly give defendants a choice of tests.

Health & Safety Code §121060 also permits orders to test other bodily fluids, such as sweat, for AIDS and as so applied is constitutional. *People v Hall* (2002) 101 CA4th 1009, 1021, 124 CR2d 806.

An order for HIV testing is invalid without probable cause; defendant may challenge the sufficiency of the evidence to support probable cause on appeal in the absence of an objection. *People v Butler* (2003) 31 C4th 1119, 1123, 6 CR3d 730. A timely objection is necessary, however, when the basis of the challenge is lack of an express finding or of a notation of such finding in the docket. *People v Stowell* (2003) 31 C4th 1107, 6 CR3d 723; see *People v Butler, supra*.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/§2.13A Military Searches [NEW]

[§2.13A] Military Searches [NEW]

 To Main Book

The search of an airman's barrack quarters authorized by a base commanding officer on probable cause complies with the Fourth Amendment and does not require a civilian search warrant. *People v Jasmin* (2008) 167 CA4th 98, 109-113, 84 CR3d 458.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/§2.14 Territorial Jurisdiction

[§2.14] Territorial Jurisdiction

 To Main Book

Identity theft. A magistrate may issue an out-of-county search warrant for evidence of identity theft if the victim resides in the same county as the issuing court. Pen C §1524(j), effective January 1, 2004.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/AFFIDAVIT REQUIREMENTS/Written Affidavits/§2.15 General Rule

AFFIDAVIT REQUIREMENTS

Written Affidavits

[§2.15] General Rule

 **To Main Book**

An oath stating the officer's belief that he has probable cause based on an incorporated statement of probable cause is an oath that the facts in the statement are true. *People v Hale* (2005) 133 CA4th 942, 947, 35 CR3d 183 (disagreeing with *People v Leonard*, cited in Book §2.15, on this point).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/§2.18 Partial Loss of Affidavit

[§2.18] Partial Loss of Affidavit

 To Main Book

Loss of the sealed portion of the affidavit is not fatal when the District Attorney's office provided an unsigned copy of the affidavit and there is substantial evidence that the contents of the copy and the lost part are identical. *People v Galland* (2008) 45 C4th 354, 371, 86 CR3d 841 (magistrate had no recollection, but Superior Court and affiant did).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/Probable Cause/
§2.22 Basic Standard

Probable Cause

[§2.22] Basic Standard

 **To Main Book**

In accord with Book §2.22 see *Safford Unified Sch. Dist. #1 v Redding* (2009) ___ US ___, 129 S Ct 2633, 2639, 174 L Ed 2d 354 (fair probability or substantial chance of discovering evidence of criminal activity).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/§2.23 Contrast to Probable Cause for Arrest Warrant

[§2.23] Contrast to Probable Cause for Arrest Warrant

 To Main Book

Discovery of recently cut marijuana stems and leaves and mail addressed to the defendant in a trash can in front of defendant's residence sufficiently links illegal activity to the residence. *People v Thus* (2003) 107 CA4th 221, 235-236, 133 CR2d 149.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/§2.24 General Principles for Applying Standard

[§2.24] General Principles for Applying Standard

 To Main Book

The known existence of an affirmative defense does not destroy probable cause. *People v Fisher* (2002) 96 CA4th 1147, 1152, 117 CR2d 838 (search warrant for marijuana may be executed even though defendant shows officers documents that he has medical permission).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/Facts, Opinions, Expertise, Informants/Opinions and Conclusions/§2.28 Affiant's Experience or Expertise

Facts, Opinions, Expertise, Informants

Opinions and Conclusions

[§2.28] Affiant's Experience or Expertise

 **To Main Book**

The affiant's expert opinion that child molesters often collect child pornography on their computers, together with other facts, establishes probable cause to search the computer of a suspected child molester. *People v Nicholls* (2008) 159 CA4th 703, 711-712, 71 CR3d 621.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/Reliability or Credibility of Information/§2.32 Hearsay

Reliability or Credibility of Information

[§2.32] Hearsay

 **To Main Book**

The principles discussed in Book §2.32 apply to affidavits under Pen C §1524.1. *Humphrey v Appellate Division* (2002) 29 C4th 569, 573-575, 127 CR2d 645 (hearsay permissible in affidavit for HIV blood test of defendant charged with molesting child and sexual battery).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/§2.33 Police Informants

[§2.33] Police Informants

 To Main Book

Information from an anonymous informant that is not self-verifying and is corroborated only as to defendant's residence and vehicles does not constitute probable cause. *People v. Gottfried* (2003) 107 CA4th 254, 264, 131 CR2d 840.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/§2.34 Citizen Informants

[§2.34] Citizen Informants

 To Main Book

Information from eight-year-old crime victims is presumptively reliable. *Humphrey v Appellate Division* (2002) 29 C4th 569, 575-576, 127 CR2d 645.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/§2.35 Illustrative Decisions Dealing With Informants

[§2.35] Illustrative Decisions Dealing With Informants

 To Main Book

(f) *Information provided to the police in breach of lawyer-client privilege.* The breach of privilege does not prevent the police from using the information, as long as they did not procure or induce the breach. *People v Navarro* (2006) 138 CA4th 146, 153, 41 CR3d 164. Procurement of the information by the police is a violation of due process and necessitates suppression of the resulting evidence. 138 C4th at 168-169. See Update §6.116 as to procedure for dealing with these matters.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/'Will Be Found in a Particular Place'/Inferences From Known Facts/§2.39 Permissible Inferences

"Will Be Found in a Particular Place"

Inferences From Known Facts

[§2.39] Permissible Inferences

 **To Main Book**

Although drug dealing gives rise to a reasonable inference that drugs will be found at the dealer's residence, mere drug use does not without more provide probable cause to search the user's residence. *People v Pressey* (2002) 102 CA4th 1178, 1191, 126 CR2d 162.

Information that the defendant had been communicating with victim by computer makes it reasonable to assume that defendant's computer contains relevant information and that it is kept at defendant's home. *People v Ulloa* (2002) 101 CA4th 1000, 1007, 124 CR2d 799 (victim, a minor, met sex crime defendant by chatting with him through AOL instant messages).

Information that a disgruntled ex-employee had shot 7 people at his former place of work and had a friend rent a storage locker for him a few days before the killings make it reasonable to believe incriminating evidence would be found at his residence, his vehicle, the storage locker, his work area, and in papers at his former place of employment relating to him. *People v Farley* (2009) 46 C4th 1053, 1097-1101, 96 CR3d 191 (death penalty case; defendant had used a shotgun and had also been observed with a rifle and four gallons of flammable liquid).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/§2.40
Impermissible Inferences

[§2.40] Impermissible Inferences

 To Main Book

Drug sales in a bar by a person who is not an owner or employee do not support an inference that drugs will be found on the premises. *People v Garcia* (2003) 111 CA4th 715, 718, 3 CR3d 895. Residential drug sales, however, support such an inference. 111 CA4th at 721; see Book §2.39.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/Current and Stale Information/§2.41 Basic Principles

Current and Stale Information

[§2.41] Basic Principles

 **To Main Book**

Probable cause to search for marijuana does not disappear when the officers who are about to execute the search warrant learn that the defendant has a doctor's permission to have marijuana. *People v Fisher* (2002) 96 CA4th 1147, 1152, 117 CR2d 838 (medical marijuana law only creates affirmative defense but does not bar search and arrest for possession).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/§2.42 Character of Criminal Activity

[§2.42] Character of Criminal Activity

 To Main Book

In *People v Gibson* (2001) 90 CA4th 371, 380-381, 108 CR2d 809, the search warrant was issued in June, and the last surveillance linking defendant to the residence in question had taken place in January. The court held that the information was not stale because there was ample evidence of a continuing criminal enterprise and no reason to believe that the defendant had moved.

A warrant obtained 52 days after an officer bought drugs from the defendant is stale. *People v Hulland* (2003) 110 CA4th 1646, 1648, 2 CR3d 919 (good-faith exception inapplicable).

Lack of dates in an affidavit is not fatal when defendant's actions are continuing. *Wood v Emmerson* (2007) 155 CA4th 1506, 1522, 66 CR3d 847 (stalking).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/§2.43 Anticipatory Warrants

[§2.43] Anticipatory Warrants

 To Main Book

An affidavit for an anticipatory warrant must show *two* kinds of probable cause: (1) a fair probability that if the triggering condition occurs, contraband or evidence of a crime will be found in a particular place, and (2) probable cause to believe the triggering condition will occur. The triggering condition itself need not be set out in the search warrant. *U.S. v Grubbs* (2006) 547 US 90, 94-97, 126 S Ct 1494, 164 L Ed 2d 195.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/§2.51 Sealing of Affidavit; Hearing

[§2.51] Sealing of Affidavit; Hearing

 To Main Book

Refusal to conduct, upon motion, the in camera review discussed in Book §2.51 is an abuse of discretion. *People v Galland* (2004) 116 CA4th 489, 10 CR3d 350.

As to the sealing of search warrant materials to protect the right to a fair trial, see Cal Rules of Ct 2.550-2.551; *People v Jackson* (2005) 128 CA4th 1009, 27 CR3d 596.

The court should not permit a law enforcement agency to retain the sealed portion of the search warrant, unless the court clerk's office lacks adequate security procedures to protect the affidavit against unauthorized disclosures and the agency has such procedures. *People v Galland* (2008) 45 C4th 354, 368, 86 CR3d 841. To invoke the exception:

- The record must show that the conditions for the exception are present; and
- The magistrate must create a record of the sealed affidavit that is not retained by the court. 45 C4th at 368-369. For ways to do that, see 45 C4th at 369.

The court should not allow a police officer to retain a confidential attachment to a search warrant affidavit. *People v Martinez* (2005) 132 CA4th 233, 239-240, 33 CR3d 328 (trial court should file it sealed along with search warrant and affidavit after the in camera hearing).

Confidential information concerning witness or victim. Courts and district attorneys are required to establish procedures to protect personal confidential information regarding crime victims and witnesses that appears in reports used to obtain search and arrest warrants. Pen C §964(a). For a description of such information, see Pen C §964(b). Discovery and court proceedings remain unaffected. Pen C §964(c).

Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/WARRANT REQUIREMENTS/§2.56 Form of Search Warrants; Questions for Issuing Magistrates

WARRANT REQUIREMENTS

[§2.56] Form of Search Warrants; Questions for Issuing Magistrates

 **To Main Book**

The form prescribed by Pen C §1529 and discussed in Book §2.56 now reads in part: "The people of the State of California to any *peace officer* in the County of _____." (New wording in italics.)

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/§2.62 Naming the Affiant

[§2.62] Naming the Affiant

 To Main Book

Evidence Code §1041 does not violate defendants' confrontation rights. *People v Martinez* (2005) 132 CA4th 233, 242, 33 CR3d 328.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/§2.64 Descriptions of Persons and Places to Be Searched and Property to Be Seized

[§2.64] Descriptions of Persons and Places to Be Searched and Property to Be Seized

 To Main Book

The adequacy of the description is determined by the contents of the warrant rather than of supporting documents. *Grob v Ramirez* (2004) 540 US 551, 557-558, 124 S Ct 1284, 157 L Ed 2d 1068.

The particularity requirement of the Fourth Amendment does not extend to a description of a triggering condition in an anticipatory search warrant. *U.S. v Grubbs* (2006) 547 US 90, 97-99, 126 S Ct 1494, 164 L Ed 2d 195. For discussion of anticipatory warrants, see [Book §2.43](#); [Update §2.43](#).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/Description of Place to Be Searched/§2.66 Key Issues

Description of Place to Be Searched

[§2.66] Key Issues

 **To Main Book**

A warrant to search defendant's premises permits search of a motor home, truck, and detached garage on the property. *People v Gallegos* (2002) 96 CA4th 612, 625, 117 CR2d 375 (search for documents).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/Description of Property to Be Seized/§2.69 Purpose and Definition of Particularity Requirements

Description of Property to Be Seized

[§2.69] Purpose and Definition of Particularity Requirements

 To Main Book

Challenges to the description of property to be seized may involve two distinct claims: (1) that the warrant does not clearly state what is sought; (2) that the scope of the warrant goes beyond the probable cause on which the warrant is based. Courts sometimes call the former the particularity issue and the latter the overbreadth issue. See, *e.g.*, *People v Ulloa* (2002) 101 CA4th 1000, 1005, 124 CR2d 799; *In re Grand Jury Subpoenas* (9th Cir 1991) 926 F2d 847, 856.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/'Meaningful Restriction' Test in Action/§2.71 Papers and Other Documentary Evidence

"Meaningful Restriction" Test in Action

[§2.71] Papers and Other Documentary Evidence

 To Main Book

Broad language with qualifying clause. In accord with *Andresen v Maryland* and *Toubus v Superior Court*, discussed in [Book §2.71](#), is [Roman Catholic Archbishop v Superior Court \(2005\) 131 CA4th 417, 460, 32 CR3d 209](#) (documents and other materials, including but not limited to documents in Archdiocese general archives and files, relating to child molestation allegations against named priest; case dealt with subpoena; court applied search warrant principles).

The more complex the investigation the more leeway courts tend to give the police. See, e.g., [People v Farley \(2009\) 46 C4th 1053, 1101-1102, 96 CR3d 191](#) (in death penalty case, court declined to invalidate clause permitting search for "any and all documents and correspondence relating to defendant"); [People v Bradford \(1997\) 15 C4th 1229, 1291, 65 CR2d 145](#).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/§2.72 Indicia-of-Occupancy Clauses

[§2.72] Indicia-of-Occupancy Clauses

 To Main Book

Indicia of occupancy clauses, also called dominion and control clauses (*People v Balint* (2006) 138 CA4th 200, 206, 41 CR3d 211), permit seizure of an open laptop computer on residential premises. 138 CA4th at 209. *People v Varghese* (2008) 162 CA4th 1084, 1100, 76 CR3d 449, extends *People v Balint* to generally allow the seizure of computers under dominion and control clauses.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/Judicial Techniques for Upholding Searches Based on Deficient Descriptions/§2.75 Reference to Affidavit

Judicial Techniques for Upholding Searches Based on Deficient Descriptions

[§2.75] Reference to Affidavit

 **To Main Book**

A warrant that fails to describe the things to be seized cannot be cured by the fact that the application for the warrant included an adequate description. *Grob v Ramirez* (2004) 540 US 551, 557, 124 S Ct 1284, 157 L Ed 2d 1068 (Fourth Amendment requires particularity in warrant itself).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/EXECUTION OF WARRANTS/Knock-Notice/Compliance With Pen C §1531/§2.102 Opportunity to Surrender Premises

EXECUTION OF WARRANTS

Knock-Notice

Compliance With Pen C §1531

[§2.102] Opportunity to Surrender Premises

 To Main Book

Waiting 15 to 20 seconds, although close, is sufficient under the following circumstances (*U.S. v Banks* (2003) 540 US 31, 38-41, 124 S Ct 521, 157 L Ed 2d 343):

- The warrant directed the officers to search for cocaine;
- The police arrived during the day when anyone inside would probably have been up and around; and
- The officers received no response to their knock.

Reasonableness is judged by the facts known to the police on the scene. 540 US at 39. A reasonable wait may need to be longer when there is no reason to suspect an immediate risk of frustration. 540 US at 41.

Twenty-five to thirty seconds suffice for a daytime search for narcotics. *People v Martinez* (2005) 132 CA4th 233, 245, 33 CR3d 328.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/Substantial Compliance/§2.103 Meanings of 'Substantial Compliance'

Substantial Compliance

[§2.103] Meanings of "Substantial Compliance"

 **To Main Book**

(3) See *People v Urziceanu* (2005) 132 CA4th 747, 791-792, 33 CR3d 859.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/§2.105
Compliance With Objectives of Statute: the Peterson Principle

[§2.105] Compliance With Objectives of Statute: the *Peterson* Principle

 To Main Book

Simply knocking, announcing, and bursting through a locked door does not meet any of the policies of the knock-notice law.
People v Urziceanu (2005) 132 CA4th 747, 792, 33 CR3d 859.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/Excused Noncompliance: Unoccupied Premises and Exigent Circumstances/§2.107 Insufficient Exigent Circumstances; 'No-Knock' Warrants

Excused Noncompliance: Unoccupied Premises and Exigent Circumstances

[§2.107] Insufficient Exigent Circumstances; "No-Knock" Warrants

 **To Main Book**

The Fourth Amendment permits no-knock warrants on a showing of sufficient probable cause. See *U.S. v Banks* (2003) 540 US 31, 35-37, 124 S Ct 521, 157 L Ed 2d 343. The showing is adequate when it establishes reasonable grounds to expect that knocking would be futile or dangerous or that it would inhibit effective investigation, *e.g.*, by allowing the destruction of evidence. *U.S. v Banks, supra*.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/§2.108 Illustrations of Sufficient Exigent Circumstances

[§2.108] Illustrations of Sufficient Exigent Circumstances

 To Main Book

In *People v Murphy* (2005) 37 C4th 490, 500, 36 CR3d 125, defendant was on probation for a drug offense, an illegal methamphetamine sale had just occurred on the premises, and the officers had loudly identified themselves to a man directly outside defendant's open door. The court held that these were adequate exigent circumstances: the officers could reasonably conclude that drugs were on the premises and that the noisy confrontation outside the door alerted defendant to conceal or destroy any drugs on the premises.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/§2.109 Effect of Unexcused Knock-Notice Violations

[§2.109] Effect of Unexcused Knock-Notice Violations

 To Main Book

The exclusionary rule does not apply to knock-notice violations. *Hudson v Michigan* (2006) 547 US 586, 593-599, 126 S Ct 2159, 165 L Ed 2d 56 (interests served by knock-notice rules not served by suppression; costs of exclusionary rule here outweigh deterrence); see [Update §1.64](#).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/Conduct of Search/Detention and Search of Occupants During Execution of Warrant/§2.110 Detention

Conduct of Search

Detention and Search of Occupants During Execution of Warrant

[§2.110] Detention

 **To Main Book**

Detainees may be handcuffed at least in dangerous situations. *Muebler v Mena* (2005) 544 US 93, 99-100, 125 S Ct 1465, 161 L Ed 2d 299 (search warrant for weapons in residence occupied by wanted gang member; multiple detainees; handcuffing during two-to three-hour search reasonable).

Officers may detain occupants of a different race than the persons who are named in the search warrant. *Los Angeles County v Rettele* (2007) 550 US 609, 127 S Ct 1989, 167 L Ed 2d 974.

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Protective sweep. Many judges believe that under appropriate circumstances officers who are executing a search warrant may conduct a protective sweep. See *People v Ledesma* (2003) 106 CA4th 857, 864, 131 CR2d 249 (protective sweep rule developed in context of searches incident to arrest applies to probation searches); Book §§4.128-4.136; Update §§4.129-4.130.

A man sitting on the top step of stairs leading to a residence about to be searched may not be frisked for weapons in the absence of reasons to believe that he is armed. *People v Sandoval* (2008) 163 CA4th 205, 77 CR3d 156.

Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/Seizure of Property Not Described in Search Warrant/The Plain-View Exception/§2.113 Basic Principles

Seizure of Property Not Described in Search Warrant

The Plain-View Exception

[§2.113] Basic Principles

 **To Main Book**

For a recent application of the plain-view exception discussed in Book §2.113, see *People v Lenart* (2004) 32 C4th 1107, 1119, 12 CR3d 592; see Update §2.115.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/§2.115 Linkage Between the Property in Plain View and Criminal Behavior ('Reasonably Identifiable as Contraband')

[§2.115] Linkage Between the Property in Plain View and Criminal Behavior ("Reasonably Identifiable as Contraband")

 To Main Book

An adequate nexus between a robbery-murder and a paper bag containing paper fragments of written numbers and a crumpled coin wrapper is established by the searching officer's knowledge that the robbery victim was missing business records, currency, and coin wrappers. *People v Lenart* (2004) 32 C4th 1107, 1119, 12 CR3d 592.

The requisite linkage need only be between the items in plain view and *some* crime, not between these items and the objects or crimes mentioned in the search warrant. *People v Gallegos* (2002) 96 CA4th 612, 623, 117 CR2d 375.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/§2.117 Presence of Third Parties

[§2.117] Presence of Third Parties

 To Main Book

Accompanying officers from another jurisdiction. People v Carrington (2009) 47 C4th 145, 164-168, 97 CR3d 117, a death penalty case, deals with the following situation: Officers from A are investigating homicides but lack cause to search the defendant's residence. Officers from B have a search warrant for the residence in a burglary case not related to the killings. The court held that the officers from A may come along when the warrant is executed and may use their observations of items in plain view to obtain their own search warrant. The court did not explain why the police from A had a right to enter the defendant's residence.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/2 Search Warrants/Information to Household/§2.123 Copy of Warrants

Information to Household

[§2.123] Copy of Warrants

 **To Main Book**

Officers who execute a search warrant are not required to display it or give the resident a copy. *People v Calabrese* (2002) 101 CA4th 79, 84-85, 123 CR2d 570.

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Temporary Detentions and Searches Incident to Temporary Detentions

Application of Fourth Amendment

[§3.3] Effects of Unlawful Detention or Frisk

What Constitutes a Temporary Detention

[§3.4] Temporary Detentions in the Spectrum of Police-Civilian Contacts

Differentiating Detentions From Less Intrusive Contacts

[§3.5] Contacts Not Amounting to Seizure ("Consensual Encounters")

Test To Determine Temporary Detention

[§3.7] Variants of *Mendenhall* Test

Police-Pedestrian Contacts

In Airports

[§3.12] Advising Person of Freedom To Leave

[§3.13] Transforming Encounter Into Detention

On Streets

[§3.19] Officers in Patrol Vehicle

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Reaching Into Suspect's Clothing

[§3.102] Objects That Feel Like Contraband Rather Than Weapons

Search for Identification

[§3.106] Persons

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/APPLICATION OF FOURTH AMENDMENT/§3.3 Effects of Unlawful Detention or Frisk

APPLICATION OF FOURTH AMENDMENT

[§3.3] Effects of Unlawful Detention or Frisk

 [To Main Book](#)

The effects of an unlawful detention may be attenuated. See [Update §§1.57A](#) and [1.57B](#).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/WHAT CONSTITUTES A TEMPORARY DETENTION/§3.4 Temporary Detentions in the Spectrum of Police-Civilian Contacts

WHAT CONSTITUTES A TEMPORARY DETENTION

[§3.4] Temporary Detentions in the Spectrum of Police-Civilian Contacts

 **To Main Book**

People v Rivera (2007) 41 C4th 304, 309, 59 CR3d 473, is in accord with *Wilson v Superior Court*, cited in Book §3.4 (police may initiate consensual encounter without suspicion of criminal activity).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/Differentiating Detentions From Less Intrusive Contacts/§3.5 Contacts Not Amounting to Seizure ('Consensual Encounters')

Differentiating Detentions From Less Intrusive Contacts

[§3.5] Contacts Not Amounting to Seizure ("Consensual Encounters")

 **To Main Book**

Officers are entitled to seek interviews with persons at their homes or hotel rooms; the nature of the ensuing contact is determined by using the *Mendenhall* test discussed in Book §3.6, *People v Rivera* (2007) 41 C4th 304, 308, 59 CR3d 473 (asking woman at doorway whether she knew defendant and requesting permission to search home is consensual encounter); *People v Jenkins* (2004) 119 CA4th 368, 374, 14 CR3d 197 (consensual encounter).

For a summary of the *Mendenhall* test, see *People v Zamudio* (2008) 43 C4th 327, 341, 75 CR3d 289.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/Test to Determine Temporary Detention/§3.7 Variants of Mendenhall Test

Test to Determine Temporary Detention

[§3.7] Variants of *Mendenhall* Test

 **To Main Book**

Officers who seek the consent of bus passengers to search their luggage need not advise them of their right not to cooperate. *U.S. v Drayton* (2002) 536 US 194, 122 S Ct 2105, 153 L Ed 2d 242. There is nothing inherently coercive or confrontational about such encounters. 536 US at 204.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/Police-Pedestrian Contacts/In Airports/§3.12 Advising Person of Freedom to Leave

Police-Pedestrian Contacts

In Airports

[§3.12] Advising Person of Freedom to Leave

 **To Main Book**

Bus passengers need not be advised that they need not cooperate with officers who seek consent to search their luggage. *U.S. v Drayton* (2002) 536 US 194, 122 S Ct 2105, 153 L Ed 2d 242.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/§3.13 Transforming Encounter Into Detention

[§3.13] Transforming Encounter Into Detention

 To Main Book

An encounter does not necessarily become a detention when the officer summons a detective who also questions the defendant and requests defendant's permission to have his jacket tested for blood. *People v Hughes* (2002) 27 C4th 287, 328, 116 CR2d 401 (death penalty case).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/On Streets/§3.19 Officers in Patrol Vehicle

On Streets

[§3.19] Officers in Patrol Vehicle

 To Main Book

In *People v Garry* (2007) 156 CA4th 1100, 1111, 67 CR3d 849, the officer saw defendant standing next to a parked car at night in a high crime area. The uniformed and armed officer shone his spotlight on the defendant, got out of the patrol car, briskly approached defendant, and immediately questioned him about his probation and parole status. Because the officer's actions in their totality would intimidate any reasonable person, defendant was considered to be detained.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/§3.23 Request to Accompany Officers to Police Station

[§3.23] Request to Accompany Officers to Police Station

 To Main Book

People v Zamudio (2008) 43 C4th 327, 342-346, 75 CR3d 289, follows *In re Gilbert R.*, discussed in Book §3.23. In *People v Zamudio*, a death penalty case, police contact with the defendant that the court found to be consensual lasted more than 2½ hours.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/Police Contacts With Persons in Vehicles/Passengers/§3.25 Automatic Detention

Police Contacts With Persons in Vehicles

Passengers

[§3.25] Automatic Detention

 **To Main Book**

A traffic stop is an automatic detention of the passenger; accordingly, a passenger may challenge the constitutionality of the stop. *Brendlin v California* (2007) 551 US 249, 127 S Ct 2400, 168 L Ed 2d 132. The reason is that no reasonable person in the position of the passenger would feel free to depart without police permission. 551 US at 255-258. See *People v Hoyos* (2007) 41 C4th 872, 893-894, 63 CR3d 1.

Because passengers are detained, they, like drivers, may be pat searched for weapons when the traffic stop was lawful and the officer has a reason to believe that the person frisked is armed and dangerous. *Arizona v Johnson* (2009) ___ US ___, 129 S Ct 781, 784, 172 L Ed 2d 694. For pat searches incident to temporary detention, see Book §§3.95-3.105.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/§3.26 Unlawful Detention

[§3.26] Unlawful Detention

 To Main Book

The cases cited in Book §3.26 are probably no longer applicable in light of *Brendlin*, discussed in Update §3.25.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/§3.30 Temporary Detention Distinguished From More Serious Contacts

[§3.30] Temporary Detention Distinguished From More Serious Contacts

 To Main Book

A person who eagerly cooperates with the police and willingly accompanies them to the station has not been arrested even though he is kept in a locked room for several hours and then interrogated for several more. *Ford v Superior Court* (2001) 91 CA4th 112, 118-128, 109 CR2d 790 (homicide case). The court noted that although defendant's movement was "impeded," he was not restrained by physical force or show of authority, and his cooperation was requested, not demanded.

After the sentence in Book §3.30, "*Miranda* requirements come into operation," add: "Custody for purposes of *Miranda* generally does not include a temporary detention, even when the detained person tells the officer that he does not want to answer questions. *People v Farnam* (2002) 28 C4th 107, 180, 121 CR2d 106 (death penalty case)."

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/REQUIREMENTS FOR TEMPORARY DETENTIONS RELATED TO CRIME INVESTIGATIONS AND TRAFFIC VIOLATIONS/Standard/§3.31 Objective Basis

REQUIREMENTS FOR TEMPORARY DETENTIONS RELATED TO CRIME INVESTIGATIONS AND TRAFFIC VIOLATIONS

Standard

[§3.31] Objective Basis

 To Main Book

The officer's suspicion must relate to *criminal* activity. Thus, a person walking down an external flight of stairs in a gated and fenced apartment complex cannot be stopped on suspicion of drinking alcohol in *public*. *People v Krohn* (2007) 149 CA4th 1294, 58 CR3d 60.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/§3.32 Totality of Circumstances

[§3.32] Totality of Circumstances

 To Main Book

U.S. v Arvizu (2002) 534 US 266, 273-278, 122 S Ct 744, 151 L Ed 2d 740, emphasizes the need to consider all of the circumstances without rules that automatically give some observations no weight. Individual facts may not be considered in isolation. *People v Perrusquia* (2007) 150 CA4th 228, 233, 58 CR3d 485. *In re Raymond C.* (2008) 45 C4th 303, 307, 86 CR3d 110, is in accord with the principle stated in Book §3.32.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/Issues Concerning Application of Standard/§3.36 Conduct Equally Consistent With Innocent Activity

Issues Concerning Application of Standard

[§3.36] Conduct Equally Consistent With Innocent Activity

 **To Main Book**

Multiple observations viewed collectively may amount to reasonable suspicion even though each observation is susceptible of an innocent explanation. *U.S. v Arvizu* (2002) 534 US 266, 274-278, 122 S Ct 744, 151 L Ed 2d 740 (court disapproved of bright line rules that certain factors are not entitled to any weight in the process of determining reasonable suspicion).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/§3.37 Training and Experience of Officer

[§3.37] Training and Experience of Officer

 To Main Book

People v Williams (2007) 156 CA4th 949, 959, 67 CR3d 711 (officer's experience that marijuana growers often work at night or early in the morning was relevant to lawfulness of stop of motorcyclist riding toward treacherous dirt road leading to marijuana patch at 5:30 a.m.), is in accord with cases cited in Book §3.37.

The training and experience of officers is not a substitute for particularized suspicion. *People v Hernandez* (2008) 45 C4th 295, 300, 301, 86 CR3d 105 (officer's experience that temporary operating permits are often invalid does not authorize stop of car without plates but with temporary permit in rear window).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/Sources of Information/§3.38 Informants

Sources of Information

[§3.38] Informants

 To Main Book

Stops based on anonymous tips have been litigated actively in recent years:

Information sufficiently reliable:

- *Exigent circumstances.* Such circumstances may make a tip adequate even without corroboration of the assertedly illegal conduct. *People v Dolly* (2007) 40 C4th 458, 461, 53 CR3d 803 (anonymous tip that a specifically described person had just pulled a gun on caller and was now in a described car at a specific location; danger of further assaults; this kind of 911 call is unlikely to be a hoax); *People v Wells* (2006) 38 C4th 1078, 1081, 45 CR3d 8 (anonymous tip about specifically described car weaving all over road; serious immediate danger to other drivers); *People v Lindsey* (2007) 148 CA4th 1390, 1396-1401, 56 CR3d 619 (anonymous 911 call of shot fired). See also *In re Richard G.* (2009) 173 CA4th 1252, 1257, 1258, 93 CR3d 506.
- *Stop soon after detailed tip.* An anonymous call that describes wrong-way driving and turning in front of oncoming traffic; names the streets on which this conduct occurred; and gives the driver's gender, vehicle description, and license number is sufficiently reliable to permit a stop of the car five minutes later. *Lowry v Gutierrez* (2005) 129 CA4th 926, 941, 28 CR3d 912. Some judges note that this may also be a case of exigent circumstances.
- *Adequate corroboration.* An anonymous tip that drugs were being sold from a particular car at a particular location is sufficiently corroborated by a deputy sheriff's observation of a hand-to-hand transaction involving the driver. *People v Butler* (2003) 111 CA4th 150, 161-162, 4 CR3d 1.

Information not sufficiently reliable:

An anonymous tip of man carrying a handgun and threatening to shoot people is not sufficiently corroborated by the officer's observation of the subject sitting on a park bench with his hands in his lap. *People v Jordan* (2004) 121 CA4th 544, 559, 17 CR3d 157.

An anonymous tip that a Ford Taurus station wagon with a license ending in 319 was parked at a particular location and that the driver was carrying a gun and cocaine does not permit detention of the driver. *People v Saldana* (2002) 101 CA4th 170, 175, 123 CR3d 763 (corroboration that a car fitting description was present at specified location did not corroborate criminal elements of tip concerning gun or cocaine).

Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/Descriptions of Suspects and Vehicles/§3.47 Chart: Illustrative Cases Finding Descriptions Inadequate

Descriptions of Suspects and Vehicles

[§3.47] Chart: Illustrative Cases Finding Descriptions Inadequate

 **To Main Book**

Add to chart in [Book §3.47](#).

Case	Crime Reported	Description	Time and Place of Stop in Relation to Crime	Match	Other Factors Mentioned by Court
<u><i>People v Durazo</i></u> (2004) 124 CA4th 728, 21 CR3d 516	Telephone threats	Mexican gang members claiming to be from Oxnard	4 days later, 3 miles away	Driver and passenger were Hispanic	Car occupants looked in direction of victim's apartment while driving by; car registered to Oxnard resident

Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/'Fit' and Group Characteristics/§3.48 Ethnicity; Gang Membership

"Fit" and Group Characteristics

[§3.48] Ethnicity; Gang Membership

 To Main Book

Racial profiling. Racial profiling, the practice of detaining a suspect based on broad criteria that cast suspicion on an entire class of people without individualized suspicion, is illegal. See *People v Durazo* (2004) 124 CA4th 728, 735, 21 CR3d 516; Pen C §13519.4(e), (f).

Judicial Tip: For Fourth Amendment purposes, the appropriate inquiry concerns the presence of individualized suspicion that in turn depends on the totality of circumstances. See Book §§3.32-3.34; Update §6.22.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/§3.50 Effect of Mistakes

[§3.50] Effect of Mistakes

 To Main Book

In re Justin K. (2002) 98 CA4th 695, 698-700, 120 CR2d 546, is in accord with *People v Smith* and *Ojeda v Superior Court* discussed in Book §3.50 (reliance on wrong statute not fatal if another statute applies). For a limitation of this principle see *People v White* (2003) 107 CA4th 636, 641-642, 132 CR2d 371. The officer observed an object dangling from the rearview mirror of defendant's car and stopped the car for violating a Vehicle Code prohibition of affixing objects to the windshield or windows. The prosecution argued that defendant had violated another provision that forbids the installation of objects that obscure the driver's vision. The appellate court rejected this contention because the record contained no evidence that the object in question obscured the driver's vision; on the contrary, there was evidence that it did not. See also Update §1.42.

In contrast, testimony that the object hanging from the mirror obstructed vision makes the stop lawful. *People v Colbert* (2007) 157 CA4th 1068, 1073, 68 CR3d 912.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/Illustrative Situations/§3.56 Presence in High Crime Area

Illustrative Situations

[§3.56] Presence in High Crime Area

 To Main Book

A pedestrian may not be detained merely because he is walking near a building under surveillance for suspected drug activity and because of a "be on the lookout" bulletin based on a report from an untested informant over a month earlier. *People v Pitts* (2004) 117 CA4th 881, 886, 12 CR3d 91. But a person who loiters in a high crime residential area at night, follows pedestrians in a suspicious manner, and enters a car from the passenger side before attempting to drive it away may properly be detained. *People v Huggins* (2006) 38 C4th 175, 241-242, 41 CR3d 593 (death penalty case).

Presence in an area of recent, specific crimes does not justify a detention without additional factors specific to the defendant. *People v Perrusquia* (2007) 150 CA4th 228, 233, 58 CR3d 485 (although defendant's car was parked at night with the engine running near the exit of a 7-Eleven store, such stores in the area had recently been robbed, and defendant tried to avoid contact with the officers, these facts were insufficient for reasonable suspicion.)

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/§3.57 Unprovoked Flight

[§3.57] Unprovoked Flight

 To Main Book

Flight by both the defendant and his companion upon seeing the approaching officer "bolsters the reasonableness of the suspicion that there is criminal activity brewing." *People v Britton* (2001) 91 CA4th 1112, 1118-1119, 111 CR2d 199.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/§3.62 Driving Under the Influence

[§3.62] Driving Under the Influence

 To Main Book

An anonymous tip that a specifically described car is weaving all over the road justifies a vehicle stop. *People v Wells* (2006) 38 C4th 1078, 1081, 45 CR3d 8; see Update §3.38. So does an officer's observation that defendant's car was weaving, almost hitting the curb. *Arburn v DMV* (2007) 151 CA4th 1480, 1482, 61 CR3d 15.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/Other Traffic Stops/§3.63 Stop for Traffic, Equipment, and Registration Violations

Other Traffic Stops

[§3.63] Stop for Traffic, Equipment, and Registration Violations

 To Main Book

Traffic stops are treated as investigatory detentions for which the officer must be able to articulate specific facts justifying the suspicion that an offense is being committed. *In re Raymond C.* (2008) 45 C4th 303, 307, 86 CR3d 310; *People v Hernandez* (2008) 45 C4th 295, 299, 86 CR3d 105.

A vehicle may be properly stopped when its trailer hitch obscures the officer's view of one numeral on the rear license plate (*People v White* (2001) 93 CA4th 1022, 113 CR2d 584; Veh C §5201 (license plates to be mounted in clearly visible position)) or when the brake light in the rear window is not working (*In re Justin K.* (2002) 98 CA4th 695, 698-700, 120 CR2d 546 (light optional under state law, but CHP properly adopted federal safety standards that make rear window light mandatory; irrelevant that stopping officer was ignorant of federal law)). Also see Update §§1.42, 1.45, 3.50.

A motorist driving with an expired registration tag but with a temporary registration in the window may not be stopped unless the officer first checks with the dispatcher to determine whether the vehicle is currently registered. *People v Nabong* (2004) 115 CA4th Supp 1, 9 CR3d 854.

Missing license plate and temporary operating permit.

- A missing license plate without a visible temporary operating permit justifies a traffic stop. See *People v Saunders* (2006) 38 C4th 1129, 1136, 45 C3d 66; Veh C §5200 (duty to attach one plate in front and one in rear when two plates issued; when only one is issued, it should be attached to the rear).
- A missing front plate, expired registration tabs on the rear plate, and a temporary permit displayed in the rear window warrant a stop. *People v Saunders, supra* (without stop, officer could not determine whether permit applied only to the registration or also to missing plate).
- Missing plates and a temporary operating permit in the rear window do *not* justify a traffic stop. *People v Hernandez* (2008) 45 C4th 295, 86 CR3d 105. Unlike *Saunders*, there was no ambiguity regarding the operating permit. 45 C4th at 300. The officer was not entitled to rely on his experience that such permits are often invalid because that would violate the requirement of particularized suspicion and legitimate the exercise of unbridled discretion. 45 C4th at 301.
- Missing plates and a temporary permit in the front window that the officer could not see when driving warrant a stop. *In re Raymond C.* (2008) 45 C4th 303, 86 CR3d 110. The officer was not required to drive around the car in order to see all the windows. 45 C4th at 308.

Expired registration; visible current operating permit. This combination of circumstances does not justify a traffic stop as long as the temporary permit is in the rear window. See *People v Brendlin* (2008) 45 C4th 262, 268, 85 CR3d 496.

Stopping a vehicle that accelerates so as to lose traction for 20 to 25 feet is proper. *Brierton v DMV* (2005) 130 CA4th 499, 509-510, 30 CR3d 275. The propriety of stopping a vehicle that has an object dangling from the rearview mirror depends on whether there is evidence that the object obstructs vision. *People v Colbert* (2007) 157 CA4th 1068, 1073, 68 CR3d 912; *People v White* (2003) 107 CA4th 636, 641-642, 132 CR2d 371. Stopping a car that has an upside down license plate is proper. *People v Duncan* (2008) 160 CA4th 1014, 73 CR3d 264 (statute requires that plate be legible). A stop for changing lanes without signaling is lawful even if only the officer who was behind the car would have been affected. *People v Logsdon* (2008) 164 CA4th 741, 79 CR3d 379 (DUI case).

The validity of a traffic stop is not affected by whether a citation was issued. *Brierton v DMV, supra* (test is reasonable suspicion at time of stop).

Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/§3.64 Speed Traps

[§3.64] Speed Traps

 To Main Book

Evidence derived from a traffic stop based on a speed trap is inadmissible only in a prosecution for speeding. *People v Hardacre* (2004) 116 CA4th 1292, 1300, 11 CR3d 214 (no Fourth Amendment violation if officer reasonably suspected defendant violated posted speed limit).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/§3.66 Pretext Stop

[§3.66] Pretext Stop

 To Main Book

In contrast to basing a stop on an actual traffic violation, an invented violation makes the stop and a subsequent arrest illegal and any evidence obtained as a result inadmissible. *People v Rodriguez* (2006) 143 CA4th 1137, 1142-1148, 49 CR3d 811.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/Duration and Scope of Detention/Time Limits/Traffic Stops/§3.73 Extension of Traffic Stop

Duration and Scope of Detention

Time Limits

Traffic Stops

[§3.73] Extension of Traffic Stop

 **To Main Book**

A traffic stop may be extended beyond the time needed to write a ticket when the collective knowledge of the officers participating in a narcotics investigation provides probable cause to believe that the defendant was engaged in drug trafficking.

People v Gomez (2004) 117 CA4th 531, 538, 12 CR3d 398.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/Scope of Detention: Officer's Actions/§3.74 Warrant Checks

Scope of Detention: Officer's Actions

[§3.74] Warrant Checks

 **To Main Book**

An officer may run a brief warrant check during a stop for a smashed taillight. See *People v Gallardo* (2005) 130 CA4th 234, 239, 29 CR3d 455.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/§3.75 Questioning During Traffic Stop

[§3.75] Questioning During Traffic Stop

 To Main Book

See also *Muebler v Mena* (2005) 544 US 93, 100-101, 125 S Ct 1465, 161 L Ed 2d 299 (INS agents do not need reasonable suspicion to ask person lawfully detained during search of house about immigration status, as long as questioning does not extend detention).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/§3.76 Consent Searches

[§3.76] Consent Searches

 To Main Book

A traffic stop is not unreasonably extended when the time between the initial stop and the consent to search is about two minutes.
People v Gallardo (2005) 130 CA4th 234, 239, 29 CR3d 455.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/§3.77 Ordering out of Car

[§3.77] Ordering out of Car

 To Main Book

Officers may order a passenger trying to leave a lawfully stopped car back into the car and then order all passengers to sit on the curb. *People v Vibanco* (2007) 151 CA4th 1, 12, 60 CR3d 1. This type of detention rests on officer safety.

People v Hoyos (2007) 41 C4th 872, 892, 63 CR3d 1, is in accord with *Maryland v Wilson* discussed in Book §3.77 (officers making lawful traffic stop may order driver and passengers out of car).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/§3.80 Handcuffing

[§3.80] Handcuffing

 To Main Book

Handcuffing the detainee and making him sit on the ground a few minutes (*People v Celis* (2004) 33 C4th 667, 675, 16 CR3d 85) and an officer drawing his gun when faced with two suspects, each of whom might flee (33 C4th at 676), do not convert a detention into an arrest.

Handcuffing is not part of a typical detention and is generally permitted only when the officer has a reasonable basis for believing that the suspect poses a present physical threat or might flee. *People v Stier* (2008) 168 CA4th 21, 27, 85 CR3d 77. The suspect's height alone is not a reasonable basis. 168 CA4th at 28. Handcuffing turns a detention into an unlawful arrest when there is no reason to believe that the detainee posed any danger to the officer or that cuffing was necessary to effectuate the purpose of the stop. *In re Antonio B.* (2008) 166 CA4th 435, 442, 82 CR3d 693.

For handcuffing a person who the police detain while executing a search warrant, see [Update §2.110](#).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/§3.83 Production of Identification

[§3.83] Production of Identification

 To Main Book

The police may require a suspect to disclose his or her name during a proper *Terry* stop. *Hibel v Sixth Judicial Dist. Court* (2004) 542 US 177, 187-188, 124 S Ct 2451, 159 L Ed 2d 292; see also [Update §3.106](#).

Officers may ask car passengers to produce identification during a lawful traffic stop. [People v Vibanco \(2007\) 151 CA4th 1, 13, 60 CR3d 1](#).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/DETENTIONS NOT BASED ON SUSPICION OF CRIMINAL ACTIVITY/Vehicle Roadblocks and Checkpoints/§3.85 Basic Principles

DETENTIONS NOT BASED ON SUSPICION OF CRIMINAL ACTIVITY

Vehicle Roadblocks and Checkpoints

[§3.85] Basic Principles

 **To Main Book**

(1) There is also an exception for brief, information-seeking stops related to a specific recent crime in that location. *Illinois v Lidster* (2004) 540 US 419, 124 S Ct 885, 157 L Ed 2d 843 (fatal hit-and-run one week earlier at location and approximate hour of checkpoint).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/Border Detentions/§3.93 At the Border

Border Detentions

[§3.93] At the Border

 To Main Book

The right to conduct suspicionless border inspections includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank. *U.S. v Flores-Montano* (2004) 541 US 149, 155, 124 S Ct 1582, 158 L Ed 2d 311. It also includes authority to seize laptop computers of a person arriving from abroad and to view their files without probable cause. *People v Endacott* (2008) 164 CA4th 1346, 79 CR3d 907.

Nonroutine border searches require reasonable suspicion. See *People v Laborde* (2008) 163 CA4th 870, 875, 77 CR3d 860. These are primarily highly intrusive searches of the person. 163 CA4th at 877. A customs search of the cabin of a cruise ship passenger returning from a foreign cruise is usually a routine border search and hence does not require suspicion. 163 CA4th at 877-879.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/SEARCHES INCIDENT TO TEMPORARY DETENTIONS/Searches for Weapons/Pat Search/§3.96 Purpose and Grounds

SEARCHES INCIDENT TO TEMPORARY DETENTIONS

Searches for Weapons

Pat Search

[§3.96] Purpose and Grounds

 **To Main Book**

In re Jose Y. (2006) 141 CA4th 748, 752, 46 CR3d 268, relaxed the reason-to-believe-suspect-is-armed-and-dangerous requirement for juveniles in a case in which a single officer was taking three minors who were on school grounds without legitimate business to the school office. The court upheld the weapons pat-down, saying that the governmental interest in preventing violence in schools outweighed the "minimal invasion" of privacy rights.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/§3.97 Reason to Believe That Detainee Is Armed

[§3.97] Reason to Believe That Detainee Is Armed

 To Main Book

During a traffic stop, a pat-down of a driver who wears baggy clothing is justified when the officers smelled marijuana coming from the car because guns often accompany drugs. *People v Collier* (2008) 166 CA4th 1374, 83 CR3d 458.

A vehicle stop for an equipment violation does not authorize the police to frisk the driver solely on the basis that the stop occurred in a high crime area at night. *People v Medina* (2003) 110 CA4th 171, 174, 1 CR3d 546. This principle is analogous to the one governing the right to detain. 110 CA4th at 177; see Book §3.56.

A pat-down is reasonable when a witness pointed out the defendant; stated that he or his companion was carrying a handgun; and defendant was hostile, aggressive, and refused to give his name. *People v Lopez* (2004) 119 CA4th 132, 137, 13 CR3d 921.

Statements by a minor that he was not on probation and that he did not consent to a search do not justify a weapons pat-down. *In re H. H.* (2009) 174 CA4th 653, 94 CR3d 450.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/Search Beyond Pat-down/Reaching Into Suspect's Clothing/§3.102 Objects That Feel Like Contraband Rather Than Weapons

Search Beyond Pat-down

Reaching Into Suspect's Clothing

[§3.102] Objects That Feel Like Contraband Rather Than Weapons

 **To Main Book**

The exception created by *Minnesota v Dickerson*, discussed in Book §3.102, is also called the "plain feel" exception. *In re Lennies H.* (2005) 126 CA4th 1232, 1237-1238, 25 CR3d 13 (officer who feels keys during pat-down may remove them upon probable cause to believe that they were keys to a stolen car).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/3 Temporary Detentions and Searches Incident to Temporary Detentions/Search for Identification/§3.106 Persons

Search for Identification

[§3.106] Persons

 To Main Book

A statute requiring that during a proper investigative stop the detainee state his or her name upon request does not conflict with the Fourth Amendment. *Hübel v Sixth Judicial Dist. Court* (2004) 542 US 177, 185, 124 S Ct 2451, 159 L Ed 2d 292. The request for identification must be reasonably related in scope to the circumstances justifying the stop. 542 US at 188.

The search of a purse for identification is unlawful when its owner had not been asked to identify herself. *In re Lisa G.* (2004) 125 CA4th 801, 807-808, 23 CR3d 163.

People v Long and *People v Loudermilk*, discussed in Book §3.106, do not broadly authorize pat-down searches for identification. *People v Garcia* (2006) 145 CA4th 782, 785-786, 52 CR3d 70 (defendant, stopped for riding bike without headlamp, said he had no ID; pat-down search for ID unlawful).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/Chapter Outline

4

Arrest and Searches Incident to Arrest

Arrest Without Warrant: Authority and Grounds

Authority To Arrest

Authority of Peace Officers To Arrest

Misdemeanors and Infractions

[§4.9] Statutory Requirements; Effects of Violation

[§4.11] Ability To Testify to Elements of Offense

[§4.13] Custodial Arrest for Minor Offenses

Territorial Limitations

[§4.19] Penal Code §830.1

Authority of Private Persons To Arrest

[§4.23] Citizen's Arrest

Probable Cause

[§4.25] Objective Standard

[§4.28] Subjective Belief of Officer

[§4.29] Totality of Circumstances

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[§4.37] Vehicle Occupants

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[§4.51] General Need for Affidavit

Time, Place, and Manner of Arrest

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[§4.93] 48-Hour Rule

[§4.94] Consequences of Unreasonable Delay

[NEW] Foreign Nationals

[NEW] [§4.102A] Duties of Peace Officers

[NEW] [§4.102B] Effects of Violation

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Search of the Person

Bodily Intrusions and Strip Searches

Blood Samples

[§4.119] General Rule

[§4.120] Reasonable Manner of Taking Sample

[§4.122] Exigent Circumstances

Search Beyond Person of Arrestee

Areas Within Arrestee's Immediate Control

[§4.124] *Chimel* Rule

Vehicles

[§4.126] *Belton* Rule

[§4.127] Conditions for Applicability of Rule

Protective Sweep

[§4.129] Conditions for Valid Sweep

Factual Basis for Sweep

[§4.130] Slight Showing Often Sufficient

[§4.135] Lack of Information

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/ARREST WITHOUT WARRANT: AUTHORITY AND GROUNDS/Authority to Arrest/Authority of Peace Officers to Arrest/Misdemeanors and Infractions/§4.9 Statutory Requirements; Effects of Violation

ARREST WITHOUT WARRANT: AUTHORITY AND GROUNDS

Authority to Arrest

Authority of Peace Officers to Arrest

Misdemeanors and Infractions

[§4.9] Statutory Requirements; Effects of Violation



The exception to the presence requirement of Veh C §40300.5 extends to the arrest of a DUI suspect on the ground that evidence of being under the influence will be destroyed by the passage of time. *People v Schofield* (2001) 90 CA4th 968, 975, 109 CR2d 429.

Revocation or suspension of a driver's license under Veh C §13353 no longer requires proof of actual driving; reasonable cause to believe that the arrestee had been driving under the influence immediately prior to the arrest is sufficient. *Troppman v Valverde* (2007) 40 C4th 1121, 1136-1137, 57 CR3d 306.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/§4.11 Ability to Testify to Elements of Offense

[§4.11] Ability to Testify to Elements of Offense

 To Main Book

Paragraph (a) has been superseded by *Troppman v Valverde* (2007) 40 C4th 1121, 57 CR3d 306; see also *People v Schofield* (2001) 90 CA4th 968, 975, 109 CR2d 429; Veh C §40300.5; Update §4.9.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/§4.13 Custodial Arrest for Minor Offenses

[§4.13] Custodial Arrest for Minor Offenses

 To Main Book

An arrest that violates a statute prohibiting a custodial arrest for the particular offense does not violate the Fourth Amendment as long as it is based on probable cause. *Virginia v Moore* (2008) ___ US ___, 128 S Ct 1598, 170 L Ed 2d 559; *People v McKay* (2002) 27 C4th 601, 607, 117 CR2d 326.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/Territorial Limitations/§4.19 Penal Code §830.1

Territorial Limitations

[§4.19] Penal Code §830.1

 To Main Book

Penal Code §830.1(a)(1) has been amended to provide that an officer's authority to arrest extends to offenses "committed within the political subdivision *that employs the peace officer or in which the peace officer serves.*" (New provisions in italics.)

School district police officers have statewide authority to make an arrest for an offense in their presence that presents an immediate danger to persons or property. *People v McHugh* (2004) 119 CA4th 202, 210, 14 CR3d 142 (driving at 90 mph on freeway and 85 mph on public street). California State University police officers have statewide authority to arrest. *Brierton v DMV* (2005) 130 CA4th 499, 511, 30 CR3d 275.

A minor traffic infraction does not present an imminent danger of escape within the meaning of Pen C §830.1(a)(3). *People v Landis* (2007) 156 CA4th Supp 12, 68 CR3d 267.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/Authority of Private Persons to Arrest/§4.23 Citizen's Arrest

Authority of Private Persons to Arrest

[§4.23] Citizen's Arrest

 To Main Book

(2) A mistake as to whether the arrested person committed a misdemeanor may provide the basis for a false arrest action. *Hamburg v Wal-Mart Stores, Inc.* (2004) 116 CA4th 497, 509, 10 CR3d 568 (protester's refusal to comply with store's reasonable time, place, and manner restrictions is not necessarily misdemeanor trespass; court reversed summary judgment for store).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/Probable Cause/§4.25 Objective Standard

Probable Cause

[§4.25] Objective Standard

 To Main Book

Defendant's conduct must be a crime *in the place it was observed*; otherwise, probable cause to arrest does not exist. *People v Knight* (2004) 121 CA4th 1568, 1573, 18 CR3d 384 (possession of loaded gun not forbidden in particular unincorporated area).

Sometimes the threshold issue is whether defendant's conduct constitutes an offense. *E.g.*, *People v McDonald* (2006) 137 CA4th 521, 40 CR3d 422 (urinating in public is a misdemeanor public nuisance); *People v Ramirez* (2006) 140 CA4th 849, 44 CR3d 813 (pedestrian who crosses intersection diagonally is not violating Vehicle Code).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/§4.28 Subjective Belief of Officer

[§4.28] Subjective Belief of Officer

 To Main Book

In accord with Book §4.28, see *People v McDonald* (2006) 137 CA4th 521, 530, 40 CR3d 422 (though officer relied on wrong statute in making arrest, the arrest is lawful if there is a right statute that applies to defendant's conduct); *Devenpeck v Alford* (2004) 543 US 146, 125 S Ct 588, 160 L Ed 2d 537 (officer arrested defendant for offense A; probable cause supported arrest for offense B; arrest valid; offenses A and B need not be related).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/§4.29 Totality of Circumstances

[§4.29] Totality of Circumstances

 To Main Book

Maryland v Pringle (2003) 540 US 366, 370-371, 124 S Ct 795, 157 L Ed 2d 769, is in accord with the totality-of-circumstances principle discussed in Book §4.29.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/Description of Suspect/§4.35 Illustrations

Description of Suspect

[§4.35] Illustrations

 **To Main Book**

In determining the adequacy of a description, the victims' erroneous lineup identification is not fatal. *People v Hill* (2001) 89 CA4th 48, 52-55, 107 CR2d 110.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/Probable Cause to Arrest Companion of Principal Suspect/§4.37 Vehicle Occupants

Probable Cause to Arrest Companion of Principal Suspect

[§4.37] Vehicle Occupants

 To Main Book

A front-seat passenger may be arrested for possessing cocaine found in a back-seat armrest when the circumstances give rise to a reasonable inference that the vehicle occupants were engaged in a common criminal enterprise. *Maryland v Pringle* (2003) 540 US 366, 373-374, 124 S Ct 795, 157 L Ed 2d 769 (quantity of drugs and cash in car indicated likelihood of drug dealing; dealer unlikely to admit innocent person to such enterprise).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/ARREST WARRANTS/Types of Arrest Warrants/§4.45 Other Arrest Warrants

ARREST WARRANTS

Types of Arrest Warrants

[§4.45] Other Arrest Warrants

 **To Main Book**

California law does not authorize issuance of an ex parte order compelling a suspect who is not in custody to submit to custody for the purpose of appearing in a lineup. *Goodwin v Superior Court* (2001) 90 CA4th 215, 226, 108 CR2d 553.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/Probable Cause/Showing of Probable Cause/§4.51 General Need for Affidavit

Probable Cause

Showing of Probable Cause

[§4.51] General Need for Affidavit

 **To Main Book**

In accord with the principle that a complaint stating the nature of the offense does not, without more, provide sufficient support to issue an arrest warrant, see *Overton v Ohio* (2001) 534 US 982, 122 S Ct 389, 151 L Ed 2d 317 (statement of four justices concurring in denial of certiorari).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/TIME, PLACE, AND MANNER OF ARREST/Residential Arrests: Payton-Ramey-Steagald Requirements/Arrests in Suspect's Residence/§4.61 Need for Arrest Warrant

TIME, PLACE, AND MANNER OF ARREST

Residential Arrests: *Payton-Ramey-Steagald* Requirements

Arrests in Suspect's Residence

[§4.61] Need for Arrest Warrant

 To Main Book

"As *Payton* makes plain, police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home." *Kirk v Louisiana* (2002) 536 US 635, 638, 122 S Ct 2458, 153 L Ed 2d 599.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/Exigent Circumstances/Danger of Destruction or Disappearance of Evidence/§4.76 Factors

Exigent Circumstances

Danger of Destruction or Disappearance of Evidence

[§4.76] Factors

 **To Main Book**

Welsh v Wisconsin, discussed in Book §4.76, is limited to nonjailable offenses and does not apply to California's DUI laws. *People v Thompson* (2006) 38 CA4th 811, 820-824, 43 CR3d 750 (exigent circumstances justify warrantless residential entry to obtain DUI suspect's blood). *Welsh v Wisconsin*, however, applies to nonjailable offenses such as possessing less than 28.5 grams of marijuana. *People v Hua* (2008) 158 CA4th 1027, 1036, 70 CR3d 559 ("line clearly drawn between jailable and nonjailable offenses").

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/§4.77 Illustrations

[§4.77] Illustrations

 To Main Book

Violation of California's DUI law is not a minor offense. See [Update §4.76](#).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/Knock-Notice/§4.80 Elements

Knock-Notice

[§4.80] Elements

 **To Main Book**

Hudson v Michigan (2006) 547 US 586, 594-599, 126 S Ct 2159, 165 L Ed 2d 56, discussed in [Update §2.109](#), applies to warrantless entries. *In re Frank S.* (2006) 142 CA4th 145, 152, 47 CR3d 320.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/§4.83 Parolees and Probationers

[§4.83] Parolees and Probationers

 To Main Book

In accord with the principle that knock-notice applies to probation searches, see *People v Murphy* (2005) 37 C4th 490, 496, 36 CR3d 125.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/§4.88 Notice of Arrest; Showing Warrant

[§4.88] Notice of Arrest; Showing Warrant

 To Main Book

When probable cause supports an arrest for a particular offense, it is immaterial that the officer stated an unrelated offense as the basis for the arrest. *Devenpeck v Alford* (2004) 543 US 146, 125 S Ct 588, 160 L Ed 2d 537.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/Limitations on the Use of Force/§4.89 Basic Principles

Limitations on the Use of Force

[§4.89] Basic Principles

 **To Main Book**

A speeding motorist whose driving threatens the lives of others may be stopped by means that seriously injure or kill him or her. *Scott v Harris* (2007) 550 US 372, 383-386, 127 S Ct 1769, 167 L Ed 2d 686 (officer intentionally rammed speeder to end high-speed chase; motorist rendered quadriplegic).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/POSTARREST REQUIREMENTS/§4.92 Right to Make Telephone Calls

POSTARREST REQUIREMENTS

[§4.92] Right to Make Telephone Calls

 [To Main Book](#)

Parents who have custodial responsibility for a minor are entitled to two additional phone calls. Pen C §851.5(c).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/Duty to Take Arrestee Promptly Before Magistrate/§4.93 48-Hour Rule

Duty to Take Arrestee Promptly Before Magistrate

[§4.93] 48-Hour Rule

 **To Main Book**

In light of an amendment to Pen C §825(a)(2), the fifth paragraph of the text should read:

If the period expires at a time when the court in which the magistrate sits is not in session, time is "extended to include the duration of the next court session on the judicial day immediately following."

For illustration of an unlawful detention of less than 48 hours, see *People v Jenkins* (2004) 122 CA4th 1160, 1175 1176, 19 CR3d 386, discussed in Update §4.94.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/§4.94 Consequences of Unreasonable Delay

[§4.94] Consequences of Unreasonable Delay

 To Main Book

Using a detention solely to question a defendant about a matter unrelated to the arrest makes even a detention of less than 48 hours unlawful and renders the ensuing confession inadmissible. *People v Jenkins* (2004) 122 CA4th 1160, 1175-1176, 19 CR3d 386 (defendant was arrested for driving without a license and was turned over to homicide inspectors and questioned about shooting while in custody for over 16 hours). For an application of the principle discussed in Book §4.94 that limits suppression to cases in which the delay produces the confession or there was an essential connection between the delay and the confession, see *People v Richardson* (2008) 43 CA4th 959, 991, 77 CR3d 163.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/Foreign Nationals [NEW]/§4.102A Duties of Peace Officers [NEW]

Foreign Nationals [NEW]

[§4.102A] Duties of Peace Officers [NEW]

 To Main Book

Penal Code §834c imposes two duties upon a peace officer who arrests a known or suspected foreign national when that foreign national is arrested and booked or detained for more than two hours:

- To advise the arrestee of the right to communicate with the arrestee's consulate, and
- To notify the appropriate official in the peace officer's agency of any request by the arrestee to communicate with her or his consulate. Pen C §834c(a)(1).

Such notification triggers further obligations:

- The official who was notified of the request must notify the consulate of the arrestee. Pen C §834c(a)(2).
- The official in charge of the custodial facility where the arrestee is located shall ensure that the arrestee may communicate with, correspond with, and be visited by a consular officer of his or her country. Pen C §834c(a)(3).

The purpose of Pen C §834c is to carry out the provisions of the Vienna Convention on Consular Relations. See Pen C §834c(b).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/§4.102B Effects of Violation [NEW]

[§4.102B] Effects of Violation [NEW]

 To Main Book

The Vienna Convention is not binding on states in the absence of Congressional action. *Medellin v Texas* (2008) 552 US 491, 128 S Ct 1346, 170 L Ed 2d 190. When claims under Pen C §834c arise, the question is whether the violation of the section was prejudicial to the defendant, *e.g.*, whether the defendant was denied any of the things the consulate could have provided. *People v Mendoza* (2007) 42 C4th 686, 711, 68 CR3d 274.

Judicial Tip: Give the defendant an opportunity to make a full record, but not on a Pen C §1538.5 motion, because no Fourth Amendment rights are involved.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/SEARCHES INCIDENT TO ARREST/Search of the Person/Bodily Intrusions and Strip Searches/Blood Samples/ §4.119 General Rule

SEARCHES INCIDENT TO ARREST

Search of the Person

Bodily Intrusions and Strip Searches

Blood Samples

[§4.119] General Rule



Mandatory postconviction DNA testing does not violate reasonable privacy expectations and is not otherwise unconstitutional. *People v Travis* (2006) 139 CA4th 1271, 44 CR3d 177; *People v Johnson* (2006) 139 CA4th 1135, 1156-1168, 43 CR3d 587; see *People v McCray* (2006) 144 CA4th 258, 264, 50 CR3d 343; Pen C §§295 et seq. This principle also applies to a minor who has committed a felony. *In re Calvin S.* (2007) 150 CA4th 443, 58 CR3d 559.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/§4.120 Reasonable Manner of Taking Sample

[§4.120] Reasonable Manner of Taking Sample

 To Main Book

Vehicle Code §23158(a) lists the persons who may take blood samples, but the use of an unlisted person does not make the blood test inadmissible as long as the blood was withdrawn in a medically approved manner. *People v Esayian* (2003) 112 CA4th 1031, 1039, 5 CR3d 542. In accord: *People v Mateljan* (2005) 129 CA4th 367, 28 CR3d 506; *People v McHugh* (2004) 119 CA4th 202, 212-214, 14 CR3d 142.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/§4.122 Exigent Circumstances

[§4.122] Exigent Circumstances

 To Main Book

Failure to honor DUI arrestee's test choice. A blood test may properly be administered when the arrestee's lack of cooperation frustrates the attempt to conduct a breath test. *People v Sugarman* (2002) 96 CA4th 210, 116 CR2d 689.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/Search Beyond Person of Arrestee/Areas Within Arrestee's Immediate Control/§4.124 Chimel Rule

Search Beyond Person of Arrestee

Areas Within Arrestee's Immediate Control

[§4.124] *Chimel* Rule

 **To Main Book**

The *Chimel* rule applies to areas accessible to the defendant *at the time of arrest*; the fact that the area was inaccessible at the time of the search does not matter as long as the search is reasonably contemporaneous. *People v Rege* (2005) 130 CA4th 1584, 1590, 30 CR3d 922 (defendant handcuffed on floor at time of search under bed at foot of which defendant was lying).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/Vehicles/§4.126 Belton Rule

Vehicles

[§4.126] *Belton* Rule

 To Main Book

The Belton rule has been sharply limited to situations in which the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. *Arizona v Gant* (2009) ___ US ___, 129 S Ct 1710, 1719, 173 L Ed 2d 485.

Judicial Tip: Beware of the efforts to avoid *Gant*. Articles within the passenger compartment are rarely within the arrestee's reach. See 129 S Ct at 1719 n4. Some police officers might be tempted to leave the scene unsecured in order to conduct a car search. See 129 S Ct at 1724-1725 (concurring opinion, Scalia, J).

Gant leaves intact the principle that a vehicle search incident to a lawful arrest is justified when there is reason to believe that evidence of the crime(s) for which defendant was arrested will be found in the vehicle. 129 S Ct at 1719; see Book and [Update §5.56](#).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/§4.127 Conditions for Applicability of Rule

[§4.127] Conditions for Applicability of Rule

 To Main Book

(1) The police may search the vehicle of a driver who parked without being pulled over and who was then arrested. *Thornton v U.S.* (2004) 541 US 615, 617, 124 S Ct 2127, 158 L Ed 2d 905.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/Protective Sweep/§4.129 Conditions for Valid Sweep

Protective Sweep

[§4.129] Conditions for Valid Sweep

 To Main Book

People v Ledesma (2003) 106 CA4th 857, 864, 131 CR2d 249, extends the right to conduct a protective sweep to officers who are about to conduct a probation search.

(1) It is an open question whether the sweep may be incident to a lawful detention outside the residence. *People v Celis* (2004) 33 C4th 667, 679, 16 CR3d 85.

(2) Before performing a sweep, the officers must know articulable facts that, together with rational inferences from them, give rise to a reasonable suspicion that the area to be swept harbors a person posing a danger to officer safety. 33 C4th at 679-680; *People v Ormonde* (2006) 143 CA4th 282, 292-295, 49 CR3d 26; see also Update §4.135.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/Factual Basis for Sweep/§4.130 Slight Showing Often Sufficient

Factual Basis for Sweep

[§4.130] Slight Showing Often Sufficient

 [To Main Book](#)

A protective sweep of a drug user's residence is justified when the officers see two vehicles and a trailer parked in front, know that at least one other person is occasionally around, and believe on the basis of experience that drug users often have weapons in the house and transients frequent the house. *People v Ledesma* (2003) 106 CA4th 857, 865, 131 CR2d 249.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/4 Arrest and Searches Incident to Arrest/§4.135 Lack of Information

[§4.135] Lack of Information

 To Main Book

A protective sweep is not justified when the police lack information whether anyone is inside the house and have no indication that persons detained outside are armed. *People v Celis* (2004) 33 C4th 667, 679, 16 CR3d 85; see *People v Ormonde* (2006) 143 CA4th 282, 292-295, 49 CR3d 26.

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Warrantless Searches

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[§5.3] Threshold Questions for Determining Presence of Reasonable Privacy Expectations

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[§5.6] Common Habits in Use of Property

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[§5.14] Public Street or Sidewalk; Temporary Shelter

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.1
INTRODUCTION AND SCOPE OF CHAPTER

[§5.1] INTRODUCTION AND SCOPE OF CHAPTER

 To Main Book

For a recent statement that warrantless searches "are *per se* unreasonable ... subject only to a few specifically established and well-delineated exceptions," see *Arizona v Gant* (2009) ___ US ___, 129 S Ct 1710, 1716, 173 L Ed 2d 485.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/PLAIN VIEW AND MISCELLANEOUS INVESTIGATIVE TECHNIQUES/Reasonable Expectation of Privacy/§5.3 Threshold Questions for Determining Presence of Reasonable Privacy Expectations

PLAIN VIEW AND MISCELLANEOUS INVESTIGATIVE TECHNIQUES

Reasonable Expectation of Privacy

[§5.3] Threshold Questions for Determining Presence of Reasonable Privacy Expectations

 **To Main Book**

In accord with the two-part inquiry discussed in Book §5.3 is *People v Maury* (2003) 30 C4th 342, 384, 133 CR2d 561.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Reasonableness of Expectation/§5.5 Basic Principle

Reasonableness of Expectation

[§5.5] Basic Principle

 **To Main Book**

Prisoners have very limited reasonable privacy expectations concerning searches of their person. *People v Collins* (2004) 115 CA4th 137, 154, 8 CR3d 731 (visual body cavity search of prisoner does not require probable cause or reasonable suspicion).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.6
Common Habits in Use of Property

[§5.6] Common Habits in Use of Property

 To Main Book

Use of a fictitious name does not render privacy expectations illegitimate. *People v Pereira* (2007) 150 CA4th 1106, 1114, 58 CR3d 847 (defendant did not abandon package by sending it under a fictitious name).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.8 Matters Observable by Public

[§5.8] Matters Observable by Public

 To Main Book

Placing drugs in the ground of the backyard of an apartment complex is "not the sort of activity reasonably tied to any proper expectation of privacy." *People v Shaw* (2002) 97 CA4th 833, 839, 118 CR2d 678. The court regarded defendant's lack of exclusive control over the area dispositive. 97 CA4th at 839.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Plain View/Particular Locations/No Violation of Reasonable Privacy Expectations/§5.14 Public Street or Sidewalk; Temporary Shelter

Plain View

Particular Locations

No Violation of Reasonable Privacy Expectations

[§5.14] Public Street or Sidewalk; Temporary Shelter

 [To Main Book](#)

In contrast to *People v Thomas*, discussed in [Book §5.14](#), a person who erects a structure of an aluminum frame covered with tarps that completely enclose an area on land set aside for camping has a reasonable expectation of privacy in the structure. *People v Hughston* (2008) 168 CA4th 1062, 1068, 85 CR3d 890.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.15 Residential Locations Open to Public or Tenants

[§5.15] Residential Locations Open to Public or Tenants

 To Main Book

People v Zichwic (2001) 94 CA4th 944, 956, 114 CR2d 733, is in accord with the principle that officers have a right to be in a private driveway that is implicitly open to the public.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.16
Adjacent Room; Neighboring Property

[§5.16] Adjacent Room; Neighboring Property

 To Main Book

Officers who trespass onto the yard of defendant neighbors do not violate defendant's reasonable expectations of privacy. *People v Claeys* (2002) 97 CA4th 55, 118 CR2d 139; see *People v Shaw* (2002) 97 CA4th 833, 118 CR2d 678.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Violation of Reasonable Privacy Expectations/§5.19 Yard of Residence

Violation of Reasonable Privacy Expectations

[§5.19] Yard of Residence

 [To Main Book](#)

In *People v Manderscheid* (2002) 99 CA4th 355, 121 CR2d 251, an officer entered defendant's backyard, knocked on the rear door, and asked defendant for consent to look for a fugitive who had been reported staying with the defendant. The court held that the officer's trespass did not invalidate the consent. 99 CA4th at 364.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Investigative Techniques/Aiding the Senses/Optical Aides/§5.30 Thermal Imaging Devices

Investigative Techniques

Aiding the Senses

Optical Aides

[§5.30] Thermal Imaging Devices

 **To Main Book**

A warrant to conduct thermal imaging requires the same showing of probable cause as any search warrant; an officer's belief to the contrary is unreasonable, and the good-faith exception is therefore inapplicable. *People v Gotfried* (2003) 107 CA4th 254, 265-266, 131 CR2d 840; see Update §1.30.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.32
Electronic Tracking Devices ('Beepers')

[§5.32] Electronic Tracking Devices ("Beepers")

 To Main Book

Installing a beeper on a vehicle, as distinguished from monitoring a beeper's signal, is not a search. *People v Zichwic* (2001) 94 CA4th 944, 954-956, 114 CR2d 733.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Aural Aids: Wiretaps and Other Listening Devices/§5.33 Basic Principles

Aural Aids: Wiretaps and Other Listening Devices

[§5.33] Basic Principles

 To Main Book

The applicable California statute is Pen C §§629.50-629.98. Its requirements are similar to those of the federal statute and designed to conform state law to it. See People v Leon (2007) 40 C4th 376, 384-385, 53 CR3d 524.

The federal statute establishes the minimum standards for the admissibility of evidence obtained by electronic surveillance. 40 C4th at 384. See People v Jackson (2005) 129 CA4th 129, 162, 28 CR3d 136 (authorization order failing to identify any targets of investigation violates Fourth Amendment).

The statutes are not limited to literal wiretapping; they cover interception of wire, pager, and cell phone communications. For an overview, see People v Leon, supra, 40 C4th at 383-385.

A person whose conversation is overheard under a federal wiretap order may proceed under Pen C §1538.5 even though he or she was not a target of the order. People v Reyes (2009) 172 CA4th 671, 683, 91 CR3d 415.

Nonelectronic interception of telephone calls. Picking up a resident's phone and listening to the call generally requires a search warrant or consent or a combination of probable cause and exigent circumstances. An example of the latter is People v Ledesma (2006) 39 C4th 641, 704, 47 CR3d 326 (police, looking for robber, had factual basis for believing that incoming call would be from him and that, by answering it, they would obtain information leading to his imminent arrest); see also Book §2.116.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.34 Exceptions

[§5.34] Exceptions



As to Sixth Amendment problems that may ensue from monitoring conversations, see *People v Martin* (2002) 98 CA4th 408, 119 CR2d 679.

(5) *Jail conversations and telephone calls from jail.* A pretrial detainee in jail does not have a greater expectation of privacy than a convict. *People v Davis* (2005) 36 C4th 510, 527, 31 CR3d 96 (conversation may be recorded); *People v Loyd* (2002) 27 C4th 997, 1010, 119 CR2d 360 (officers may monitor and record unprivileged communications between inmates and visitors to gather evidence of crime) and *People v Kelley* (2003) 103 CA4th 853, 127 CR2d 203, are in accord with *People v Riel*, discussed in Book §5.34. An inmate who makes calls after notice that he or she is subject to monitoring impliedly consents to recording of the calls. *People v Windham* (2006) 145 CA4th 881, 887, 51 CR3d 884; *People v Kelley, supra*.

(9) *Secret witness programs: recording calls of person suspected of crime.* *People v Maury* (2003) 30 C4th 342, 381-387, 133 CR2d 561 (promise of anonymity inapplicable to persons whom police suspect of providing information about their own criminal activities).

Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Aiding the Sense of Smell/§5.35 Canine Sniffs

Aiding the Sense of Smell

[§5.35] Canine Sniffs

 To Main Book

The canine sniff must be by a well-trained narcotics-detection dog to assure that it will disclose only the presence or absence of narcotics. *Illinois v Caballes* (2005) 543 US 405, 407-409, 125 S Ct 834, 160 L Ed 2d 842.

The renter of a storage locker has a reasonable privacy interest in it, but not in the air surrounding it; the results of a dog sniff of that air support probable cause for a search warrant. *People v Bautista* (2004) 115 CA4th 229, 235, 8 CR3d 862 (result not affected by DEA agents' use of army dog in possible contravention of federal statute, nor by fact that sniff was accidental).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.39
Inspection of Bank and Other Third Party Records

[§5.39] Inspection of Bank and Other Third Party Records

 To Main Book

Descriptions in subpoenas are subject to the same Fourth Amendment principles as search warrants. See *Roman Catholic Archdiocese v Superior Court* (2005) 131 CA4th 417, 460, 32 CR3d 209.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Search of Abandoned, Discarded, or Disclaimed Property/Meaning of Abandonment/§5.42 Illustrative Cases

Search of Abandoned, Discarded, or Disclaimed Property

Meaning of Abandonment

[§5.42] Illustrative Cases

 **To Main Book**

A boy who lives with his sister and frequently runs away for extended periods has not abandoned his privacy expectations in his home. *In re Rudy F.* (2004) 117 CA4th 1124, 1134, 12 CR3d 483 (boy had not removed all of his possessions and was again living in home at time of search).

A robber accidentally drops his cell phone at the scene of the robbery and makes no effort to reclaim it when he discovers the loss. This constitutes abandonment. *People v Dagg* (2005) 133 CA4th 361, 365, 34 CR3d 649 (defendant's reason for not going back for the phone—fear of arrest—does not affect the outcome).

Defendant pays for one night's stay in a motel. Several hours after check-out time, he has not paid for the next night and is not in his room. A damaged window screen is lying on the floor, and the bathroom window is open. Defendant's belongings are in his room, and his car is in the motel parking lot. These facts support a finding of abandonment; the court said they arguably also support the opposite finding. *People v Parson* (2008) 44 C4th 332, 343-348, 79 CR3d 269.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Discarding/
§5.45 Garbage

Discarding

[§5.45] Garbage

 **To Main Book**

The presence of fresh marijuana clippings in defendant's trash outside his house furnishes probable cause for a warrant to search the house. *People v. Thuss* (2003) 107 CA4th 221, 224, 133 CR2d 149.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.47
Disclaimers

[§5.47] Disclaimers

 To Main Book

The use of a fictitious name and address by a shipper of a package is not conclusive evidence of abandonment; the totality of the circumstances needs to be considered. *People v Pereira* (2007) 150 CA4th 1106, 1111-1114, 58 CR3d 847.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/WARRANTLESS SEARCHES OF MOTOR VEHICLES/Bases for Searches/§5.54 Search Incident to Arrest

WARRANTLESS SEARCHES OF MOTOR VEHICLES

Bases for Searches

[§5.54] Search Incident to Arrest



The *Belton* rule cited in [Book §5.54](#) has been limited. See [Update §4.126](#).

Noncustodial traffic arrests permit limited searches for vehicle registration or personal identification under certain circumstances. See [Book §§5.78-5.81](#); [Update §5.78](#).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.56 Search Under 'Automobile Exception'

[§5.56] Search Under "Automobile Exception"

 To Main Book

Arizona v Gant (2009) ___ US ___, 129 S Ct 1710, 1719, 173 L Ed 2d 485, is in accord with the principle stated in [Book §5.56](#) (search of vehicle incident to lawful arrest proper upon reason to believe evidence relevant to crime for which defendant arrested may be found in vehicle).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Inventory Searches of Impounded Vehicles/Requirements for Lawful Impoundment Not Based on Probable Cause/§5.62 Right to Impound

Inventory Searches of Impounded Vehicles

Requirements for Lawful Impoundment Not Based on Probable Cause

[§5.62] Right to Impound

 [To Main Book](#)

Statutory authorization alone does not satisfy all constitutional requirements. *People v Williams* (2006) 145 CA4th 756, 762, 52 CR3d 162. In *Williams*, an officer stopped defendant's rental car for a seat belt violation, arrested defendant on an outstanding warrant, and impounded the vehicle as permitted by Veh C §22651. Defendant had parked the car in front of his home in a residential area in which other cars were also parked in the street. The court held that under the circumstances, impounding served no community caretaking function, and that a policy of impounding vehicles whenever a custodial arrest of the driver was made violated the Fourth Amendment. 145 CA4th at 762-763.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Automobile Exception/§5.66 Basic Principles

Automobile Exception

[§5.66] Basic Principles

 **To Main Book**

Delay in returning the car to the owner does not make the search unreasonable. *People v Superior Court (Nasmeh)* (2007) 151 CA4th 85, 101, 59 CR3d 633 (24 days).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.72
Opportunity to Obtain Search Warrant

[§5.72] Opportunity to Obtain Search Warrant

 To Main Book

The automobile exception applies even if the police obtained a search warrant. *People v Superior Court (Nasmeh)* (2007) 151 CA4th 85, 101, 59 CR3d 633 (search reasonable even if there were legal problems with search under warrant).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Scope of Search/§5.73 Basic Principles

Scope of Search

[§5.73] Basic Principles

 **To Main Book**

People v Hunter (2005) 133 CA4th 371, 379, 34 CR3d 818, is in accord with *People v Dey*, discussed in Book §5.73. Observation of marijuana in a car, of a passenger who was on CYA parole, and of another passenger who was a known street drug dealer are sufficient probable cause to search the trunk of the car. 133 CA4th at 378-379.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.76 Time and Place of Search

[§5.76] Time and Place of Search

 To Main Book

Probable cause to search does not dissipate even after the vehicle has been impounded. *People v Panab* (2005) 35 C4th 395, 469, 25 CR3d 672.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Entries Into Vehicles for Other Purposes/To Look for Registration or License/§5.78 Basic Principles

Entries Into Vehicles for Other Purposes

To Look for Registration or License

[§5.78] Basic Principles

 **To Main Book**

When a driver has been detained for a traffic infraction, a search of the vehicle for registration or personal identification documents is valid (*In re Arturo D.* (2002) 27 C4th 60, 65, 115 CR2d 581) if

- The driver fails to produce registration or ID papers upon request, *and*
- The search is limited to areas "where such documentation reasonably may be expected to be found."

Areas subject to search are not restricted to traditional repositories of registration papers such as sun visors and glove compartments, but include the area under the front seat on the driver's side (27 C4th at 83), as well as on the passenger's side (27 C4th at 87). The officer may view the area from behind the seat. 27 C4th at 83.

The search must be nonpretextual. See 27 C4th at 78.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Illustrative Cases/§5.81 Unlawful Entries

Illustrative Cases

[§5.81] Unlawful Entries

 **To Main Book**

The reference to *Belton* no longer applies. See [Update §4.126](#).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.83 Chart: Comparison of Permitted Warrantless Vehicle Searches

[§5.83] Chart: Comparison of Permitted Warrantless Vehicle Searches

 To Main Book

The segment of the chart dealing with searches incident to arrest should be modified to reflect *Arizona v Gant*, discussed in [Update §4.126](#).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/ENTRIES TO PRESERVE LIFE OR PROPERTY/Factual Basis for Entry/§5.85 Basic Principles

ENTRIES TO PRESERVE LIFE OR PROPERTY

Factual Basis for Entry

[§5.85] Basic Principles

 **To Main Book**

Indications of a possible "marijuana rip-off" at a commercial nursery are an insufficient basis for an entry under the community caretaking exception. *People v Morton* (2003) 114 CA4th 1039, 8 CR3d 388. It is not reasonable to stop a car on the ground that the officer had seen the passenger walk unsteadily to the vehicle. *People v Madrid* (2008) 168 CA4th 1050, 1060, 85 CR3d 900 (no indication that passenger needed help or that driver could not provide it).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.86 Victim's Denial of Problem

[§5.86] Victim's Denial of Problem

 To Main Book

Probable cause to search for marijuana does not disappear when defendant has a medical marijuana prescription and could lawfully possess an amount greater than initially observed. *People v Strasburg* (2007) 148 CA4th 1052, 1059-1060, 56 CR3d 306 (medical marijuana statute provides limited immunity, not shield from investigation).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.88 Belief and Motive of Officer

[§5.88] Belief and Motive of Officer

 To Main Book

The subjective motivation of the officers is irrelevant. *Brigham City v Stuart* (2006) 547 US 398, 403-405, 126 S Ct 1943, 164 L Ed 2d 650 (immaterial whether officers entered to arrest defendants or to assist injured person as long as entry objectively reasonable).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Homicides and Other Violent Offenses/Illustrations/§5.91 Police Conduct Lawful

Homicides and Other Violent Offenses

Illustrations

[§5.91] Police Conduct Lawful

 **To Main Book**

- Officers responding to noise complaint at 3 a.m. see a juvenile, with fists clenched, being held back by several adults, then break free and strike one of the adults in the face, sending the latter to the sink spitting blood. *Brigham City v Stuart* (2006) 547 US 398, 403-405, 126 S Ct 1943, 164 L Ed 2d 650 (officers had reasonable basis to believe that injured adult might need help and that violence was just beginning).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.94 Missing Persons; Unattended Children

[§5.94] Missing Persons; Unattended Children

 To Main Book

Exigent circumstances justified an entry into a storage area controlled by the defendant when the victim had been reported as missing for three weeks, when the defendant said unconcernedly that the victim was gone a week or week and a half, and when the report also stated that the defendant had threatened to lock the victim in the storage area. *People v Rogers* (2009) 46 Cal4th 1136, 1156-1161, 95 CR3d 652 (death penalty case).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/CONSENT SEARCHES/Scope of Consent/Consent to Search/§5.111 Searches Not Within Scope

CONSENT SEARCHES

Scope of Consent

Consent to Search

[§5.111] Searches Not Within Scope



Also beyond the scope of consent is a repeated search of a car's passenger compartment, trunk, and under the hood, lasting nearly 15 minutes, when the officer had obtained consent by asking defendant, "Mind if I check real quick and get you on your way?" *People v Cantor* (2007) 149 CA4th 961, 965, 57 CR3d 478. Also see Update §5.148.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Validity of Consent/§5.112 Basic Principles

Validity of Consent

[§5.112] Basic Principles

 **To Main Book**

The police need not corroborate an anonymous tip before requesting consent to enter and search. *People v Rivera* (2007) 41 C4th 304, 308-311, 59 CR3d 473 (consensual encounter between police and homeowner does not implicate Fourth Amendment); see Update §§3.4-3.5.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Factors Affecting Voluntariness/§5.114 Statements Concerning Search Warrants

Factors Affecting Voluntariness

[§5.114] Statements Concerning Search Warrants

 **To Main Book**

A claim of authority to remove a resident's children unless he consented to a search is even more coercive than an assertion that the officers have a search warrant. *In re Rudy F.* (2004) 117 CA4th 1124, 1131 n3, 12 CR3d 483.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.117
Miranda Admonition

[§5.117] *Miranda* Admonition

 To Main Book

People v Monterroso (2004) 34 C4th 743, 758, 22 CR3d 1, is in accord with *People v James*, discussed in Book §5.117.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.118
Custody; Handcuffs

[§5.118] Custody; Handcuffs

 To Main Book

People v Monterroso (2004) 34 CA4th 743, 758, 22 CR3d 1, in accord with Book §5.118, held that the fact that defendant was under arrest and in handcuffs when he consented was only one of the factors to be considered in determining voluntariness (trial court's determination that consent was voluntary was upheld).

The consent of a person unnecessarily handcuffed during a temporary detention is involuntary. *People v Stier* (2008) 168 CA4th 21, 28, 85 CR3d 77. See Update §3.80.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.119
Number of Officers; Time

[§5.119] Number of Officers; Time

 To Main Book

The presence of 10 to 12 officers did not make a consent to search involuntary when nothing suggests that the will of the person who consented "was overborne by the searching officer." *People v Weaver* (2001) 26 C4th 876, 924, 111 CR2d 2 (death penalty case).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Efforts to Mislead/§5.122 By Police

Efforts to Mislead

[§5.122] By Police

 **To Main Book**

Pretending to be a prospective home buyer to gain entry does not make the consent involuntary. *People v Lucatero* (2008) 166 CA4th 1110, 83 CR3d 364 (entry to make observations used in subsequent search warrant application). Contra: *People v De Caro* (1981) 123 CA3d 454, 466, 176 CR 509.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Third Party Consent/Actual and Apparent Authority/§5.128 Basic Principles

Third Party Consent

Actual and Apparent Authority

[§5.128] Basic Principles

 **To Main Book**

The police are entitled to assume that a person who answers their knock has the authority to let them enter. *People v Ledesma* (2006) 39 C4th 641, 703, 47 CR3d 326 (death penalty case; person who said he was just visiting had apparent authority).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Applications/Landlords and Innkeepers/§5.132 No Authority to Consent

Applications

Landlords and Innkeepers

[§5.132] No Authority to Consent

 **To Main Book**

A university, like a landlord, lacks actual authority to consent to a police search of a student's room. *People v Superior Court (Walker)* (2006) 143 CA4th 1183, 1208, 49 CR3d 831. The court did not decide the issue of apparent authority. 143 CA4th at 1213.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Joint Owners, Occupants, and Spouses/§5.134 Actual Authority

Joint Owners, Occupants, and Spouses

[§5.134] Actual Authority

 **To Main Book**

When one occupant consents, and another, who is present, objects, a search based on consent is invalid as to the latter. *Georgia v Randolph* (2006) 547 US 103, 126 S Ct 1515, 164 L Ed 2d 208. *Randolph* does not affect entries and searches whose validity rests on a basis other than consent, such as an entry to protect a victim of domestic violence.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/PROBATION AND PAROLE SEARCHES/§5.141 Validity in Absence of Individualized Suspicion

PROBATION AND PAROLE SEARCHES

[§5.141] Validity in Absence of Individualized Suspicion

 To Main Book

A warrantless search under a search clause is lawful when the officers have reasonable suspicion that the probationer is engaged in criminal activity. *U.S. v Knights* (2001) 534 US 112, 121-122, 122 S Ct 587, 151 L Ed 2d 497; see *People v Ramos* (2004) 34 C4th 494, 506, 21 CR3d 575. Parolees, however, may be searched without suspicion of wrongdoing. *Samson v California* (2006) 547 US 843, 126 S Ct 2193, 165 L Ed 2d 250. *U.S. v Knights* declined to decide whether a probation search without reasonable suspicion is lawful; accordingly, such a search continues to be proper. *People v Medina* (2007) 158 CA4th 1571, 1578, 70 CR3d 413; Book §5.141.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Nature and Validity of Search Conditions/Validity/§5.144 Probationers

Nature and Validity of Search Conditions

Validity

[§5.144] Probationers

 **To Main Book**

People v Ramos (2004) 34 C4th 494, 505-506, 21 CR3d 575, upheld a probation search condition in a DUI case, saying that the condition was reasonably related to the conviction and to the protection of the public.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.146
Deferred Entry of Judgment/Diversion

[§5.146] Deferred Entry of Judgment/Diversion

 [To Main Book](#)

Pen C §1000.12(c)(4)(D) has been repealed.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Scope of Search/§5.148 Limited by Scope of Search Condition

Scope of Search

[§5.148] Limited by Scope of Search Condition

 **To Main Book**

A car driven by a man with a woman passenger is stopped. He is on parole. The passenger's purse is at her feet. A parole search of the driver may not validly extend to the purse. *People v Baker* (2008) 164 CA4th 1152, 1159, 79 CR3d 858 (no reasonable suspicion that the purse belonged to driver, that he exercised possession or control over it, or that it contained anything belonging to him).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.149
Construction of Search Conditions

[§5.149] Construction of Search Conditions

 To Main Book

A search clause that permits search of a probationer's residence extends to the locked room of probationer's son when the probationer has access to the room keys. *People v Pleasant* (2004) 123 CA4th 194, 19 CR3d 796.

People v Gomez (2005) 130 CA4th 1008, 30 CR3d 662, is contrary to *People v Howard*, discussed in Book §5.149.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.151
Change of Probationary Status

[§5.151] Change of Probationary Status

 To Main Book

Similar to *People v Fields*, discussed in [Book §5.151](#), a probation search is valid even though the judgment including the search clause is later set aside. *People v Miller* (2004) 124 CA4th 216, 21 CR3d 13 (court held good-faith exception applied). A parole search of the property of a person arrested for parole violation is valid as long as parole has not been formally revoked. *People v Hunter* (2006) 140 CA4th 1147, 45 CR3d 216.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.153
Arbitrary or Harassing Searches

[§5.153] Arbitrary or Harassing Searches

 To Main Book

Attaching a beeper on the underside of a parolee's truck is not arbitrary or capricious when the police are aware of a dramatic increase in commercial burglaries near the parolee's residence after he was released from prison. *People v Zichwic* (2001) 94 CA4th 944, 952, 114 CR2d 733. See also Update §5.141. A search in public during broad daylight during which the officer pulled back the waistband of defendant's underwear is not a public strip search that unduly harasses the parolee. *People v Smith* (2009) 172 CA4th 1354, 1357, 1363, 92 CR3d 106 (court notes steps by officer to protect defendant's privacy).

Officers testified they stopped defendant's car for failing to signal a turn and then conducted a parole condition search. Defense evidence that defendant had not committed the traffic violation is relevant on the issues of (1) whether the officers stopped defendant for the violation and (2) if not, whether their action was arbitrary, capricious, or harassing. *People v Cervantes* (2002) 103 CA4th 1404, 1408, 127 CR2d 468.

A parole search less than 24 hours after the same officer searched defendant, his van, and his house was held not to be harassing under the particular circumstances. *People v Sardinas* (2009) 170 CA4th 488, 496, 87 CR3d 896 (search conducted across street from apartment complex was known to officer for drug trafficking, defendant was on parole for drug possession, and officer had observed him associate with known addicts in past).

Property of others. The police may only search rooms or areas they reasonably believe to be under the sole or joint control of the person who is subject to the search condition. *People v Woods* (1999) 21 C4th 668, 682, 88 CR2d 88; *People v Smith* (2002) 95 CA4th 912, 916, 116 CR2d 694. A purse belonging to the probationer's wife may be searched when the police know facts giving rise to an inference that the probationer had access to it. 95 CA4th at 919.

Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Police Information Concerning Search Condition/§5.154 Lack of Information

Police Information Concerning Search Condition

[§5.154] Lack of Information

 To Main Book

A search condition of which the police was unaware at the time of the search no longer justifies the search of a parolee or probationer; *People v Sanders* (2003) 31 C4th 318, 334, 2 CR3d 630 (reasonableness of search must be determined by circumstances known to officer at time of search); *People v Miller* (2007) 146 CA4th 545, 52 CR3d 894; *Myers v Superior Court* (2004) 124 CA4th 1247, 22 CR3d 369; *People v Bowers* (2004) 117 CA4th 1261, 13 CR3d 15. The same principle applies to juvenile probationers. *In re Jaime P.* (2006) 40 C4th 128, 51 CR3d 430, overruling *In re Tyrell J.*, discussed in Book §5.154. *Sanders* is retroactive. *People v Moore* (2006) 39 C4th 168, 45 CR3d 784.

A defendant on searchable probation who misidentifies himself is estopped from claiming that the officer did not know of the search condition and that the search was therefore illegal. *People v Watkins* (2009) 170 CA4th 1403, 1408, 89 CR3d 135.

Limited information. When the police know that the defendant is on *parole*, they need not verify that the parolee is subject to a search condition. *People v Middleton* (2005) 131 CA4th 732, 739, 31 CR3d 813 (all California paroles include such a condition). In accord is *People v Solorzano* (2007) 153 CA4th 1026, 1030-1032, 63 CR3d 659 (officer need not be aware that parolee had signed parole search agreement).

Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.155
Erroneous Information

[§5.155] Erroneous Information

 To Main Book

A search based on erroneous information from a parole officer that defendant is on parole is unlawful because parole officers are adjuncts to law enforcement. *People v Willis* (2002) 28 CA4th 22, 38-39, 120 CR2d 105. The same is true of erroneous information from the probation department that the defendant is on probation. *People v Ferguson* (2003) 109 CA4th 367, 134 CR2d 705. The first paragraph of Book §5.155 should be disregarded in light of *Ferguson*.

Erroneous information from the police dispatcher that the defendant is on parole does not invalidate the search when the defendant is, in fact, on probation and subject to a search condition. *People v Hill* (2004) 118 CA4th 1344, 1351, 13 CR3d 719.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/SEARCHES BY SCHOOL AUTHORITIES/§5.157 Basic Principles

SEARCHES BY SCHOOL AUTHORITIES

[§5.157] Basic Principles

 **To Main Book**

A police officer assigned to a school for a two-year term is a school official for purposes of the principle discussed in Book §5.157 that school officials may search students on less than probable cause. *In re William V.* (2003) 111 CA4th 1464, 4 CR3d 695.

Courts will not second-guess the validity of school rules except in patently arbitrary instances. *Safford Unified Sch. Dist. #1 v Redding* (2009) ___ US ___, 129 S Ct 2633, 2640 n1, 174 L Ed 2d 354 (rule banning students from having any drugs, including over-the-counter pain killers, without advance permission is valid).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/§5.158
Illustrative Applications

[§5.158] Illustrative Applications



As to search of a student's purse for identification, see [Update §3.106](#).

(4) *Strip Search*. Suspicion that a girl student gave out nonprescription pain relievers justifies a search by school employees of the student's backpack and outer clothing, but not a search in which the student's breasts and pubic areas are exposed. *Safford Unified Sch. Dist. #1 v Redding* (2009) ___ US ___, 129 S Ct 2633, 2639-2643, 174 L Ed 2d 354 (no suspicion of danger to other students and no reason to suppose student concealed drugs in underwear).

California prohibits all strip searches by school employees ([Ed C §49050](#); see [Book §4.123](#)), but this provision does not affect the admissibility of evidence in juvenile or criminal proceedings. [Ed C §49051](#).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/5 Warrantless Searches/Additional Issues/§5.160 Individual Suspicion

Additional Issues

[§5.160] Individual Suspicion

 **To Main Book**

Drug testing of all students who participate in competitive extracurricular activities is constitutional. *Board of Educ. v Earls* (2002) 536 US 822, 825, 122 S Ct 2559, 153 L Ed 2d 735.

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Handling Penal Code §1538.5 Motions

What Motions Come Within Penal Code §1538.5

Grounds for Motion

Chemical Tests

Penal Code §1538.5 Inapplicable

[§6.20] Denial of Choice of Tests

[§6.21] Other Claims

[§6.22] Racial Profiling

"Standing": Defendant May Only Contest Violation of Own Rights

[§6.28] Nature of Inquiry

Residential Premises

[§6.30] Range of Privacy Expectations

[§6.31] Co-occupants

Vehicles

[§6.35] Driver of Stolen Car

[§6.36] Passengers

[§6.37] Others

[§6.40] Disclaimers; Contradictory Positions

Time and Manner of Making Motions

Written Motion

Specificity

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[§6.45] Warrantless Searches

Time for Filing Motion and Response

Felonies

[§6.47] Motion at Preliminary Hearing

Motion After Filing of Information or Indictment

[§6.48] 10-Day Notice

Motions in Felony Cases

By Defendant

At Preliminary Hearing

Relitigation in Trial Court

[§6.59] By the Prosecution

At Trial

Illustrative Cases

[§6.82] Ineffective Representation

By Prosecution

At Special Hearing Under Pen C §1538.5(j)

[§6.85] Basic Principles

Hearing

[§6.100] Hearing by Magistrate Who Issued Search Warrant

[§6.101] Challenging Judge Under CCP §170.6

[NEW] [§6.103A] Exclusion of Witnesses

Burden and Standard of Proof

Warrantless Searches

Prosecution Burden

[§6.107] Consent

Meeting the Prosecution's Burden: Illustrative Cases

[§6.109] Information From Other Officers; *Harvey-Madden*

Search and Arrest Warrants

[§6.112] Good Faith; Independent Source

Attack on Warrant for Misstatements or Omissions

[§6.115] Lesser Showing for Discovery

[§6.116] In Camera Hearings

Evidence and Presentation

[§6.123] Order of Proof

[NEW] [§6.128A] Witness's Assertion of Privilege Against Self-Incrimination

[§6.129] Later Use of Defendant's Testimony

[NEW] [§6.129A] Affidavits

Appellate Review

Felonies

Motion at Preliminary Hearing

[§6.132] Review Sought by Defendant

Penal Code §1538.5(i) Motion

Review Sought by Defendant

[§6.135] Postconviction

Misdemeanors

[§6.141] Appeal by Prosecution

Related Proceedings

Suppression Issues Raised by Nonparty Under Pen C §1524(c)

[§6.144] Right to Hearing

[§6.147] Issues at Hearing; In Camera Inspection

[NEW] [§6.147A] Orders Under Pen C §1524(c)

Return of Property

After Grant of Suppression Motion

[§6.149] Basic Principles

[§6.153] Hearing To Determine Whether Seized Documents Are Privileged

[§6.154] Nonstatutory Motions

[§6.155] Motions Under Forfeiture Statutes

[NEW] Production of Copies of Business Records Seized Under Search Warrant

[NEW] [§6.156A] Demand and Declaration

[NEW] [§6.156B] Meaning of "Business" and "Business Records"

[NEW] [§6.156C] Costs of Producing Copies

[NEW] [§6.156D] Response to Demand for Production

[NEW] [§6.156E] Motion for Extension of Time

[NEW] Motion To Deny Copies

[NEW] [§6.156F] Grounds for Motion

[NEW] [§6.156G] Venue, Time for Filing, and Time of Hearing

[NEW] [§6.156H] Government's Right to In Camera Hearing

[NEW] [§6.156I] In Camera Hearing: Procedure

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/WHAT MOTIONS COME WITHIN PENAL CODE §1538.5/Grounds for Motion/Chemical Tests/Penal Code §1538.5 Inapplicable/§6.20 Denial of Choice of Tests

WHAT MOTIONS COME WITHIN PENAL CODE §1538.5

Grounds for Motion

Chemical Tests

Penal Code §1538.5 Inapplicable

[§6.20] Denial of Choice of Tests

 **To Main Book**

A blood test after defendant frustrates efforts to conduct a breath test is not an improper denial of test choices. *People v Sugarman* (2002) 96 CA4th 210, 116 CR2d 689.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.21 Other Claims

[§6.21] Other Claims

 To Main Book

Police failure to comply substantially with California regulations in administering a chemical test may be challenged by an in limine motion to exclude at trial, rather than by a Pen C §1538.5 motion. See *People v Williams* (2002) 28 C4th 408, 412, 121 CR2d 854. Substantively, breath test results are admissible upon a showing of compliance with the regulations *or* a showing of (1) properly functioning equipment, (2) a properly administered test, and (3) a qualified operator. 28 C4th at 417.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.22 Racial Profiling

[§6.22] Racial Profiling

 To Main Book

Racial profiling without individualized suspicion raises a Fourth Amendment issue. See *People v Durazo* (2004) 24 CA4th 728, 735, 21 CR3d 516; Pen C §13519.4(e), (f).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/"STANDING": DEFENDANT MAY ONLY CONTEST VIOLATION OF OWN RIGHTS/§6.28 Nature of Inquiry

"STANDING": DEFENDANT MAY ONLY CONTEST VIOLATION OF OWN RIGHTS

[§6.28] Nature of Inquiry

 **To Main Book**

As to challenging evidence from a wiretap order, see [Update §5.33](#).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/Residential Premises/§6.30 Range of Privacy Expectations

Residential Premises

[§6.30] Range of Privacy Expectations

 To Main Book

A person who had the owners' permission to come and go and use the facilities of the residence when the owners were absent and who took precautions to maintain privacy had a reasonable expectation of privacy in the premises. *People v Stewart* (2003) 113 CA4th 242, 253, 6 CR3d 249 (status as overnight guest not essential to privacy claim).

In contrast to *People v Satz*, discussed in Book §6.30, a person who pays for a motel room with a counterfeit bill retains an expectation of privacy; the user of a stolen credit card, as in *Satz*, knows she is defrauding the innkeeper, but a person passing a counterfeit bill may be completely unaware of that fact. *People v Munoz* (2008) 167 CA4th 126, 132, 83 CR3d 843.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.31 Co-occupants

[§6.31] Co-occupants

 To Main Book

Resident family members have a reasonable expectation of privacy in their entire home. *In re Rudy F.* (2004) 117 CA4th 1124, 1134, 12 CR3d 483 (15-year-old living with his sister and her boyfriend has reasonable privacy expectation in contents of sister's bedroom). The court distinguished *McPeters*, discussed in Book §6.31, on the ground that defendant in that case was an overnight guest, while the boy in *Rudy F.* was a family member who resided with his sister and who had access to her room. 117 CA4th at 1135.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5
Motions/Vehicles/§6.35 Driver of Stolen Car

Vehicles

[§6.35] Driver of Stolen Car

 **To Main Book**

People v Carter (2005) 36 C4th 1114, 1141, 32 CR3d 759, is in accord with *People v Melnyk*, discussed in Book §6.35.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.36 Passengers

[§6.36] Passengers

 To Main Book

People v Valdez (2004) 32 C4th 73, 122, 8 CR3d 271, follows *Rakas v Illinois*, discussed in Book §6.36.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.37 Others

[§6.37] Others

 To Main Book

The head of a drug ring who has others transport drugs in his car and who registers and insures it in the name of his brother has no legitimate expectation of privacy in the vehicle. *People v Tolliver* (2008) 160 CA4th 1231, 1240, 73 CR3d 375.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.40 Disclaimers; Contradictory Positions

[§6.40] Disclaimers; Contradictory Positions

 To Main Book

A defendant who denies he had a gun in his waistband, claiming that the police planted it on him, has standing to challenge his detention and search. *People v Dachino* (2003) 111 CA4th 1429, 4 CR3d 691.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/TIME AND MANNER OF MAKING MOTIONS/Written Motion/Specificity/Case Law/§6.45 Warrantless Searches

TIME AND MANNER OF MAKING MOTIONS

Written Motion

Specificity

Case Law

[§6.45] Warrantless Searches



Reply briefs and responses to them are not mandatory; justification for a search and specific grounds for the motion may be presented orally at the time of the hearing. Pen C §1538.5(f), (i); see Update §§6.47-6.48.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/Time for Filing Motion and Response/Felonies/§6.47 Motion at Preliminary Hearing

Time for Filing Motion and Response

Felonies

[§6.47] Motion at Preliminary Hearing

 **To Main Book**

The prosecution need not file a reply brief, but may present its justification for the search or seizure orally when the motion is heard. Pen C §1538.5(f); *People v Britton* (2001) 91 CA4th 1112, 1116, 111 CR2d 199; see *In re Justin K.* (2002) 98 CA4th 695, 697, 120 CR2d 546. The defendant also need not file a response, but may specify the grounds of the motion orally at the hearing. *People v Smith* (2002) 95 CA4th 283, 300, 115 CR2d 483.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/Motion After Filing of Information or Indictment/§6.48 10-Day Notice

Motion After Filing of Information or Indictment

[§6.48] 10-Day Notice

 **To Main Book**

Written replies and responses are not mandatory. Pen C §1538.5(i); see Update §6.47.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/MOTIONS IN FELONY CASES/By Defendant/At Preliminary Hearing/Relitigation in Trial Court/§6.59 By the Prosecution

MOTIONS IN FELONY CASES

By Defendant

At Preliminary Hearing

Relitigation in Trial Court

[§6.59] By the Prosecution



Refiling or seeking an indictment is unavailable when the suppression motion has been granted twice, unless the prosecution has new evidence not reasonably discoverable at the time of the second suppression hearing. Pen C §1538.5(p); People v Toney (2004) 32 C4th 228, 232, 8 CR3d 577. The prosecution may, however, move to reinstate the complaint even if the defendant's suppression motion has been granted twice. 32 C4th at 233 (motion to reinstate is not relitigation but seeks review of soundness of magistrate's ruling on suppression motion).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/At Trial/Illustrative Cases/§6.82 Ineffective Representation

At Trial

Illustrative Cases

[§6.82] Ineffective Representation

 **To Main Book**

When the particular defense attorney only came into the case recently, but defendant's counsel had been employed in the case for two months, a suppression motion at trial is properly denied. *People v Frazier* (2005) 128 CA4th 807, 829, 27 CR3d 336 (court did not discuss inadequate representation question; court said that allowing knowledge of defense to be assessed based on knowledge of new defense counsel alone would encourage gamesmanship and delay).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/By Prosecution/At Special Hearing Under Pen C §1538.5(j)/§6.85 Basic Principles

By Prosecution

At Special Hearing Under Pen C §1538.5(j)

[§6.85] Basic Principles

 **To Main Book**

A motion under Pen C §1538.5(j) is a precondition to dismissal and refiling by the prosecution. *People v Jackson* (2002) 96 CA4th 1265, 1275, 117 CR2d 886; Pen C §1538.5(j).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/HEARING/§6.100 Hearing by Magistrate Who Issued Search Warrant

HEARING

[§6.100] Hearing by Magistrate Who Issued Search Warrant

 **To Main Book**

When the prosecution refiles following dismissal due to a magistrate's grant of a suppression motion, the relitigated motion "shall be heard by the same judge who granted the motion at the first hearing if the judge is available." Pen C §1538.5(j), (p); see *People v Superior Court (Jimenez)* (2002) 28 C4th 798, 801, 123 CR2d 31.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.101 Challenging Judge Under CCP §170.6

[§6.101] Challenging Judge Under CCP §170.6

 To Main Book

The prosecution may not use CCP §170.6 to challenge the judge who rehears a suppression motion in a refiled case under Pen C §1538.5(j), (p). People v Superior Court (Jimenez) (2002) 28 CA4th 798, 801, 123 CR2d 31 (peremptory challenge would sanction forum shopping that the Legislature intended to forbid in this situation).

Jimenez does not apply to a relitigated Pen C §995 motion. People v Superior Court (Cooper) (2003) 114 CA4th 713, 7 CR3d 862 (court had granted first §995 motion on search grounds; People refiled; People may use CCP §170.6 in subsequent §995 motion).

Disqualification after suppression hearing. In People v Williams (2007) 156 CA4th 949, 955-960, 67 CR3d 711, the judge who heard the suppression motion denied it and immediately thereafter said that the defendant had perjured himself and revoked his OR release. The judge was then disqualified for bias. In this case, defendant is not entitled to a new Pen C §1538.5 hearing. The denial of the suppression motion was lawful because it was based on the evidence presented at the hearing. 156 CA4th at 956.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.103A Exclusion of Witnesses [NEW]

[§6.103A] Exclusion of Witnesses [NEW]

 To Main Book

On motion of either party the court "shall"

- Exclude actual and potential witnesses;
- Order them not to talk to each other until they have all been examined; and
- When feasible, order that the witnesses be kept separate from each other. Pen C §1538.5(c)(2)-(4), effective January 1, 2003.

These provisions do not apply to the investigating officer and to the defendant's investigator. Pen C §1538.5(c)(4).

The motion may be contested on the ground that the person sought to be excluded is not, in fact, excludable under the statute. Pen C §1538.5(c)(2)(i), (3).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/Burden and Standard of Proof/Warrantless Searches/Prosecution Burden/§6.107 Consent

Burden and Standard of Proof

Warrantless Searches

Prosecution Burden

[§6.107] Consent

 **To Main Book**

In accord with the principle that the prosecution has the burden of proving that consent was freely and voluntarily given is *People v Weaver* (2001) 26 C4th 876, 924, 111 CR2d 2.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/Meeting the Prosecution's Burden: Illustrative Cases/§6.109 Information From Other Officers; Harvey-Madden

Meeting the Prosecution's Burden: Illustrative Cases

[§6.109] Information From Other Officers; *Harvey-Madden*

 To Main Book

Hearsay is admissible when the information provided to the arresting officer by other officers is specific and reliable. *People v Gomez* (2004) 117 CA4th 531, 541, 12 CR3d 398. This principle is not affected by the restrictions on hearsay imposed by *Crawford v Washington* (2004) 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177. *People v Gomez, supra*, 117 CA4th at 541-542.

In re Richard G. (2009) 173 CA4th 1252, 1259, 93 CR3d 506, refused to apply *Harvey-Madden* because the court concluded that under the circumstances, there was no practical way that the police dispatcher could have manufactured the information.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/Search and Arrest Warrants/§6.112 Good Faith; Independent Source

Search and Arrest Warrants

[§6.112] Good Faith; Independent Source

 **To Main Book**

When the police rely on erroneous information, the prosecution has the burden of proving facts that warrant application of the good-faith exception, including proof that the error did not originate with law enforcement or an adjunct to it. *People v Willis* (2002) 28 C4th 22, 36-37, 120 CR2d 105.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/Attack on Warrant for Misstatements or Omissions/§6.115 Lesser Showing for Discovery

Attack on Warrant for Misstatements or Omissions

[§6.115] Lesser Showing for Discovery

 [To Main Book](#)

A blanket denial that the key events described in the search warrant affidavit occurred constitutes an adequate preliminary showing. *People v Estrada* (2003) 105 CA4th 783, 793, 129 CR2d 589.

Defendant must specify what he or she wants the trial court to do; requesting disclosure of the informant's identity without explaining how that is to happen in the context of the in camera discovery hearing is not sufficiently specific. 105 CA4th at 796.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.116 In Camera Hearings

[§6.116] In Camera Hearings

 To Main Book

(1) A similar in camera hearing should be held when the defendant claims that the search warrant is based on evidence procured by the police in violation of the attorney-client privilege. *People v Navarro* (2006) 138 CA4th 146, 167-171, 41 CR3d 164. See Update §2.35 as to substantive law.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/Evidence and Presentation/§6.123 Order of Proof

Evidence and Presentation

[§6.123] Order of Proof

 **To Main Book**

Penal Code §1538.5(c) has been renumbered §1538.5(c)(1), effective January 1, 2003.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.128A Witness's Assertion of Privilege Against Self-Incrimination [NEW]

[§6.128A] Witness's Assertion of Privilege Against Self-Incrimination [NEW]

 To Main Book

A witness testifies at a Pen C §1538.5 hearing. On cross-examination, the witness asserts the privilege against self-incrimination. The court may strike the testimony, at least if credibility is a central concern and the questions involved are more than peripherally related to the direct testimony. *People v Seminoff* (2008) 159 CA4th 518, 527-528, 71 CR3d 582.

Judicial Tip: Before striking testimony, the court should carefully consider any suggestions for a less severe response.

A defendant who testifies at a suppression hearing has little reason to claim the Fifth Amendment privilege. See Book §6.129.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.129 Later Use of Defendant's Testimony

[§6.129] Later Use of Defendant's Testimony

 To Main Book

An analogous rule applies to the admissibility of defendant's invocation of Fourth Amendment rights during the investigation of the offense. *People v Wood* (2002) 103 CA4th 803, 809, 127 CR2d 132, discussed in Update §1.63.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.129A Affidavits [NEW]

[§6.129A] Affidavits [NEW]

 To Main Book

A party may not present its case by affidavit instead of live testimony at the hearing of a Pen C §1538.5 motion. *People v Johnson* (2006) 38 C4th 717, 42 CR3d 887.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/APPELLATE REVIEW/Felonies/Motion at Preliminary Hearing/§6.132 Review Sought by Defendant

APPELLATE REVIEW

Felonies

Motion at Preliminary Hearing

[§6.132] Review Sought by Defendant

 **To Main Book**

Court unification has not abrogated the need to make a subsequent suppression motion in order to preserve the right to raise the issue on appeal. *People v Richardson* (2007) 156 CA4th 574, 581, 67 CR3d 552; *People v Garrido* (2005) 127 CA4th 359, 364, 25 CR3d 494. A second motion is unnecessary, however, in the following sequence when the magistrate grants a suppression motion at the preliminary hearing, and prosecution successfully moves to reinstate the complaint. The trial court considers the suppression issues in deciding whether to grant reinstatement; accordingly, it would be futile to make another suppression motion in the trial court. *People v Gutierrez* (2004) 124 CA4th 1481, 1484, 21 CR3d 926.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/Penal Code §1538.5(i) Motion/Review Sought by Defendant/§6.135 Postconviction

Penal Code §1538.5(i) Motion

Review Sought by Defendant

[§6.135] Postconviction

 **To Main Book**

Following a guilty plea, a defendant may appeal a denial of a motion to discover an informant's identity only if the defendant made a suppression motion in the trial court. *People v Hunter* (2002) 100 CA4th 37, 122 CR2d 229.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/Misdemeanors/§6.141 Appeal by Prosecution

Misdemeanors

[§6.141] Appeal by Prosecution

 To Main Book

The prosecution may not appeal the Pen C §1538.5 ruling when the prosecution moved to dismiss the action following the ruling. *People v Gallagher* (2009) 171 CA4th Supp 1, 90 CR3d 695. Under these circumstances, the prosecution also may not appeal the order dismissing the case. 171 CA4th Supp at 7 (invited error). A prosecution statement of inability to proceed is not the equivalent of a motion to dismiss and hence does not prevent an appeal of the dismissal order. *People v Bonds* (1999) 70 CA4th 732, 737, 83 CR2d 10.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/RELATED PROCEEDINGS/Suppression Issues Raised by Nonparty Under Pen C §1524(c)/§6.144 Right to Hearing

RELATED PROCEEDINGS

Suppression Issues Raised by Nonparty Under Pen C §1524(c)

[§6.144] Right to Hearing



For another type of nonparty challenge to a search warrant, see Pen C §1524.3(c), discussed in Update §2.4 (motion by provider of electronic communications or e-mail services to quash or limit search warrant served on it under Pen C §1524(a)(7)).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.147 Issues at Hearing; In Camera Inspection

[§6.147] Issues at Hearing; In Camera Inspection

 To Main Book

A colorable claim of privilege necessitates a hearing. *State Compensation Ins. Fund v Superior Court* (2001) 91 CA4th 1080, 1088-1091, 111 CR2d 284. The trial court may not rely on a sealed affidavit to find that the crime/fraud exception to the attorney-client privilege applies and that therefore no hearing is needed. 91 CA4th at 1091.

A party may assert the privilege without first designating separate items for sealing by the master; a request to seal all seized documents suffices. 91 CA4th at 1089.

Privileges that may be raised include the work product doctrine. 91 CA4th at 1091-1092. The court may not sustain a work product claim when there is probable cause of criminal activity by the lawyer, unless the hearing establishes that the lawyer's services were not sought to facilitate a crime or fraud. Pen C §1524(h), effective September 29, 2002.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.147A Orders Under Pen C §1524(c) [NEW]

[§6.147A] Orders Under Pen C §1524(c) [NEW]

 To Main Book

A trial court's order under Pen C §1524(c) (order re documents seized under special master procedure) is not appealable, but is reviewable by petition for writ of mandate. *Green v Shinee v Superior Court* (2001) 88 CA4th 532, 536, 105 CR2d 886.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/Return of Property/After Grant of Suppression of Motion/§6.149 Basic Principles

Return of Property

After Grant of Suppression of Motion

[§6.149] Basic Principles

 **To Main Book**

Property that the defendant lawfully possessed under the California medical marijuana law (Health & S C §11362.5) should be returned to him or her. See *City of Garden Grove v Superior Court* (2007) 157 CA4th 355, 68 CR3d 656.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.153 Hearing to Determine Whether Seized Documents Are Privileged

[§6.153] Hearing to Determine Whether Seized Documents Are Privileged

 To Main Book

The right to an in camera hearing is not affected by the limitation on work product claims in Pen C §1524(h). Pen C §1524(i), effective September 29, 2002.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.154 Nonstatutory Motions

[§6.154] Nonstatutory Motions

 To Main Book

An order denying a nonstatutory motion for return of property is not appealable, but review may be sought by a petition for writ of mandate. *People v Hopkins* (2009) 171 CA4th 305, 308, 89 CR3d 744.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.155 Motions Under Forfeiture Statutes

[§6.155] Motions Under Forfeiture Statutes

 To Main Book

An indigent party to a forfeiture proceeding does not have the right to appointed counsel. *People v Madewski* (2001) 94 CA4th 659, 115 CR2d 14 (proceeding under Pen C §502.01).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/Production of Copies of Business Records Seized Under Search Warrant [NEW]/§6.156A Demand and Declaration [NEW]

Production of Copies of Business Records Seized Under Search Warrant [NEW]

[§6.156A] Demand and Declaration [NEW]

 **To Main Book**

A business whose records were seized under a search warrant may file a demand with the seizing agency to produce copies of the business records. Pen C §1536.5(a), effective January 1, 2005.

The demand must be accompanied by a declaration that denial of access would unduly interfere with the regular conduct of business or obstruct the business entity from fulfilling a legal obligation. An adequate declaration is one that makes a prima facie case that specific business activities or specific legal obligations faced by the entity would be impaired or impeded by the ongoing loss of records. Pen C §1536.5(a), (c).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.156B Meaning of 'Business' and 'Business Records' [NEW]

[§6.156B] Meaning of "Business" and "Business Records" [NEW]

 To Main Book

A "business" for the purposes of Pen C §1536.5 is any entity, including a sole proprietorship, that operates legally in California and offers products or services. Pen C §1536.5(i)(2).

Penal Code §1536.5(i)(3) defines "business records" broadly to include computer data and data compilations, as well as traditional paper records and items that may become technologically feasible in the future.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.156C Costs of Producing Copies [NEW]

[§6.156C] Costs of Producing Copies [NEW]

 To Main Book

The business that seeks the copies bears the reasonable and necessary costs of producing them. The court may, on request of either party, resolve disputes concerning these costs. Pen C §1536.5(g).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.156D Response to Demand for Production [NEW]

[§6.156D] Response to Demand for Production [NEW]

 To Main Book

The agency upon which the demand for production of copies is made may respond in one of four ways:

- (1) It may make copies available to the business within 10 court days of service of the demand. Pen C §1536.5(b)(1).
- (2) Within the same time, it may make the records available to the business for copying. Pen C §1536.5(b)(2).
- (3) It may seek an extension of time to respond. Pen C §1536.5(b)(5); see Update §6.156E.
- (4) It may seek an order denying the demand. Pen C §1536.5(d); see Update §6.156F.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.156E Motion for Extension of Time [NEW]

[§6.156E] Motion for Extension of Time [NEW]

 To Main Book

The agency holding the records may move for additional time to review the records or make copies. Pen C §1536.5(b)(6).

Venue. The appropriate court is the one that issued the search warrant. Pen C §1536.5(h).

Time. The motion must be "made" within 10 court days of service of the demand for production. Pen C §1536.5(b)(6).

Required showing. The agency must show that reviewing or producing copies of the records within 10 court days would create a hardship. Pen C §1536.5(b)(6).

Court order. If the court grants the motion, its order sets the time frame for reviewing and duplicating the records, deferring to the business the priority of the records to be reviewed and copied. Pen C §1536.5(b)(6).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/Motion to Deny Copies [NEW]/§6.156F Grounds for Motion [NEW]

Motion to Deny Copies [NEW]

[§6.156F] Grounds for Motion [NEW]

 To Main Book

A motion to deny copies may be based on one or more of the following grounds (Pen C §1536.5(a), (c)):

(1) *Inadequacy of declaration.* The declaration in support of the demand for copies fails to make a prima facie case that specific business activities or specific legal obligations faced by the entity would be impaired or impeded by the ongoing loss of records.

Judicial Tip: When this is one of the bases for the motion, determine it first. See Pen C §1536.5(c). The underlying question is whether the declaration makes it reasonably clear what business activities or legal obligations would be impaired or impeded by lack of access to what records.

(2) *No undue interference.* Denial of copies will not unduly interfere with the business's ability to conduct its regular course of business or obstruct fulfillment of a legal obligation.

Judicial Tip: Determine this matter, if alleged, before considering any of the grounds listed below. The agency holding the records may raise this claim even when the declaration is sufficient on its face. Do not make the business prove undue interference. The burden of proof is on the moving party.

(3) *Risk of ongoing criminal activity.* Possession of the records by the business will pose a significant risk of ongoing criminal activity.

(4) *Contraband.* The records are contraband.

(5) *Evidence.* The records are evidence of criminal conduct by the business entity.

Judicial Tip: Determine what records, if any, could properly be offered in a trial to prove the existence of specific criminal conduct. See Evid C §140.

(6) *Sexual conduct.* The records depict actual or simulated sexual conduct by a minor.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.156G Venue, Time for Filing, and Time of Hearing [NEW]

[§6.156G] Venue, Time for Filing, and Time of Hearing [NEW]

 To Main Book

Venue. The motion must be filed in the court that issued the search warrant. Pen C §1536.5(h).

Time for filing. The agency must file and serve its motion within 10 days from service of the demand for production or within any extension of time granted by the court or as soon as reasonably possible after the agency discovered "the risk of harm." Pen C §1536.5(d). Risk of harm means risk that release of the records would pose a significant risk of ongoing criminal activity. Pen C §1536.5(c)(2).

Time of hearing. The motion is to be heard within two days of filing unless the parties agree otherwise. Pen C §1536.5(e).

Judicial Tip: Continuances may be needed when the parties cannot agree; it will often be difficult for the business to prepare a proper response in two days.

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.156H Government's Right to In Camera Hearing [NEW]

[§6.156H] Government's Right to In Camera Hearing [NEW]

 To Main Book

When a government agency makes a motion to deny copies of records, the agency has a right to an ex parte in camera hearing on the motion under two circumstances (Pen C §1536.5(f)(1)):

- (1) The government alleges in its request for an in camera hearing that the business entity is, or is likely to become, a target of the investigation resulting in the seizure of the records.
- (2) The government makes a particular factual showing "in its pleadings" that a hearing in open court would impede or interrupt an ongoing criminal investigation. The target here is someone other than the business that seeks copies of its records.

Judicial Tips: A request on the first ground should be granted as long as it substantially complies with Pen C §1536.5(f)(1). A request on the second ground requires a factual showing. Determine first whether the pleadings are adequate on their face, *i.e.*, factual and specific. If not, deny the request for an in camera hearing. If they are facially adequate, the requisite factual showing should be the initial matter at the in camera hearing. See Pen C §1536.5(f)(2).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/6 Handling Penal Code §1538.5 Motions/§6.156I In Camera Hearing: Procedure [NEW]

[§6.156I] In Camera Hearing: Procedure [NEW]

 To Main Book

Request. The request for an ex parte in camera hearing must be made "upon filing" the motion to deny copies and must be served upon the business entity. Pen C §1536.5(f)(1). The statute does not provide for a response.

Oath. Any evidence at the in camera hearing showing that release of the material would pose a significant risk of ongoing criminal activity, or impede or interrupt an ongoing criminal investigation, must be offered under oath. Pen C §1536.5(f)(2).

Transcription. A reporter must be present at the in camera hearing and transcribe all of it. Pen C §1536.5(f)(2).

Sealing. The court must order that the transcript and any physical evidence presented at the hearing be sealed. Thereafter only a court may have access to the transcript and evidence, unless a court determines that disclosure is necessary to avoid denying a party a fair trial. Pen C §1536.5(f)(3).

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Source: Criminal Law/California Judges Benchbook: Search and Seizure Update/Table of Statutes

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